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# A DIGEST

THE PROPERTY OF  
THE LAW SOCIETY

OF

## THE REPORTED CASES

DETERMINED IN

# The Superior Courts of Ontario

AND

## The Supreme and Exchequer Courts of Canada,

CONTAINED IN VOLUMES

45-46 QUEEN'S BENCH. 31-32 COMMON PLEAS. 27-29 CHANCERY.  
1-19 ONTARIO REPORTS. 5-17 APPEAL REPORTS. 8-13 PRACTICE REPORTS.  
8-17 SUPREME COURT REPORTS. HODGINS' ELECTION CASES. 1 ELECTION CASES.

WITH

A TABLE OF CASES AFFIRMED, REVERSED, OR SPECIALLY CONSIDERED.

Compiled by Order of the Law Society of Upper Canada,

BY

JAMES F. SMITH, Esq.,

F. J. JOSEPH, Esq.,

ONE OF HER MAJESTY'S COUNSEL,

AND

OF OSGOODE HALL, BARRISTER-AT-LAW.

TOGETHER WITH

## AN APPENDIX,

CONTAINING A DIGEST OF CASES REPORTED IN VOLS. 1 TO 4 OF CARTWRIGHT'S  
CASES ON THE BRITISH NORTH AMERICA ACT, 1867,

BY

JOHN R. CARTWRIGHT, Esq.,

ONE OF HER MAJESTY'S COUNSEL.

TORONTO:

ROWSSELL & HUTCHISON.

1892.

ENTERED according to the Act of the Parliament of Canada, in the year of our Lord  
one thousand eight hundred and ninety-two, by THE LAW SOCIETY OF UPPER CANADA,  
in the office of the Minister of Agriculture.

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OSGOODE HALL  
April, 1892.

## PREFACE.

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This volume contains the cases published in the Law Society's reports, and such of the reported cases in the Supreme Court of Canada and in the Judicial Committee of the Privy Council as have any relation to the law of Ontario, subsequent to Robinson & Joseph's Digest.

The arrangement of the former Digest has been followed as closely as possible, being the one with which the profession are most familiar. Cross references to cases have been made where it has been considered that they have any bearing on the subject treated of. Each case referred to as a cross reference will be found under its appropriate heading.

In the appendix will be found a complete digest of all the decisions contained in the first four volumes of Cartwright's Cases on the British North America Act.

The compilers desire to express their thanks to A. H. Marsh, Esq., Q. C., and Thomas Langton, Esq., Q. C., for their supervision of the Titles "Pleading" and "Practice," and to Allan M. Dymond, Esq., Barrister, for many valuable suggestions in the preparation of the work. To Mr. Dymond they are further indebted for the arrangement of the Titles "Waiver," "Words and Terms," the "Table of Cases," and the "Table of Cases Affirmed, Reversed or Specially Considered."

J. F. S.

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OSGOODE HALL,

*April, 1892.*

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Chief Justices and Judges

OF THE

SUPREME AND EXCHEQUER COURTS OF CANADA

AND OF THE

SUPERIOR COURTS OF ONTARIO

DURING THE PERIOD OF THIS DIGEST.

*Supreme and Exchequer Courts of Canada.*

CHIEF JUSTICE.

HON. SIR WILLIAM JOHNSTONE RITCHIE, KNT. Appointed 11th of January, 1879.

JUDGES.

HON. SAMUEL HENRY STRONG .....	Appointed 8th of October, 1875.
HON. TÉLÉSPHORE FOURNIER .....	" 8th of October, 1875.
HON. WILLIAM ALEXANDER HENRY ....	" 8th of October, 1875.
HON. HENRI ELZÉAR TASCHEREAU ....	" 7th of October, 1878.
HON. JOHN WELLINGTON GWYNNE ....	" 14th of January, 1879.
HON. CHRISTOPHER SALMON PATTERSON.	" 27th of October, 1888.

*Superior Courts of Ontario and The Supreme Court of Judicature.*

*Court of Appeal for Ontario.*

CHIEF JUSTICES (a).

HON. THOMAS MOSS .....	Appointed 30th of November, 1877.
HON. JOHN GODFREY SPRAGGE .....	" 2nd of May, 1881.
HON. JOHN HAWKINS HAGARTY .....	" 6th of May, 1884.

(a) The Chief Justice of Appeal is styled "Chief Justice of Ontario."—R. S. O. (1887) c. 44, s. 5.

# JUDGES.

HON. GEORGE WILLIAM BURTON .....	Appointed 30th of May, 1874.
HON. CHRISTOPHER SALMON PATTERSON..	" 6th of June, 1874.
HON. JOSEPH CURRAN MORRISON .....	" 30th of November, 1877.
HON. FEATHERSTON OSLER .....	" 17th of November, 1883.
HON. JAMES MACLENNAN .....	" 27th of October, 1888.

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## *Court of Queen's Bench, and Queen's Bench Division of the High Court of Justice.*

### CHIEF JUSTICES AND PRESIDENTS.

HON. JOHN HAWKINS HAGARTY .....	Appointed 13th of November, 1878.
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### JUDGES.

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## *Court of Common Pleas, and Common Pleas Division of the High Court of Justice.*

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HON. SIR ADAM WILSON, KNT. (a) ....	Appointed 13th of November, 1878.
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HON. JOHN EDWARD ROSE .....	" 4th of December, 1883.
HON. HUGH MACMAHON .....	" 30th of November, 1887.

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(a) The Hon. Sir Adam Wilson, Knt., was first appointed a Puisne Judge of the Court of Queen's Bench 11th of May, 1863. The date of this appointment is omitted in R. & J. Digest.

*Court of Chancery, and Chancery Division of the High Court of Justice.*

CHANCELLORS AND PRESIDENTS.

HON. JOHN GODFREY SPRAGGE ..... Appointed 27th of December, 1869.  
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KENNETH MCKENZIE, Esq., Q.C. .... Appointed 12th of July, 1877.  
JOHN BOYD, Esq., Q.C. .... " 28th of March, 1883.  
JOSEPH EASTON McDougall, Esq., Q.C.. " 17th of September, 1885.

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**Masters and Referees**

OF

**THE SUPREME COURT OF JUDICATURE.**

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ROBERT GLADSTONE DALTON, Esq., Q.C. ... Appointed Clerk of the Crown and Pleas  
of the Court of Queen's Bench, 21st of  
February, 1870 ; appointed Master in  
Chambers, 23rd of August, 1881.  
THOMAS WARDLAW TAYLOR, Esq., Q.C. ... Appointed Master in Ordinary, 16th of  
December, 1872.  
RICHARD PORTER STEPHENS, Esq. .... Appointed Referee in Chambers 1st April,  
1876.  
THOMAS HODGINS, Esq., Q.C. .... Appointed Master in Ordinary of the Su-  
preme Court of Judicature for Ontario,  
10th of January, 1883.  
JOHN WINCHESTER, Esq. .... Appointed Registrar of the Queen's Bench  
Division 28th October, 1882, and  
Official Referee of the High Court  
22nd of March, 1884.

**Ministers of Justice and Attorneys-General**

FOR

**THE DOMINION OF CANADA.**

---

HON. JAMES McDONALD, Q.C. .... Appointed 17th of October, 1878.

HON. SIR ALEXANDER CAMPBELL, K.C.M.G.,

Q.C. .... " 20th of May, 1881.

HON. SIR JOHN DAVID SPARROW THOMPSON,

K.C.M.G., Q.C. .... " 25th September, 1885.

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**Attorney-General**

FOR

**THE PROVINCE OF ONTARIO.**

---

HON. OLIVER MOWAT, Q.C. .... Appointed 31st of October, 1872.

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**Editors and Reporters**  
 OF THE  
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 AND OF THE  
**SUPERIOR COURTS OF ONTARIO.**

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**Supreme and Exchequer Courts of Canada.**

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GEORGE DUVAL ..... Appointed 20th of January, 1876.

ASSISTANT REPORTERS.

CHARLES H. MASTERS ..... Appointed (temporarily), 17th September,  
 1885, (permanently) 1st October, 1886.

ARCHIBALD SANDWICH CAMPBELL ..... Appointed 3rd March, 1886.

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**Superior Courts of Ontario.**

EDITORS.

CHRISTOPHER ROBINSON, Q.C. .... Appointed 30th of May, 1872.

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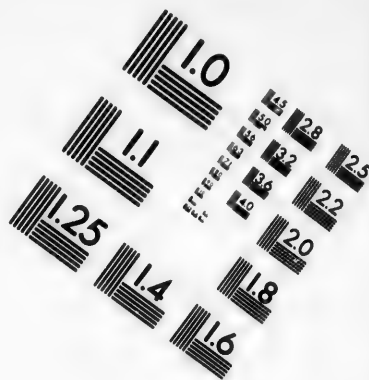
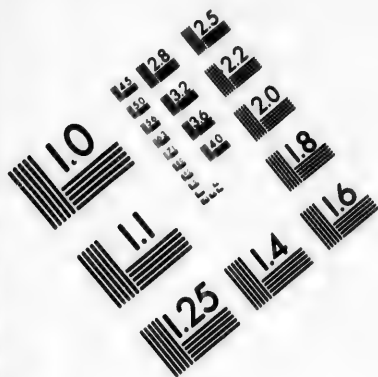
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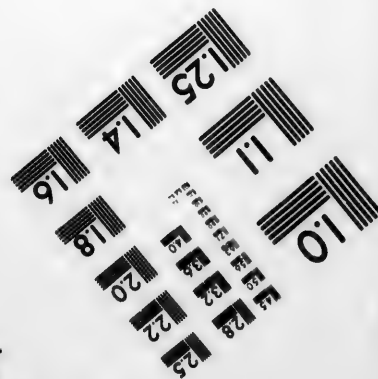
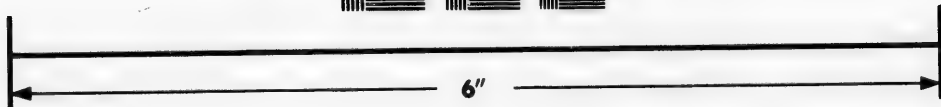
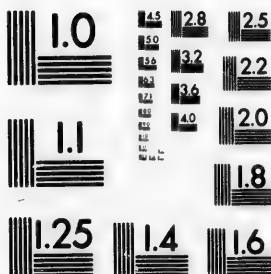
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 R. S. O. . . .  
 S. C. . . . .  
 S. C. R. . . .  
 U. C. L. J. . .  
 U. C. L. J. N.



## ABBREVIATIONS.

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A. J. Act.....	Administration of Justice Act.
App. Cas.....	Appeal Cases, House of Lords and Privy Council.
A. R. ....	Appeal Reports (Ontario).
C. C. L. C. ....	Civil Code of Lower Canada.
C. C. P. ....	Code of Civil Procedure, Lower Canada.
C. P. D. ....	Common Pleas Division.
C. L. J.....	Canada Law Journal.
C. L. T.....	Canada Law Times.
C. S. C.....	Consolidated Statutes of Canada.
Chy. ....	Grant's Reports.
Chy. D.....	Chancery Division.
Con. Rule .....	Consolidated Rules of Practice.
Con. Stat. N. B. ....	Consolidated Statutes of New Brunswick.
Dom. ....	Dominion of Canada.
E. C.....	Election Cases.
G. O.....	General Orders of the Court of Chancery.
H. E. C. ....	Hodgins' Election Cases.
Imp.....	Imperial Statutes.
L. R. C. ....	Lower Canada Reports.
Man.....	Manitoba.
M. L. R. ....	Montreal Law Reports.
Ont. ....	Ontario.
O. J. Act. ....	Ontario Judicature Act.
O. R.....	Ontario Reports.
O. S.....	Old Series Queen's Bench Reports.
P. E. I.....	Prince Edward Island.
P. Q.....	Province of Quebec.
P. R.....	Practice Reports.
Q. B. D.....	Queen's Bench Division.
Que. ....	Province of Quebec.
R. C.....	Rules of Court.
R. S. N. S. ....	Revised Statutes of Nova Scotia.
R. S. C.....	Revised Statutes of Canada.
R. S. O. ....	Revised Statutes of Ontario.
S. C.....	Same Case.
S. C. R. ....	Supreme Court Reports.
U. C. L. J. ....	Upper Canada Law Journal.
U. C. L. J. N. S.....	Upper Canada Law Journal New Series.

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THE CITY OF TORONTO

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AB

- I. OF ACTION
- II. OF APPEAL
- III. OF DISTRESS
- IV. OF EXCELSIOR
- V. OF EXECUTION
- VI. OF ROAD
- VII. OF SHIP
- VIII. WAIVER

On the 26th of  
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# DIGEST

OF

## THE REPORTED CASES

CONTAINED IN

43, 46 QUEEN'S BENCH.

31, 33 COMMON PLEAS.

3-17 SUPREME COURT REPORTS.

27-29 CHANCERY.

5-17 APPEAL REPORTS.

1 ELECTION CASES.

1-19 ONTARIO REPORTS.

8-13 PRACTICE REPORTS.

HODGINS' ELECTION CASES.

### ABANDONMENT.

- I. OF ACTION—See COSTS.
- II. OF APPEAL—See APPEAL.
- III. OF DISTRESS—See DISTRESS.
- IV. OF EXCESS—See DIVISION COURTS.
- V. OF EXECUTION—See EXECUTION.
- VI. OF ROADS—See WAY.
- VII. OF SHIP—See INSURANCE.
- VIII. WAIVER—See WAIVER.

On the 26th of June, P. and M. exchanged cheques for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st of July, and it was alleged by P., but denied by M., that a similar restriction applied to the latter cheque. The private bankers suspended payment and closed their doors about noon on the 7th of June, having a large balance in their hands at the credit of M., who, on that day, served a writ on them in an action to recover this balance, the amount of the cheque being included. His cheque was never presented for payment, nor was any notice of dishonour given. The cheque of P. was presented and paid. Some time after the suspension of the private bankers, and after some negotiations between P. and M. as to the payment of M.'s cheque, P. signed a memorandum drawn up by M. in the following form: "Please take judgment when you think best against F. and L. (the private bankers), to include the amount of your cheque for \$575 to me upon the understanding that the same is to be paid me out of the first proceeds of such judgment. You are to exercise your best discretion in the matter." M. then went on with his action, and entered judgment, but nothing was recovered:—Held, that this memorandum did not necessarily import an abandonment of P.'s claim upon the cheque, and the acceptance of a new and substituted mode of obtaining payment,

and did not operate as an accord and satisfaction. *Blackley v. McCabe*, 16 A. R. 295.

### ABATEMENT.

- I. OF ACTION—See ACTION.
- II. PLEAS IN—See PLEADING.
- III. OF PURCHASE MONEY ON SALE OF LAND—See SALE OF LAND BY ORDER OF THE COURT—SPECIFIC PERFORMANCE.

### ABORTION.

See CRIMINAL LAW.

### ABSCONDING DEBTOR.

- I. ATTACHMENT.
  - 1. *When Issuable*, 2.
  - 2. *Application for*, 3.
  - 3. *Special Bail*, 4.
  - 4. *Powers of Local Master*, 4.
  - 5. *Setting Aside*, 4.
- II. JUDGMENT, 4.
- III. EXECUTION, 5.
- IV. COSTS, 6.
- V. SERVICE ON—See PRACTICE.

#### I. ATTACHMENT.

- 1. *When Issuable*.

Goods were sold to the defendant by the plaintiffs upon a five months' credit, and he refused to accept a bill of exchange at five months for their price. The plaintiffs, before the expiration of the five months, issued a writ of attachment against the defendant under the Absconding Debtors' Act, R.S.O. (1877) c. 68, on an affidavit

that defendant was indebted to them for goods sold and delivered:—Held, that to bring a case within the statute, there must be a debt due and payable at the time of the issuing of the writ, and that in this case there was no such debt as sworn to. The attachment was therefore set aside. Semble, that in proceedings of this kind the existence of the debt itself may be enquired into. *Kyle v. Barnes*, 10 P. R. 20.—*Dalton, Master*—Cameron.

Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtors' Act, and that such writ may be granted at the suit of the Crown, where the defendant absconds to avoid being arrested for a felony. *Regina v. Stewart*, 8 P. R. 297.—Osler.

## 2. Application for.

In an action at the suit of the Crown, an order was made for a writ of attachment against defendant as an absconding debtor:—Held, that the affidavit of debt which in this case was made by the Crown attorney was sufficient. *Regina v. Stewart*, 8 P. R. 297.—Osler.

Held, that the amount for which special bail is to be put in need not be mentioned in the order for the writ. *Id.*

The affidavit upon which the order for a writ of attachment against an absconding debtor was issued were not styled in any court, although sworn before a commissioner for taking affidavits in the Q. B., who appended to his signature the words "A Com. in B. R.," etc.:—Held, that the affidavits were sufficient. *Ellerby v. Walton*, 2 P. R. 147, followed: *Hart v. Ruttan*, 23 C. P. 613, not followed. *Scott v. Mitchell*, 8 P. R. 518.—Armour.

An application was made to a county judge for an order to issue a writ of attachment under the Absconding Debtors' Act; the judge did not finally determine against the application, but gave leave to renew it upon a further affidavit:—Held, that there was no reason why the application should not afterwards be made to another judge. *Bank of Hamilton v. Baine*, (2) 12 P. R. 439.—Q. B. D.

Semble, that where a judge refuses to grant an attachment or an order to hold to bail, successive applications may be made to successive judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one; but in the case of a subsequent application upon the same or different material the judge should always be informed of every previous application; this, however, more as of a matter of propriety than of legal right, and an omission to do so would not be a ground for setting aside the order if the material warranted the granting of it. *Id.*

Held, that the same particularity in stating the cause of action is not required when a judge has to make an order for a writ of attachment or to hold to bail, as was required in an affidavit to hold to bail when no order of a judge was required, nor as when personal liberty is involved. *Id.*

## 3. Special Bail.

In an action at the suit of the Crown, an order was made for a writ of attachment against defendant as an absconding debtor. Service of the writ was accepted by his attorney, who entered an appearance to the writ:—Held, that this was a useless proceeding, and that the defendant should have put in special bail. *Regina v. Stewart*, 8 P. R. 297.—Osler.

See *Bank of Hamilton v. Baine*, 12 P. R. 418, *infra*.

## 4. Powers of Local Master.

Local masters have no greater powers in matters coming before them in chambers under the jurisdiction given them by the O. J. Act (44 Vict. c. 5) and 48 Vict. c. 13, s. 21 (O.), than those conferred upon the master in chambers, and from these powers the power of referring causes under the Common Law Procedure Act is excepted. A local master has, therefore, no power to make an order to proceed against an absconding debtor, upon default after service of the writ of attachment, where such order contains a clause directing a reference under s. 197 of the C. L. P. Act (1877). It is intended by ss. 8 and 9 of the Absconding Debtors' Act, R. S. O. (1877), c. 68 that only one order shall be made under which the plaintiff may proceed to judgment, and, therefore, where an order of reference is necessary the order to proceed must be made by a judge who has jurisdiction to refer causes. *Bank of Hamilton v. Baine*, 12 P. R. 418.—Street.

## 5. Setting Aside.

On an application to set aside the writ:—Held, that any defect in the materials on which it was granted, might be supplied by the affidavits used on such application. *Regina v. Stewart*, 8 P. R. 297.—Osler.

Held, that defendant was precluded from moving to set aside the proceeding by having accepted service of the writ, with knowledge of certain alleged irregularities, and having delayed moving until after the time for pleading had expired. *Id.*

If a creditor has reasonable grounds for inferring his debtor's intention to defraud his creditors, a writ of attachment will not be set aside. *Scott v. Mitchell*, 8 P. R. 518.—Armour.

The Judge of a County Court who orders the issue of a writ of attachment out of the High Court under s. 2 of the Absconding Debtors' Act, R. S. O. (1877), c. 68, has no jurisdiction to entertain an application to set aside such writ. *Disher v. Disher*, 12 P. R. 518.—C. P. D.

See *Wills v. Carroll*, 10 P. R. 142, *infra*.

## II. JUDGMENT.

After judgment has been entered against an absconding debtor pursuant to the finding of a County Court judge on a reference under R. S. O. (1877) c. 68, s. 9, the master in chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend. *Wills v. Carroll*, 10 P. R. 142.—Chy. D.

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III. EXECUTION.

The mere fact that a writ of attachment against an absconding debtor is in the sheriff's hands does not bind the debtor's land, and the land is not bound until seizure. *Robinson v. Bergin*, 10 P. R. 127.—*Dalton, Master*.

The sheriff's bailiff went to and entered upon the land of the debtor, on which his family resided, and finding there no goods, did not leave any one in possession; he said that he had no instructions beyond the warrant to seize the land; he told the debtor's wife at the time that the land would be sold, but he did no other act of seizure:—Held, that there was no seizure, and that writs of fi. fa. lands placed in the sheriff's hands subsequent to the writ of attachment, were entitled to priority. *Id.*

On the 25th of January, 1884, seven warrants of attachment at the instance of different plaintiffs were issued out of a Division Court against the goods of the defendant, an absconding debtor, and under them the bailiff seized certain goods. Subsequently and on the same day a writ of attachment was issued by the plaintiff in this suit against the defendant as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff pursuant to section 16 of the Absconding Debtors' Act. Five other Division Court attachments and one County Court attachment were afterwards issued. Judgments were recovered by all the attaching creditors; executions were issued in the suits in the Superior and County Courts; and the clerk of the Division Court furnished the sheriff with a certified memorandum of the judgments in that court, by virtue of which each creditor mentioned in it was entitled for the purpose of sharing in the proceeds to be treated as a plaintiff who had obtained judgment and sued out execution. Pending this suit an order was made for the sale of the goods attached under the writ, and the goods were sold, and the proceeds of the sale paid into court. Upon a motion for distribution of the moneys in court the plaintiffs claimed payment of their costs of suit in priority to all other claims. It was ordered that the costs of issuing the plaintiff's writ, and the fees and charges paid to the sheriff for executing it should be paid first out of the fund, because these costs and charges were necessarily incurred in seizing, recovering, and preserving the property, and that any fees which had been incurred in the Division Court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it till it was delivered to the sheriff should also be paid out of the fund, and also the costs of the order directing the sheriff to sell, and the costs of this application, and that after payment of these charges the fund should be distributed ratably among the creditors. *Darling v. Smith*, 10 P. R. 360.—*Osler*.

On the 27th of September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th, a writ of attachment under the Absconding Debtors' Act, was issued and placed in the sheriff's hands under which he seized all the defendant's property, credits, and effects. On the 1st and 2nd October, two more writs of attachment were placed in his hands. On the 13th October, the sheriff sold under the executions and realized

enough to satisfy them; the moneys remaining in his hands pending these proceedings. On the 20th of October, the sheriff received a certificate under the Creditors' Relief Act, 1880, and another certificate on the 24th. On the 26th he sold the balance of the defendant's property, seized by him. After this various certificates and executions were received by him. On the 14th of October, he had made the entry in his book under the Creditors' Relief Act. None of the attaching creditors had placed executions in the sheriff's hands:—Held, that as the proceedings under the Absconding Debtors' Act had been commenced prior to the sale of the goods, and therefore prior to the sheriff being required to act under the Creditors' Relief Act, the latter did not supersede the former, so that the moneys realized were subject to such former Act, and must be distributed thereunder: that the proceedings under the latter Act were not well taken; and that the creditors who had certificates, to come within the former Act, must obtain judgment and execution in the ordinary mode. *Macfie v. Pearson*, 8 O. R. 745.—*Rose*.

Where money comes into the hands of a Division Court clerk under a garnishee summons, and he is made aware of a writ of attachment under the Absconding Debtors' Act, R. S. O. (1887), c. 66, he must pay the money to the sheriff and not to the primary creditor, under the provisions of s. 16 of that Act. *Re Moore v. Wallace*, 13 P. R. 201.—*Q. B. D.*

Where after the service upon the garnishees of a Division Court garnishee summons a County Court writ of attachment was placed in the hands of the sheriff, and the garnishees paid the amount owing by them to the primary debtor, to the sheriff, but the judge in the Division Court ordered the sheriff to pay the money to the Division Court clerk, and the clerk to pay it out to the primary creditors in the Division Court:—Held, that the judge was right in ruling that the money should have been paid by the garnishees to the Division Court clerk under s. 189 of the Division Courts' Act, R. S. O. (1887) c. 51, and therefore his order upon the sheriff to pay it to the clerk could not be interfered with; but the order to pay out to the primary creditors was contrary to s. 16 of the Absconding Debtors' Act, R. S. O. (1887), c. 66; and prohibition to restrain the clerk from so paying out the money was directed. *Id.*

IV. COSTS.

Held, that the object of section 20 of R. S. O. (1877) c. 68, is to save harmless the bona fide attaching creditor, whose writ has had the effect of saving and protecting the debtor's property for the execution creditor. In this case there was a fund, not exigible under the execution, to which the attaching creditors alone were entitled, and several attachments, of which the plaintiff's was third in time, and the whole property had been seized and sold or retained under the first writ. The plaintiff, without disclosing these facts, obtained an order under s. 20 of the Act that all costs of his attachment should be paid out of the debtor's assets before the execution, and under it taxed his whole costs of suit. The order was set aside, for had the facts been disclosed it should not have been made, and in

any event only the costs of suing out and executing the attachment were taxable. The application to set aside such order was held not to be an appeal. *Hughes v. Field*, 9 P. R. 127.—*Order*.

### ABSENT DEFENDANTS.

*See* ASCENDING DEBTOR—INTOXICATING LIQUORS—PRACTICE.

### ABSTRACT OF TITLE.

*See* QUIETING TITLES—REGISTRY LAWS—SALE OF LAND.

### ACCEPTANCE.

I. OF BILLS—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. OF STOCK—*See* COMPANY.

III. OF OFFICE—*See* MUNICIPAL CORPORATIONS.

IV. OF SERVICE—*See* PRACTICE.

V. OF GOODS—*See* SALE OF GOODS.

### ACCESSORY.

*See* CRIMINAL LAW—EVIDENCE.

An accessory before the fact is liable to extradition, but an accessory after the fact is not. *Regina v. Browne*, 6 A. R. 386; 31 C. P. 484.

### ACCIDENT.

I. FROM NEGLIGENCE—*See* NEGLIGENCE.

II. INSURANCE AGAINST—*See* INSURANCE.

### ACCOMPLICE.

*See* CRIMINAL LAW—EVIDENCE.

*See Regina v. Browne*, 6 A. R. 386; 31 C. P. 484, *supra*.

### ACCORD AND SATISFACTION.

*See* MORTGAGE—PAYMENT—WILL.

*See Blackley v. McCabe*, 16 A. R. 295, p. 2; *Crathern v. Bell*, 45 Q. B. 473; 46 Q. B. 365; 8 A. R. 537, pp. 844, 845; *Weldon v. Vaughan*, 5 S. C. R. 35, p. 334; *Brundage v. Howard*, 13 A. R. 337, p. 248.

### ACCOUNT.

I. ACTIONS FOR ACCOUNT, 8.

II. ALTERATION, 8.

III. REFERRING MATTERS OF ACCOUNT—*See* ARBITRATION AND AWARD—PRACTICE.

IV. MORTGAGE SUITS—*See* MORTGAGE.

V. PARTNERSHIP ACCOUNTS—*See* PARTNERSHIP.

VI. LIMITATION OF ACTIONS FOR—*See* LIMITATION OF ACTIONS.

VII. OF TRUSTEES—*See* TRUSTS AND TRUSTEES.

#### I. ACTIONS FOR ACCOUNT.

Semble, where one creditor, having obtained property from his debtor in fraud of other creditors, has realized the property, and received the proceeds in a shape that cannot be earmarked, another creditor who has thereby been defrauded, cannot make the preferred creditor account for the said proceeds, and has no other remedy than that prescribed by 13 Eliz. c. 5, s. 2. *Davis v. Wickson*, 1 O. R. 369.—*Boyd*.

*See Rogers v. Ullman*, 27 Chy. 137, p. 1695; *Menzies v. Ogilvie*, 27 Chy. 456, p. 90; *Harper v. Culbert*, 5 O. R. 152, p. 1081; *Carnegie v. Federal Bank of Canada*, 8 O. R. 75, p. 201; *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4, p. 730; *Cameron v. Birkford*, 11 A. R. 52, p. 1539; *Sandford v. Portes*, 16 A. R. 565, p. 112.

#### II. ALTERATION.

Criminal liability. *See In re Hall*, 9 P. R. 373; 8 A. R. 31, p. 436.

### ACCRETION.

*See* WATER AND WATER-COURSES.

### ACKNOWLEDGMENT OF TITLE.

*See* LIMITATION OF ACTIONS.

### ACQUIESCENCE.

*See* ESTOPPEL.

### ACTION OF PARLIAMENT.

*See* CONSTITUTIONAL LAW—STATUTES.

### ACTION.

I. BY AND AGAINST WHOM MAINTAINABLE.

1. Particular Persons.

(a) Persons Aggrieved, 9.

Right of  
in actions

(b) *Assignee of Chose in Action*—See CHOSE IN ACTION.

(c) *Other Persons*—See THE SEVERAL TITLES.

2. *Other Cases*, 10.

II. NOTICE OF ACTION, 11.

III. FOR WHAT MAINTAINABLE.

1. *Generally*, 12.

2. *In Other Cases*—See THE SEVERAL TITLES.

IV. PLACE OF ACCRUAL.

1. *Generally*, 15.

2. *Division Court Cases*—See DIVISION COURTS.

V. JOINDER OF CAUSES OF ACTION—See PLEADING.

VI. PARTIES—See PLEADING.

VII. MULTIPLICITY OF ACTIONS—See MORTGAGE.

VIII. CIRCUMSTANCES OF ACTION, 15.

IX. CONSOLIDATING—See PRACTICE.

X. SPLITTING CAUSES OF ACTION—See DIVISION COURTS.

XI. CROSS ACTIONS, 15.

XII. DISCLAIMER, 16.

XIII. ABATEMENT OF.

1. *By Death of Parties*, 16.

2. *Other Cases*, 17.

XIV. DISCONTINUANCE AND WITHDRAWAL—See PRACTICE.

XV. COMPROMISING AND SPLITTING.

1. *By Parties*, 17.

2. *By Solicitor*—See SOLICITOR.

XVI. SUSPENSION OF ACTIONS IN CASES OF FELONY, 17.

XVII. RESTRAINING—See INJUNCTION.

XVIII. DISMISSING.

1. *For non-compliance with Order for Discovery for Interrogatories*—See EVIDENCE.

2. *Other Cases*—See PRACTICE.

XIX. TRIAL OF—See TRIAL.

XX. LIMITATION OF—See LIMITATION OF ACTIONS.

XXI. RELEASING—See RELEASE.

XXII. REVIVING—See SCIRE FACIAS AND REVIVOR.

XXIII. PARTICULAR ACTIONS—See THE SEVERAL TITLES.

XXIV. JURISDICTION OF COURTS—See THE SEVERAL TITLES.

I. BY AND AGAINST WHOM MAINTAINABLE.

1. *Particular Persons*.

(a) *Persons Aggrieved*.

Right of shareholders to use name of company in actions against other shareholders. See *In-*

*ternational Wrecking Co. v. Murphy*, 12 P. R. 423, p. 278.

In actions for mechanics' liens. See *Bank of Montreal v. Haffner*, 3 O. R. 183; 10 A. R. 592, p. 1170; *Oldfield v. Barbour*, 12 P. R. 554, p. 1173.

See *Verratt v. McAulay*, 5 O. R. 313, p. 1701; *Atkins v. Ptolemy*, 5 O. R. 366, p. 1331.

2. *Other Cases*.

The contract in this case having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name: *Taschereau and Wynne, JJ., diss. Weldon v. Vaughan*, 5 S. C. R. 35.

Quere, whether the clerk of a municipality is only liable to a conviction under sec. 159 of the Assessment Act, R. S. O. (1877), c. 180, at the suit or upon complaint of the Crown, or to a civil action by the plaintiffs as well. *Town of Peterborough v. Edwards*, 31 C. P. 231.—Galt.

Held, (affirming *Ferguson, J.*), that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Roberts v. Hall*, 1 O. R. 388.—Chy. D.

Held, following *Parkes v. St. George*, 10 A. R. 496, that the plaintiffs not being execution creditors, could not maintain an action to set aside a chattel mortgage on the ground that the debt was incorrectly stated therein. *Hyman v. Culbertson*, 10 O. R. 443.—Q. B. D.

The defendant Jefferys, owner of a frame tenement in Toronto, agreed with his co-defendant Dollery for the removal thereof to another part of the city, such removal to be made at D.'s own risk and without damage to that or any other property. Both defendants contemplated and intended that the house was to be drawn and moved along Sherbourne street for some distance. Under a by-law of the city, all persons were prohibited under a penalty from moving any building into, along, or across any street without the written permission of the board of works. In this case no such permission was obtained, and in the course of hauling the building along the line of the track of the plaintiffs one of the sills was upset, thus preventing its further removal for two days, during which time the plaintiffs sustained loss by the non-receipt of fares and damage to their property.—Held, (*Burton, J. A.*, dissenting), that Jefferys as well as Dollery, was liable for the loss so occasioned. Per *Oslar, J. A.*, as the plaintiffs had, by their charter, the superior right of user and occupation of the street, a duty was cast upon J. to see that proper precautions were taken to prevent injury arising from obstructing the railway by means of the building of which he was procuring the removal, and which could not from its size be removed along the street without obstructing the traffic. *Toronto Street Railway Company v. Dollery*, 12 A. R. 679.

Where a person suing on behalf of himself and others is disentitled to sue on his own behalf, he





conveyance or transfer made by the debtor, prior to the assignment under which he claims to be such assignee. *Lumsden v. Scott*, 4 O. R. 323.—*Ferguson*.

If a person borrow money from an innocent lender and employs it in preferring a creditor, the lender is not debarred from suing for repayment. *Court v. Holland*, 4 O. R. 688.—*Proudfoot*.

Where one brought action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover:—Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessities did not make the registered owner liable. *Nelson v. Wyle*, 8 O. R. 82.—*Boyd*.

In an action under 40 Vict. c. 43, s. 47 (D.), brought in Ontario against a shareholder there resident, of a company whose head office was in another province, where judgment had been obtained by the plaintiff against the company, and execution thereon had been returned unsatisfied:—Held, reversing the judgment of *Rose, J.* (7 O. R. 435), that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario. *Brice v. Muuro*, 12 A. R. 453.

The fact that a plaintiff has brought an action for infringement before registering his trademark, which action has therefore proved abortive does not prevent him bringing another action after registering. *Smith v. Fair*, 14 O. R. 729.—*Proudfoot*.

The plaintiff sued for damages for false testimony alleging that he had failed in a prior action by reason of such testimony given therein by the present defendant:—Held, that the action would not lie; and the plaintiff being in default by reason of not having given notice of trial, the action was dismissed. *Clarke v. Creighton*, 13 P. R. 113.—*Dalton, Master*.—*Galt*.

After the time fixed by an award under the Ditches and Water-courses' Act, 1883, for the completion of certain drainage work by neighbouring landowners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work with the object of having it completed according to the award, but as the plaintiff alleged the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, etc.:—Held, that the provision of section 13 of the Act, as to the inspection of the engineer is imperative, and an action would lie for breach of his duty; but even if the evidence had shewn such a breach the damages claimed were not the proximate, necessary, or natural result thereof. The other provisions of section 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate,

result of such non-performance. Those who by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages. *O'Byrne v. Campbell*, 15 O. R. 330.—*Q. B. D.*

The defendants enlarged a drain running through the plaintiff's land; the earth taken from which they deposited on either side and left it there. The plaintiff sued for damages to his land, etc., by reason of such depositing of the earth. It was admitted that the work was done under a by-law passed under section 576 of the Municipal Act (1883), and it was not suggested that the by-law was defective in any way. The jury found that the defendants were not guilty of any negligence, but that the plaintiff had suffered damage in consequence of the execution of the work:—Held (reversing the decision of *Rose, J.*), that upon these findings judgment should have been entered for the defendants; that a cause of action could not accrue from the doing of a lawful act, unless in a negligent manner; and that the plaintiff's remedy, if any, was by arbitration to obtain compensation under the Municipal Act of 1883, s. 91. *Preston v. Corporation of Camden*, 14 A. R. 85.

On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it telegraphed him, that if unable to pay it to draw on them for the amount. The acceptor took the telegram to the manager of the plaintiffs' bank, who on the faith of it discounted a sight bill drawn by the acceptor on the drawers with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so re-drawn:—Held, that the telegram having been sent for the purpose of inducing persons to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced:—Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal v. Thomas*, 16 O. R. 503.—*C. P. D.*

Actions brought in the name of a road company against the present plaintiffs were dismissed with costs, on the ground that the company had never been incorporated according to law. The present actions were brought against four of the incorporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefor against the company having been returned *nulla bona*:—Held, that in the absence of malice and want of reasonable and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as incorporators or as solicitors bringing actions on behalf of plaintiffs who had no legal existence. *Flatt v. Waddell—Townsend v. Waddell*, 18 O. R. 539.—*Q. B. D.*

N. D. respondent, owner of a cheese factory, made an agreement with farmers by which the latter agreed to give the milk of their cows to no other cheese factory than that of N. D. N. D. subsequently sold to G. D. (the appellant) the

factory and sous la simple garantie de ses faits et promesses, whatever rights he may have under his agreement with the farmers, for the bulk sum of \$7,000. G. D. assigned to B. the factory and the same rights, but excluding warranty, sans garantie aucune, for \$7,500. A company was subsequently formed to whom B. assigned the factory and the rights, and one of the farmers to the original agreement having sold milk to another cheese factory, the company sued him, but the action was dismissed, on the ground that N. D. could not validly assign personal rights he had against the farmers. Thereupon G. D. brought an action against N. D. to recover the price paid for rights which N. D. had no right to assign. At the trial it was proved that although the price mentioned in the deed and paid was a bulk sum for the factory and the rights, the parties at the time valued the rights under the agreement with the farmers at \$5,000. G. D. also admitted that the action was taken for the benefit of the present owners of the factory:—Held, affirming the judgment of the court below, Strong and Fournier JJ., dissenting, that, inasmuch as the appellant, by the sale he had made to B., had received full benefit of all that he had bought from respondent, and had no interest in the suit, he could not claim to be reimbursed a portion of the price paid. Per Taschereau, J., if any action lay, it could only have been to set the sale aside, the parties being restored to the *status quo ante* if it were maintained. *Demers v. Duhaime*, 16 S. C. R. 366.

See *Brooks v. Conley*, 8 O. R. 549, p. 1078; *Caswell v. Murray*, 9 P. R. 192, p. 357; *Connec v. Canadian Pacific R. W. Co.*, 11 P. R. 149; 12 A. R. 744, p. 2046; *Bender vs. Carrier*, 15 S. C. R. 19, p. 339.

#### IV. PLACE OF ACCRUAL.

##### 1. Generally.

As to place where cause of action arose on breach of contract. See *Gildersleeve v. McDougall*, 31 C. P. 164; 6 A. R. 553, p. 758.

#### VIII. CIRCUIT OF ACTION.

M. being seized in fee of land mortgaged to the plaintiff, and then sold to D. expressly subject to the mortgage. D. sold to one Maybe in the same manner, and Maybe sold to defendant, who had notice of the title, covenanting against incumbrances. The plaintiff proceeded against M. and the defendant, and obtained judgment for sale on non-payment and costs, whereupon defendant paid the plaintiff's claim for debt, interest and costs, and took an assignment of the judgment and mortgage:—Held, that the defendant had no right under such judgment to levy from M. any portion of the costs so paid, for if he were allowed to do so, M., by the effect of the conveyance, would have a remedy over for them against the land, defendant's property, and could then force defendant to pay them back. *Kempt v. Macaulay*, 9 P. R. 582.—Dalton, Master.—Proudfoot.

#### XI. CROSS ACTIONS.

For compensation for defect in quality of goods sold. See *Towers v. Dominion Iron and Metal Co.*, 11 A. R. 315, p. 1861.

On the 4th February, 1885, the Confederation Life Association commenced an action in the Chancery Division to set aside a policy of insurance. On the 13th May, 1885, Miller et al. brought an action to recover the amount of the policy, and on the 23rd May moved to stay proceedings in the former action:—Held, following the rule laid down in *Thomson v. South Eastern R. W. Co.*, 9 Q. B. D. 320, that there is no hard and fast rule in cases of cross actions, that the one commenced last should be stayed. The court should take the circumstances into consideration, and exercise its discretion as to what is the fairest mode of settling the dispute, and give the conduct of the litigation to the party upon whom the substantial burden of proof rests. On appeal *Rose, J.*, declined to make any order. Subsequently, on the 27th June, 1885, the defendants in the first action moved for a stay of proceedings in it, and the Master made an order accordingly. On 12th appeal on October, Boyd, C., declined to interfere at present, as the action of Miller v. Confederation Life had been tried and a verdict given for the plaintiffs, but reserved leave to renew the motion if the verdict should be set aside, and varied the order of the Master by consolidating the two actions. *Miller v. Confederation Life Association—Confederation Life Association v. Miller*, 11 P. R. 241.

See *Direct Cable Co. (Limited) v. Dominion Telegraph Co.* 28 Chy. 648, p. 1630.

#### XII. DISCLAIMER.

An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land is regularly made before appearance, although the application would be entertained after appearance where the justice of the case required it. But where two defendants applied after appearance to have their names struck out, and the court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed, with costs. *Anglo-Canadian Mortgage Co. v. Cotter*, 8 P. R. 111.—Dalton, Q. C.

Costs after defendant disclaims any interest in the result of a suit. See *Wansley v. Smallwood*, 11 A. R. 439, p. 366.

#### XIII. ABATEMENT OF.

##### 1. By Death of Parties.

Semble, that under O. J. Act, Rule 383 (Con. Rule 620), an action of seduction abates by the death of the plaintiff. *Udy v. Stewart*, 10 O. R. 591.

The plaintiffs, formerly owners of a line of steamers, brought this action against the defendants, who were formerly owners of another line of steamers, alleging that by certain misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, they, the plaintiffs, were induced to enter into an agreement with the defendants for the amalgamation of the two

lines and the defendants ran the same such misrepresentation after be proceeded dants. *Be* See S. C.

P. brought the I. C. R. to board a the neglig the train t nonsuited, nonsuit wa Between th a new trial was entere Supreme C full court: Act, or the wick (G. S. of action a al action revived.

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Where ce were partie ing an acc estate:—He compromise ministration which had promised. R. 467.—H

#### XVI. SUSE

To an act pleaded that laid an infor defendant v plaintiff wi harm, the felony: the magistrate, not yet tak

lines and the formation, in connection with the defendants, of a joint stock company to own and run the same, and seeking damages in respect of such misrepresentations. One of the defendants died after issue joined:—Held, the action could be proceeded with against the surviving defendants. *Beatty v. Newton*, 9 O. R. 385.—Wilson. See S. C., 12 A. R. 50; 13 S. C. R. 1.

P. brought an action against a conductor of the I. C. R. for injuries received in attempting to board a train, and alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. On the trial P. was nonsuited, and on motion to the full court the nonsuit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial P. died and a suggestion of his death was entered on the record. On appeal to the Supreme Court of Canada from the order of the full court:—Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick (U. S. N. B. c. 86) an entirely new cause of action arose on the death of P. and the original action was entirely gone and could not be revived. *White v. Parker*, 16 S. C. R. 699.

See *Brown v. Grove*, 18 O. R. 311, p. 1918.

## 2. Other Cases.

This suit became abated between the date of the report and the term fixed by it for payment, by subsequent encumbrancers. On an application for a final order for foreclosure it was refused, and a new day was appointed allowing the encumbrancers an additional time for payment, equal to the time the suit remained abated. *Biggar v. Way*, 8 P. R. 158.—Blake.

See *Creve-Read v. County of Cape Breton*, 14 S. C. R. 8, p. 1254.

## XV. COMPROMISING AND SETTLING.

### 1. By Parties.

A married woman can compromise an action brought in her own name against her husband. See *Vardon v. Vardon*, 6 O. R. 719, p. 884.

Where certain creditors and the administrator were parties to an order in chambers compromising an action respecting certain assets of the estate:—Held, that they were bound by such compromise, and could not impeach in this administration proceeding the validity of securities which had been in question in the action compromised. *Merchants' Bank v. Monteith*, 10 P. R. 467.—Hodgins, *Master in Ordinary*.

## XVI. SUSPENSION OF ACTIONS IN CASES OF FELONY.

To an action for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate, charging defendant with feloniously, etc., wounding the plaintiff with intent to do him grievous bodily harm, thereby charging the defendant with felony: that defendant was brought before the magistrate, and committed for trial, which had not yet taken place: that the subject of both the

civil and criminal prosecution was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of:—Held, on demurrer, plea good, and an order was accordingly made staying the civil action in the meantime. *Taylor v. McCullough*, 8 O. R. 309.—Rose.

## ADDING PARTIES.

See INJUNCTION—PLEADING.

## ADMINISTRATION.

I. OF ESTATES—See EXECUTORS AND ADMINISTRATORS.

II. OF INSURANCE COMPANY'S DEPOSIT—See INSURANCE.

## ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

## ADMISSIONS.

See EVIDENCE.

## ADOPTION.

See INFANT.

## ADULTERY.

ALIMONY IN CASE OF—See HUSBAND AND WIFE.

## ADVANCEMENT.

See INFANT.

## ADVERSE POSSESSION.

See EJECTMENT—LIMITATION OF ACTIONS.

## ADVERTISEMENT.

I. PUBLICATION OF MUNICIPAL BY-LAWS—See MUNICIPAL CORPORATIONS.

II. SALE OF LAND.

1. *Under Execution*—See EXECUTION.

2. *Under Quieting Titles Act*—See QUIETING TITLES.

3. *By Order of the Court*—See SALE OF LAND BY ORDER OF THE COURT.

4. *Compensation for Misrepresentation*—See SALE OF LAND.

The fact that an intestate whose estate is being partitioned, has been dead for forty-five years does not warrant a master in dispensing with the usual advertisement for creditors. *Biggar v. Biggar*, 8 P. R. 488.—Blake.

Notice for a call on stock under 12 Vict. c. 157, s. 27, published in a newspaper in one district is sufficient to render the shareholders residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held. *Provincial Ins. Co. v. Cameron Executor*, 31 C. P. 523.—C. P. D.; 9 A. R. 56.

Trustees in selling some church property under R. S. O. (1887), c. 237, s. 13, advertised on the same day of the week for four successive weeks in a daily paper:—Held, not a sufficient compliance with the provision of the statute directing publication in a "weekly paper," to make a proper sale of the lands, and that the purchaser had good ground for refusing to accept the title offered. *Re Trustees of the East Presbyterian Church and McKay*, 16 O. R. 30.—Ferguson.

### AFFIDAVIT.

IN PARTICULAR CASES—See THE SEVERAL TITLES.

Where affidavits used on a motion were badly written, scarcely legible and difficult to decipher, the court refused the plaintiff all costs connected with their preparation, although the costs of the suit were given him. *Burham v. Garvey*, 27 Chy. 80.—Sprague.

The affidavit of bonafides in a chattel mortgage purported to be sworn before "T. B. F.," without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R., etc.":—Held, no objection to the affidavit of bonafides. *Hamilton v. Harrison*, 46 Q. B. 127.—Q. B. D.

The affidavits upon which the order for a writ of attachment against an absconding debtor was issued, were not styled in any court, although sworn before a commissioner for taking affidavits in the Q. B., who appended to his signature the words, "A Com. in B. R., etc.":—Held, that the affidavits were sufficient: *Ellerby v. Walton*, 2 P. R. 147, followed; *Hart v. Rutan*, 23 C. P. 613, not followed. *Scott v. Mitchell*, 8 P. R. 518.—Armour.

Where the affidavit for an order to arrest, was intitled in the High Court of Justice but not in the proper Division:—Held, that the objection was clearly amendable. *Robertson v. Coulton*, 9 P. R. 16.—Osler.

An affidavit entitled in the Q. B., and sworn before the Judicature Act came into force, might under section 11, sub-sections 2 and 3, be made the foundation of an order in the Q. B. Division. *Elliot v. Capell*, 9 P. R. 35. Dalton, Master.—Osler.

In the plaintiff's affidavit on a motion to sign final judgment under Rule 80, O. J. Act (Con.

Rule 739), the word "defence" had been struck out, and the word "appearance" interlined, without being initiated by the commissioner before whom the affidavit was sworn:—Held, under Rule 468 O. J. Act (Con. Rule 611), that the affidavit could not be read. *Boyd v. McNutt*, 9 P. R. 493.—Dalton, Master.

The copy of affidavit marked as an exhibit to the affidavit of the Toronto agent was not filed as an exhibit, and was subsequently produced to the court as an original affidavit, a new jurat having been added:—Held, per Falconbridge, J., that the exhibit, even though it was not actually in the hands of the officer of the Court, was part of the record of the case, and should not have been so dealt with. *Gilbert v. Stiles*, 13 P. R. 121.

### AGENT.

See PRINCIPAL AND AGENT.

### AGREEMENT.

- I. GENERALLY—See CONTRACT.
- II. TO LEASE—See LANDLORD AND TENANT.
- III. AS TO COSTS—See SOLICITOR.

### AIR.

See *Carter v. Grasett*, 14 A. R. 685, p. 117.

### ALIEN.

- I. ARREST OF—See ARREST.
- II. EXTRADITION OF—See EXTRADITION.
- III. SECURITY FOR COSTS BY—See COSTS.
- IV. RIGHT TO VOTE—See PARLIAMENTARY ELECTIONS.
- V. SERVICE ON—See PRACTICE.
- VI. NATURALIZATION OF—See PARLIAMENTARY ELECTIONS.

Payment of money to foreign guardian. See *Flanders v. D'Evelyn*, 4 O. R. 704, p. 909.

Foreign trustee for infants. See *Re Andrews*, 11 P. R. 199, p. 908.

The mortgagee of a British ship is not an owner within the meaning of Imperial Statute, 17 & 18 Vict. c. 104, and there is no provision in that statute to prevent an alien being a mortgagee. *Comstock v. Harris*, 13 O. R. 407.—Pondfoot.

### ALIMONY.

See HUSBAND AND WIFE.

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**ALLEGIANCE.**

See PARLIAMENTARY ELECTIONS.

**ALLOTMENT OF SHARES.**

See COMPANY.

**ALLUVION.**

See WATER AND WATER-COURSES.

**ALTERATION.**

I. OF ACCOUNTS—See ACCOUNT.

II. OF BILLS AND NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

III. OF DEEDS—See DEED.

IV. OF INSURED PREMISES.—See INSURANCE.

Alteration of filed copy of election petition by clerks of Toronto agent of petitioner's solicitor. Service of copy corresponding with altered petition on respondent. See *Lincoln and Niagara Election, (Dom.)—Pattison v. Rykert*, 1 E. C. 428.

**AMALGAMATION.**

See COMPANY—RAILWAYS AND RAILWAY COMPANIES.

**AMENDMENT.**

I. OF DECREE—See PLEADING.

II. OF JUDGMENTS—See JUDGMENT.

III. OF EXECUTIONS—See EXECUTION.

IV. OF PLEADINGS—See PLEADING.

V. OF INFORMATIONS—See INTOXICATING LIQUORS.

VI. OF CONVICTIONS—See INTOXICATING LIQUORS—JUSTICES OF THE PEACE—SESSIONS.

VII. OF PROCEEDINGS IN CONTROVERTED ELECTIONS—See PARLIAMENTARY ELECTIONS.

Where pending the investigation of the title under the Quieting Titles' Act, the petitioner laid out the land in village lots and registered a plan:—Held, that the petition must be amended in accordance with the plan. *Re Morse*, 8 P. R. 475.—Blake.

There having been a misnomer in the names of the applicants for a mandamus—Per Armour, and Cameron, J.J., such misnomer not having been objected to on the argument below might be amended. Per Hagarty, C.J., in such a case

no amendment should be granted as a matter of discretion. *In re High School Board of High School District No. 4, of the U. C. of Stormont, Dundas, and Glengarry, and the Municipal Corporation of the Township of Winchester*, 45 Q. B. 400.

Where a bridge was wrongly described in an indictment as being in two townships:—Held, that though this could have been amended at the trial it could not be amended on a motion to set aside the verdict or for a new trial. *Regina v. County of Carleton*, 1 O. R. 277.—Q. B. D.

Where the affidavit for an order for arrest was intitled in the High Court of Justice, but not in the proper division:—Held, that the objection was clearly amendable. *Robertson v. Coulton*, 9 P. R. 16.—Osler.

The capias issued after action was in the form formerly used for the commencement of an action:—Held, amendable. *Id.*

See *Re Smart Infants*, 12 P. R. 635, p. 848.

**ANCIENT DOCUMENTS.**

See EVIDENCE.

**ANIMALS.**

I. DISTRAINING DAMAGE FEASANT—See DISTRESS.

II. BY-LAWS REGARDING—See MUNICIPAL CORPORATIONS.

III. INJURY TO—See RAILWAYS AND RAILWAY COMPANIES.

Effect of Bills of Sale Act, R. S. O. (1877) c. 119, where animal conveyed by one of two owners. See *Gunn v. Burgess*, 5 O. R. 685, p. 185.

Damages recoverable for loss of sheep killed by dogs. See *Regina v. Perrin*, 16 O. R. 446, p. 555.

Liability of wife of owner of an animal feræ nature for damages caused by its escape from premises forming part of her separate estate. See *Shaw v. McCreary*, 19 O. R. 39, p. 880.

The defendant killed upon his own land, which adjoined that of the plaintiffs and was unfenced, a deer, one of the progeny of certain deer imported by the plaintiffs and defendant, and allowed to run at large upon the land:—Held, that the deer was feræ nature and having been shot by the defendant on his own land, belonged to him:—Held, also, that neither the Act incorporating the plaintiffs 29-30 Vict. c. 122, nor R. S. O. (1887), c. 221, s. 10, vested the absolute property in the deer in the plaintiffs. *Re Long Point Co. v. Anderson*, 19 O. R. 487.—Q. B. D.

**ANNUITY.**

See WILL.



On the 18th October, 1866, the owner of real estate granted an annuity thereof of \$40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant claiming ten years' arrears, with interest thereon:—Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of annuity; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could recover only six years' arrears without interest, as against a puisne incumbrancer who had duly registered his conveyance. *Crone v. Crone*, 27 Chy. 425.—Proudfoot.

Interest on, as against assignee in insolvency. See *Sharr v. Badenach*, 10 O. R. 131, p. 2198.

T. C. S. devised his estate of Clark Hill, with the islands, lands and grounds appertaining, to his nephew M.—M.'s grandmother, by her will, directed her executors to pay him \$2,000 a year so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate, and beautify the property known as Clark Hill, and the islands connected therewith:—Held, that the expropriation, under an Act of the Legislature, of part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated, the arbitrators properly excluded the consideration of any contemplated loss by M. of this annuity. *In re Macklem and the Commissioners of the Niagara Falls Park*, 14 A. R. 20.

A failure by M. to reside and occupy, would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate which must be by his own act or default; the vis major of a binding statute could not work a forfeiture. Upon the evidence the court refused to interfere with the amount of compensation awarded. *Ib.*

See *Coleman v. Hill*, 10 O. R. 172, p. 1265; *MacLennan v. Gray*, 16 O. R. 321; 16 A. R. 224; *S. C.*, sub nom. *Gray v. Coughlin*, 18 S. C. 553, p. 1254.

### ANSWER.

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II. IN PLEADING—See PLEADING.

### ANTE-NUPTIAL SETTLEMENT.

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XII. IN CRIMINAL LAW.

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The court being of the court below New Brunswick See also, Moore v. rance Co. of Har Moryan, 7 S. C. F 36; Murray v. C R. 646; Canada 8 A. R. 564; Con lue, Co., 15 O. R. Neill v. Traveller

The prisoner wa the Chancery Div tie, which on ap the court being e second writ of ha tained, and the pr mon Pleas Division whereupon he aga appeal was dismi circumstance a se tained. Per Ha concurring). The ed to tl court fery Division, he of such appeal, v sequent affirmance and he could not this court on the Hall, 8 A. R. 135

Per Burton and for the technical of Lords on an eg in other appellate ticular case, the a last resort. *Ib.*

The effect of an in a court of first or motion drops o



8. *From Surrogate Court*—See **SURROGATE COURT**.

9. *From Judge in Chambers*—See **PRACTICE**.

10. *From Single Judge in Court*—See **HIGH COURT OF JUSTICE**.

11. *From Masters*—See **PRACTICE**.

12. *From Local Judge*—See **PRACTICE**.

13. *From Referees*—See **PRACTICE**.

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15. *From Convictions*—See **SESSIONS**.

**XII. IN CRIMINAL MATTERS**—See **CRIMINAL LAW**.

### I. GENERALLY.

Quære, can the Dominion Parliament give an appeal in a case in which the Legislature of a Province has expressly denied it. *Danjon v. Marquis*, 3 S. C. R. 251.

When a decision of the Court of Appeal in England is at variance with one of the Court of Appeal in this Province, the latter should be followed here, as the former court is not the court of ultimate appeal for the province: *Sutton v. Sutton*, 22 Chy. D. 511, not followed. *MacDonald v. McDonald*, 11 O. R. 187—Proudfoot. See *MacDonald v. Elliott*, 12 O. R. 98, p. 1205.

The court being equally divided, the judgment of the court below was not altered. *McLeod v. New Brunswick Railway Co.*, 5 S. C. R. 281. See also, *Moore v. Connecticut Mutual Life Assurance Co. of Hartford*, 6 S. C. R. 634; *Côté v. Morjan*, 7 S. C. R. 1; *McCallum v. Odette*, *ib.* 36; *Murray v. Canada Central R. W. Co.*, 7 A. R. 646; *Canada Central R. W. Co. v. McLaren*, 8 A. R. 504; *Cousineau v. City of London Fire Ins. Co.*, 15 O. R. 329; *In re Hall*, 8 A. R. 135; *Neill v. Travellers' Ins. Co.*, 7 A. R. 370.

The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice, which on appeal to this court was affirmed, the court being equally divided (8 A. R. 31). A second writ of habeas corpus was thereupon obtained, and the prisoner brought before the Common Pleas Division, when he was again remanded, whereupon he again appealed to this court, which appeal was dismissed with costs, as under such circumstance a second appeal could not be entertained. Per Hagarty, C. J. (Spragge C. J. O. concurring). The prisoner having already appealed to this court from the judgment of the Chancery Division, he must abide by the legal result of such appeal, viz., the dismissal of it and consequent affirmation of the decision appealed from, and he could not again ask the interference of this court on the same state of facts. *In re Hall*, 8 A. R. 135. See S. C. 32 C. P. 498.

Per Burton and Patterson, J. J. A. The grounds for the technical rule of practice of the House of Lords on an equal division have no existence in other appellate tribunals, although in the particular case, the appellate court is the court of last resort. *ib.*

The effect of an equal division in this court, as in a court of first instance, is simply that the rule or motion drops or the appeal is dismissed, and

the judgment below remains undisturbed, but is not considered as a binding authority. *ib.*

The Act 29-30 Vict. c. 45, apparently substituted the right of appeal in habeas corpus cases for successive applications from court to court. *ib.*

Per Patterson, J. A. By the effect of the Judicature Act, a decision of any one division is a decision of the High Court, this matter had therefore been already disposed of on the former appeal. *ib.*

It is the duty of an Appellate Court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case. *Russell v. Lefrancois* 8 S. C. R. 335. See *Regina v. Ambrose*, 16 O. R. 251, p. 1049.

When a judgment appealed from is wholly founded upon questions of fact, the Supreme Court of Canada will not reverse it unless convinced beyond all reasonable doubt that such judgment is clearly erroneous. *Arpin v. The Queen*, 14 S. C. R. 736.

The rule generally followed by the court is not to review the finding of the judge of first instance, where his decision depends upon a balance of testimony; still, if the court in banc upon an application to it has reversed that finding, this court must be satisfied upon appeal, that the court in banc was wrong before it will interfere with that judgment. *Hale v. Kennedy*, 5 A. R. 157.

Per Gwynne, J. It is a point fairly open to enquiry in a Court of Appeal whether or not, as in this case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts. *Gallagher v. Taylor*, 5 S. C. R. 368.

Per Gwynne, J. A Court of Appeal should not reverse the finding upon matters of fact of the judge who tried the case and had the opportunity of observing the demeanour of the witnesses, unless the evidence be of such a character as to convey to the mind of the judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. *Ryan v. Ryan*, 5 S. C. R. 405. See also *Little v. Brunker*, 28 Chy. 191; *The Pictou—McCaig v. Keith*, 4 S. C. R. 648; *Merchants' Bank of Canada v. Smith*, 8 S. C. R. 512.

Remarks upon reversing the findings of a judge or jury upon a question of fact or of mixed law and fact. *Scribner v. Kinloch*, 12 A. R. 307.

Where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be reversed in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *Graselt v. Carter*, 10 S. C. R. 105; *Cook v. Patterson*, 10 A. R. 645; *Halton Election (Ont.)—Russell v. Barber*, 1 H. E. C. 283.

The judge who tried the case, in which the evidence was conflicting and irreconcilable,

rested his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. This court, while not differing from the judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence allowed the appeal and reversed the decision of the court below. *Cameron v. Bickford*, 11 A. R. 52. Reversed by the Privy Council. Not reported.

The judgment of the court below in an election case will not be reversed unless clearly wrong. *Berthier Election (Dom.)—Generenz v. Cuthbert*, 9 S. C. R. 102; *Montcalm Election (Dom.)—Magan v. Dugas, Ib.*, 93; *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.

In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages. *Levi v. Reed*, 6 S. C. R. 482.

Per Gwynne, J. A Court of Appeal should not interfere with damages awarded by a judgment under consideration in appeal unless they appear to have been calculated upon a wrong principle or arrived at without regard to considerations which ought to govern a tribunal in awarding damages. It is not sufficient if the judges in appeal sitting as judges in the first instance might have given as some of the judges, in the court below in this case were disposed to give, larger damages. *Mayor of City of Montreal v. Hall*, 12 S. C. R. 74.

Semble, where an appeal is made from the exercise of discretion by a judge, the court should not review such discretion. *Neill v. Travellers' Ins. Co.*, 9 A. R. 54; *Regina v. Richardson*, 8 O. R. 651; *South Victoria Election (Ont.)—Roden v. McIntyre*, 1 E. C. 182; *Kennedy v. Braithwaite, Ib.* 195. But see *Regina v. Meyer*, 11 P. R. 477, p. 445.

Per Ritchie, J.—A Court of Appeal ought not to differ from a court below on matters of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. *Jones v. Tuck*, 11 S. C. R. 197.

The court will not hear an appeal where the court below, in the exercise of its discretion, has ordered a new trial on the ground that the verdict is against the weight of evidence. *Eureka Woollen Mills Co. v. Moss*, 11 S. C. R. 91.

An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action in statu quo long enough to enable him to obtain the decision of an appellate court on points already decided in other cases, against his contention, in courts of first instance. *Wyll v. McMaster*, 4 O. R. 717.—Ferguson.

In penal statutes questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi criminal trial has acquitted the respondent the appellate court will not reverse the finding. *North Ontario Election (Ont.)—McCaskill v. Paxton*, H. E. C. 304.

What is proper compensation to be allowed to a trustee for his management of a trust estate is a matter of opinion, and even if, in granting the allowance, the court below may have erred on the side of liberality, that alone is not sufficient ground for reversing the judgment. Where the master had allowed \$125, which the court, on appeal, increased to \$250, the Court of Appeal refused to interfere. *McDonald v. Davidson*, 6 A. R. 320.

The plaintiff being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial. On appeal to the Court of Appeal—Held, that the court could not interfere. *Robinson v. Hall*, 6 A. R. 534.

As to interfering with discretion of judge on an application for an interlocutory injunction. See *Hathaway v. Doig*, 6 A. R. 264, p. 924.

Where the question involved affected matters arising in the exercise of statutory powers, and was of general interest, leave was given to appeal although a sum less than \$200 was at stake. *O'Donohoe v. Whitty*, 2 O. R. 424.—Chy. D. See also *S. C.*, 9 P. R. 361.

A party who has been ordered by the court to attend for further examination after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal. *MacGregor v. McDonald*, 11 P. R. 518.—Dalton, Master.—Armour.

It appeared that the Despatch Company, defendants herein, had given notice of appeal to the Court of Appeal from the decision of Osler, J., before the other defendants appealed to this court. Per Armour, J.—Where there is a general judgment against several defendants, Rule 510 (See Con. Rule 798) does not permit them to sever and appeal to different courts, but they were all bound to appeal to the tribunal to which the defendant taking the first step had appealed, and on this ground, the appeal should be dismissed. *Hately v. Mercantile Despatch Co.*, 4 O. R. 723.

Where upon the argument of an appeal the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the court refused to wade through the mass of pleading which had been filed in the court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of the court below upon such pleadings. *Quinlan v. Union Fire Ins. Co.*, 8 A. R. 376.

The judgment in the court below (32 C. P. 131) overruled a demurrer on the assumption that a plea had been amended according to leave given, but the appeal book did not shew the amendment to have been made, the defence as set out in the printed case was held bad on demurrer, and the appeal by the plaintiff was allowed with costs; *Cameron, J.*, dissenting, who thought that under the circumstances the plea should be treated as

amended pursuant to court below, below which right as it was *Boswell v. Su*

Interest was respondent in *Union Fire Ins. Co. v. R. S. O.* (1887)

Where the court below on an appeal chose to dismiss the appeal, the judge below was dismissed. 317.

Held, that an appeal from a judgment, on the ground that the judge below was dismissed, was not a proper appeal for reversal. R. 283.

Although a party may hear an appeal, yet a trifling amount may be encouraged. R. 700.

Where a party appeals from a judgment, the ground for appeal, he cannot say that no case was made, which the court below had decided against him, unless he has shown that the assessment of the land occurred. *N. Johns v. C. Cas.* 590.

See *Re G. O. R.* 252, p. 30.

Where a party appeals from a judgment, he cannot say that no case was made, which the court below had decided against him, unless he has shown that the assessment of the land occurred. *N. Johns v. C. Cas.* 590.

The solicitor had given an inadvertent decision to the defendant. Under the circumstances, the other defendants' appeal was allowed. *Road Co., Ltd.*

Having been brought, the plaintiff's appeal was allowed. *108 R. S. C.* \*appeal on an action is

amended pursuant to the leave granted by the court below, and that the judgment of the court below which was in the opinion of this court right as it was given, should not be reversed. *Boswell v. Sutherland*, 8 A. R. 233.

Interest when judgment is given in appeal for respondent in a personal action. See *Quinlan v. Union Fire Ins. Co.*, 8 A. R. 376, p. 1079. See R. S. O. (1887), c. 44, s. 58.

Where the case was disposed of in the court below on an immaterial issue; and as the appellants chose to rest their case upon a point which the judge found against them, the appeal should be dismissed. *McKenzie v. Dancey*, 12 A. R. 317.

Held, that the plaintiff could not object to the appeal from the Common Pleas Division as irregular, on the ground that, having been begun by both defendants, it was continued by only one. Per Osler, J. A.—If there was anything in the objection, it should have been taken by way of substantive motion to strike out the appeal for irregularity. *Arscott v. Lilley*, 14 A. R. 283.

Although the Supreme Court cannot refuse to hear an appeal in a case where only \$22 is involved, yet the bringing of appeals for such trifling amounts is objectionable, and should not be encouraged. *McDonald v. Gilbert*, 16 S. C. R. 700.

Where special leave to appeal is granted on the ground that the appellant desires to raise a particular question of great and general importance, he cannot be permitted at the hearing to say that no such question arises, and to argue that the case turns upon a question of fact on which the court below was in error. Accordingly the appellant town corporation was precluded from contending that, as matter of fact, the assessment in question had been confined to the land occupied by the road. *Corporation of St. Johns v. Central Vermont R. W. Co.*, 14 App. Cas. 590.

See *Re Gabourie—Casey v. Gabourie*, 12 P. R. 252, p. 30.

## II. TIME FOR APPEALING.

### 1. Generally.

Where a solicitor's clerk, through forgetfulness, neglected to set down an appeal as required by G. O. 642 (Con. Rule 849), the Referee refused to extend the time for appealing, and on appeal, Spragge, C., upheld his ruling. *Dunard v. McLeod*, 8 P. R. 343.

The solicitor for the defendants (except L.) had given due notice of appeal, but through inadvertence set down the appeal on behalf of the defendants the gravel road company only. Under the circumstances stated in the judgment, the other defendants were allowed to set down their appeal. *Lewis v. Talbot Street Gravel Road Co.*, 10 P. R. 15.—Osler.

Having regard to the analogy of statutes which limit the period within which action shall be brought, the words "appeal brought," in section 108 R. S. C. c. 43 (The Indian Act) would mean "appeal commenced," for under those statutes an action is held to be "brought" when it is com-

menced. The meaning of appealing is giving notice to your adversary of your intention to appeal by serving him with a notice of appeal. *Regina v. McGauley*, 12 P. R. 259.—Armour.

Two of the defendants (legatees) in an administration suit appealed from the report of a master and thereby succeeded in charging the plaintiff and executor, with their shares of a sum of \$4,000, which the executor had lost to the estate. The other defendants did not appeal, and as to them the report became absolute on the 24th March, 1887. Three of these defendants in September, 1887, after the success of their co-defendants' appeal was established, moved for leave to appeal and to extend the time, their excuse for the delay being that they had supposed the appeal of their co-defendants would enure to their benefit:—Held, that justice required that the time for appeal should be extended, and these defendants let in to appeal, upon their placing the executor in as good a position as he would have occupied if they had appealed within the time allowed; notwithstanding that the \$4,000 was lost to the estate by an innocent mistake of the executor, that he had acted as he did by reason of the instructions given him by the testator, and his acting and taking advice according to the instructions had led directly to the mistake. *Langdon v. Robertson*, 12 P. R. 139, followed. *Birls v. Betty*, 6 Madd. 90, distinguished. *Re Gabourie—Casey v. Gabourie*, 12 P. R. 252.—Ferguson.

A transferee of a judgment debtor was allowed to appeal from the order for his examination under 49 Vict. c. 16, s. 12 (Ont.), after the time for appealing had expired, his delay being satisfactorily explained. *Blakeley v. Blaise*, 12 P. R. 565.—MacMahon.

See *Sieverwright v. Leys*, 9 P. R. 200, p. 1665; *Langdon v. Robertson*, 12 P. R. 139, p. 410.

## III. STAYING PROCEEDINGS PENDING APPEAL.

A stay of proceedings will not be granted pending an appeal unless security is given for the costs of appeal as well as for those in the court below. Applications for a stay should not be made ex parte. *Grand Trunk R. W. Co. v. Ontario and Quebec R. W. Co.*, 9 P. R. 420.—Proudfoot.

Bills of costs amounting to \$250.10 were on a taxation reduced to \$187.10. The plaintiff contended that he was not liable to pay as much as \$187.10, if any sum, and applied to the Master in Chambers for an order to stay an execution for \$187.10 pending an appeal to the Court of Appeal, under section 33 O. J. Act. This order was refused, and on appeal Boyd, C., held that what was "in controversy on appeal," was a sum less than \$200, and therefore that the order of the Master was right. *O'Donohoe v. Whitty*, 9 P. R. 361.

The plaintiff was permitted to proceed with a new trial pending an appeal, where he shewed that he had already been inconvenienced by delay, that further delay would prejudice him financially, and that by it he might lose important oral evidence. *McDonald v. Murray*, 9 P. R. 464.—Winchester, Registrar.—Hagarty.

The 27th section of the Court of Appeal Act, R. S. O. (1877), c. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause. *McLaren v. Caldwell*, 29 Chy. 438.—Ferguson.

A party who has been ordered by the court to attend for further examination after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal. *MacGregor v. McDonald*, 11 P. R. 518.—Dalton, Master.—Armour.

The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal upon a question arising in the action as to the method of trial of the issues in this and a cross-action. *Connec v. Canadian Pacific R. W. Co.*, 11 P. R. 356.—Dalton, Master.—Galt.

Staying execution pending appeal. See *Lewis v. Talbot St. Gravel Road Co.*, 10 P. R. 15, p. 1665.

An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed by the foreign court. Terms as to diligence in prosecuting the appeal and preservation of the defendant's property in Ontario in statu quo were annexed to the order. *Huntingdon v. Attrill*, 12 P. R. 36.—C. P. D.

See *Porrell v. Peck*, 8 P. R. 85, p. 411; *Canadian Land and Emigration Co. v. Municipality of Dysart*, 9 O. R. 495; *O'Donohoe v. Robinson*, 10 A. R. 622, p. 1991.

#### IV. ADMISSION OF FURTHER EVIDENCE.

Remarks on the reception of further evidence by appellate courts. *Merchants' Bank v. Lucas*, 12 P. R. 526.—C. of A.

A cause had been carried down to trial in 1879 when it was postponed at the instance of defendants, and a trial took place in 1880, when a verdict was rendered in favour of the plaintiffs, which the Court of Queen's Bench refused to set aside. The defendants, thereupon appealed to this court, and when the appeal came on to be heard (in 1882) an application was made by the defendants to be allowed to adduce evidence alleged to have been recently discovered, tending to relieve the defendants from liability, which evidence it appeared consisted mainly of entries in the books of the defendants. The court being of opinion that proper diligence had not been used by the defendants, as in such case they must have discovered the evidence at a much earlier date, refused the application with costs. *Murray v. Canada Central R. W. Co.*, 7 A. R. 646.

The court on the argument allowed the plaintiff, on terms, to give in evidence the proclamation bringing into force the Ontario Factory Act. *Dean v. Ontario Cotton Mills Co.*, 14 O. R. 119.—Q. B. D.

Held, that a document which has not been proved nor produced at the trial cannot be relied on or made part of the case in appeal. *Lionias v. Molson's Bank*, 10 S. C. R. 527; followed in

*Exchange Bank of Canada v. Gilman*, 17 S. C. R. 108.

New evidence was allowed to be used upon appeal under Con. Rule 585, and the decision of Ferguson, J. (13 P. R. 388), was reversed thereupon. The discovery of the new evidence after a sitting of the Divisional Court had passed was received as an excuse for delay. *Leach v. Grand Trunk R. W. Co.* (No. 2), 13 P. R. 467.—Chy. D.

#### V. RIGHT TO TAKE GROUNDS OF APPEAL NOT TAKEN IN THE COURT BELOW.

The appeal being allowed in this case on a ground not taken in the court below or assigned as a reason of appeal, the court refused the appellant his costs in appeal. *Page v. Austin*, 7 A. R. 1; *Ellis v. Millland R. W. Co.*, 7 A. R. 464; *Garrett v. Roberts*, 10 A. R. 650.

The plaintiffs had succeeded in respect of the title made under the judgment in partition, and not for the estate of the grantor in the memorial; and the effect of that judgment seemed not to have been pressed in the court below, and was not urged before this court until the second argument. Under the circumstances the appeal was dismissed without costs. *VanVelsor v. Hughes*, 9 A. R. 390.

On the appeal the defendants urged amongst other grounds, one not taken in the rule nisi or raised by the pleadings, namely that the evidence disclosed good cause for dismissal. When offered the opportunity at the trial to amend and raise such defence, counsel for the defendants declined to do so.—Held, that the defence could not be raised on appeal. *Lash v. Meriden Britannia Co.*, 8 A. R. 680.

The petitioner was not allowed to urge before the court a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial of the petition. *South Ontario Election (Ont.)—Farrell v. Brown*, H. E. C. 420; *Sub nom. Farewell v. Brown*, 12 L. J. N. S. 216.

It was contended by the plaintiffs before the Divisional Court that the defendants were members of a de facto corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial. The court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions, as they might be advised. *Flatt v. Waddell—Townsend v. Waddell*, 18 O. R. 539.—Q. B. D.; *L'Union St. Joseph de Montreal v. Lapierre*, 4 S. C. R. 164.

#### VI. COSTS OF APPEAL.

##### 1. Generally.

Recovery back of money paid into court including costs as security for appeal.—Interest. See *Citizens' Ins. Co. v. Parsons*, 32 C. P. 492.

An application for further security for costs of appeal on the ground of the insolvency of one or

more of the appellant refused. *Burton*.

Where the exercise of discretion. *Campbell v.*

The appeal costs as the Boale v. Dico followed by this court.

An appeal which ordered plaintiff (31) divided was Travellers L.

The plaintiff C. P. D. (12) 5th March, 1 the appeal court being Bailey, 13 P.

Appeal dismissed members of different rear wrong, but should be m Rooney, 11 A.

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Held, that in the only or Divisional Co appeal, but as expense and t should be give O. R. 699.—C

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Costs of app "costs of suit but require to for taxation. Monteith, 11 P

more of the sureties should be made to the court appealed from. *Lumsden v. Davis*, 10 P. R. 10.—Burton.

Where the judgment was varied on a matter of discretion no costs of appeal were given. *Campbell v. Prince*, 5 A. R. 330.

The appeal in this case was allowed without costs as the bill had been filed on the authority of *Boale v. Dickson*, 13 C. P. 337, which was properly followed by the court below but was overruled by this court. *McLaren v. Caldwell*, 6 A. R. 458.

An appeal from the Court of Common Pleas which ordered a nonsuit after verdict for the plaintiff (31 C. P. 394) the court being equally divided was dismissed with costs. *Neill v. Travellers Ins. Co.*, 7 A. R. 570.

The plaintiff appealed from the decision of the C. P. D. (12 P. R. 535) as to costs, and on the 5th March, 1889, judgment was given dismissing the appeal without costs, the Judges of this court being divided in opinion. *Livernois v. Bailey*, 13 P. R. 62.—C. of A.

Appeal dismissed without costs where the members of the court were all of opinion for different reasons, that the order below was wrong, but did not agree as to the extent it should be modified or reversed. *Schroeder v. Rooney*, 11 A. R. 673.

On appeal to the Court of Appeal the judgments of the Court of Chancery in favour of the plaintiffs respectively, were affirmed with costs of appeal; and the defendants appealed to the Supreme Court. In the first case that court gave leave to the defendants (appellants) to amend their answer, saying nothing as to costs, and upon such amendment being made, declared that the award upon which the bill had been filed should be null and void, but said nothing about costs. In the second case the Supreme Court ordered a new trial to be had between the parties, without costs to either party. The plaintiffs having obtained orders of the Court of Chancery, making the certificates of the Court of Appeal of the judgments in appeal orders of the Court of Chancery, issued executions thereon for the costs awarded in appeal:—Held, that the plaintiffs were not entitled to the costs of the appeal to the Court of Appeal, and the executions were set aside. *Norrall v. Canada Southern R. W. Co.*; *Cunningham v. Canada Southern R. W. Co.*, 9 P. R. 339.—Proudfoot.—Chy. D.

Held, that inasmuch as the plaintiff succeeded in the only branch of the case argued before the Divisional Court she should get her costs of that appeal, but as to the rest of the suit, to save the expense and trouble of apportionment, no costs should be given or received. *Gough v. Beush*, 6 O. R. 699.—Chy. D.

Where an appellant omitted to take an objection in the court below, the Court of Appeal, on allowing an appeal on that ground, refused him his costs of appeal. *Garrett v. Roberts*, 10 A. R. 650.

Costs of appeal are not carried by the words "costs of suit as between solicitor and client," but require to be specially mentioned in the order for taxation. *Re Monteith—Merchants Bank v. Monteith*, 11 P. R. 361.—Boyd.

The appeal of one of the defendants, a bank, was allowed and the bill against them dismissed but as they set up a claim in their original answer, which was urged on appeal and could not be maintained they were held not entitled to their costs of defence or of the appeal. *Bailey v. Jellett*, 9 A. R. 187.

A certain sum of money had been paid into court as security for the defendants' appeal to the Court of Appeal, which was afterwards abandoned; and by an order made on the consent of both parties it was provided that the plaintiff's costs should be paid out of this money after taxation:—Held, (*Armour, C. J.*, diss.), that this money was a fund in court within the meaning of Con. Rule 1207, and there should be a revision by one of the taxing officers at Toronto of the taxation of costs by the local Registrar. Per *Armour, C. J.*—The object of Con. Rule 1207 was for the protection of a fund in court where the parties to the taxation of costs payable thereout were none of them sufficiently interested in the fund in Court to protect it. *Cousineau v. City of London Fire Ins. Co.*, 13 P. R. 36.—Q. B. D.

Held, that the bank, the respondents to this appeal, being the parties having the carriage of the proceedings in the Master's office and supporting the judgment of the Master for the general benefit of the creditors, of whom they were one, should be reimbursed the costs of the appellant out of the estate, but not so as to prejudice the rights of the appellant. *Re Hague—Traders' Bank v. Murray*, 14 O. R. 660.—Ferguson.

Where an appeal was quashed for want of jurisdiction the costs imposed were only costs of a motion to quash. *O'Sullivan v. Lake*, 16 S. C. R. 636.

Where the action abated by death of the plaintiff so that there was no cause before the court appealed to the appeal was quashed without costs. *White v. Parker*, 16 S. C. R. 699.

See *Wilson v. Brown*, 6 A. R. 411; *Page v. Austin*, 7 A. R. 1; *Ellis v. Midland R. W. Co.*, 7 A. R. 464; *Van Velsor v. Hughson*, 9 A. R. 390; *Greay v. Siddall*, 12 P. R. 557.

## VII. ABANDONMENT AND WAIVER.

The Divisional Court varied an order of a Judge ordering a father to take proceedings by petition instead of by habeas corpus for the custody of his children by making the habeas corpus to run concurrently with the petition:—Held, that the father had waived his right to appeal from the order directing the filing of the petition by having complied with such order. *Re Smart Infants*, 12 P. R. 635; *S. C.*, *Ib.* 312, 435.—C. of A.

If a party appeals from a judgment in his favour claiming relief inconsistent with that granted by the judgment appealed from, and, pending the appeal, proceeds upon the judgment and obtains the relief granted thereby, he will be deemed to have abandoned his appeal, which will be quashed at the instance of the respondent on a motion for that purpose. *International Wrecking Co. v. Lobb*, 12 P. R. 207.—C. of A.

By an order of *Boyd, C.*, (12 P. R. 275) a motion by the defendant to set aside a judgment

for irregularity was refused, but the defendant was let in to defend upon paying into court or securing \$700 addition a month. The defendant moved for and obtained an order extending the time for paying the money, and then appealed from part of the order refusing to set aside the judgment for irregularity:—Held, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it. *Pierce v. Palmer*, 12 P. R. 368.—Chy. D.

### APPEAL BOOKS.

See COURT OF APPEAL.

### APPEARANCE.

- I. TO WRIT OF SUMMONS—See PRACTICE.
- II. IN EJECTMENT—See EJECTMENT.
- III. JUDGMENT IN DEFAULT OF—See FRAUDULENT JUDGMENT—JUDGMENT.

### APPORTIONMENT.

OF RENT—See LANDLORD AND TENANT.

### APPROPRIATION OF PAYMENT.

See PAYMENT.

## ARBITRATION AND AWARD.

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3. *References under C. L. P. Act*, 36.
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5. *To Master in Ordinary, Local Master or Referee*—See PRACTICE.

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### I. SUBMISSION AND REFERENCE.

#### 1. *What may be Referred*.

Right to refer an indictment and all matters in difference between plaintiffs and defendants in respect of a public road, etc. See *Township of Hungerford v. Latimer*, 13 A. R. 315.

See *Macdonell v. Baird*, 13 P. R. 331.

#### 3. *References under C. L. P. Act*.

Quære, whether a reference by consent by rule of court or judge's order is within section 205 of the C. L. P. Act. *McCarthy v. Arbuckle*, 31 C. P. 405.

Held, on an application to refer to arbitration an action on the common counts, that where a material question of fact was in dispute, the case was not a proper one in which to make an order for compulsory reference. *Gannon v. Gibb*, 8 P. R. 115.—Dalton, Q.C.

An action for an account and delivery up of a trust estate was referred at the trial to the master at Picton, by an order drawn up on reading the pleadings and hearing counsel; the master to have all the powers of a judge as to certifying and amending pleadings, etc., and to enquire and report as to the plaintiff's right to bring an action, the defendant to have the right to claim all such allowances for his care, etc., as in the master's opinion he should shew himself entitled to: costs to be in the master's discretion, and the whole report to be reviewed or appealed from, according to the statute in that behalf:—Held, a reference under section 189 of the C. L. P. Act (not under sections 47 or 48 of the Judicature Act), and that an appeal from the finding of the master was therefore regularly set down under the provisions of that Act to be heard before a single Judge in court. *Cumming v. Low*, 2 O. R. 499.—Oaler.

At the trial was made: 4 sides, and 1 matters in dispute cause be referred master of the powers as to of the High of the suit and tion of the master was C. L. P. Act, sections 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100. *lace v. Whale*

Actions in accounts will course. The agreeing to a dispute in an investigation of gart, 9 O. R.

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See *McCarthy v. Haggan Hamilton v. Baird*, 13 P. R.

#### 4. *Making*

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At the trial the following order of reference was made: "Upon hearing the solicitors on both sides, and by their consent, I order that all matters in difference between the parties in this cause be referred to the certificate of the local master of this court at Orangeville, with all the powers as to certifying and amending of a Judge of the High Court of Justice, and that the costs of the suit and of the reference be in the discretion of the said local master:—"Held that the master was to act as an arbitrator under the C. L. P. Act, not as an officer of the court under sections 47, 48 of the O. J. Act, and that defendant might sign judgment on his report. *Wallace v. Whaley*, 9 P. R. 248.—Dalton, Master.

Actions involving the investigation of long accounts will not be referred as a matter of course. There is nothing to prevent parties agreeing to a consent reference of all matters in dispute in an action, even though involving investigation of long accounts. *Webster v. Haggart*, 9 O. R. 27.—C. P. D.

By an order made at nisi prius on the 4th November, 1886, upon the application of the defendants and without the consent of the plaintiffs, the actions and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should be the right of appeal in the same way as if the order was made under section 189 of the C. L. P. Act; and by clause 8, that the reference should be considered as made in pursuance of section 48 of the Judicature Act, 1881; and also, in so far as the same was applicable, as under the provisions of section 189 of the C. L. P. Act.—Held, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III. c. 15, but under section 48 of the Judicature Act and section 189 of the C. L. P. Act. *Connie v. Canadian Pacific R. W. Co.*, 16 O. R. 639.—Rose.

See *McCarthy v. Arbuckle*, 31 C. P. 405; *Webster v. Haggart*, 9 O. R. 27, p. 46; *Bank of Hamilton v. Baine*, 12 P. R. 418; *Macdonell v. Baird*, 13 P. R. 331 p. 42.

#### 4. Making Submission a Rule of Court.

By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forego all right to compensation except under the agreement. One E. was to inspect and value the work already done on the building, and if not according to plans and specifications, L. was to rectify the same at his own expense. E. was to value the building in its present condition, and his award was to be final, and to be the sole amount due to L. to date; he was also to inspect and value the building material on the ground, which was to be paid for at the original cost:—Held, that the effect of the agreement was, that a price to be fixed by E. was to be paid for L.'s works, that E. was not an arbitrator; but that

the agreement could not be made a rule of court as a submission to arbitration. *In re Langman and Martin*, 46 Q. B. 569.—Osler.

When a submission to arbitration provides for making the submission a rule of any particular court, no suit or proceeding can be had in any other court to set aside the award, whether such submission has or has not been made a rule of the court named in it. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.—Blake.

The agreement for submission contained a clause that it should be made a rule of the court of Queen's Bench in England, and all proceedings thereunder should be governed as in Great Britain by the provisions of the English C. L. P. Act:—Held, that this formed no objection to the jurisdiction of our Court of Chancery. *S. C. sub. nom. Direct United States Cable Co. (Limited) v. Dominion Telegraph Co. of Canada*, 8 A. R. 416.

The plaintiff and defendant agreed in writing to submit certain matters in dispute to an arbitrator, to be selected by a person named in the submission, who subsequently appointed the arbitrator verbally:—Held, per Patterson and Morrison, J.J.A., affirming the judgment of Osler, J., (30 C. P. 466), that the fact that the arbitrator was verbally appointed did not prevent the submission from being made a rule of court. Per Burton, J. A., and Armour, J., that the appointment not being in writing, it was a parol submission and could not be made a rule of court. *Cruickshank v. Corbey*, 5 A. R. 415.

In the case of an arbitration under the Municipal Act, R. S. O. (1887) c. 184, a municipal by-law and appointments in writing by the parties of the arbitrators constitute such a submission to arbitration by consent as may be made a rule of court under section 13 of R. S. O. (1887) c. 53. R. S. O. (1887) c. 184, s. 404, provides that every award made thereunder shall be subject to the jurisdiction of the High Court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court:—Held, upon the language of this section, that the submission should be made a rule of court before the award is moved upon. *Re City of Toronto Leader Lane Arbitration*, 13 P. R. 166.—Q. B. D.

Held, that any party to the submission has prima facie a right to have it made a rule of court; and according to the practice existing when the Consolidated Rules came into force, no person other than the applicant was entitled to be heard upon a motion for such an order; and therefore by Con. Rule 526 there is no necessity for serving notice of motion, and an order can be made ex parte. *Id.*

Such an order is merely a necessary form in order to give the court jurisdiction over the award; it binds no one and concedes nothing; the granting of it is compulsory on the court upon the production of the proper affidavits; and the court can enquire into and adjudicate upon all matters of substance when the award itself is sought to be attacked or enforced. Therefore, it was immaterial that upon an ex parte application for such an order it was not disclosed that there were certain matters in controversy between the parties as to enlargements of the time for making the award. *Id.*



## II. ARBITRATOR.

1. *Restraining Arbitrators from Proceeding.*

Before a submission has been made a rule of court, a court of equity has jurisdiction to restrain an arbitrator improperly appointed from entering upon the duties of such arbitration. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.—Blake.

In a suit in the Court of Chancery to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs for irregularity in such nomination:—Held, that the arbitrators being necessary parties and the defendants resident in this country, the arbitrators, though resident out of the jurisdiction, were properly made defendants to the bill. *Ib.*

The object of a cross bill ordinarily was to obtain discovery on the part of the plaintiff in the cross cause to be used in the original cause; or in order to obtain full relief in respect of the subject matter of litigation in the original cause. Therefore, where a bill was filed to restrain arbitrators on the ground of irregularity in their appointment, from acting in respect of matters in dispute between the plaintiff and defendant companies and the defendants by their answer asked that if the court entertained the case it should afford them relief in respect of the matters in dispute between the companies:—Held, that this was not the proper office of a cross bill, and therefore could not be set up as a subject of cross relief by the answer. *Ib.*

The defendants set up by way of defence and as a ground of demurrer to the plaintiffs' bill to restrain proceedings by the alleged arbitrators, the pendency of another action in New York for the same purpose; but—Held, that this could only form a ground for application to stay proceedings, or to compel the plaintiffs to elect between the two tribunals; and, Semble, that under the circumstances set out in the report of the case, it could not be taken advantage of in any way. *S. C. sub. nom. Direct United States Cable Co. (Limited) v. Dominion Telegraph Co. of Canada*, 8 A. R. 416.

2. *Disqualification of.*

The finding and certificate were set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendants' company, and had after the finding accepted it, and was thus disqualified from acting. *Comnee v. Canadian Pacific Railway Co.*, 16 O. R. 639.—Rose.

See *Re McQuillan and The Guelph Junction R. W. Co.*, 12 P. R. 294.

3. *Proceedings Before.*(a) *Examination of Witnesses.*

Held, that under R. S. O. (1877) c. 50, s. 224, the witnesses on an arbitration must be examined upon oath, unless there is a positive agreement or consent to the contrary. Such consent or agreement may be shewn deors the submission, and in this case, upon the affidavits filed, it was held to be sufficiently made out; but, semble, that it cannot be inferred from the absence of

objection or mere acquiescence. *In re Rushbrook and Starr*, 46 Q. B. 73.—Cameron.

4. *Powers and Duties of.*(a) *In Particular Cases.*

By a consent judgment in an action between members of a certain pool association for the sale of lubricating oil, it was provided that "all matters which may hereafter come into dispute between the association or board of directors thereof, or any member or members \* \* \* relative to the said agreement" (sc. the original agreement of association), "or any alleged breach or non-observance thereof, or of any of the rules or regulations made, or to be made, by the said board thereunder, and all matters of complaint by any member or members against any other member or members in respect of the premises," should be referred to arbitration as therein specified. Acting under the agreement, the board had fixed a sum of three cents per gallon to be paid to the association by the parties thereto, on the sale of any lubricating oil. A dispute now arose on the motion of one of the members as to whether the three cents per gallon were payable on sales made by one member of the association to another, and whether the rate was payable upon the proportion of distilled petroleum used in making axle grease:—Held, that these matters were properly within the scope of the arbitrator under the above clause in the judgment, though they amounted to a dispute upon the construction of the agreement, and the rules made under it, and it was no objection that in the course of the reference it might be necessary to procure an injunction, which an arbitrator could not grant:—Semble, if it should be established to his satisfaction that the parties ought to be relieved from certain things covered by the agreement, the arbitrator might so relieve them:—Held, also, that the mere fact of an action to reform the agreement having been brought, and being pending did not paralyze the power of the arbitrator. *Willesford v. Watson*, L. R. 14 Eq. 572, followed, *Piercy v. Young*, 14 Chy. D. 200, commented on. *Woodward v. McDonald*, 13 O. R. 671.—Proudfoot.

By clause 2 of the order of reference, the referees were directed to make and publish their award in writing on or before the 3rd January, 1887, or such other day as they should appoint. During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved (as to which the dispute was), and certify their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887, reported "we do hereby find and certify that the plaintiffs moved the respective quantities hereinafter mentioned," etc.:—Held, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of section 209 of the C. L. P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award. *Comnee v. Canadian Pacific R. W. Co.*, 16 O. R. 639.—Rose.

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Held in this case that apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding was too late, failed. *Id.*

Held, upon the evidence, that there was no waiver of the objections to the finding; and that although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one. *Id.*

See *In re Langman and Martin*, 46 Q. B. 569, p. 38; *Cannon v. Toronto Corn Exchange*, 5 A. R. 285; *Essery v. Court Pride of the Dominion*, 2 O. R. 596.

#### (b) Directing Time and Manner of Payment.

Where the reference was only for the purpose of ascertaining and awarding the damages sustained by the plaintiff by a fire negligently set by the defendant, and the defendant agreed to pay the amount awarded; and it was provided that the costs of the arbitrators and award, etc., should be paid by the party entitled thereto, in whose favour the award should be made:—Held, that the arbitrators had no power to give a month for payment of the sum awarded, or to direct that the defendant should pay the costs, but that these directions were severable from the rest of the award, and might be rejected. In such a case the proper course is to discharge generally a rule to set aside the award, not to make it absolute in part. *Re Egleston and Taylor*, 45 Q. B. 479.—Osler.

A submission to arbitration recited that a controversy existed between A. W., J. W. and M. in relation to the amounts due and paid on a certain mortgage made by M. to a loaning company, and as to the proportion of said mortgage paid by the said parties to the company, and submitted this controversy to the arbitrators; and the parties covenanted with each other to observe the award. The arbitrators awarded that M. had paid the company the amount he agreed with A. W. to pay on the mortgage, and had overpaid his proportion by \$627, in which sum A. W. was indebted to him; and that A. W. should pay that sum to him on or before the 1st of June, 1882; and should also pay the costs of the reference, viz., \$35. Nothing was said about J. W.:—Held, by Osler, J. (1) That the arbitrators had not exceeded their powers in directing payment by A. W., (2) That the award was not bad for omitting to mention J. W., this being equivalent to an award that there was nothing due by him:—Held, that the finding as to costs was unauthorized, but was severable from the rest of the award. *Whitely v. MacMahon*, 32 C. P. 453.

Arbitrators upon a reference to settle disputes between parties, found the balance due from the firm to one of the partners, and declared in the award that this balance was a lien upon the assets to be paid out of them specifically:—Held, that they had the power to give this direction, and the partner in question had power to sell to satisfy the lien out of the specific property applicable of which he was joint owner. *Redick v. Skelton*, 18 O. R. 100.—Boyd.

#### (c) Costs.

By an order of reference the arbitrator was empowered to certify and amend pleadings and proceedings, and otherwise as a judge at nisi prius, and costs of the reference, arbitration, and award were to abide the result of the award:—Held, that the arbitrator had no power to make any disposition of the costs, as they were provided for by the reference. *Devaney v. Dorr*, 4 O. R. 206.—Wilson.

When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award. A direction as to the costs in such a case:—Held, severable from the rest of the award. *Re Harding and Wren*, 4 O. R. 605.—Rose.

In an action on a bill of costs the parties consented that judgment should be entered for a certain sum "subject to the award" of a named person. When the action came on for trial this consent was filed, and the trial Judge indorsed the record: "I order that judgment be entered for the plaintiff for the sum of, etc., subject to the consent filed herein." Nothing was said about costs, and they were not provided for in any way. The arbitrator or referee made his report or award finding that the amount of the judgment should be reduced to a named sum, and adding "I do award to the plaintiff the costs of this action, including the costs of the reference and award." Judgment was entered in accordance with this award. Con. Rule 550 provides that "The court will not refer to arbitration:—Held, that this Rule does not prevent any arrangement for the settlement of an action entered into and acted upon by litigants from being sanctioned and enforced by the court; and therefore there was power to make a reference by consent in this way; but it was a reference to arbitration and not a reference under the Judicature Act, and the referee had no power to deal with the costs. The award of costs was stricken out of the judgment, and an application afterwards made to the trial Judge to amend the indorsement on the record so as to provide for the costs was refused, although the omission to provide for costs was not intentional. *Macdonell v. Baird*, 13 P. R. 331.—Dalton, Master.—MacMahon.

See *Re Egleston and Taylor*, 45 Q. B. 479, p. 41; *Whitely v. MacMahon*, 32 C. P. 453, p. 41; *Re Beatty and the City of Toronto*, 13 P. R. 316; *Re Smith and the City of Toronto*, 13 P. R. 479.

#### III. UMPIRE OR THIRD ARBITRATOR.

To an action for wrongful dismissal, and on the common counts, defendants pleaded an award, by which all matters in dispute between the parties had been settled. The submission was to S. and N., and such third person as "the said arbitrators" should appoint, "so that the said arbitrators or umpire" make his or their award \* \* by, etc., or such further day as "the arbitrators, or any two of them," might enlarge to. Before entering upon their duties, S. and N. appointed E. as third arbitrator, and the award was executed by S. and E. only, but proffered, in the body of it, to be the award of the

three:—Held, that E. was a third arbitrator, not an umpire; that the word "umpire," in the submission, must be rejected as surplusage; and the award was invalid, not having been made by all three arbitrators. *Willson v. York*, 46 Q. B. 289.—Q. B. D.

One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named, should appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request, should appoint an arbitrator on behalf of the other party. A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, on the agent of the plaintiff company in New York, and on the 19th the plaintiff company, by cablegram from London, named one C. M. D., of New York as their arbitrator. On the 28th of the same month S., the arbitrator of the defendant company, wrote to C. M. D. requiring him to join in the naming of an umpire, but he answered that he was about to leave the city, and would return on the 30th; that having been only advised by cable of his appointment and that his commission would be mailed to him, he could not until its arrival, intelligently take any action. On the 30th C. M. D. returned to his office, and then wrote to S. expressing his readiness to act, and at the same time confirmed a nomination made by his partners, during his absence, of an umpire:—Held, affirming the decree of the court below, (28 Chy. 648), (1) that the facts did not establish any refusal or neglect on the part of C. M. D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead; (2) that the naming by the arbitrators of an umpire was not such an act as required C. M. D. to take part in within ten days from his appointment, or in default that his appointment should be vacated, and S. have the right to name a substitute. (3) (28 Chy. 648) that the naming, by the arbitrators, of an umpire was a judicial act which could not legally be performed by the partners of one of the arbitrators, and his subsequent confirmation thereof was ineffectual. *Direct United States Cable Co. (Limited) v. Dominion Telegraph Co. of Canada*, 8 A. R. 416; S. C., *sub nom.* *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.

#### IV. AWARD.

##### 1. Time of Making.

In an action on contract, the matters in difference were, by rule of court by and with the consent of the parties, submitted to arbitration. By the rule of reference the award was directed to be made on or before the 1st May, 1877, or such further or ulterior day as the arbitrators might endorse from time to time on the order. The time for making the award was extended by the arbitrators till the 1st of September, 1877. On the 31st August, 1877, the attorneys for plaintiff and defendants, by consent in writing,

endorsed on the rule of reference, extended the time for making the award till the 8th September. On the 7th September the arbitrators made their award in favour of the plaintiff for the sum of \$5,001.42, in full settlement of all matters in difference in the cause:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that where the parties, through their respective attorneys in the action, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award made within the extended period is an award made under the rule of reference, and is valid and binding on the parties. That the fact of one of the parties being a municipal corporation makes no difference. *Oakes v. City of Halifax*, 4 S. C. R. 640.

Two persons submitted certain matters in dispute between them to the award of a barrister of character and standing. The submission provided that the death of either party should not operate as a revocation of the power and authority of the arbitrator; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before entering on the reference. One of the parties had died since the submission, and the survivor now applied to the court to enlarge the time. It appeared that the Statute of Limitations had so run since the submission as to bar portions of the applicant's claim:—Held, reversing the decision of Rose, J., that the facts of the death and the absence of the right of appeal would not warrant the court in refusing to enlarge the time, and that under the circumstances no injustice would be done by enlarging it. *Re Curry*, 12 P. R. 437.—Q. B. D.

##### 2. Execution of.

Three arbitrators on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them but not signed, and it was understood that nothing further was to be done but have a formal award drawn up and executed. Next day the award was drawn up and executed by two of the arbitrators in the presence of each other, but in the absence of the third arbitrator, who two days afterwards executed it in the presence of one of the other arbitrators. In an action on such award:—Held, affirming the judgment of Hagarty, C. J., that the award should have been executed by the three arbitrators together, and that it was invalid. *Nott v. Nott*, 5 O. R. 283.—C. P. D.

See *Freeman v. Ontario and Quebec R. W. Co.*, 6 O. R. 413.

##### 3. Publication of.

Held, that an award is published (for the purpose of regulating the time for an application to set it aside) when the parties have notice that it may be had on payment of charges. It is not needful that there should be notice of the contents of the award before it can be said to be published. *Redick v. Skelton*, 18 O. R. 100.—Boyd.

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## 4. Certainty.

See *Beaudet v. North Shore R. W. Co.*, 15 S. C. R. 44; *Biganette v. North Shore R. W. Co.*, 17 S. C. R. 363.

## 5. Reference Back.

The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the court refused to refer the matter back to them, but ordered that it be remitted to the Judge of the County Court, unless counsel could agree upon such facts as would enable the court to deal with the matters in dispute. *In re Allmarle and Eastnor*, 46 Q. B. 183.—Armour.

Held, in this case that no case was made out for remitting the action to the arbitrator on the ground of the discovery of fresh evidence, it not being shown that the evidence could not have been obtained by reasonable diligence; nor on the ground of the absence of a material witness, of whose evidence the defendants were aware during the progress of the reference, and neglected to ask for a commission or postponement. *Lemay v. McRae*, 16 O. R. 307.—Armour.

An application to remit a case back to arbitrators for reconsideration need not be made within the time limited for moving to set aside an award, but it must be made within a reasonable time, and delay must be satisfactorily accounted for. *Leicester v. Grazebrook*, 40 L. T. N. S. 883, approved and followed. *Re Citizens Insurance Co. and Henderson*, 13 P. R. 70.—C. of A.

In this case a reference of the claims upon certain insurance policies was made by submission to two arbitrators, who disagreed, and in pursuance of the submission chose an umpire, who made his award on the 25th July, 1887. On the 29th May, 1888, the insurers moved for a reference back on the ground that they had then recently discovered evidence that a quantity of goods saved from the fire were not credited by the assured on their proofs of loss and were fraudulently concealed:—Held, that there should be a reference back to the arbitrators to consider the new evidence and determine its bearing on the questions originally submitted to them. The reference back should be general and not limited to an inquiry as to what goods were not destroyed by fire. *Id.*

See *McCarthy v. Arbuckle*, 31 C. P. 405.

## V. APPEAL FROM AWARD.

Where a voluntary submission to arbitration contained a provision that the agreement might be made a rule of court, and that the court might be moved to set aside or refer back the award:—Held, that this conferred no right of appeal under R. S. O. (1877) c. 50, s. 191, which, under section 205, could only be conferred by the terms of the submission. *In re Township of York and Willson*, 8 P. R. 313.—Osler.

Held, that in Nova Scotia, where the rule nisi to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other

ground of objection to the award can be raised on appeal. *Oakes v. City of Halifax*, 4 S. C. R. 640.

The order of reference made by the presiding Judge at the assizes was: "Upon the consent of the parties, I do order and direct that the matters in dispute between the plaintiff and defendant upon the issues joined in this action be referred," etc. It was urged that the action being one which involved the investigation of long accounts, the reference must be deemed to have been made compulsorily, and the consent to have been merely to the arbitrator named. It appeared that, as a matter of fact, the learned Judge exercised no discretion, but, on the parties announcing their consent, he made the order; and at the time suggested the insertion of a clause authorizing an appeal, if such were desired, but it was not required:—Held, that the reference was a consent reference, and there was no appeal. *Webster v. Haggart*, 9 O. R. 27.—C. P. D.

Held, affirming the judgment of the Queen's Bench (46 Q. B. 235), that an appeal will lie from an award made pursuant to a consent reference at nisi prius under section 205 C. L. P. Act. *McEwan v. McLeod*, 9 A. R. 239.

In the case of a voluntary nisi prius submission to arbitration in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. (1877) c. 50, ss. 191, 192 and 193, and the time for appealing from the award runs from the date of filing. *McEwan v. McLeod*, 9 A. R. 239, followed. *Shepherd v. Canadian Pacific R. W. Co.*, 11 P. R. 517.—Boyd.

On a reference being made to the official arbitrators of certain claims made by one H. against the government for damages arising out of the enlargement of the Lachine Canal to land situated on said canal, the arbitrators awarded H. \$9,216 in full and final settlement of all claims. On an appeal taken to the Exchequer Court by H. (Taschereau, J., presiding) this amount was increased to \$15,990, including \$5,600 for damages caused to the land from 1877 to 1884 by leakage from the canal since its enlargement, and the Judge reserved the right to H. to claim for future damages from that date. On appeal to the Supreme Court of Canada it was:—Held, reversing the judgment of the Exchequer Court and confirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present and future damages, and that the evidence did not justify any increase of the amount awarded. Gwynne, J. was of opinion that under 42 Vict. c. 8, s. 38 the Supreme Court had power (although the crown did not appeal to the Exchequer Court) to review the award of the arbitrators, and that in this case \$1,000 would be an ample compensation for any injury that the claimant's land can be said to have sustained, which upon the evidence can be attributed to the work of the enlargement of the canal. *Regina v. Hubert*, 14 S. C. R. 737.

B., the contractor for building the E. & H. Railway, and practically the owner thereof, negotiated with the solicitor of the C. S. R. for the sale to the latter of the E. & H. Railway when built. While the negotiations were pend-

ing B. went to California, and the agents who looked after the affairs of the E. & H. Railway in his absence applied to the manager of the C. S. R. for some rolling stock to assist in its construction. The manager of the C. S. R. was willing to supply the rolling stock on execution of the agreement for sale of the road which was communicated to B., who wrote a letter to the manager in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars and any other assistance or advantage you may have given Mr. Farquier (the agent)." The negotiations for the purchase of B's railway by the C. S. R. having fallen through, an action was brought by the latter company against B. and the E. & H. Railway for the hire of the rolling stock which was resisted by B., on two grounds, one that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs which had fallen through by no fault of B. and the other, that if the plaintiffs had any right of action it was only against the E. & H. Railway and not against him. By consent of the parties the matter was referred to the arbitration of a County Court Judge, with a provision in the submission that the proceedings should be the same as on a reference by order of the court, and that there should be a right of appeal from the award as under R. S. O. (1877) c. 50, s. 189. The arbitrator gave an award in favor of the plaintiffs; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits but upheld the award. The defendants then appealed to the Supreme Court of Canada:—Held, affirming the judgment of the Court of Appeal that the arbitrator was justified in awarding the amount he did to the plaintiffs, and that B. as well as the company was liable therefor. *Bickford v. Canada Southern R. W. Co.*, 14 S. C. R. 743.

In a matter of expropriation of land for the Intercolonial railway, the award of the arbitrators was increased by the Judge of the Exchequer Court from \$4,155 to \$10,824.25, after additional witnesses had been examined by the Judge. On an appeal to the Supreme Court it was:—Held, affirming the judgment of the Exchequer Court, that as the judgment appealed from was supported by evidence, and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. Gwynne, J., dissenting. *Regina v. Charland*, 16 S. C. R. 721.

On an appeal to the Supreme Court from a judgment of the Exchequer Court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the Intercolonial railway:—Held, reversing the judgment of the Exchequer Court and restoring the award of the official arbitrators, that to warrant an interference with an award of value necessarily largely speculative an appellate court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on or something overlooked which ought to have been considered by the official arbitrators, and upon the evidence

in this case this court refused to interfere with the amount of compensation awarded by the official arbitrators. *Regina v. Paré*, *Regina v. Beaulieu*, 16 S. C. R. 716.

See next Subhead.

## VI. SETTING ASIDE AND STAYING PROCEEDINGS ON.

### 1. Time for Moving.

On the 2nd December, 1878, the submission being within the 9 & 10 Will. III., the plaintiff moved to set aside an award made on the 13th of August previously, accounting for his delay on the ground that the defendant had, on the 4th September, before the end of the next term, served a notice on him of his intention to appeal. It was not, however, sworn that he refrained from moving owing to this notice:—Held, reversing the decision of Proudfoot, V. C., that the evidence did not shew that the delay was induced by the defendant, but that if it had, it would have been no excuse for delay. *Pardee v. Lloyd*, 5 A. R. 1.

An award must be moved against within the term following its publication, or within the period which such term formerly occupied. And when the term has been abolished, where an award was published on the 13th August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888, was:—Held, too late. *Kean v. Edwards*, 12 P. R. 625.—Armour.

See *Connex v. Canada Pacific R. W. Co.*, 16 O. R. 639, p. 41; *Redick v. Skelton*, 18 O. R. 100, p. 44.

### 2. For Reception or Rejection of Evidence.

Held, that the award in this case was bad and must be set aside, as it appeared that the arbitrators had received the evidence of one of the parties in the absence of the others, and after the arbitration was supposed to be closed. *Whitely v. McMahon*, 32 C. P. 453.—Osler.

After the evidence had been closed the construction committee of the railway company wrote a letter addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the company before the award was made and by him to the umpire, but was not communicated to H. until after the award, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, and reduced the sum awarded, while the other two arbitrators swore it had no effect upon their finding:—Held, that the award was bad. Remarks as to the caution to be observed by arbitrators in such cases in considering or acting upon such agreements made pending the arbitration. *Herring and Napanee, Tamworth and Quebec R. W. Co.*, 5 O. R. 349.

The improper reception or rejection of evidence by an arbitrator, without any corrupt intent, does not amount to legal misconduct upon which an award will be set aside. *Webster v. Hajjari*, 9 O. R. 27.—C. P. D.

The evidence made by the plaintiff's arbitrator; and the arbitrator's refusal to examine witnesses. It did not appear that the award was influenced by the evidence. Held, that the award was not set aside. *See* *Regina v. Paré*, *Regina v. Beaulieu*, 16 S. C. R. 716.

In the conduct of the arbitration, the arbitrator was flexible that the award was not set aside. *See* *Regina v. Paré*, *Regina v. Beaulieu*, 16 S. C. R. 716.

Upon a motion for a new award, the arbitrator's statements from the evidence of the other party were taken into consideration. *See* *Regina v. Paré*, *Regina v. Beaulieu*, 16 S. C. R. 716.

Where it appeared that the arbitrator had received evidence of one of the parties in the absence of the others, and after the arbitration was supposed to be closed, the award was set aside. *See* *Whitely v. McMahon*, 32 C. P. 453.—Osler.

*See* *Lemay v. Lemay*, 348, p. 50.

### 3. Miscellaneous.

Held, affirming the judgment of the plaintiff's arbitrator, that the award was not set aside. *See* *Regina v. Paré*, *Regina v. Beaulieu*, 16 S. C. R. 716.

*See* *Regina v. Paré*, *Regina v. Beaulieu*, 16 S. C. R. 716.

*See* *Regina v. Paré*, *Regina v. Beaulieu*, 16 S. C. R. 716.



The evidence received consisted in statements made by the plaintiff ante litem motam in substance confirmatory of his evidence before the arbitrator; and the rejection consisted in the arbitrator's refusal to receive parts of the plaintiff's examination without the whole being received. It did not appear that the arbitrator was influenced by the evidence objected to and he made no request to be allowed to reconsider his award:—Held, that while the evidence objected to was not strictly admissible, the award could not be interfered with on such ground, and especially so since R. S. O. (1877) c. 50, s. 289, when it did not appear to have occasioned any miscarriage on the merits. *Ib.*

In the conduct of arbitrations the rule is inflexible that the arbitrators must be scrupulously guarded against any possible charge of unfair dealing towards either party; therefore where one of the parties to a reference, who had been examined as a witness, after the evidence had been closed and the matter argued, sent by mail his affidavit explaining some portion of his evidence, to the arbitrator, but which was not received by him until after he had written out the view in accordance with which he subsequently made his award; the court affirmed the judgment of the court below setting aside the award. *Race v. Anderson*, 14 A. R. 213.

Upon a motion to set aside an award on the ground that the arbitrators improperly received statements from one of the parties in the absence of the other:—Held, that it is not necessary in such a case to impute any intentional impropriety of conduct to the arbitrators, nor to shew that their decision has been in any way influenced by what has occurred; it is only necessary to shew that their minds may possibly have been influenced against the applicant by the communications that have taken place. *Re Ferris and Eyre*, 18 O. R. 395.—Street.

Where it appeared that after the close of the evidence and while the arbitrators were considering it, some explanations in regard to an account were given to them by one party to the arbitration in the absence of the other on a certain evening, and that when the arbitrators and the parties all met the next morning, one of the arbitrators said that they had had an explanation about the account, and wanted to know what the other party had to say about it:—Held, that the award was bad, and must be set aside. *Ib.*

See *Lemay v. McRae*, 16 O. R. 307; 16 A. R. 348, p. 50.

### 3. Misconduct of Arbitrators.

Held, affirming the decree of Proudfoot, V.C., that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants: that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and, quære, whether if shewn it would be a defence in such a proceedings. *Norrell v. Canada Southern R. W. Co.*, 5 A. R. 13.

See *Harding v. The Township of Cardiff*, 29 Chy. 308.

See Previous Subhead.

### 4. Other Cases.

The award in this case having been directed to be made within a year by an order of the Chancery Division where the parties were litigating concerning it:—Held, that the motion to set it aside or refer back should have been made in that division. *In re Township of Muskoka and Village of Gravenhurst*, 6 O. R. 352.—Cameron.

The bill in this case was filed to rectify an award made under a submission to arbitration between the parties, on the ground that the arbitrators considered matters not included in the submission, and had divided the sums received by the defendant from the plaintiffs, because defendant's brother and partner was a party to such receipt, although the partnership affairs of the defendant and his brothers were excluded from the submission. The bill prayed that the award might be amended and the defendant decreed to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties; there was also a prayer for general relief:—Held, affirming the judgment of the court below, that to grant the decree prayed for would be to make a new award which the court had no jurisdiction to do, but:—Held, also, reversing the decision of the court below, that under the prayer for general relief the plaintiffs were entitled to have the award set aside. *Vernon v. Oliver*, 11 S. C. R. 156.

Held, affirming the judgment of Armour, C. J., (16 O. R. 307), that where the action and all matters of account and counter-claim therein, and all matters in difference between the parties were by consent referred to the arbitration and final end and determination of a named person and no provision was made for an appeal, his award, valid on its face, could not be attacked because of alleged improper reception of evidence by him, or because of alleged errors in the principle of computation upon which he proceeded; the evidence having been received with reference to matters in difference between the parties and within the jurisdiction of the arbitrator, and the principle of computation being disclosed in a draft award, not delivered with, nor forming any part of the formal award, and in conversations, after the making of the award, between the arbitrator and one of the solicitors for the attacking party, the arbitrator himself not admitting that he had made any mistake, and not assisting the party complaining of the award to apply to the court to set it right. *Dinn v. Blake*, L. R. 10 C. P. 388; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189, followed; *Re Dare Valley R. W. Co.*, L. R. 6 Eq. 429, distinguished; *East and West India Dock Co. v. Kirk*, 12 App. Cas. 738, considered. *Lemay v. McRae*, 16 A. R. 348.

See *Re Eggleston and Taylor*, 45 Q. B. 479, p. 41; *Comtee v. Canadian Pacific R. W. Co.*, 16 O. R. 639, p. 41.

### VII. ENFORCING AWARD.

In answer to a bill to enforce an award, the defendant by answer submitted to the court a number of matters as objections to the award, and that a reference back to the arbitrator, with certain instructions, or a reference to the master as to the matters in dispute should be directed.

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At the hearing on bill and answer, the defendant objected (1) to the jurisdiction of the court, the submission providing that the submission and award should be made a rule of the Queen's Bench or Common Pleas; (2) that the filing of the bill was premature, the time for moving against the award not having expired:—Held, that a proceeding to enforce an award by summary application, must be taken after the time for moving against it has elapsed. *Moore v. Buckner*, 28 Chy. 606.—Spragge.

Quere, whether a proceeding for that purpose by action at law or suit in equity, can be taken before that time. *Ib.*

Held, that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their forum; but the defendant having submitted to the jurisdiction by his answer, and himself asked the intervention of the court, could not now be heard to object. *Ib.*

It not appearing that there was any good reason for filing a bill instead of proceeding in the usual way, the court (Spragge, C.) refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the award under the statute. *Ib.*

See *Norvall v. Canada Southern R. W. Co.*, 5 A. R. 13, p. 49.

#### VIII. COSTS.

Costs of arbitration and award where proceedings stayed in an action on a policy pending arbitration as to amount of loss. See *Hughes v. British American Ins. Co.*, and *Hughes v. London Assurance Co.*, 7 O. R. 465; *Hughes v. Hand in Hand Ins. Co.*, *Ib.* 615.

Costs of reference to fix amount of rent on renewal of lease. See *Smith v. Fleming*, 12 P. R. 520.

In taxing the costs of an arbitration upon the County Court scale no larger fee for attendance of counsel before the arbitrators than \$25 can be allowed even though the attendance is for several days. *Re Montague and the Township of Aldborough*, 12 P. R. 141.—Wilson.

Item, 153 of tariff A, Consolidated Rules of Practice, should be read as part of item 164; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration where there is no cause in court and a reference to a local officer to tax costs has been made under R. S. O. (1887), c. 53, s. 24. *Re McKeen and Township of South Gower*, 12 P. R. 553.—Boyd.

Upon an appeal from the taxation of costs of an arbitration, which the plaintiffs were ordered to pay:—Held, that items in respect of the loss of time in travelling and travelling expenses of an arbitrator were properly disallowed. *Re Hillyard and the Royal Ins. Co.*, 12 P. R. 285.—Galt.

Held, that the amount to be allowed per diem to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with. *Ib.*

See *Moore v. Buckner*, 28 Chy. 606, p. 51; *Harding v. Township of Cardiff*, 29 Chy. 308; *Macdonell v. Baird*, 13 P. R. 331, p. 42.

#### IX. IN PARTICULAR CASES.

##### 1. Questions arising between Members of Incorporated Societies.

See *Cannon v. Toronto Corn Exchange*, 5 A. R. 268; *Essery v. Court Pride of the Dominion*, 2 O. R. 596.

#### ARBITRATOR.

See ARBITRATION AND AWARD.

#### ARCHITECT.

Although an architect, employed by the owner, for reward to superintend the construction of a house may, as between the latter and the contractor by the terms of their own agreement be in the position of an arbitrator and his decision as between them unimpeachable except for fraud or dishonesty, yet as between himself and his employer he is answerable for either negligence or unskilfulness in the performance of his duty as architect. *Irving v. Morrison*, 27 C. P. 242 approved. *Badgley v. Dickson*, 13 A. R. 494.

#### ARMY.

See MILITIA.

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#### II. ASSAULTING

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#### III. IN WHAT

Held, on the that the defence a resident of the 3 O. R. 384.—

The general of our law to p other into Ont contracted abro the debtor is he about to return *Rosenfeldt*; *See Oaler*.

Where the own country t returning, or in the creditor n upon a ca. re.

A defendant United States d abode, and in t visit to his par arrested on a ch tent to defraud 9 P. R. 511.—

The prisoner information con land, charging felony in that c rant had been is that a person c & 7 Vict, c. 34, here for an offen less upon a warn committed, and court in this c close a felony ac try; and Semb wit, larceny was therefore d 8 P. R. 452.—C

It is of no co a person may be



## VIII. WARRANT OF COMMITMENT—See JUSTICE OF THE PEACE.

## IX. ON NE EXEAT—See NE EXEAT.

## X. WRIT OF ARREST—See WRIT OF ARREST.

## XI. BAIL—See BAIL—CRIMINAL LAW.

## XII. MALICIOUS ARREST—See MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.

## I. MANNER OF ARREST.

Liability of constable to trespass for unnecessary handcuffing. See *Hamilton v. Massie*, 18 O. R. 585.

## II. ASSAULTING CONSTABLE IN MAKING ARREST.

Indictment for assaulting a constable acting under a warrant of commitment. See *Regina v. King*, 18 O. R. 566.

## III. IN WHAT CASES ARREST CAN BE MADE.

## 1. Of Foreigners.

Held, on the evidence set out in the report, that the defendant could properly be treated as a resident of this province. *Cartwright v. Hinds*, 3 O. R. 384.—C. P. D.

The general rule that it is against the policy of our law to permit a foreigner to follow another into Ontario, and arrest him for a debt contracted abroad, is limited to cases in which the debtor is here on temporary business, and is about to return to his own country. *Butler v. Rosenfeldt*; *Sweetzer v. Rosenfeldt*, 8 P. R. 175.—Oaler.

Where the debtor has absconded from his own country to Ontario, and does not intend returning, or intends to go to some other country, the creditor may follow and arrest him here upon a ca. re. *Ib.*

A defendant having contracted a debt in the United States of America, his ordinary place of abode, and in the act of returning there after a visit to his parents in this country, cannot be arrested on a charge of leaving Ontario with intent to defraud his creditors. *Smith v. Smith*, 9 P. R. 511.—Hagarty.

The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—Held, that a person cannot, under the Imperial Act 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a Judge of a superior court in this country. Such warrant must disclose a felony according to the law of this country; and Semble, that the expression "felony, to wit, larceny," is insufficient. The prisoner was therefore discharged. *Regina v. McHolme*, 8 P. R. 452.—Cameron.

It is of no consequence where the domicile of a person may be, or to what country he is bound

by allegiance as a subject or citizen, if he comes to this province, and reside here, and contract debts, and is about to quit the country (that is in fact to change his residence to a foreign country, even though that country be his place of domicile) with the intent to defraud his creditors, he is subject to arrest as it prevails in this province. *Kersterman v. McLellan*, 10 P. R. 122.—Wilson.

Held, that a defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest, to which he was subject in this province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest. *Ib.*

The plaintiff claimed \$20,000 damages from the defendant, the cause of action being criminal conversation with the plaintiff's wife. The defendant lived in the United States, but was here for a temporary purpose when the plaintiff had him arrested under an order to hold to bail. The plaintiff in his affidavit sworn on the 30th January, on which the order was granted, stated that the defendant had arrived in Toronto that morning, and that he intended to leave for his own country that night, with intent to defraud the plaintiff of the damages he had sustained. Upon a motion for the defendant's discharge:—Held, that in leaving Ontario he was not doing so with intent to defraud the plaintiff, and was therefore entitled to be discharged. Ex p. Gutierrez, 11 Chy. D. 298, specially referred to. *Rice v. Fletcher*, 13 P. R. 46.—MacMahon.

## IV. WRITS OF CAPIAS AND ORDER FOR ARREST.

## 1. Issue of.

Notwithstanding the Judicature Act, section 90 and Rule 5, a writ of capias may still be issued under R. S. O. (1877) c. 67, and the C. L. P. Act before an action has been commenced by a writ of summons. *Vetter v. Cowan*, 46 Q. B. 435.—Cameron.

Held, that where a ca. sa. had been issued upon the judgment within the year it was not necessary to return and file the same within the year. *Beninger v. Thrasher*, 1 O. R. 313.—Q. B. D.

When serving a defendant with an order to examine him as a judgment debtor it is not necessary to exhibit the original order unless demanded in order to entitle the plaintiff to move for a ca. sa. against him under R. S. O. (1877) c. 50, s. 305. *Imperial Bank v. Dickey*, 8 P. R. 246.—Galt.

The Judge of a County Court has no power, either as such Judge or as local Judge of the High Court, to order the issue of a ca. sa. in an action in the High Court. *Cochrane Manufacturing Co. v. Lamon*, 11 P. R. 351, followed. *Waterhouse v. McVeigh*, 12 P. R. 676.—Armour.

Where defendant was arrested on a ca. re., and it was doubtful whether the debt was actually due or not, the court refused to discharge the defendant, although the judge who granted the order for the writ would not have done so, if all the facts had been before him. *Willett v. Brown*, 8 P. R. 468.—Hagarty.

In this case an order for a ca. sa. was granted upon two affidavits; one that of the Toronto agent for the plaintiff's solicitors exhibiting a copy of an affidavit made by one of such solicitors, stating that he believed it to be a true copy, and that the original was stated to have been enclosed in a letter received by him that day, but was not so enclosed, but not stating that such an affidavit ever existed:—Held, that this could not be treated as forming any evidence upon which an order for arrest could be founded. *Gilbert v. Stiles*, 13 P. R. 121.

Consolidated Rule 544 provides, that all orders made by a Judge of the High Court in Chambers shall be signed by the clerk in Chambers:—Held, that an order for the arrest of the defendant signed by the Judge who made it, and not by the clerk, was not properly issued:—Held, also, upon the evidence, that the defendant was not about to quit Ontario with intent to defraud; and, upon both grounds, the defendant should be discharged from custody. *St. Croix v. McLachlin*, 13 P. R. 438.—Ferguson.

## 2. Application for Discharge or to Set Aside Arrest.

### (a) Power of Court or Judge.

Held, that a Divisional Court may review the action of a Judge in setting aside a writ of ca. sa. and the arrest thereunder, and also his action in making the order to arrest. *Carterwright v. Hinds*, 3 O. R. 384.—C. P. D.

A Divisional Court has power under Con. Rule 1051 to set aside or vary an order for arrest made by a County Court Judge in a County Court action. *Elliot v. McNaug*, 13 P. R. 416.—Q. B. D.

A local Judge of the High Court has no power to order the discharge of a defendant held in custody under a ca. sa. issued out of the High Court of Justice. *Cochrane Manufacturing Co. v. Lamon*, 11 P. R. 351.—Galt.

A Judge in chambers has no power to rescind his own order for a writ of ca. sa. or to discharge the defendant from custody after the order has been acted upon. *McNabb v. Oppenheimer*, 11 P. R. 214.—Rose.

A Judge of the High Court sitting in single court has power to set aside an order for the issue of a ca. sa. issued by the local Judge of the High Court. *Waterhouse v. McVeigh*, 12 P. R. 676.—Armour.

### (b) Defects in Affidavit.

Held, that a statement in the affidavit on which the order to arrest was founded, that the defendant had made "an assignment of all his property," without adding for the general benefit of all his creditors, was of itself objectionable, as leading to the belief that the assignment was fraudulent, but apart from this there was sufficient stated to justify the issue of the order. *Carterwright v. Hinds*, 3 O. R. 384.—C. P. D.

The affidavit stated only that defendant was indebted in \$116.60 on two promissory notes overdue; but defendant who had left the country, did not deny that he was indebted, and the particu-

lars were stated in the special endorsement of the writ of summons served on him. An affidavit stating the particulars sufficiently was allowed to be filed in support of the order. *Robertson v. Coulton*, 9 P. R. 16.—Osler.

On an application to set aside the order for an arrest and the writ, etc., but not to be discharged out of custody, objections that the affidavit discloses no sufficient cause of action, or shews that the defendant is about to leave the province are not open. *Ib.*

Where the affidavit for the order was entitled in the High Court of Justice, but not in the proper division:—Held, that the objection was clearly amendable. *Ib.*

The use in the affidavit upon which an order for the issue of a ca. re. was granted of the words "intent to defeat," instead of "intent to defraud," the latter being the words prescribed by R. S. O. (1877) c. 67, s. 5:—Held, not fatal to the arrest. *Laing v. Slingerland*, 12 P. R. 366.—Armour.

The affidavit used stated that the deponent was credibly informed and believed certain facts, not stating the name of his informant nor the grounds of his belief:—Held, that this statement did not comply with Con. Rule 609, and was insufficient as proof of the facts stated, upon an application for such an order. *Gibbons v. Spalding*, 11 M. & W. 173; *McInnes v. Macklin*, 6 U. C. L. J. O. S. 14, referred to. *Gilbert v. Stiles*, 13 P. R. 121.—Q. B. D. See *S. C.*, p. 55.

### (c) Other Cases.

The capias issued after action was in the form formerly used for the commencement of an action:—Held, amendable. *Robertson v. Coulton*, 9 P. R. 16.—Osler.

On an application to set aside an arrest the Judge should not enquire into the particular form of the action, if satisfied that a cause of action exists. *Butler v. Rosenfeldt*; *Sweetzer v. Rosenfeldt*, 8 P. R. 175.—Osler.

In an action for breach of promise of marriage the defendant was arrested under a ca. re., the order for which was granted upon an affidavit which did not swear to any amount of damage. Upon a motion to discharge the defendant from the custody of his bail, he denied the promise of marriage, and the plaintiff filed no affidavit corroborating her own. The intent of the defendant to leave the country rested on alleged admissions made by the defendant to the plaintiff, which he denied, and he also brought forward a strong fact against his likelihood to abscond from the province:—Held, that, under these circumstances, the defendant should be discharged, and the bail bond delivered up to be cancelled. *Donegan v. Short*, 12 P. R. 589.—Boyd.

Upon an application to set aside an order for a ca. sa. upon the ground that it is based upon insufficient material, as distinguished from a motion to discharge the defendant from custody upon the merits, no new material can be used. *Damer v. Busby*, 5 P. R. at p. 389, followed. *Gilbert v. Stiles*, 13 P. R. 121.—Q. B. D.]

Where a judgment for his examination costs of an affidavit the motion was denied. *Bank v. Dicke*.

Defendant who debt alleged plaintiff recovered the plaintiff facts stated in no reasonable be liable, and as to the other had reasonable was entitled to the plaintiff v. *Porritt v. Fra*.

A sheriff under a ca. sa. as against the age on the am v. *Oppenheimer*.

V.

In an action arrested under having been issued and he custody of the defendant was not in custody, but on and that he payment of a agent Debtors *ley v. Sharp*.

A defendant ca. sa. is a del within the m *Hay v. Paters*.

Held, (reversing Judge,) that if maintained on returnable imprisonment; for such purpose should be returned. *C. J. O. disse* A. R. 486.

I. ACTION

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## 3. Costs.

Where a judgment debtor disobeyed an order for his examination he was directed to pay the costs of an application for a ca. sa., although the motion was dismissed upon his giving sufficient excuse for his disobedience. *Imperial Bank v. Dickey*, 8 P. R. 246.—Galt.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be \$704, but the plaintiff recovered only \$489. As to \$80 which the plaintiff failed to recover, it was held, on the facts stated in the report of the case, that he had no reasonable ground for believing defendant to be liable, and he abandoned it at the trial, but as to the other portion, for which he failed, he had reasonable ground:—Held, that defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. (1877) c. 50, s. 343. *Porritt v. Fraser*, 8 P. R. 430.—Osler.

A sheriff upon arresting a judgment debtor under a ca. sa. thereby becomes at once entitled as against the execution creditor to full poundage on the amount of the execution. *McNab v. Oppenheimer*, 11 P. R. 348.—Galt.

## V. MISCELLANEOUS CASES.

In an action for seduction the defendant was arrested under a writ of ca. re., and judgment having been entered against him a ca. sa. was issued and he was surrendered by his bail to the custody of the sheriff:—Held, that the defendant was not in custody as a debtor or on execution, but on mesne process as a wrong doer, and that he was not entitled to an order for payment of a weekly allowance under the Indigent Debtors Act, R. S. O. (1877) c. 69. *Wheatley v. Sharp*, 8 P. R. 189.—Cameron.

A defendant arrested and imprisoned under a ca. sa. is a debtor in close custody in execution within the meaning of R. S. O. (1877) c. 69. *Hay v. Paterson*, 11 P. R. 114.—Rose.

Held, (reversing the judgment of the county Judge,) that proceedings to fix bail cannot be maintained on a writ of ca. sa. which is made returnable immediately after the execution thereof; for such purpose it is necessary that the writ should be returnable on a day certain. (Hagarty, C. J. O., dissenting.) *Proctor v. Mackenzie*, 11 A. R. 486.

## ASSAULT.

I. ACTION FOR—See TRESPASS.

II. CRIMINAL ASSAULT—See CRIMINAL LAW.

## ASSESSMENT.

I. OF DAMAGES—See DAMAGES.

II. FOR TAXES—See ASSESSMENT AND TAXES.

III. FOR INSURANCE—See INSURANCE.

IV. QUALIFICATION AS MEMBER OF MUNICIPAL COUNCIL—See MUNICIPAL CORPORATIONS.

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## ASSESSMENT AND TAXES.

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VI. COVENANT FOR TAXES—See LANDLORD AND TENANT.

VII. TAXES BETWEEN LANDLORD AND TENANT—See LANDLORD AND TENANT.

VIII. EXEMPTIONS OF MANUFACTORIES—See MUNICIPAL CORPORATIONS.

IX. TAXES BETWEEN VENDOR AND PURCHASER—See SALE OF LAND—SALE OF LAND BY ORDER OF THE COURT.

X. SCHOOL RATES—See PUBLIC SCHOOLS.

## I. ASSESSMENT.

1. Of Personality.

(a) Corporations.

The plaintiffs were a company incorporated under the Imperial Companies' Acts of 1862 and 1867, for the purpose of lending money on real

estate or on public securities, etc., the registered office of which was in the city of Aberdeen, Scotland, but having an agency, and the only agency, of the company at Toronto, Ontario. All the income or profits of the company arising from the business in Ontario, after deducting expenses of management, were remitted by the general managers at Toronto to Aberdeen, where all dividends were declared, and paid to the shareholders, who were assessed for income tax under the laws of Great Britain. By 43 Vic. c. 27, s. 1, (O.), the personal property of an incorporated company (other than those mentioned in sub-s. 2, namely, banks or companies investing all or the greater part of their means in works requiring the investment of the whole or principal part of their means in real estate, and which are exempt) shall be assessed against the company in the same manner as an unincorporated company, or partnership, which, under section 30 of R. S. O. (1877) c. 180, is assessable against the firm at the usual place of business, and not against the individual partners; and by section 3 of 43 Vic. c. 27, all personal property in the province, the owner of which is not resident therein, shall be assessable like that of residents, whether in the possession or control or in the hands of an agent or trustee or not, and shall be assessable in the municipality in which such property shall happen to be, but by sub-section 3 this section was not to apply to dividends or other choses in action owned and standing in the name of a person not residing in the province. The corporation of the city of Toronto under the said section 3, assessed the plaintiffs for \$100,000 of personal property, being the interest of moneys invested in Ontario, and paid or payable to the agents at Toronto, or at the credit of the company at a bank, or being moneys lying at the credit of the company in a bank for investment:—Held, that section 3 of 43 Vic. c. 27, (O.), was not ultra vires the legislature, and that the assessment came within its provisions: that this was not one of the companies mentioned in sub-section 2 of section 1 of the Act, nor was the personal property, dividends or other choses in action under sub-s. 3 of that section. *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552.—C. P. D.

The plaintiff company was a foreign corporation, with its head office in England, but carrying on insurance business in Canada, with an agency office at Kingston, Ontario, and the head office for Canada at Montreal:—Held, that insurance premiums received at Kingston by the agent of the company there, for insurance business transacted through him as such agent, were, under 43 Vic. c. 27, (O.), assessable at Kingston as taxable income or personal property against the company and its said agent, although the agent paid taxes on his own income, which was partly derived from commissions on the premiums received, and the fact that the premiums, having been previously sent by the agent, after collection, to the head office in Montreal, were not in the municipality of Kingston, when the assessment was made, did not make any difference. *Phoenix Ins. Co. of London v. City of Kingston*, 7 O. R. 343.—Ferguson.

By section 25 of the Saint John City Assessment Act of 1882, it is provided that "all rates and taxes levied and imposed upon the city of

Saint John, shall be raised by an equal rate upon the value of the real estate situate in the city, and part of the city to be taxed and upon the personal estate of the inhabitants and of persons deemed and declared to be inhabitants or residents of the said city. \* \* \* And upon the capital stock, income, or other thing of joint stock companies, corporations, or persons associated in business." And after providing for the levying of a poll tax, such section goes on to say that "the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income and real value, and amount of the same as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof." Section 28 of the same Act provides that "all joint stock companies and corporations shall be assessed, under this Act, in like manner as individuals; and for the purposes of such assessment, the president or any agent, or manager of such joint stock company or corporation, shall be deemed and taken to be the owner of the real and personal estate, capital stock and assets of such company or corporation, and shall be dealt with and may be proceeded against accordingly." J. D. L., the president of the bank of New Brunswick, was assessed under the provisions of the above Act, on real and personal property of the bank valued, in the aggregate, at \$1,100,000. The capital stock of the bank at the time of such assessment, was only \$1,000,000, and he offered to pay the taxes on that amount which was refused. It was not disputed that the bank was possessed of real and personal property of the assessed value. On appeal from the Supreme Court of New Brunswick, refusing a certiorari to quash the said assessment:—Held, Fournier, J., dissenting, that the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, \$1,000,000. *Ex parte James D. Levin*, 11 S. C. R. 484.

The defendant company carried on their business at London and were assessed there. They purchased the mortgages and other assets of the Brant Loan and Savings Company, a similar institution which carried on business in Brantford. After this the latter company ceased to do business and the defendants left the mortgages and assets which had been transferred to them with an agent in Brantford for collection, but they had no branch office and did not carry on business there. The plaintiffs assessed them for personal property in Brantford from which the defendants did not appeal to the court of revision, and the plaintiffs brought an action to recover the amount of the assessment:—Held, that the defendants were assessable in London for the property which the plaintiffs had assumed to tax, and that as they had no branch office in Brantford and were not carrying on business there the plaintiffs' assessment of them was illegal and void: that there being no jurisdiction to assess them in Brantford the defendants were not bound to appeal to the court of revision and might question the assessment in the action. *Nickle v. Douglas* (in appeal), 37 Q. B. 63, followed. *City of Brantford v. Ontario Investment Co.*, 15 A. R. 605.

The defendants were a life insurance company with their head office at H., in this province,

and transacted received applied forwarded to policies issued on the same as in K. In an city of K., to r defendants on the defendants and that their they could not had elected un sub-s. 2 to be income:—Held, guson, J., (18 was not a bran of section 35 premiums recei assessable there the year's tax but this could sum total of ga together with t ness done at th tegral part of K. agency. C Assurance Co.,

Semble, tha 10 of section tions 35 and 3 intended to co specifically asc tangible and in into these pro Sullivan, 6 App lb.

See *Lawless* infra; *London don*, 15 A. R. C

The tax imp B.), upon "inc balance of gain and where no s there is no inc being assessed section or in t construction o plied to the in a year, otherw accepted sense *Lawless v. Sul judgment of S*

See *London don*, 15 A. R.

See s

The north p vey, and lot 4 less, was asses half," etc. " half lot numb 4." The coll pancies:—He indicated wan

and transacted business by agents in K., who received applications for insurances which they forwarded to the head office, from which all policies issued ready for delivery, the premiums on the same also being collected by the agents in K. In an action by the corporation of the city of K., to recover taxes, assessed against the defendants on income, it was contended that the defendants' only place of business was in H. and that their business was of such a nature that they could not be assessed at K., and that they had elected under R. S. O. (1887) c. 193, s. 35, sub-s. 2 to be assessed at H. on their whole income:—Held, reversing the decision of Ferguson, J., (18 O. R. 18), that the agency at K. was not a branch business within the meaning of section 35 above referred to, and that the premiums received year by year at K. were not assessable there. The ultimate profit represents the year's taxable income under the statute, but this could only be ascertained by placing the sum total of gains and losses against each other, together with the result of the volume of business done at the head-office, and no distinct integral part of this income was referable to the K. agency. *City of Kingston v. Canada Life Assurance Co.*, 19 O. R. 453.—Chy. D.

Seemingly, that notwithstanding sub-section 10 of section 2, "personal property" in sections 35 and 36 of R. S. O. (1887) c. 193 is intended to cover only something readily and specifically ascertainable, and "income" an intangible and invisible entity is not to be read into these provisions of the Act. *Lawless v. Sullivan*, 6 App. Cas. 373, specially referred to. 1b.

See *Lawless v. Sullivan*, 6 App. Cas. 373, *infra*; *London Mutual Ins. Co. v. City of London*, 15 A. R. 629, p. 69.

#### (b) Of Income.

The tax imposed by 31 Vict. c. 36, s. 4, (N. B.), upon "income," is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense as the balance of gain over loss. *Lawless v. Sullivan*, 6 App. Cas. 373, reversing judgment of Supreme Court, 3 S. C. R. 117.

See *London Mutual Ins. Co. v. City of London*, 15 A. R. 629, p. 70.

See also preceding Sub-head.

#### 3. Of Lands.

##### (a) Generally.

The north part of a lot called lot 1 in one survey, and lot 4 in another, of 100 acres more or less, was assessed variously as "number 1, N. half," etc. "Number 1, N. part," etc. "N. half lot number 1," etc., and "broken lots 1 and 4." The collector's roll showed similar discrepancies:—Held, that though these irregularities indicated want of care and accuracy in the offi-

cers of the municipality, they did not invalidate the assessment, as the land was sufficiently pointed out. *McKay v. Chrysler*, 3 S. C. R. 436, distinguished. *Nelles v. White*, 29 Chy. 338.—Spragge.

The assessment of four lots, containing about 400 acres in the name of the plaintiff embraced seven acres already sold and separately assessed, of which fact the assessor was aware. The defendant purchased at a sale for taxes, and the plaintiff instituted proceedings impeaching the sale within two years thereafter:—Held, affirming the judgment of the court below, that the assessment was illegal, and vitiated the sale. *Fleming v. McNabb*, 8 A. R. 656.

A. & H. were the respective owners of the north and centre parts of a certain lot, which were both occupied by H. until the year 1871, when the buildings were burned, and H. went out of possession. He subsequently paid the taxes up to 1873, when he left the neighbourhood, and did not return until 1883, and then found his part and that of A.'s had been sold for taxes, but he had received no notice of any taxes being in arrear. In an action by H. and his wife, who had subsequently acquired his title, it appeared that both pieces had been assessed separately in 1872, together in 1873, were not assessed at all in 1874, were assessed together as the "north-half of lot 13, one-tenth of an acre," in 1875, together as the "north part of lot 13," in 1876, in one parcel as "north part 13" in 1877, and that they had been sold for the taxes due on both parcels down to 1877, and for those on the north piece for 1878:—Held, that the tax sale was invalid and could not be sustained, and that the plaintiffs were entitled to recover possession. *Hill v. Macaulay*, 6 O. R. 251.—Ferguson.

In the year 1875, a lot of land containing 200 acres and patented as one lot was assessed on the resident roll as lot 114, 200 acres, value \$1,000. From 1876 to 1878, it was similarly assessed. In 1879 it was also so assessed, except that the quantity of land was stated to be 100 instead of 200 acres. The whole 200 acres was occupied by a tenant who duly paid the taxes for each year including 1879. On the non-resident roll for 1879, the east half of the lot appeared assessed as 100 acres, value \$800. By reason thereof it was returned to the county treasurer as in arrear for the taxes of 1879, and a sale thereof made:—Held, that the sale for taxes was invalid; that the assessment on the resident roll for 1879, was of the whole lot upon which the taxes were paid, the mistake in stating the quantity of land to be 100 acres, not making such assessment less an assessment of the whole lot, while the error of putting the east half on the non-resident roll could not affect the owner's right to the land. *Jeffery v. Hewis*, 9 O. R. 364.—C. P. D.

Section 16 of cap. 100 C. S., New Brunswick, relating to rates and taxes provides that "real estate where the assessors cannot obtain the names of any of the owners shall be rated in the name of the occupier or person having ostensible control, but under such description as to persons and property \* \* \* as shall be sufficient to indicate the property assessed and the character in which the person is assessed." T. G., owner of real estate in Westmorland county, N. B., died, leaving a widow who administered his



estate and resided on the property. The property was assessed for several years in the name of the estate of T. G., and in 1878 it was assessed in the name of "Widow G.:"—Held, affirming the judgment of the Court below, that the last named assessment was illegal as not comprising such description of persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed. *Flanagan v. Elliott*, 12 S. C. R. 435.

Quere, whether a person who has laid out land into town lots or village lots for sale cannot afterwards if he find he cannot dispose of them as such, or for any other reason replace his land as it was before. *In re G. W. Allan*, 10 O. R. 110.—Wilson.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in the city a first lien thereon except as against the Crown:—Held, affirming the judgment of the court below, that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed. *O'Brien v. Cogwell*, 17 S. C. R. 420.

The Act provided that in case of non-payment of taxes assessed upon any lands thereunder, the city collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the mayor should affix his signature and the seal of the corporation; one of such statements should then be filed with the city clerk, and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on any real estate therein mentioned, any statements or lists so signed and sealed, should be received as conclusive evidence of the legality of the assessment, etc. In a suit to reclose a mortgage on land which had been sold for taxes under this act, the legality of the assessment and sale was attacked:—Held, per Strong, Taschereau and Gwynne, J.J., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section it was necessary for the defendants to show, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the act, and the production and proof of one of such statements was not sufficient. Per Ritchie, C. J., and Patterson, J., that it was sufficient to produce the statement returned to the collector, signed and sealed as required, and with the necessary warrant annexed, and in the absence of evidence to the contrary it must be assumed that all the proceedings were regular, and that the provisions of the statute requiring duplicate statements had been complied with. *Ib.*

See *Beckett v. Johnston*, 32 C. P. 301, p. 81; *Church v. Fenton*, 5 S. C. R. 239, p. 77; *Carson v. Veitch*, 9 O. R. 706; *Donovan v. Hogan*, 15 A. R. 432, p. 64; *Hall v. Farquharson*, 15 A. R. 457, p. 65.

See also III., 8, p. 40.

#### (b) Non-Resident Lands.

Unoccupied land divided into lots was assessed for the year 1879, and entered in the non-resident

division of the assessment roll, but instead of being assessed by the numbers and names of the lots alone, separately valued, and without the name of the owner, it was entered with the name of the owner prefixed, and valued en bloc. The taxes assessed against the whole, together with the name of the person taxed, were entered on the collector's roll for the year, instead of being entered on the non-resident tax roll, and transmitted to the county treasurer. The owner became also the occupant of the lands before the delivery to the collector of the collector's roll for 1879, and he paid the taxes so assessed to the collector in that year. The collector, notwithstanding, returned them to the clerk as non-resident taxes unpaid, and the township clerk returned them to the county treasurer in a "list of non-resident taxes returned from the collector's roll," and they were so entered in the treasurer's books. In the treasurer's list of lands liable to be sold for arrears of taxes in 1882, sent to the township clerk, the land in question was entered charged with the taxes of 1879. The land had in the meantime been regularly assessed, as occupied land, for the years 1880, 1881, and 1882, but the assessor neglected to give notice to the occupant that it was liable to be sold for the arrears of 1879, and the township clerk omitted to include it, as he should have done, in the return made by him to the county treasurer, pursuant to section 111, in the list of non-resident lands which appeared, by the assessment roll of 1882, to have become occupied. The land was accordingly sold in December, 1882, for the taxes of 1879—the owner having continued in occupation, and being ignorant of the sale or that the taxes were alleged to be in arrear:—Held, affirming the judgment of Ferguson, J., that the taxes having been entered in the collector's roll, with the name of the person assessed, the payment to the collector was valid, and consequently that there were no taxes in arrear for which the land could lawfully be sold. Per Patterson, J. A., semble, under the circumstances in evidence, the sale had not been properly conducted, and therefore the land had not been sold in pursuance of and under the authority of the Act so as to give operation to section 155. *Donovan v. Hogan*, 15 A. R. 432.

Plaintiff was the owner of a group of small islands in Lake Rousseau, in the township of Medora, containing in all less than fifty acres. The island in question was patented to one Pope by the description of island D. Plaintiff purchased it from Pope and called it by the fancy name of Oak Island, and built a house and made other improvements thereon, residing there for some months in each year. The assessor having been erroneously informed that Pope was the owner of an island in Lake Rousseau called D, put down island D in the non-resident division of the assessment roll with the name "Robert T. Pope." This was done to distinguish it from another island D in the same lake and township. He did not know that this island D was one of the group belonging to Hall, though he knew that Hall was putting improvements on one of the islands, which was in fact island D or Oak Island. He supposed that the name of the improved island was Flora; and this was the name of one of Hall's islands, a small rock on which there were no improvements. The improved island was the one meant to be assessed, and

actually assessed. The taxes so assessed for the year 1883 the island for the year 1883. Held, affirming the judgment of the Court below, that the last named assessment was illegal as not comprising such description of persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed. *Flanagan v. Elliott*, 12 S. C. R. 435.

Per Patterson, J. A., semble, under the circumstances in evidence, the sale had not been properly conducted, and therefore the land had not been sold in pursuance of and under the authority of the Act so as to give operation to section 155. *Donovan v. Hogan*, 15 A. R. 432.

See *Jeffery v. Deverill v. Coe, Mallory*, 17 O.

#### (c) Crown Lands.

In 1808 an order was made for the grant of land to the Loyalist. In 1810 the land was under, and a petitioned the Crown for this was by mistake from her; and passed allowing locate other lands before the surrender of the treasurer's tract, specifying land was thereon being returned as in arrear for and liable for sale and a tax-deed conveyed to N., who whom the plaintiff named the Governor was the assignee had discovered that was in error, the but that under was regular, and a patent issued a oil was passed, a valid he did not government had of the land. I land to H., who Held, (reversing as under 59 Geo only lands granted liable to assessment circumstances, the Crown and vests being taken rather necessary act, a general in not could not make taxes as against valid, and nothing defendant, claim was entitled to the plaintiff had the moneys paid

actually assessed, though under a wrong name. The taxes so assessed were actually paid. In 1883 the island D was sold for arrears of taxes for the years 1879, 1880, 1881, and 1882:—Held, affirming the judgment of Ferguson, J., and of the Chancery Division, (12 O. R. 598), that island D being identified as that intended to be assessed, and being that on which the improvements had been made, the owner was not affected by the mistake of the assessor in describing it as Flora Island; and that the taxes having been duly paid the sale was void:—Sembler, that island D or Oak Island should have been assessed on the resident instead of the non-resident division of the assessment roll. *Hall v. Farquharson*, 15 A. R. 457.

Per Patterson, J. A., observations as to assessment of several parcels of non-resident land less than 200 acres for statute labour. *Ib.*

See *Jeffery v. Hewis*, 9 O. R. 364, p. 62; *Deverill v. Coe*, 11 O. R. 222, p. 76; *Dalziel v. Mallory*, 17 O. R. 80, p. 82.

#### (c) *Crown and Indian Lands.*

In 1808 an order in council was passed for a grant of land to W., the daughter of a U. E. Loyalist. In 1818 certain land was located thereunder, and a patent issued therefor. In 1819 W. petitioned the Governor-in-Council, stating that this was by mistake and without any authority from her; and in 1820 an order in council was passed allowing her to surrender the land and to locate other land in lieu thereof. In 1820, before the surrender, the surveyor-general furnished the treasurer with a list of lands in this district, specifying this lot as deeded to W. The land was thereupon assessed, and in 1831, having been returned by the treasurer to the sheriff as in arrear for the taxes for the years 1820-9, and liable for sale, it was in that year sold to S., and a tax-deed given in 1832. In 1839 S. conveyed to N., who in 1840 conveyed to G., through whom the plaintiff claimed. In 1839 N. petitioned the Governor-in-Council, stating that he was the assignee of the tax-purchaser; that he had discovered that the surveyor-general's return was in error, the land having been surrendered, but that under the circumstances the tax-sale was regular, and that it should be confirmed, and a patent issued to him. In 1840 an order in council was passed, stating that if N.'s tax-title was valid he did not require a patent, but if not, the government had no power to make a free grant of the land. In 1868 the Crown granted the land to H., who conveyed to the defendant:—Held, (reversing Burton, J., 6 O. R. 564,) that as under 59 Geo. III. c. 7 and 6 Geo. IV. c. 7, only lands granted by the Crown were to be liable to assessment and sale, and as, under the circumstances, the lands never passed out of the Crown and vested in W.—the formal surrender being taken rather as a precautionary than as a necessary act, and the mistake of the surveyor-general in not giving notice of the surrender could not make the land liable to be sold for taxes as against the Crown—the tax sale was invalid, and nothing passed under it; and that the defendant, claiming under the subsequent patent, was entitled to the land:—Quere also, whether the plaintiff had any claim against the Crown for the moneys paid at the tax sale; at all events

after the tax sale the parties dealt with the land with notice of the difficulties that existed. *Moffatt v. Scratch*, 8 O. R. 147.—C. P. D.—affirmed, 12 A. R. 157.

Held, that land in which the Indian title has been surrendered to the Crown and which has been afterwards sold or located, is liable to be sold for taxes imposed by a municipality, although while the title and interest are wholly in the Crown, the land is exempt from taxation. *Church v. Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239, referred to and followed. *Totten v. Truax*, 16 O. R. 490.—Boyd.

Certain lands, after the grant from the Crown, became by certain meane conveyances the property of the Bank of Upper Canada, and upon the failure of that bank were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown by 33 Vict. c. 40 (D.) The Crown then sold them and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provision for payment of taxes, but the taxes were not paid and the lands were sold, this action being brought to set aside the tax sale:—Held, per Hagarty, C. J. O., and Osler, J. A., that the Act, 33 Vict. c. 40 (D.) was *intra vires*, as dealing with "Bankruptcy and Insolvency" or "Banking and Incorporation of Banks." That the lands were therefore properly vested in the Crown as trustee, and that the interest of the Crown as mortgagee and trustee could not be sold for arrears of taxes, but was exempt under R. S. O. (1887) c. 193, s. 7, sub-s. 1. Per Burton, J. A. That the Act was *ultra vires* as an interference with "Property and Civil Rights in the Province" and that the lands remained in the trustees subject to taxation. That even if the Act was *intra vires* still the lands, being vested in the Crown in the place and stead of the trustees voluntarily selected by the shareholders of the bank, were not exempt from taxation. Per MacLennan, J. A. That the Act was *ultra vires* and the lands subject to taxation, but that, upon the evidence, the sale was fraudulent and void as far as the interest of the Crown was concerned. The judgment of the Queen's Bench Division, 17 O. R. 615, was therefore affirmed, Burton, J. A., dissenting. *Regina v. County of Wellington*, 17 A. R. 421.

See *Church v. Fenton*, 5 S. C. R. 239, p. 77; *O'Grady v. McCaffray*, 2 O. R. 309, p. 83; *Stevenson v. Traynor*, 12 O. R. 804, p. 75.

#### (d) *For Local Improvements.*

Effect of local improvement rate created at the instance of covenantor (and others) upon his covenant against incumbrances. See *Cumberland v. Kearns*, 18 O. R. 151; 17 A. R. 281.

See *Bain v. City of Montreal*, 8 S. C. R. 252.

#### 4. *Exemptions.*

By section 3 of the Assessment Amendment Act, 51 Vict. c. 29 (O.), which came into force on August 1st, 1888, section 7 of the Assessment Act, R. S. O. (1887) c. 193 was amended by adding to the exemptions: "All horses, etc., owned and held by any owner or tenant of any farm,



and when carrying on the general business of farming or grazing." The defendant township was instituted under the Municipal Institutions Act for Algoma, Muskoka, etc., (R. S. O. (1887) c. 185), s. 20 of which provided for the making of an assessment roll, which said roll, by section 28, when finally revised, was to be the roll of the municipality until a new roll was made, the council by section 29 to fix the time for making the subsequent roll at periods of not less than one nor more than three years, and the year for the purposes of the Act was to commence on 1st January thereof; and by section 364 of the Municipal Act, (R. S. O. (1887) c. 184), the rates or taxes were to be considered as imposed on and from 1st January, and end with 31st December, unless otherwise provided. By section 30 the council might in each year after the final revision of the roll pass a by-law levying a rate on all the real and personal property, etc. The assessment for the year 1888 was made in the months of March and April, and the roll was returned to the clerk of the municipality on or about 1st May, and was finally revised by the council sitting as a Court of Revision on 16th June. On 4th August a by-law was passed directing a rate to be levied to meet the current expenses for the year:—Held, under the circumstances, the personal property mentioned was not exempt for the year 1888. *Henderson v. Township of Stisted*, 17 O. R. 673.—Galt.

In an action brought by appellants against respondents to recover the sum of \$308.50 for three years' school taxes imposed on property occupied by them as a farm situate in one municipality the products of which, with the exception of a portion sold to cover the expenses of working and cultivating, were consumed at the Mother House, situate in another municipality:—Held, reversing the judgment of the Court below, that as the property taxed was not occupied by the respondents for the objects for which they were instituted, but was held for the purpose of deriving a revenue therefrom, it did not come within the exemptions from taxation for school rates provided for by 32 Vict. c. 16, s. 13 (Que.):—Held also, that said section 13 does not extend as regards exemptions, sections 77 of c. 15 of the C. S. L. C., which has not been repealed, but which has been amended by the addition of 41 Vict. c. 6, s. 26 (Que.) *Les Commissaires D'Ecoles pour la Municipalité du Village de St. Gabriel v. Les Sœurs de la Congrégation de Notre Dame de Montreal*, 12 S. C. R. 45.

Action by the City of Montreal to recover the sum of \$408 for assessment or taxes for the years 1878, 1879, 1880, in property in the said city occupied by defendant. The property set out in the plaintiff's declaration was during the time mentioned therein occupied and used as a private boarding and day school for girls kept and maintained by defendant, who employed divers teachers and who, during that time, had therein on an average for their education as pupils eighty-five girls per annum. The institution never received any grant from the plaintiff:—Held, Gwynne, J., diss., that the institution was an educational establishment within the meaning of 41 Vict. c. 6, s. 26, (Que.), and exempt from municipal taxation. *Dame Mary Wylie v. City of Montreal*, 12 S. C. R. 384.

By 41 Vict. c. 6, s. 26 (Que.) all educational houses or establishments, which do not receive any subvention from the corporation or municipality in which they are situated, are exempt from municipal and school assessments "whatever may be the Act in virtue of which such assessments are imposed, and notwithstanding all dispositions to the contrary":—Held, reversing the judgment of the court below, that the exemption from municipal taxes enjoyed by educational establishments under said 41 Vict. c. 6, (Que.) s. 26, extends to taxes imposed for special purposes, e.g., the construction of a drain in front of their property. (Sir W. J. Ritchie, C.J., dissenting.) *Les Ecclésiastiques de St. Sulpice de Montreal v. City of Montreal*, 16 S. C. R. 399.

Held, that by the true construction of sections 323, 326 and 327 of Quebec "Town Corporation General Clauses Act, 1876" (40 Vict. c. 60) no part of a railway is made taxable property except the land as land occupied by the road, the bridges or other superstructures thereon being excluded. *Corporation of St. Johns v. Central Vermont R. W. Co.*, 14 App. Cas. 590, affirming 14 S. C. R. 288.

#### 5. Statute Labour.

There is no liability to perform statute labour in a village municipality, and a by-law providing for its commutation was held ultra vires and void, and was quashed. *In re Stayner*, 46 Q. B. 275. Osler.

Held, that a township council can provide for the performance of statute labour upon the roads of their township to the extent of the commutation tax charged in respect of non-resident lands, and for payment therefor out of the general funds of the municipality before such tax has been received from the county treasurer; and that the performance of such work is not necessarily restricted to any particular statute labour division. *In re Allan and Township of Amabel*, 32 C. P. 242.—Osler.

Observations by Patterson, J., as to assessment of several parcels of non-resident land less than 200 acres for statute labour. See *Hall v. Farquharson*, 15 A. R. 457.

#### 6. Appeal to Court of Revision and County Judge.

Where an assessment roll was returned to the county clerk's office on the 1st May, but the certificate was neither signed nor sworn to till 4th May, and additions were made to the roll between the 1st and 4th May, and the notice to the parties assessed (signed) informed them that they must give notice of appeal within fourteen days from the latter date:—Held, that a notice of appeal given on 18th May was in time, because the roll was not "delivered to the clerk completed and added up with the certificates and affidavits attached" before 4th May; and that the county Judge should not therefore have dismissed an appeal to him on the ground that the notice was not served within fourteen days from 1st May, as well as because that was not the ground taken before the Court of Revision:—Held, also, had the Court of Revision proceeded on that ground their decision would have been binding on

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the county Judge. A mandamus was therefore directed to the county Judge to try the appeal. *In re the Hon. G. W. Allan*, 10 O. R. 110.—Wilson.

Semble, the court's council having extended the time for the return of the roll to the 15th of June, although that date was disregarded by all parties to this application, the applicant had of right the power to appeal within fourteen days from such date. *Id.*

In an action to restrain the defendants, the corporation of the township of Dysart and the members of the Court of Revision thereof, from increasing the assessment on the plaintiffs' lands in that township to \$243,113.75, an increase of \$132,000 over the previous year, and from levying taxes thereon, the plaintiffs alleged that the proceedings of the Court of Revision were all parts of a fraudulent and improper arrangement and conspiracy that had been entered into before the holding of the said Court of Revision by the members thereof in conjunction with others, to increase the assessment of the plaintiffs. No evidence was adduced as to the actual or assessable value of the lands, but the plaintiffs stated that the highest bid they had had for them was \$80,000. It was further alleged that the members of the Court of Revision had before their election as councillors, complained that the company's assessment was not high enough, and had procured their election partly through announcing that if they were elected the assessment would be increased, and that they had held a secret meeting with other persons and arranged for bringing on appeals to that Court:—Held, affirming the decision of the Chancery Division, (9 O. R. 485), that the matters complained of were not sufficient to affect the judgment of the Court of Revision so as to render it void for fraud; and that the plaintiffs had no remedy other than by an appeal to the Stipendiary Magistrate of Haliburton, under R. S. O. c. 6, s. 23. *Canadian Land and Emigration Company v. Municipality of Dysart*, 12 A. R. 80.

A County Judge in appointing a day subsequent to the first of August, for hearing an appeal from a Court of Revision is not, under R. S. O. (1877) c. 180, s. 59, sub-s. 7, exceeding his jurisdiction, notwithstanding the terms of that sub-section. *In re Ronald and the Village of Brussels*, 9 P. R. 232.—Cameron.

The plaintiffs, a Mutual Insurance Company, carrying on business in London (Ont.), were assessed for the gross amount of their receipts after payment of the year's losses and expenses, from which assessment they appealed successively to the Court of Revision and the County Judge, both of whom sustained the action of the assessor, which was affirmed by Proudfoot, J., (11 O. R. 592), on the ground that the decision of the County Judge was final; and an appeal to this Court was on a like ground dismissed with costs. Where the assessor has jurisdiction to assess the property, his assessment can only be reviewed in the mode provided by the Act, viz., by appeal to the Court of Revision, and the County Judge. *London Mutual Insurance Co. v. City of London*, 15 A. R. 629.

R. S. O. (1877) c. 180, s. 59, regulating appeals to the County Judge from the Court of Revision

as to the assessment of property, provides (sub-section 2) that the person appealing shall serve upon the clerk of the municipality within five days after the date limited by the Act for closing the Court of Revision a written notice of his intention to appeal: (sub-section 3) that the Judge shall notify the clerk of the day he appoints for hearing appeals; and (sub-section 4) that the clerk shall thereupon give notice to all the parties appealed against. Section 56, sub-section 19, provides that all the duties of the Court of Revision shall be completed, and the rolls finally revised, before the 1st day of July in each year. The Court of Revision heard the appeals in question on the 10th June, 1886, and rendered judgment on the following day. Notices of appeal dated the 15th June, 1886, were served upon the clerk on the 19th; the Court of Revision sat until the 5th July; on the 15th July the clerk notified the Judge that notice had been given of these appeals, and on the 28th July the Judge notified the clerk of the day that he had appointed for hearing the appeals, and the clerk notified the parties. Held, that the limitation in section 59, sub-section 2, should be construed to mean that notice of appeal should not be served after the expiration of five days from the closing of the Court of Revision; and also that the service in this case was within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him; and further, that service prior to the expiry of the five days was good service. *Scott v. Town of Listowel; Livingstone v. Town of Listowel*, 12 P. R. 77.—Rose.

Compelling Court of Revision to hear appeals. See *In re Marter and the Court of Revision of the Town of Gravenhurst*, 18 O. R. 243.

Appeal from Court of Revision in the North-West Territories. See *Angus v. Calgary School Trustees*, 16 S. C. R. 716.

See *Re McLean and The Township of Ops*, 45 Q. B. 325; *City of Brantford v. Ontario Investment Co.*, 15 A. R. 605, p. 60; *In re Roman Catholic Separate Schools*, 18 O. R. 606.

## II. TAXES.

### 1. When due.

On the 2nd April, 1880, a by-law was passed by the corporation of the city of Toronto imposing a rate for that year, and on the same day another by-law was passed providing for the time and mode of payment, declaring that all taxes over \$5 should be due on 4th June, and might be paid by three instalments, and that on prompt payment of the first instalment on the said 4th June, the time would be extended for the payment of the other instalments to days named, and so with the second instalment, etc., and on non-payment an additional charge of five per cent was imposed. It was also expressly provided that nothing therein contained should affect or diminish the collector's right, when he should deem it expedient, after a proper demand made, to proceed at any time before the said several days to collect the said taxes by distress, etc. By the statute R. S. O. (1877) c. 180, the right to distrain is given on neglect to pay in fourteen days after demand; and such demand shall



(c) *Distress and Sale.*

Held, that the insertion in the by-law of the discretionary power to the collector to distrain was improper and unauthorized. *Chamberlain v. Turner*, 31 C. P. 460.—C. P. D.

Per Rose, J.—Where there is sufficient distress on the property, and the municipality by its own laches put it out of its power to distrain, section 100 of R. S. O. (1877) c. 180, does not avail to give the right to collect by action. *Carson v. Veitch*, 9 O. R. 706.

The defendant, as collector of taxes of a village for the year 1886, on the 9th January, 1888, seized goods of the plaintiff as a distress for taxes assessed against the plaintiff upon the assessment roll for 1886. The plaintiff brought this action of replevin to recover the goods so seized:—Held, upon the evidence, that it was not shewn that the plaintiff was not duly and legally assessed for the taxes in respect of which the distress was made. *Lewis v. Brady*, 17 O. R. 377.—Q. B. D.

Section 120 of the Assessment Act, R. S. O. (1887) c. 193, provides that the clerk shall deliver the roll to the collector on or before the 1st day of October, or such other day as may be prescribed by by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about the 1st January, 1887:—Held, that the provisions of section 120, are directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid. *Id.*

Section 132 of the Act provides that every collector shall return his roll to the treasurer on or before the 14th December in each year, or such day in the next year, not later than the 1st February, as the council of the municipality of may appoint; section 133 provides that in case the collector fails or omits to collect the taxes or any portion thereof by the day appointed the council may by resolution authorize the collector, or some other person in his stead, to continue the levy and collection of the unpaid taxes in the manner and with the powers provided for by the general levy and collection of taxes. On the 11th December, 1886, (before the roll was delivered to the collector) the council passed a resolution that the collector proceed at once to collect the taxes for 1886; on the 7th March, 1887, another resolution instructing F. B. (the defendant), to enforce the payment of the uncollected taxes at once; on the 14th November, 1887, a resolution that P. B. collector, be instructed to have the roll for 1886 returned by the 24th inst.; and on the 17th January, 1888, (after the distress and before the replevy) a resolution that the time for the collection of the unpaid taxes for 1886 be extended until the 15th February, 1888, and that P. B. be authorized to collect until that date. The roll for 1886 remained in the hands of the defendant from the time of the delivery of it to him until after the distress and replevy:—Held, that the defendant was either the collector within the meaning of section 132 when he made the distress, and having the roll still in his hands

unreturned was authorized to make it, following *Newbury v. Stephens*, 16 Q. B. 65; or he was a person authorized as collector, or in the stead of the collector, by the resolution of the council to continue the levy and collection under section 133, which provides no limit of time in such case; and in either case the distress by him was valid. *Id.*

It was proved that the defendant on the 11th January, 1887, duly demanded the taxes distrained for:—Held that this demand was sufficient to warrant the distress, and the fact that the defendant several times afterwards demanded the same taxes did not affect the validity of the first demand, which was the only one required. *Id.*

In December, 1886, the plaintiffs sold to one H., who was a tenant of the defendant G., of certain premises in the city of Stratford, a safe under the ordinary lien agreement. Under the lease H. was to pay taxes. In October, 1887, after the first instalment of purchase money had been paid, H. surrendered his lease to G., who took over the chattels of H., (including the safe,) at a valuation, and assumed payment of the proportion up to that time of the taxes for 1887. G. then leased the premises to the defendant P., and sold to him the chattels (including the safe.) The defendant J. was the collector of taxes for the city of Stratford, and the roll for 1887 was delivered to him on the 26th October, 1887. It was provided by by-laws of the city that all taxes and assessments should be paid by the 31st December in each year, and that five per centum should be added for non-payment and collected as if the same had originally been imposed and formed part of such unpaid tax or assessment. On the 2nd November, 1887, J. served on P. a tax notice shewing the amount of taxes and requiring payment of these taxes on or before the 31st December "according to city by-law; after that date 5 cents on the dollar will be added to the above amount." On the 9th March, 1888, the plaintiffs demanded from the defendants P. and G. possession of the safe, but possession was refused, and on the same day the defendant J., acting under the instructions of the defendant G., issued his warrant to the defendant T. to distrain, and the safe was seized on that day and sold on the 15th March to the defendant G., whose object in buying was to protect P. No demand for payment of the taxes other than the demand served on the 2nd November, 1887, had been made:—Held, per Burton and Maclellan, J.J.A., that the sale (upon the evidence) was not made in good faith, and was void:—Held also, per Osler, J.A., that as to the collector and bailiff, though not as to the other defendants, the sale was made in good faith and would have protected them if otherwise valid, but that it was bad as to all the defendants on the ground that no demand had been made by the collector after the time fixed by the by-law for payment of the taxes. *Goldie v. Johns*, 16 A. R. 129.

Issue of execution by the receiver of taxes for city of St. John and arrest in default of payment—Respondent superior. See *McSorley v. Mayor, &c., of the City of St. John*, 6 S. C. R. 531.

See *Chamberlain v. Turner*, 31 C. P. 460, p. 71.

## III. SALE OF LAND FOR TAXES.

## 1. Proof of Taxes in Arrear.

In a suit commenced by a bill in the Court of Chancery, asking for an account of damages sustained by certain trespasses alleged to have been committed by the appellant (defendant) for an injunction and for possession, the principal question raised was whether a sale of the land for taxes, which took place on the 1st March, 1866, through and under which the respondent (plaintiff) claimed title, was valid. The evidence is fully set out in the report:—Held, that there was no evidence to shew that the land sold had been properly assessed, and, therefore, the sale of the land in question was invalid. [Strong and Gwynne, JJ., dissenting]. *McKay v. Crygler*, 3 S. C. R. 436.

On an application under the Vendors and Purchasers Act, R. S. O. (1877) c. 109, to compel a purchaser to carry out a purchase, it was shewn that the vendor claimed through a tax sale, and had declined to produce any further evidence of the validity of the tax sale than the treasurer's deed, and what might be obtained from the Treasurer's books, returns, and warrants, to which he referred the purchaser:—Held, that the treasurer's lists of lands in arrears for taxes furnished to the warden would be as valid evidence of the non-payment as the treasurer's warrant to the sheriff under 16 Vict. c. 182, s. 55, was held to be by the judgment in *Clarke v. Buchanan*, 25 Chy. 559; and that coupled with the warrant from the warden they would be conclusive, and would afford evidence of non-payment up to the time of the sale. *Re Morton and Lot No. 6 on Plan No. 580 in the County of York*, 7 O. R. 59.—Proudfoot.

A sale in 1880 of non-resident lands for taxes being impeached on the ground of no taxes being due, the original non-resident collector's rolls for 1877, 1878, and 1879, were produced, shewing amounts in arrear for each year respectively, which with interest amounted to the sum for which the land was sold. The due preparation of the warrant to sell, and advertising in the Official Gazette were also proved:—Held, sufficient proof of the taxes being due. *Fitzgerald v. Wilson*, 8 O. R. 559.—Chy. D.

On the 21st October, 1880, land was sold for taxes for the years 1877 and 1878, and on the 15th November, 1881, a tax deed executed. The patent from the Crown issued in 1878. There was no evidence as to the right of the patentee of the land previous to the issuing of the patent, nor that the Crown Lands Commissioner had made any return to the treasurer of the land having been treated as a free grant, sold or agreed to be sold by the Crown under section 106 of R. S. O. (1877) c. 180, so as to render it liable to be assessed prior to the year 1878:—Held, there not being any taxes proved to be in arrear for three years as required, the sale and tax deed were invalid. At the trial the plaintiff produced his patent. The defendant, in answer thereto, put in the tax deed:—Held, that the plaintiff by production of his patent made out a prima facie case, and the defendant, relying on his tax deed, was bound to prove the sale and arrears for three years, that is, that some portion thereof was in arrear for three years. *Stevenson v. Traynor*, 12 O. R. 904.—C. P. D.

## 2. Duties of Municipal Officers as to Arrears of Taxes.

By R. S. O. (1877) c. 180, ss. 108, 109, the county treasurer is to furnish the clerk of each municipality with lists of lands three years in arrear for taxes, and such clerks are to keep the lists in their offices for inspection, and are to give copies to the assessors who are to notify the occupant and owner, if known, by means of the assessment notice, that the land is liable to be sold for arrears of taxes. By sections 155 and 156 a tax deed is to be final and binding on the former owners and all claiming under them if the lands are not redeemed in one year, and the deed is to be valid against all parties if not questioned by some interested person within two years from the time of sale. The land in question was, in 1879, assessed as non-resident. Defendant became the owner in 1878, and having come to reside thereon in the former year, improperly paid these taxes to the collector instead of to the treasurer. No notice of arrears was given to the then owner and occupant, and they were not entered on the roll for 1882, as required by the Act. The defendant paid all taxes subsequently demanded, including those for 1882, but the land was, notwithstanding, put up and sold for the taxes of 1879, a trifling sum, on the 30th December, 1882. The treasurer's deed was dated the 15th February, 1884:—Held, that the sale could not be supported, as the notice required by section 109, that the land was liable to be sold for taxes, had not been given, and that such irregularity was not cured by sections 155 and 156 of the Act. *Hutchinson v. Collier*, 27 C. P. 249; *Church v. Fenton*, 28 C. P. at p. 404, doubted by Wilson, C. J.:—Per Armour, J. The substantial compliance with the provisions of R. S. O. (1877) c. 180, ss. 108-111 inclusive, is a condition precedent to the right to sell non-resident lands for taxes:—Quere, per Wilson, C. J., whether there was not evidence that the land was not sold in a "fair, open and candid manner." Observations on the impropriety of tax sales as now conducted under legislative authority. *Derwent v. ...*, 11 O. R. 222.—Q. B. D.

Held, that the duties of the assessor and township clerk, under sections 109, 110 and 111, of R. S. O. (1877) c. 180, are imperative and not directory merely, and their performance is conditional to the validity of a tax sale:—*Burton, J. A., diss. Donovan v. Hogan*, 15 A. R. 432.

See *Smith v. Midland R. W. Co.*, 4 O. R. 494, p. 81; *Haisley v. Somers*, 15 O. R. 275, p. 78; *Hall v. Farquharson*, 15 A. R. 457, p. 78.

## 3. Warrant to Sell.

It was objected that the warrant was not addressed to any one. It recited that the treasurer had submitted to the warden the land liable to be sold, and proceeded: "Now, I, the warden, command you," etc. This was given to the treasurer, was produced by him, and was acted on by him. The warrant purported to be drawn up pursuant to 32 Vict. c. 36, s. 128:—Held, that the warrant was sufficient. *Fitzgerald v. Wilson*, 8 O. R. 559.—Chy. D.

The court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice re-

sulting from 1

the warrant to

In September Keppel, in the a tract of land Indians, was a Government, v the Indian land plaintiff. In acres, was sold due for the year sold to defende the defendant for taxes in 18 seal of the coun "to levy upon inafter mention thereon and se and attached to lands to be sold plaintiff. Thee attached together length of the ticated by the seal of the coun sessment Act, required to ret to be sold for t the treasurer, under the hand county, &c.:— the court below tion being surr came ordinary granted became the list and wa tire instrument ments of the st any irregularit section of R. S Henry, J.J., d S. C. R. 239.

See *Flanagan*

Held, that t the township o *Beckett v. John*

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A purchase nominally by o in reality ma benefit of the of the county, in an action position absolu a purchaser at veyance to the land remained guilty of the c cured by the p a. 189, althoug action was n *Smith*, 17 O.

Agreements sheriff's sale.



sulting from literal inaccuracy in the frame of the warrant to sell. *Ib.*

In September, 1857, a lot in the township of Keppel, in the county of Grey, forming part of a tract of land surrendered to the crown by the Indians, was sold, and in 1869, the Dominion Government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to 1869, to one D. K., who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1874. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land hereinafter mentioned for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrants were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county. By section 128 of the Assessment Act, 32 Vict. c. 36, (O.), the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, etc., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c. :—Held, affirming the judgment of the court below, (1) That upon the lands in question being surrendered to the crown, they became ordinary unpated lands, and upon being granted became liable to assessment; (2) That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th section of R. S. O. (1877) c. 180, (Fournier and Henry, J.J., dissenting.) *Church v. Fenton*, 5 S. C. R. 239.

See *Flanagan v. Elliott*, 12 S. C. R. 435, p. 63.

#### 4. Conduct of Sale.

Held, that the purchase under a tax sale by the township clerk, was a voidable transaction. *Beckett v. Johnson*, 32 C. P. 301.—C. P. D.

Held, that a reeve of the township in which the land sold for taxes are situate, is not disqualified ex-officio, from purchasing. *Totten v. Traux*, 16 O. R. 490.—Boyd.

A purchase of land at a tax sale was made nominally by one G. for the plaintiff, but was in reality made with the money and for the benefit of the plaintiff's husband, the treasurer of the county, who conducted the sale :—Held, in an action of trespass, that the treasurer's position absolutely debarred him from becoming a purchaser at the sale, and the sale and conveyance to the plaintiff were void; and as the land remained in the hands of the persons guilty of the original fraud, the sale was not cured by the provisions of R. S. O. (1887) c. 193, s. 189, although it took place in 1883, and the action was not brought till 1889. *Mooney v. Smith*, 17 O. R. 644.—Q. B. D.

Agreements between intending purchasers at sheriff's sale. See *Keefer v. Roaf*, 8 O. R. 69.

Owner's presence at sale held not to estop him from complaining of irregularities in sale. See *Claxton v. Shibley*, 9 O. R. 451.

At a sale of land for taxes, the treasurer is bound under R. S. O. (1877) c. 180, s. 137, if he sells any particular part of a lot, to sell in preference such part as he may consider best for the owner to sell first, and section 129 does not relieve him from this duty; and for such purpose he must obtain the necessary information to enable him to arrive at a sound judgment thereon. Section 129 applies to the duty of the treasurer before the sale; section 138 to his duty at and after the sale, and before he grants his certificate. History of the provisions of these sections traced. *Haisley v. Somers*, 15 O. R. 275.—Q. B. D.

Semble, it is sufficient to sell so much of a lot as may be necessary to secure the payment of the taxes due, and the particular part need not be determined until the certificate is given to the purchaser. *Ib.*

Where the treasurer, before he granted his certificate, knew that there was a house upon the lot, and although within a few minutes walk of his office, did not take the trouble to ascertain on what part of the lot the house was situated, but gave his certificate describing the part sold so as to include the greater part of the house :—Held, (affirming on this point the judgment of Proudfoot, J., 13 O. R. 600,) that the sale not having been fairly conducted was invalid. *Ib.*

The purchase money was \$1, although the value with the improvements was about \$1,000, no inquiry having been made as to its value, and the township officials having apparently taken no pains to acquire any information about it beyond what appeared on the assessment roll. Semble, per Hagarty, C. J. O., Patterson, and Oaler, J.J. A., that the sale would be void as not having been under the circumstances openly and fairly conducted within the meaning of section 155 of R. S. O. (1877) c. 180. *Hall v. Farquharson*, 15 A. R. 457.

The duty of the county treasurer in reference to tax sales observed upon : *Hall v. Hall*, 2 E. & A. 569; *Haisley v. Somers*, 13 O. R. 600, considered. *Ib.*

Semble, a sale for more taxes than are actually due, cannot be supported under section 137, where section 155 does not apply in consequence of the sale not having been openly and fairly conducted. *Yokham v. Hall*, 13 Chy. 235; *Edinburgh Life Ins. Co. v. Ferguson*, 32 Q. B. 253, followed. *Ib.*

Semble, the sale was not "fairly conducted," as the advertisement describing the lands as unpated, was of such a character as to damp the sale. *Scott v. Stuart*, 18 O. R. 211.—Chy. D.

See *Haisley v. Somers*, 13 O. R. 600, p. 79; *Deverill v. Coe*, 11 O. R. 222, p. 76; *Donovan v. Hogan*, 15 A. R. 432, p. 64.

#### 5. Certificate of Sale.

A sheriff's certificate of sale for taxes is made for the purpose of giving the purchaser certain rights, in order to the protection of the property,



until it is redeemed or becomes his absolutely, and forms no part of his title. The description in it being defective does not invalidate the sheriff's deed, nor, *Semble*, would its absence. *Nelles v. White*, 29 Chy. 339.—*Spragge*. See *S. C.*, *sub nom. White v. Nelles*, 11 S. C. R. 587.

#### 6. Redemption of Lands Sold.

Held, that the certificate of the treasurer that the land was not redeemed is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty. More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton and Lot No. 6 on Plan No. 580 in the County of York*, 7 O. R. 59.—*Proudfoot*.

#### 7. Deeds for.

The proper officers to execute the deed of land sold for taxes are the warden and treasurer at the time the deed is demanded, not the persons holding those offices at the time of the sale. *Ferguson v. Freeman*, 27 Chy. 211.—*Chy. D.*

Held, that the words "be the same more or less," following the description of the quantity of land, improperly inserted in the sheriff's deed, might be rejected as surplusage. *Nelles v. White*, 29 Chy. 338.—*Spragge*. See *S. C.*, *supra*.

At a sale of part of a certain lot for taxes the treasurer, who made the sale, marked in the sale book the part sold as the south one-tenth, but afterwards gave a certificate for the north one-tenth, and this was finally conveyed to the defendant on December 5, 1884; the bid was for one-tenth of an acre only.—Held, that the above state of facts did not invalidate the tax sale and the title of the defendant to the north one-tenth. *Haisley v. Somers*, 13 O. R. 600.—*Proudfoot*.

A sheriff's deed of lands sold at a tax sale described them as "forty-five acres of the south half of lot 17 in the 4th concession" of King; and a deed given to one S. contained an exception, "save and excepting out of the same forty-five acres sold for taxes:—Held, that the exception was void for uncertainty; and a subsequent release of lands purchased at the tax sale by the sheriff's vendee to S. had sufficient to operate upon and was effectual as a release. *Pearson v. Mulholland*, 17 O. R. 502.—*Q. B. D.*

Certain patented lands, which were sold for taxes, were described in the advertisement as unpatented, and in the treasurer's deed as "all that," etc., "being composed of all the right, title, and interest of the lessee, locattee, licensee, or purchaser from the Crown, in and to lot," etc. Held, affirming the decision of *Boyd, C.*, that the treasurer by his deed having purported to sell the interest only of a locattee or purchaser from the Crown, the power he exercised was directed to that particular estate only, which, being non-existent, there was nothing that the power could operate upon, and that the deed was invalid. *Scott v. Stuart*, 18 O. R. 211.—*Chy. D.*

The act provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with:—Held, per *Strong, Taschereau and Gwynne, JJ.*, that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be imposed:—Held, per *Ritchie, C. J.*, and *Patterson, J.*, that the deed could not be invoked in the present case to cure any defects in the proceedings as it was not delivered to the purchaser until after the suit commenced; therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the act, rendered the sale void. *O'Brien v. Coggswell*, 17 S. C. R. 420.

#### 8. Objections Cured by Statute.

*Quere*, (per *Spragge, C.*) whether the provisions of section 155 of the Assessment Act of 1869 apply where a sale of land took place before the Act, but the deed was not executed until after; or whether it applies only to a case where both were before or both after the enactment. *Ferguson v. Freeman*, 27 Chy. 211.

*Quere*, whether since 32 Vict. c. 36, and preceding statutes, when some taxes are in arrear, but a sale has been made for more, the defect is cured. *Nelles v. White*, 29 Chy. 338.—*Spragge*. See *S. C.*, *sub nom. White v. Nelles*, 11 S. C. R. 587.

Per *Fournier, Henry, and Gwynne, JJ.*—Where it appears that no portion of the taxes has been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by section 155 of 32 Vict. c. 36, (Ont.) *Strong, J.*, *dicta*, holding that section 155 applied to a case where any taxes were in arrear at the date of the sale. *McKay v. Cryslar*, 3 S. C. R. 436.

*Quere*, as to the effect of the curative provisions of section 156 of the Assessment Act, R. S. O. (1877) c. 180, since the decision of the Supreme Court, in *McKay v. Cryslar*, 3 S. C. R. 436, and whether a tax deed may be questioned for irregularities in the assessment or in the proceedings prior to sale after the lapse of the two years. *Jeffery v. Hewis*, 9 O. R. 364.—*C. P. D.*

Ejectment under a tax deed by the assignee of the purchaser, who was the township clerk. The sale was for the taxes alleged to be due for the years 1871 and 1872. In the assessment roll for 1871 the land was described as "S. E. pt. 12, 53 acres;" and for 1872 as "S. E. pt. 12, 53 acres;" and it appeared that the land, whether taken as the south or south-east part, included portions of the lot owned respectively by F. and C., and on which they had paid their taxes; and also certain lots of a village laid out on part of 12:—Held, that the plaintiff's title failed; for that the assessment was illegal. Per *Wilson, C. J.*, also that the evidence, set out in the report of this case, showed that the defendant had, as between himself and the municipality, paid the taxes upon his part of the lot:—Held, also, that the defect was not cured by section 155 of the

Assessment Act.  
*Beckett v. Johnson*

Where it appeared that the treasurer was correct in regard to the taxes authorized by 32 Vict. c. 36, taken place for the required length of time thereafter, while in two years it was not clear that the county clerk and properly complicated the provisions 111 and 112 of the *Midland R. W.*

Certain lands, having been sold in 1881, being one-eleven acres, the sale was on foot, J., who held a. 155, did not maxim de minimis but, on an appeal O. R. 451,) this *Boyd, C.*—In Y excess of statute and its imposition the sale. There originally imposed and the owner met by the advertisement ing forward the steps to have it allowed for payment afterwards invoked Per *Ferguson*, cents and the commission upon it the words "error" in section 150 of the provision is to be valid. *Yokham* and distinguished 295.—*Chy. D.*

It was objected that in 1881 neither returned the land were, and further the assessment required as required by *Semble*, that these and would be cured R. 451.—*Proudfoot*

It appeared that the sale it was not patented or unpatented (1877), c. 180, as *Haisley v. foot*. See *Scott v.*

Though the owner was not notified c. 180, s. 109, of sell:—Held, that was not cured by *Haisley v. Somers*

In 1882 a lot seemed for 1879 as the taxes of the lot therefor being ex

Assessment Act of 1868, 32 Vict. c. 36 Ont. *Beckett v. Johnston*, 32 C. P. 301.—C. P. D.

Where it appeared that, as far as the county treasurer was concerned, all the steps taken by him in regard to the sale were regular, and authorized by 32 Vict. c. 36, and that the sale had taken place for taxes actually in arrear for the required length of time, followed by a tax deed thereafter, which had not been questioned within two years:—Held, that the sale and deed were not afterwards impeachable, although it was not clear on the evidence, whether the county clerk and the assessor had or had not properly complied with the requirements of sections 111 and 112 of the said Act. *Smith v. Millard R. W. Co.*, 4 O. R. 494.—Boyd.

Certain lands, worth from \$300 to \$800 having been sold in November, 1881, for \$6.06 taxes, being one-eleventh in excess of taxes really due, the sale was on this ground set aside by Proudfoot, J., who held that R. S. O. (1877), c. 180, s. 155, did not cure the error, and that the maxim *de minimis non curat lex* did not apply; but, on an appeal to the Divisional Court, (9 O. R. 451,) this judgment was reversed. Per Boyd, C.—In *Yokham v. Hall*, 15 Chy. 335, the excess of statute labor tax was clearly illegal, and its imposition being unjustifiable vitiated the sale. There was no illegal excess of tax originally imposed upon the land in this case, and the owner must be regarded as being notified by the advertisement of sale of the error in carrying forward the amount, and having taken no steps to have it remedied, pending the period allowed for payment or redemption, he cannot afterwards invoke its aid to annul the tax sale. Per Ferguson, J.—The difference of twenty cents and the calculation of interest and commission upon it must fall within the meaning of the words "error or miscalculation" mentioned in section 150 of R. S. O. (1877), c. 180, and if so the provision is that the tax deed shall not be invalid. *Yokham v. Hall*, 15 Chy. 335, considered and distinguished. *Claxton v. Shibley*, 10 O. R. 295.—Chy. D.

It was objected to the regularity of the sale, that in 1881 neither the assessor nor the clerk returned the lands as occupied, as in fact they were, and further that the clerk did not examine the assessment roll when returned by the assessor as required by R. S. O. (1877), c. 180, s. 111: Semble, that these are matters of procedure only, and would be cured by section 155. *S. C.*, 9 O. R. 451.—Proudfoot.

It appeared that in the advertisement of the sale it was not stated whether the land was patented or unpatented:—Held, that R. S. O. (1877), c. 180, ss. 150, 155 did not cure this defect. *Haisley v. Somers*, 13 O. R. 600—Proudfoot. See *Scott v. Stuart*, 18 O. R. 211.

Though the owner of the land was known, he was not notified as required by R. S. O. (1877), c. 180, s. 109, of the assessment and liability to sell:—Held, that this was an omission which was not cured by R. S. O. (1877), c. 180, s. 155. *Haisley v. Somers*, 13 O. R. 600.—Proudfoot.

In 1882 a lot of land in the village of F., assessed for 1879 as "non-resident," was sold for the taxes of the latter year, the treasurer's deed therefor being executed in 1883. In an action

of ejectment brought by the purchaser against the original owner in 1888, it appeared that in 1882 the list of lands liable to be sold for arrears of taxes required by section 108, R. S. O. (1877), c. 180, and which contained the lot in question, was sent by the treasurer to the clerk of the village, but that it had been lost, and although the land was occupied at the time, it was not returned "as occupied" nor was the owner notified that it was liable to be sold for taxes as provided for by section 109, R. S. O. (1877), c. 180:—Held, (Boyd, C., dissenting) that the sale was invalid, and that notwithstanding the lapse of time these defects were not cured by sections 155 or 156, R. S. O. (1877) c. 180. Per Proudfoot, J.—The want of notice to the defendant of the arrears and of the liability of his land to be sold for them was the want of an essential requisite to the power of sale. Per Ferguson, J.—The land having become occupied and having sufficient distress on it to satisfy the taxes, should, notwithstanding the errors of the municipal officers, be considered as if it had been returned "occupied" and the sale under such circumstances being forbidden by section 130, R. S. O. (1877), c. 180, was not cured by section 156 of that statute. Per Boyd, C.—The omission to raise within the proper time the objection that section 109, R. S. O. (1877), c. 180 was not complied with is cured by section 156: that section being in the nature of a statute of limitations as to such objection. *Datzel v. Mallory*, 17 O. R. 80.—Chy. D.

See *Church v. Fenton*, 5 S. C. R. 239, p. 77; *White v. Nelles*, 11 S. C. R. 587; *Deverill v. Coe*, 11 O. R. 222, p. 76; *Donovan v. Hogan*, 15 A. R. 432, p. 64; *Hall v. Farquharson*, 15 A. R. 457, p. 78; *Mooney v. Smith*, 17 O. R. 644, p. 77; *O'Brien v. Cogswell*, 17 S. C. R. 420, p. 80.

#### 9. Time for Impeaching.

Under section 1 of 37 Vict. c. 15, O., a tax deed is valid and binding unless questioned before a court of competent jurisdiction within two years by a person interested. One O., the defendant herein claiming under a sheriff's deed, given under an execution against lands, and also under a deed from one M., filed a petition under the Quietting Titles Act within two years from the obtaining of a tax deed by the plaintiff, who became contestant in the proceedings, and filed his claim under the tax deed, but, on the opposition of O., afterwards withdrew and abandoned it. Afterwards an order was made by the referee dismissing O.'s petition, which order was affirmed by a Judge on appeal, as she had failed to make out anything. At the time the execution issued under which O. purchased one of the parties to the suit was dead, and the interest of the others had passed to M. by conveyance from them to M. in trust to sell and apply the proceeds to pay their creditors, and the deed from M. was a breach of trust by M. with O.'s knowledge:—Held, that O. was not a person interested within the meaning of the Act, for that one of the parties being dead the sheriff's deed conveyed nothing, and neither did the deed from M., being a breach of trust. Per Osler, J., the proceedings under the Quietting Titles Act were a questioning of the deed within the meaning of

37 Vict. c. 15. Per Wilson, C. J., the proceedings had no such effect, as the questioning must be a successful questioning. *McNab v. Peer*, 32 O. P. 545.—C. P. D.

The Statute of Limitations does not begin to run against a tax purchaser until the period of redemption has expired. *Smith v. Midland R. W. Co.*, 4 O. R. 494.—Boyd.

Held, following *Hutchinson v. Collier*, 27 C. P. 249, that the two years given by section 156 of R. S. O. (1877), c. 180, within which a tax deed can be questioned, is to be computed from the giving of the deed and not from the time of the sale. The court, though not satisfied with the decision as arrived at in that case, considered they were bound by it. *Lytle v. Brodby*, 10 O. R. 550.—C. P. D. See *Claxton v. Shibley*, *ib.*, at p. 298.

Held, affirming the judgment of *Ferguson, J.*, that the two years limited by section 156, R. S. O. (1877), c. 180, for impeaching a tax sale run from the time of making the tax deed, not from that of the auction sale. The word sale in that section can be properly understood only in the sense of conveyance. *Hutchinson v. Collier*, 27 C. P. 249; *Church v. Fenton*, 28 C. P. 204, approved of. The contrary view expressed in *Smith v. Midland*, 4 O. R. 494; *Lytle v. Brodby*, 10 O. R. 550; *Claxton v. Shibley*, 10 O. R. 295; and *Deverill v. Coe*, 11 O. R. 222, dissented from. *Donovan v. Hogan*, 15 A. R. 432.

See *Daniel v. Mallory*, 17 O. R. 80, p. 82.

#### 10. Lien of Tax Purchaser.

Held, that R. S. O. (1877), c. 180, s. 165, does not apply in a case where there have been no taxes in arrear at the time of the sale of the land for taxes. *Charlton v. Watson*, 4 O. R. 489.—*Ferguson*.

#### 11. Other Cases.

Where the crown land commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantees, B., who had paid only part of the purchase money, and the lands were afterwards sold for taxes:—Held, the tax sales were of no validity as against M., to whom a patent was subsequently issued. *O'Grady v. McCaffray*, 2 O. R. 309.—Chy. D.

Since 16 Vict. c. 182, s. 56, a tax sale of unpatented lands conveys to a purchaser only such rights in respect of the land as the original locatee enjoyed. *ib.*

Under the Assessment Act of 1869, 32 Vict. c. 36, the lands of railways might be sold for the non-payment of taxes. *Smith v. Midland R. W. Co.*, 4 O. R. 494.—Chy. D.

Tax sale where no taxes in arrear.—Cancellation of deed. See *Charlton v. Watson*, 4 O. R. 489.

Agreements between intending purchasers at sale. See *Keefer v. Roof*, 8 O. R. 69.

Held, that the fact that the purchase money was not paid for a week or two after the sale

did not invalidate the sale. *Haisley v. Somers*, 13 O. R. 600.—Boyd.

Held, that the defendant was entitled under R. S. O. (1877), c. 95, s. 4, though not under R. S. O. (1877), c. 180, s. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses. *ib.*

Purchase at tax sale by lessee during tenancy. See *Heyden v. Cattle*, 15 O. R. 257.

#### IV. MISCELLANEOUS CASES.

Mandamus to municipal corporation to levy sinking fund. See *Clarke v. Town of Palmerston*, 6 O. R. 616.

Invalidity of assessment for want of notice. See *Bain v. City of Montreal*, 8 S. C. R. 252.

Action to recover taxes paid under belief that assessment valid. *ib.*

Action to have assessment quashed after payment of taxes under protest. See *Ex parte James D. Lewin*, 11 S. C. R. 484.

Per Strong, J. Every contribution to a public purpose imposed by superior authority is a "tax." *Les Ecclesiastiques de St. Sulpice de Montreal v. City of Montreal*, 16 S. C. R. 399.

#### ASSESSMENT ROLL.

See ASSESSMENT AND TAXES—PARLIAMENTARY ELECTIONS.

#### ASSESSORS.

See ASSESSMENT AND TAXES.

#### ASSETS.

See EXECUTORS AND ADMINISTRATORS.

Per Proudfoot, J.—By the effect of the Judicature Act all distinction between legal and equitable debts, and legal and equitable remedies is abolished. Debts of every kind are now recoverable in one forum, and the same forum enables creditors to reach every kind of assets, whether formerly legal or equitable, and the necessary result is, that the distinction between legal and equitable assets is at an end, and upon this subject the rules of law and equity being at variance, the latter are to prevail. *Bank of Toronto v. Hall*, 6 O. R. 653.

There can be no marshalling of assets in favour of a charity. *Becher v. Hoare*, 8 O. R. 328.—*Ferguson*.

Debts owing to the defendant from persons living in Ontario are assets in Ontario which may be rendered liable to the judgment within the meaning of Rule 45 (e) O. J. Act. (See Con. Rule 271.) *Purres v. Slater*, 11 P. R. 507.—*Ross*.

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**ASSIGNMENT.**

- I. FOR THE BENEFIT OF CREDITORS—See BANKRUPTCY AND INSOLVENCY.
- II. EQUITABLE ASSIGNMENT—See EQUITABLE ASSIGNMENT.
- III. FRAUDULENT ASSIGNMENT—See BANKRUPTCY AND INSOLVENCY—FRAUDULENT CONVEYANCES.
- IV. OF CONTRACTS—See CONTRACTS.
- V. OF CHOSE IN ACTION—See CHOSE IN ACTION.
- VI. OF GOODS AND CHATTELS—See BILLS OF SALE AND CHATTEL MORTGAGES.
- VII. OF STOCK—See COMPANY.
- VIII. OF DOWER—See DOWER.
- IX. OF SUBJECT MATTER OF INSURANCE—See INSURANCE.
- X. OF POLICIES—See POLICIES.
- XI. OF JUDGMENTS—See JUDGMENT—PRINCIPAL AND SURETY.
- XII. OF LEASES—See LANDLORD AND TENANT.
- XIII. OF MORTGAGES—See MORTGAGE.
- XIV. OF PATENTS—See PATENT OF INVENTION.
- XV. OF SECURITIES—See PRINCIPAL AND SURETY.

Equitable assignment of goods. See *McMas-ter v. Garland*, 31 C. P. 320; 8 A. R. 1.

Absolute assignment of bond intended as a security only. See *Livingston v. Woot*, 27 Chy. 515.

Assignment of money in court—solicitor's lien. See *Yemen v. Johnston*, 11 P. R. 231.

**ASSISTANCE (WRIT OF).**

The application of R. S. O. (1877) c. 66 is not limited to purely common law actions pending in those courts before the Judicature Act, but extends to all writs of execution; and a writ of assistance in execution of a decree of the Court of Chancery for the recovery of land, is a writ of execution within the meaning of section 11 of that Act, and is not in force after one year from the date, if unexecuted, unless renewed. *Adamson v. Adamson*, 12 P. R. 21.—Boyd.

**ASSIZES.**

See COURT OF ASSIZE.

**ASSURANCE.**

See INSURANCE.

**ATTACHMENT.**

- I. OF DEBTS—See ATTACHMENT OF DEBTS.
- II. OF GOODS—See ABSCONDING DEBTOR.
- III. OF THE PERSON—See CONTEMPT OF COURT—EVIDENCE—EXAMINATION OF JUDGMENT DEBTOR.

**ATTACHMENT OF DEBTS.**

- I. WHO MAY ATTACH, 86.
- II. WHAT MAY BE ATTACHED, 86.
- III. PROCEEDINGS BY BILL IN EQUITY, 90.
- IV. EXAMINATION OF JUDGMENT DEBTOR—See EXAMINATION OF JUDGMENT DEBTOR.
- V. DIRECTING ISSUE TO BE TRIED, 90.
- VI. APPEALS, 91.
- VII. PRACTICE, 92.
- VIII. COSTS, 92.
- IX. PAYMENT BY GARNISHEES, 92.
- X. UNDER ABSCONDING DEBTORS' ACT—See ABSCONDING DEBTOR.
- XI. IN DIVISION COURTS—See DIVISION COURTS.

**I. WHO MAY ATTACH.**

Held, that a judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O. (1877), c. 50, s. 304, nor garnish debts due to him. *Ghent v. McColl*, 8 P. R. 428.—Dalton, Q. C.

A defendant who has obtained execution upon a rule of court for the judgment of costs of the day by the plaintiff, is under R. S. O. (1877), c. 67, s. 12, and c. 66, s. 72, a judgment creditor, and entitled to garnish moneys due by the plaintiff. *Elliot v. Capell*, 9 P. R. 35.—Dalton, Master.—Osler.

The person to receive payment under an order for payment of costs only, is entitled to an order attaching debts due or accruing due to the person to pay. Any doubt existing upon the English cases and the O. J. Act rules, is cleared up by R. S. O. (1877), c. 66, s. 72, *Re Irvine*, a Solicitor, 12 P. R. 297.—Dalton, Master.

**II. WHAT MAY BE ATTACHED.**

In garnishee proceedings a court of law will as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which, or by which the debt attached has been recovered where the garnishee has notice of the lien. *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437.—Osler.

A court of equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in equity to the prejudice of the attorney's lien for costs in that suit. *Ib.*

A debt is garnishable where it consists of money due under an award and decree of the Court of Chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount in such a case is finally ascertained, execution may be issued against the garnishee, although he still disputes his liability, and the Judge is not bound to direct an issue. *In re Sato v. Hubbard*, 8 P. R. 445.—Osler.

The defendant's father devised his estate to trustees upon the trust, among others, "to pay my son A. (the defendant) the interest of the sum of \$800 annually during the term of his natural life." An order was made by the Master in Chambers, directing the trustees to pay over the interest from time to time accruing to the plaintiff, who was a judgment creditor of the son. *Lloyd v. Wallace*, 9 P. R. 335.—Dalton, Master.

Held, affirming the judgment of Armour, J., that a negotiable promissory note, not yet due, is not a debt which may be attached within the meaning of Rule 370 of the O. J. Act (Con. Rule 935). *Jackson v. Cassidy*, 2 O. R. 521.—Q. B. D.

Held, reversing the judgment of the court below, that under the garnishee clauses of the U. L. P. Act of Prince Edward Island transcripts of ss. 60 to 67 of the English C. L. P. Act, 1854, an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor, and that payment of the amount by the garnishee to the judgment creditor of the payee, in pursuance of a Judge's order, is a valid discharge. *Roblee v. Rankin*, 11 S. C. R. 137.

G. was entitled under the will of C. to a life estate in land, and to the proceeds of personality to be paid to her by the executors. Judgment creditors of G. had had a fi. fa., goods returned nulla bona, but had not sued out a fi. fa. lands, when a receiver was appointed to the estate of C., whereupon the judgment creditors by petition, before the passing of the Ontario Judicature Act, applied for an order that the receiver might be directed to pay their judgment out of G.'s money in his hands; or that they might attach and sell G.'s life estate or, that the tenants of the realty might be directed to attorn to the petitioners and that they might be put in receipt of the rents and profits:—Held, (on appeal from Proudfoot, V. C.) that such petition had been properly dismissed, for the creditors were not in a position when they presented it either to garnish the personal estate, if that could have been done under the A. J. Act, 1873, or to seize the real estate under execution; and they had therefore no rights which the appointment of a receiver interfered with. But, Held, following *Re Cowan's Estate*, L. R. 14 Chy. D. 638, that the petitioners might now garnish the moneys in the hands of the receiver; and it being alleged that a fi. fa. lands had since issued, the court upon payment of costs granted leave to the petitioners, under the prayer for general relief, to sue out such writs as they might be advised. *Leaming v. Woon*, 7 A. R. 42., but see next case.

The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of

the sale of such estate when made by the trustees, is not attachable under rule 370 (Con. Rule 935) relating to the attachment of debts. It is only a debt legally or equitably due or accruing due, that is to say, debitum in presenti solvendum in futuro, which is capable of attachment; moneys which may or may not become payable by a trustee to his cestui que trust are not debts. The case of *Leaming v. Woon*, 7 A. R. 42, is not to be followed, being founded on *Re Cowan's Estate* 18 Chy. D. 638, which is now overruled by *Webb v. Stenton*, 11 Q. B. D. 530. Judgment of Ferguson, J., (15 O. R. 66), reversed. The proper course in such a case is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of fi. fa. against goods or lands. *Stuart v. Grough*, 15 A. R. 299.

A judgment creditor does not, properly speaking, become a creditor of the garnishee by service of an attaching order upon the latter. The garnishee continues to be debtor to his own creditor, the judgment debtor, until he has paid the amount owing into court, or to the attaching creditor, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied:—Held, therefore, that the plaintiff, who had obtained a garnishee order, garnishing a debt due from the Brockville and Ottawa Railway Company to W. S., his judgment debtor (which railway was now represented by the defendants), was not a "creditor" of the said company, holding a bona fide claim against it within 27 Vict. c. 57, s. 10, (Dom.) *Wardrope v. Canadian Pacific Railway Company*, 7 O. R. 321.—Ferguson.

E. A. conveyed real and personal estate to one B. upon trust, to convert the same into money, and pay debts, etc., and as to any balance remaining, upon trust to pay the same to R. A. son of E. A., or if B. should see fit he might invest the same in the purchase of a homestead, and convey the same to R. A. in fee:—Held, reversing the judgment of the County Court, that there was no debt due from B. to R. A. which could be garnished by the creditors of R. A. *McKindsey v. Armstrong*, 10 A. R. 17.

McLeod contracted with Hawkins to erect a house, for which he was to receive \$1,225; \$300 when the frame was up, \$300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed on or before the 3rd February, 1884. McLeod went on with the work and received the two sums of \$300, but he had not completed the building on the 3rd of February, 1884. He, however, continued the work till after that time, and until after the 1st of April, when the building being still unfinished, Hawkins entered, took possession, and completed it. McCraney & Son, having a judgment against McLeod, obtained and served an attaching order and garnishing summons on Hawkins, the garnishee, on the 15th of March, 1884:—Held, that at the time of serving the attaching order no debt existed according to the terms of the contract, and no promise to pay had arisen by implication, and therefore there was nothing upon which the attaching order could operate. *McCraney v. McLeod*, 10 P. R. 539.—Dalton, Master—Rose.

A judgment due to his judgment creditor, attaching order, an assignment of the time of the hands the great to the estate to demand; and be of the attachment assigned to G. the estate of S. tor was entitled from the insol that was in the attaching order. Leod, 10 P. Parker v. How

By the judgment was found to be ordered to pay some interlocutory. Subsequent of the plaintiff a Division Court defendant to pay plaintiff's costs defendant's interest paid \$115 into court after judgment costs coming to attachable debt by the service properly payable it was ascertained ant could not ascertained at as it was by his money paid into ment was to be due to the plaintiff the same debt Macpherson v.

R. S. O. (1877) plate any alteration remains strictly but makes a intervenes. A garnished rents to the judgment days had arrived to payment over portion of the the day of service Quere, whether against a mortgage Toronto Printing Master—Galt.

Held, reversed J., (13 P. R. 26) an insurance contract unadjusted are provisions of Code 11 Q. B. D. 518 299, considered, 13 P. R. 30

Held that the portion, wherefore not subject 933. B.



A judgment creditor seeking to garnish funds due to his judgment debtor by S., served an attaching order upon the assignee of S. under an assignment for the benefit of creditors. At the time of the service the assignee had in his hands the greater part of the moneys belonging to the estate of S., but had not declared a dividend; and before he did so, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.:—Held, that the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount that was in the hands of the assignee when the attaching order was made. *McCraney v. McLeod*, 10 P. R. 539, explained and followed. *Parker v. Howe*, 12 P. R. 351.—Dalton, *Master*.

By the judgment in this action the defendant was found to owe the plaintiff \$115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment certain creditors of the plaintiff issued garnishment process from a Division Court, attaching all debts due from defendant to plaintiff. After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid \$115 into the Division Court, having previously paid another sum of \$115 to the sheriff to procure his release from arrest under a *capias* after judgment in this action:—Held, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the garnishment process, and properly payable into the Division Court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into court, as it was by his own default; and therefore the money paid into court pursuant to the attachment was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff. *Macpherson v. Tisdale*, 11 P. R. 261.—Boyd.

R. S. O. (1877), c. 136, ss. 2-6, does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but makes a severance where a third interest intervenes. And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived:—Held, that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order:—*Quere*, whether the rents could be garnished against a mortgagee of the landlord. *Massie v. Toronto Printing Co.*, 12 P. R. 12.—Dalton, *Master*—Galt.

Held, reversing the decision of *Falconbridge*, J., (13 P. R. 26), that moneys due or owing from an insurance company to a policy holder although unadjusted are garnishable under the enlarged provisions of Con. Rule 935. *Webb v. Stenton*, 11 Q. B. D. 518, and *Stuart v. Grough*, 15 A. R. 299, considered. *Canada Cotton Co. v. Parmater*, 13 P. R. 308.—C. P. D.

Held that the garnishees, being a foreign corporation, where not "within Ontario," and therefore not subject to the provisions of Con. Rule 935. *Id.*

So long as a railway company is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize, or take, or sell, or foreclose any part of the property of the company. Their remedy is the appointment of a receiver. The bondholders of the defendants in this case were held not entitled to the moneys claimed by them, which were the earnings of the road deposited in a bank, and which had been attached by judgment creditors of the road. Decision of *Boyd*, C., (18 O. R. 581), reversed. *Phelps v. St. Catharines and Niagara Central R. W. Co.*, 19 O. R. 501.—Chy. D.

See *Stuart v. McKim*, 8 O. R. 739, p. 91; *Nicholson v. Shannon*; *McPherson v. Shannon*, 28 Chy. 378.

### III. PROCEEDINGS BY BILL IN EQUITY.

The plaintiff claimed to be a creditor of O., and as such filed a bill alleging that O. was mortgagee or otherwise entitled to some interest in the lands of M., and that O. was about to dispose of his interest therein in order to defeat the claim of the plaintiff, and prayed an account of what was due by O., and to restrain M. from paying O., and also an order for M. to pay plaintiff. At the hearing, the court (*Spragge*, C.), made a decree referring it to the Master to ascertain what was due by O. to the plaintiff, and if anything found due that O. should be ordered to pay the amount due to the plaintiff, with costs; but dismissed the bill as against M., with costs. *Menzies v. Ogilvie*, 27 Chy. 456.

The plaintiffs, who had recovered judgment against the defendant, W., filed a bill alleging that W., being the owner of lands subject to a mortgage, conspired with his co-defendant whereby a second mortgage was executed by W. to one A., who paid the money to the co-defendant, which was held by him as agent or trustee for W. The lands were subsequently sold in a suit by the first mortgagee, and realized sufficient to pay the two mortgages only. The plaintiffs proved their claim in that suit in the master's office, but received nothing. They alleged that they had been led to believe that the mortgage by W. to A. was bona fide, but had ascertained that such was not the fact; and prayed that the co-defendants might be ordered to pay over the amount paid out of the proceeds of the land to satisfy the mortgage in favour of A.:—Held, that the bill was in effect one to garnish the money due to W. in the hands of his co-defendant, and under the authority of *Horsley v. Cox*, L. R. 4 Chy. 92, and *St. Michael's College v. Merrick*, 1 A. R. 520; *S. C.*, 26 Chy. 216, could not be maintained. *Gilchrist v. Wiley*, 28 Chy. 425.—Blake.

### V. DIRECTING ISSUE TO BE TRIED.

The defendant a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the assembly, which he handed to the Speaker of the Assembly to wait the action of the House with regard to the alleged bribery. The plaintiffs, judgment creditors of the defendant, issued an order attaching all debts due



from C. to the defendants, claiming that the money so handed to him became a debt payable to the defendant. The court, Galt, J., dissenting, without expressing any opinion on the merits, directed an issue to be tried, under Rule 373, O. J. Act, (Con. Rule 939), as to the garnishee's indebtedness. The form of the issue was subsequently settled by the registrar, namely whether at the date of the service upon the garnishee of the attaching order, there was any debt due or accruing due from the garnishee to the defendant, which on appeal to the full court was held sufficient. *Stuart v. McKim*, 8 O. R. 739—C. P. D.

The plaintiff, after recovering judgment against the defendant, issued an attaching order upon moneys in the hands of a Canada Company, which were admittedly not the moneys of the latter, and which the plaintiff swore he was informed and believed belonged to the judgment debtor, but which were claimed by his son. There was nothing before the Judge of the County Court to support the assertion of the plaintiff, and the examination of the claimant taken at the instance of the plaintiff, failed to shew that there was any reason to believe that the claim was not well founded:—Held, that the Judge had under Rule 375 (Con. Rule 945) a discretion to direct or refuse to direct the trial of an issue, and that such discretion was properly exercised in refusing to so direct and in rescinding the attaching order:—Semble, if the plaintiff had been able to suggest even a plausible ground for supposing that it was the money of the judgment debtor, or to cast a suspicion upon the bona fides of the claim of the son, it would have been the duty of the Judge to direct an issue, if the plaintiff desired it. *Johnson v. Moody*, 12 P. R. 203.—C. of A.

See *In re Sato v. Hubbard*, 8 P. R. 445, p. 87; *Canada Cotton Co. v. Parmelee*, 13 P. R. 308, p. 92.

#### VI. APPEALS.

Proceedings were taken before a county Judge to garnish certain moneys, payable by the county to the plaintiff, as clerk of the peace and county crown attorney, and which moneys that Judge ordered to be attached in favour of the creditor, the present defendant. Thereupon, the debtor, the defendant in those proceedings, filed a bill in this court, seeking to restrain further action on such order:—Held, that this court had no jurisdiction to grant the relief asked; that the proper place to obtain such relief was by appeal to the Court of Appeal; and, without determining whether the claim of the debtor against the county, was such as could be garnished, the court (Proudfoot, V. C.), refused the motion for injunction, with costs. *Van Norman v. Grant*, 27 Chy. 498.

Held, that there is no appeal from an order made in garnishee proceedings in a County Court, under R. S. O. (1877), c. 50, s. 313, appeals from County Courts being expressly limited to the cases mentioned in section 35 of the County Courts Act. Section 200 of the C. L. P. Act does not give a general appeal from the County Courts being controlled by the sub-heading preceding section 189. *Sato v. Hubbard*, 6 A. R. 546.

Held, also, affirming Falconbridge, J., (13 P. R. 20), that the garnishees had the right to appeal against an order directing the trial of an issue between the judgment creditors and a claimant of the moneys attached. *Canada Cotton Co. v. Parmelee*, 13 P. R. 308.—C. P. D.

#### VII. PRACTICE.

The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor or by a partner of the attorney. Semble, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice. *In re Sato v. Hubbard*, 8 P. R. 445.—Osler.

Semble, the question of the validity of a judgment should not be argued on the return of a garnishee summons, but should be raised on an application to set aside the execution. *Elliot v. Capell*, 9 P. R. 35.—Dalton, Master.

#### VIII. COSTS.

Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 (C. R. 945) to order security for costs. *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121.—Dalton, Master.

See *Gall & Co. v. Collins*, 12 P. R. 413.

#### IX. PAYMENT BY GARNISHEES.

An appeal from the order of a county Judge directing payment over to the plaintiff by a garnishee of moneys in his hands was allowed by the court in a former judgment (10 A. R. 17). It appeared that the garnishee had paid over the moneys in his hands before the appeal was initiated:—Held, that the certificate of the former judgment properly contained an award of restitution of the money so paid, which the court had authority to make under 45 Vict. c. 6, (Ont.) *McKindsey v. Armstrong*, 11 P. R. 200.—C. of A.

After an order to pay over had been made upon a garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this the garnishees subsequently without further compulsion or threat of execution paid the money to the attaching creditor without moving against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so:—Held, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over and the garnishees from disposing of the money when received by them (otherwise than by paying it to the receiver), without leave of the court. The duty of garnishees who have notice of circumstances affecting the right of the attaching creditor to enforce the order to pay over pointed out. Wood

v. Dunn, L. effect of the rights of an attach- head Dock Co. v. Grough, 15

Held, per I reau, J.J., affi of Queen's Be have been vol in the hands of ment of such a final judgment no longer any or collocation by an opposit Gwynne, J.J., the moneys w the court at th was filed, such nard v. Molson

See ATTORNEY

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v. Dunn, L. R. 2 Q. B. D. 72, considered. The effect of the appointment of a receiver upon the rights of an attaching creditor considered. *Hawkins v. Gathercole*, 1 Drew. 12; *Ames v. Birkenhead Dock Co.*, 20 Beav. 332, acted on. *Stuart v. Grough*, 15 A. R. 299.

Held, per Ritchie, C. J., Strong and Tascheau, J., affirming the judgment of the Court of Queen's Bench, Montreal, that where moneys have been voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition en sous ordre. *Fournier and Gwynne, JJ.*, dissenting, on the ground that as the moneys were still subject to the control of the court at the time the opposition en sous ordre was filed, such opposition was not too late. *Bar-nard v. Molson*, 15 S. C. R. 716.

### ATTORNEY.

See ATTORNEY-GENERAL—COUNTY ATTORNEY—SOLICITOR.

### ATTORNEY-GENERAL.

Held, affirming the judgment of Proudfoot, V. C. (26 Chy. 126), that the doctrine of escheats applies to Ontario; that the Attorney-General for Ontario is the proper person to represent the Crown and to appropriate the escheat to the uses of the province; that the Court of Chancery has jurisdiction in such a case; and that it was proper for the Attorney-General to file a bill in the Court of Chancery to enforce the escheat. *Attorney General of Ontario v. O'Reilly*, 6 A. R. 576.

Held, reversing the decision of Spragge, C. (23 Chy. 65), that the Attorney-General for Ontario, as representing only a limited portion of the public, with whom, if at all, a contract existed for the construction of a bridge by a company incorporated by the Dominion Parliament, from Canada to the United States, across the Niagara River, had no locus standi. *Attorney-General v. International Bridge Co.*, 6 A. R. 537. See also S. C. 27 Chy. 37.

The work being one within the jurisdiction of the parliament of Canada, that parliament, presumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it:—Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information. S. C. 6 A. R. 537.

As to the necessity of a public nuisance being moved against by the Attorney-General. See *Hathaway v. Doig*, 28 Chy. 461.

Semble, but for the language used in *Guelph v. The Canada Company*, 4 Chy. 656, the proper frame of a suit by a municipality against a railway company for trespassing by running their track along one of the streets of the municipality without their consent would be by way of infor-

mation in the name of the Attorney-General with the corporation as relators. *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4.—Boyd.

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury. Montreal, 8th October, 1880:—By J. A. Mousseau, Q.C.; C. P. Davidson, Q. C.; L. O. Loranger, Attorney-General." Messrs. Mousseau and Davidson were the two counsel authorized to represent the Crown in all the criminal proceedings during the term. A motion supported by affidavit was made to quash the indictment on the ground, inter alia, that the preliminary formalities required by section 28 of 32 and 33 Vict. c. 29 had not been observed. The chief justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was held, on appeal, reversing the judgment of the Court of Queen's Bench, that under 32 and 33 Vict. c. 29, s. 28, the Attorney-General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the Attorney-General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside. *Abrahams v. The Queen*, 6 S. C. R. 10.

To an action on a drainage by-law to compel a municipal corporation to complete a drain, and also to restrain a misapplication of moneys assessed, and for an account, the Attorney-General is not a necessary party. See *Smith v. Township of Raleigh*, 3 O. R. 405.—Ferguson.

Semble, that on an application to question a patent under the Patent Act of 1872, the intervention of the Attorney-General is not essential. *In re The Bell Telephone Co.*, 9 O. R. 339.—C. P. D.

The questions in this case relating to the Fire Insurance Company Acts, so far as raised, were held not to be of such a constitutional character as to require notice to the Attorney-General of the province, and the Minister of Justice of the Dominion. *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82.—O'Connor.

The Attorney-General ordered to be made a party to a case involving the title to a roadway, in order to give protection to the Dominion Government in expropriating the land. See *Re Trent Valley Canal*—"Re Water Street" and "The Road to the Wharf," 11 O. R. 687.—Boyd.

The Attorney-General of the province is the proper officer to sue in respect of all matters having locality in the province. See *Attorney-General of Nova Scotia ex rel. Dickie v. Azford*, 13 S. C. R. 204.

It is not necessary to make the Attorney-General a party to an action by an incorporated educational institute for the removal of one of the trustees for improper dealing with trust funds. *Wilberforce Educational Institute v. Holden*, 17 O. R. 439.—Rose.

Semble, per Gwynne, J.—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a Court of Justice in a suit in which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca v. Attorney-General of Canada*, 17 S. C. R. 612.

### ATTORNEMENT.

See LANDLORD AND TENANT.

### AUCTION AND AUCTIONEERS.

LICENSING AUCTIONEERS—See MUNICIPAL CORPORATIONS.

In a bill filed by a mortgagor against his son, a bidder at the sale by another of the defendants, a loan company, to which bill the company and one B. were also defendants, it was alleged that it had been agreed between the son and B. that in consideration of the son's securing to B. a debt of the plaintiff, B. would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land, which he accordingly did; that in consequence of B.'s refusal to make the promised advance, the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding, and that B. afterwards privately bought the land at a great undervalue to the loss of the plaintiff:—Held, on demurrer, that the bill sufficiently, though inartificially, alleged that by reason of B.'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale, and profited thereby to the loss and damage of the plaintiff. *Campion v. Brackenridge*, 28 Chy. 201.—Spragge.

As to effect of misrepresentations in sale of land by auction. See *Stammers v. O'Donohoe*, 28 Chy. 207; 8 A. R. 161; S. C. sub. nom. *O'Donohoe v. Stammers*, 11 S. C. R. 358; *Re Murray and Kerr*, 13 O. R. 414.

Compensation in case of mistake as to quantity of land sold. See *Cottingham v. Cottingham*, 11 A. R. 624.

A master has no power to give leave to bid to a party conducting a sale—Application must be made to the Court. *Re Laycock—McGillivray v. Johnson*, 8 P. R. 548.—Blake.

Liberty to mortgagee and trustee to bid at sale. See *Ricker v. Ricker*, 7 A. R. 282.

Power of factor to sell by auction for repayment of advances without special authorization. See *Mitchell v. Sykes*, 4 O. R. 601.

Contract not signed by the vendor, but subsequently admitted by letters. See *O'Donohoe v. Stammers*, 11 S. C. R. 358.

See *Wilmot v. Stalker*, 2 O. R. 78; *Keefer v. Roof*, 8 O. R. 69; *See v. McLean*, 14 S. C. R. 632.

### AUDIT.

Of county attorney's account. See *In re Fenton and the Board of Audit of the County of York*, 31 C. P. 31; *In re Stanton and the Board of Audit of the County of Elgin*, 3 O. R. 86.

### AVERAGE.

See SHIP.

### AWARD.

See ARBITRATION AND AWARD.

### BAGGAGE.

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### BAIL.

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- II. PROCEEDINGS AGAINST BAIL, 97.
- III. SURRENDER OF PRINCIPAL, 97.
- IV. SPECIAL BAIL.
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  2. *Costs under R. S. O. (1877)*, c. 50, s. 343, 99.
- V. RIGHTS OF ASSIGNEE OF BAIL BOND, 99.
- VI. CHARGING IN EXECUTION—See PRISONER.
- VII. RECOGNIZANCE OF BAIL—See RECOGNIZANCE.
- VIII. ATTACHMENT AGAINST ABSCONDING DEBTOR—See ABSCONDING DEBTOR.
- IX. IN CRIMINAL MATTERS—See CRIMINAL LAW.

### LIABILITY OF BAIL.

A Judge's order to hold to bail in the sum of \$300, was obtained in an action of tort, in which the plaintiff swore to a cause of action for \$500. The bail piece was in the usual form, stating: "Bail for \$300 by order of," etc. The recognizance of bail was in the words of the statute, namely: "You, the bail 'do jointly and severally undertake that if' the defendant in the original action 'shall be condemned, then he shall pay the costs and condemnation money, or render himself to the custody of the sheriff,' etc., 'or you will do so for him.'" Rule 89 of T. T. 1856, (Con. Rule 1085), provides that "the bail shall only be liable for the sum sworn to by the affidavit of debt and costs of suit, not exceeding in the whole the amount of their recognizance." In the original action a verdict was obtained against the defendant for \$400, and \$125.27 costs. In an action on the recognizance against the bail:—Held, Cameron, C.J., diss., that the undertaking in the recognizance to pay

the condemn with Rule 8 amount ment therefore for the \$300 Judge's order, and of this act the recogniz language, inst adapted to me Baker v. Jack

Held, that t A-1e 1085) th amount of th tiff having rec whole sum sw recovery again be more than Slingerland, 17

### II. PR

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Held, that the bond being torious, could no fore this court.

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the condemnation money, read in connection with Rule 89, (Con. Rule 1085) meant the amount mentioned in the Judge's order; and therefore the bail in this action were only liable for the \$300 the amount mentioned in the Judge's order, and the costs of the original action and of this action. The reasonableness of having the recognizance express its meaning in simple language, instead of adhering to a form of words adapted to meet a different practice, suggested. *Baker v. Jackson*, 9 O. R. 661.—C. P. D.

Held, that under Rule 89 of T. T. 1856, (Con. Rule 1085) the liability of bail is limited to the amount of their recognizance; and the plaintiff having recovered in the original action the whole sum sworn to in the affidavit of debt, his recovery against the bail should not in any event be more than the former amount. *Laing v. Slingerland*, 17 O. R. 392.—Q. B. D.

## II. PROCEEDINGS AGAINST BAIL.

Where the plaintiff in an alimony suit obtains a writ of arrest and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into court, to be applied from time to time in payment of the alimony and costs: and, Semble, that upon such payment the sureties are entitled to be discharged from their bond. *Needham v. Needham*, 29 Chy. 117.

Held, reversing the judgment of the County Judge, that proceedings to fix bail cannot be maintained on a writ of ca. sa. which is made returnable immediately after the execution thereof. For such purpose it is necessary that the writ should be returnable on a day certain. (Hagarty, C. J. O., dissenting.) *Proctor v. Mackenzie*, 11 A. R. 486.

In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute:—Held, affirming the judgment of the Supreme Court of Nova Scotia that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed. *Woodworth v. Dickie*, 14 S. C. R. 734.

Held, that the objection as to be the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this court. *Id.*

## III. SURRENDER OF PRINCIPAL.

The sureties on a statutory bail bond under a writ of ne exeat provincia have no power to surrender their principal as at common law. An application by sureties for discharge from a bond and for repayment of the money paid to the sheriff as collateral security was refused. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot.

Where a defendant is arrested by a sheriff under a ca. re, and after verdict is surrendered by his bail to the same sheriff upon an action being commenced against them, the sheriff is not entitled to a copy of the bail-piece before receiving

the prisoner into custody; and where such refusal was given, the sheriff was compelled to pay the costs of an application to stay proceedings, and an order was made to extend the time for surrender. *Grierson v. Corbett*, 8 P. R. 517.—Osler.

The defendants were special bail for one S. upon an recognizance in an action by the plaintiffs against S. The proceedings in the original action were begun and carried on in the county of Middlesex, and the condition of the recognizance was that S. would, if condemned, satisfy, etc., or render himself to the custody of the sheriff of Middlesex; or the cognizors, the present defendants, would do so for him. R. S. O., (1877), c. 50, s. 40 (Con. Rule 1062) provides for the render of the defendant to the sheriff of the county in which the action against such defendant has been brought; and section 42 of the same Act (Con. Rule 1064) provides that special bail may surrender their principal to the sheriff of the county in which the principal is resident or found, and that upon proof of due notice to the plaintiff of the surrender, and production of the sheriff's certificate thereof, a Judge shall order an exoneretur to be entered on the bail-piece, and thereupon the bail shall be discharged. The defendants on the 7th February, 1888, rendered S. to the sheriff of Norfolk, S. being found in that county, and obtained from the sheriff a certificate of such render but obtained no order for the entry of an exoneretur. The writ of summons in this action upon the recognizance was served on the defendants on the 10th of April, 1888, and on the 16th April, 1888, the defendants served on the plaintiffs a notice of the render of S. to the sheriff of Norfolk:—Held, that the bail were not entitled to be discharged, and that the plaintiffs were entitled to bring this action upon the recognizance, because no order for an exoneretur had been obtained, notwithstanding the notice of render; but that, the substantial duty of rendering the principal having been performed, the defendants should be relieved upon terms. The court ordered that upon the defendants filing an order for an exoneretur within two weeks and paying the costs of the action within ten days after taxation, the judgment for the plaintiffs should be set aside and all further proceedings stayed; otherwise judgment to be entered for the plaintiffs with costs. *Laing v. Slingerland*, 17 O. R. 392.—Ferguson.—Q. B. D.

## IV. SPECIAL BAIL.

### 1. Effect of Putting in.

The plaintiffs issued a writ of capias, irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs. It required the defendant to put in special bail, which by its recognizance meant an undertaking by sureties to pay the condemnation money in which the defendant "shall be condemned in this action." The claim indorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment. The bail to the sheriff undertook that special bail would be put in, and special bail was put in:—Held, that the defendant and his sureties had, by put-

ting in special bail, treated the writ as one issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action, and a statement of claim delivered after such an appearance was therefore regular:—*Semble*, section 34 of the C. L. P. Act, (R. S. O. (1877) c. 50, s. 39,) has not been repealed by Rule 5, O. J. Act. *Cochrane Manufacturing Company v. Lamon*, 11 P. R. 162.—*Rose*.—Q. B. D.

## 2. Costs under R. S. O. (1877) c. 50, s. 343.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be \$704, but the plaintiff recovered only \$489. As to \$80 which the plaintiff failed to recover, it was Held, on the facts stated in the report of the case, that he had no reasonable ground for believing defendant to be liable and he abandoned it at the trial, but as to the other portion for which he failed he had reasonable ground:—*Held*, also the defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. (1877), c. 50 s. 343. *Porritt v. Fraser*, 8 P. R. 430.—*Osler*.

## V. RIGHTS OF ASSIGNEE OF BAIL BOND.

Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited; and where in an alimony suit the statutory bond under a writ of ne exeat has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor, paid into court, and applied in discharging arrears of alimony.—*Richardson v. Richardson*, 8 P. R. 274.—*Spragge*.

## BAILIFF.

See DIVISION COURTS.

## BAILMENT.

See CARRIERS—RAILWAYS AND RAILWAY COMPANIES—SHIP.

Where possession is changed it need not be given personally to the creditor, purchaser or mortgagee; it may equally be given to a trustee or bailee for him, and the debtor may increase the claim of such bailee or may charge the goods with further sums in favour of other persons. *McMaster v. Garland*, 31 C. P. 320.—C. P. D.

The plaintiff had been for sometime a guest of the defendant, an inn keeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing baggage, etc., the plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost. There was no other evidence of any negligence in the matter:—*Held*, reversing the judgment of the County Court, that the plaintiff could not recover. *Palin v. Reid*, 10 A. R. 63.

See *Oliver v. Newhouse*, 32 C. P. 90; 8 A. R. 122; *Troop v. Hart*, 7 S. C. R. 512; *Dominion Bank v. Davidson*, 12 A. R. 90; *Brassart v. McEwen*, 10 O. R. 179; *Adams v. Watson Manufacturing Co., (Limited)*, 15 O. R. 218; 16 A. R. 2; 16 S. C. R. 543.

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See PARLIAMENTARY ELECTIONS.

## BANKRUPTCY AND INSOLVENCY.

### I. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

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### I. ASSIGNMENT

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## 12. Discharge.

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## IX. STOPPAGE IN TRANSIT—See SALE OF GOODS.

## X. TAKING MALICIOUS PROCEEDINGS IN BANKRUPTCY—See MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.

## I. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. *Assent of Creditors*.

A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent or knowledge of it by any creditor shewn.—Held, affirming the judgment of the County Court, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor; but—Semble, (per Patterson, J.A.), that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable. *Cooper v. Dixon*, 10 A. R. 50.

The meaning of R. S. O. (1887), c. 124, s. 3, sub-s. 2, is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent until and unless it be superseded by an assignment executed with such consent; and the words which occur through the Act, "an assignment for the general benefit of creditors under this Act," are to be governed by this construction.—Held, therefore, that a sheriff who had seized goods of insolvent debtors under execution was not justified in refusing to give them up to the debtors' assignee, who was not a sheriff, and the assignment to whom had not been assented to by the number of creditors required by R. S. O. (1887), c. 124, s. 3; but Held, also, that as the goods were covered by a chattel mortgage, the sheriff could set up the rights of the mortgagee in answer to an action by the assignee to restrain the sale of the goods under the execution. The assignee having failed in the action, because the mortgagee's rights disentitled him to succeed, and the sheriff having contested the assignee's rights on the other ground, which was declared to be untenable, no costs were given to either party. *Anderson v. Glass*, 16 O. R. 592—Street.

It is sufficient under R. S. O., (1887), c. 124, s. 3, sub-s. 5, if the consent of creditors to an assignment is given subsequently to the assignment

being made, provided that it is given before any assignment is made to the sheriff of the county. *Hall v. Fortye*, 17 O. R. 435—MacMahon.

See *Nolan v. Donnelly*, 4 O. R. 440, *infra*.

2. *Execution of*.

The assignment in this case was executed by one partner, at the request of his co-partner, in the partnership name, and was made at the request of several creditors:—Held, that the assignment was properly executed, and that there was sufficient assent of the creditors. *Nolan v. Donnelly*, 4 O. R. 440.—C. P. D.

The assignment was executed by one of the partners for a co-partner under verbal instructions from the co-partner before leaving for England to sign for him, if an assignment became necessary; and also under a cablegram received from him while in England, to the same intent:—Held, that though authority to execute a deed must be by deed, this would not affect goods of which the assignee took actual possession, namely, the stock-in-trade in the assignee's store; nor goods warehoused for and held by a bank, where the bank was notified and agreed to hold the surplus, after paying the bank's claim, for the assignee, which was equivalent to taking possession, and which were the only goods in question here. *Nelles v. Maltby*, 5 O. R. 263.—C. P. D.

Held, (Burton, J.A., dissenting), that the directors of an incorporated trading company had power to authorize the execution of an assignment for the benefit of creditors of the company, and that the defendants, execution creditors, as strangers to the company could not object that the authority of the shareholders was not given, or that they had not ratified the deed: *Donly v. Holmwood*, 4 A. R. 555, distinguished. Per Burton, J.A., that the directors could not do so without the sanction of the shareholders. *Whiting v. Hovey*, 13 A. R. 7. Affirmed by Supreme Court. *Sub nom. Hovey v. Whiting*, 14 S. C. R. 575.

To an action by L. against A. the defence was release by deed. On the trial it was proved that A. had executed an assignment for the benefit of creditors and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for \$800." \* \* \* In April, 1885, A. wrote a letter to L., in which he said; "In one year more I will try again for myself and hope to pay you in full." In November, 1886, the account sued upon was stated.—Held, reversing the judgment of the Court below, Taschereau and Patterson, JJ., dissenting, that the execution of the deed on his behalf being made without sufficient authority L. was not bound by the release contained therein and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it:—Held, per Taschereau and



Patterson, J.J., that though A. had no sufficient authority to sign the deed yet there was an agreement to compound which was binding on L. and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A., who could only receive the dividends realized by the estate. *Lawrence v. Anderson*, 17 S. C. R. 349.

See *Bank of Commerce v. Jenkins*, 16 O. R. 215, p. 115.

### 3. Construction of.

On the 26th May, 1880, two chattel mortgages were executed by the plaintiff to one J. G. One mortgage was to secure \$215 and interest; the other being a security for certain promissory notes of the mortgagor endorsed by the mortgagee, which had been discounted by the defendant, who was the holder thereof. On the 24th July, both the mortgages, together with the goods and chattels comprised therein, were assigned to defendant by J. G. On the 22nd July, previously, R. G. and J. G., who had been trading in partnership, assigned to O. & K., upon trust for the benefit of creditors, amongst other things all the grain, farm stock, crops whether growing or cut, and other chattels and effects of the said assignors, or either of them, wheresoever situate, and also all mortgages and all other personal estate wheresoever situate of the said assignors, or either of them, or in which any of them had any right or interest:—Held, that the terms of the deed of assignment to O. and K. were sufficient to include these mortgages and the goods comprised in them, and therefore, as regarded the first-named mortgage, there being no contrary intention, it passed under the deed, so that the subsequent assignment of that mortgage to the defendant was of no avail; but as regarded the other mortgage, the defendant being the beneficial owner thereof, as holder of the notes secured thereby, and the mortgagee having no interest therein, there could be no intention that it should pass under the deed, and therefore it passed to the defendant under the assignment to him:—Semble, that there was evidence to show that the plaintiff recognized the defendant's title as assignee. *Sutton v. Armstrong*, 32 C. P. 11.—C. P. D.

Held, that the omission of some part of the assignor's estate from the assignment or the postponing the making of the assignment until certain favoured creditors had obtained judgment and execution, did not invalidate it. *Nelles v. Malby*, 5 O. R. 263.—C. P. D.

Accidental omission of claim from schedule of debts. See *McLean v. Garland*, 13 S. C. R. 366.

An assignment in trust for creditors, amongst other things authorized the trustees to sell for cash or on credit, and if on credit, with or without security for the balance of purchase money remaining unpaid, and also to pay in full any debts which constituted a lien on the assets where deemed advisable in the interests of the trust:—Held, affirming the judgment of the court below (2 O. R. 525) that the introduction into the trust deed of power to sell on credit, which was so given in good faith, did not invalidate the assignment:—Held, also that the discretion vested in the trustee to pay such liens in

full did not invalidate the deed. *O'Brien v. Clarkson*, 10 A. R. 603.

Held, overruling *Robertson v. Thomas* (8 O. R. 20), that assignments for the benefit of creditors were until 48 Vict. c. 26 (Ont.) within the Act relating to Chattel Mortgages and Bills of Sale, R. S. O. (1877), c. 119. *Whiting v. Hovey*, 13 A. R. 7. See also S. C., *Sub nom. Hovey v. Whiting*, 14 S. C. R. 515.

An assignment for the benefit of creditors though confined in terms to the assignor's personal estate, professed to be drawn under 48 Vict. c. 26, (Ont.):—Held, it was not within the Act; and this action brought by the assignee to set aside a chattel mortgage, must be dismissed. *Blain v. Peaker*, 18 O. R. 109.—Rose.

It is clear it was intended under the Act to bring all the estate of the assignor into the hands of the assignee for general distribution. *Id.*

Held, that all reference to the real estate having been struck out from the form used for making the assignment, the omission was not a "mistake, defect, or imperfection" within section 10, and capable of amendment under that section. *Id.*

See *Nelles v. Malby*, 5 O. R. 263, p. 105; *Moorehouse v. Bostwick*, 11 A. R. 76, p. 106; *Badenach v. Slater*, 8 A. R. 402; 10 S. C. R. 296.

### 4. Description of Property.

See *Nolan v. Donnelly*, 4 O. R. 440, p. 193; *Whiting v. Hovey*, 13 A. R. 7, p. 194.

### 5. Provisions for Carrying on Business.

An assignment in trust for creditors of a small stock of goods valued at about \$230, and some land, made to a person not a creditor, contained a provision empowering the assignee, without consulting the creditors, to carry on the business, and wind it up, no time being stated therefor: to pay all salaries, wages, etc., and all advances made in goods and money for conducting said business in the winding up thereof, to the best advantage, which advances he was authorized to make, and also to sell the said land as to him should seem meet, and to retain a reasonable compensation for the execution of the said trusts:—Held, (Wilson, C. J., dissenting) affirming the judgment of Hagarty, C. J., that the assignment was void, as containing provisions hindering and delaying creditors, and such as they could not reasonably be required to agree to. *Gallagher v. Glass*, 32 C. P. 641.—C. P. D.

Where an assignment provides for the carrying on of the business of the insolvent debtor by the assignee, but only as subsidiary to the winding up of the same, this is not unreasonable, and does not invalidate the assignment. *Ontario Bank v. Lamont*, 6 O. R. 147.—Boyd.

By a deed of assignment for the benefit of creditors the trust was declared to be "to sell and dispose of such portions of the said estate as shall be readily saleable either for cash or credit, or under the power hereinafter contained to carry on the said business. \* \* and to stand pos-

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ceased of the said moneys, etc., and all profits and increase arising therefrom, in trust to pay," etc., and a subsequent part of the deed provided that the assignee "shall have power to employ the said party of the first part (the insolvent) or any other person in winding up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade."—Held, affirming the judgment of the County Court, (Hagarty, C. J. O., dissenting), that the provisions above set forth did not invalidate the deed. *Jennings v. Moss*, 10 A. R. 698.

A deed of assignment for the benefit of creditors gave power "until the said trustee shall deem it advisable to dispose of the said business, to carry on the same, employing any person or persons as his agent or agents for such purpose if he deemed it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods or merchandise as may be requisite for such purpose," and the trustee was not to become liable for the debts or losses of the said business in any way except for the distribution of the moneys come to his hands under the deed. There was no evidence of any intentional dishonesty on the part of the assignor:—Held, reversing the judgment of the County Court, that this provision did not invalidate the deed under R. S. O. (1877) c. 118. (Hagarty, C.J.O., dissenting.) *Alexander v. Wavell*, 10 A. R. 135.

#### 6. Partnership and Separate Creditors.

Under an assignment by a firm in trust for creditors, the assignee was directed to distribute the proceeds of the property assigned "ratably and proportionably among all the creditors of the assignors in payment and satisfaction as far as possible of their just debts, having due regard to the rights of partnership and private creditors, and distributing the same as between them according to law."—Held, that the assignment was valid, that it provided for the payment, both of the partnership and separate creditors, out of their respective estates appointed for that purpose according to law, the meaning of which is well known. *Nelles v. Matthey*, 5 O. R. 263.—O. P. D.

E. & J. being in partnership, dissolved and divided their assets. Subsequently E. being sued by M., an individual creditor, made an assignment of all his estate, real and personal, for the benefit of his creditors, and by the terms of the assignment, placed his partnership and individual creditors on the same footing. In an action by M. (after he had obtained judgment) to set aside the assignment. It was:—Held, that after the dissolution and division of assets, E.'s share became his separate property, and could not be assigned for the benefit of his partnership creditors until his individual debts were first paid, and that the assignment as to personalty was bad and must be set aside, but that a debtor may give a preference to one creditor over another under the Statute of Elizabeth, and that the assignment as to realty was good. *Martin v. Evans*, 6 O. R. 238.—Boyd.

On the dissolution of a partnership between L. and W., the latter transferred all his interest in

the partnership to L., who subsequently became insolvent and assigned all his estate, including that part of it which had formerly been assets of the partnership, to the defendant, in trust to pay "the claims of his creditors ratably and proportionately, and without preference or priority, recognizing such liens, claims, charges, and priorities as the law directs."—Held, reversing the judgment of Proudfoot, J., (5 O. R. 104); that under the terms of the deed there was no priority between the separate creditors of L. and the joint creditors of L. and W., all being creditors of L., and that both classes of creditors were entitled to be paid *pari passu*. *Moorehouse v. Bostwick*, 11 A. R. 76.

See *McKilrick v. Haley*, 46 Q. B. 246 p. 114; *Re Walker*, 6 A. R. 160 p. 120; *Mills v. Kerr*, 7 A. R. 769; *Kerr v. Canadian Bank of Commerce*, 4 O. R. 652; *Bank of Toronto v. Hall*, 6 O. R. 653.

#### 7. Creditors holding Security.

If a person borrow money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment; and if he holds security, such as the mortgage in this case, he can charge the money so loaned on such security. *Court v. Holland*, 4 O. R. 688.—Proudfoot.

The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge:—Held, that the debt under the chattel mortgage was not extinguished. A subsequent common law assignment for the benefit of creditors was made by the debtor of all his property to the defendant in trust to pay expenses, etc., and "to apply the balance in or towards payment of the debts of the assignor in proportion to their respective amounts without preference or priority."—Held, that the plaintiff was entitled to sue for the whole debt, and therefore to share in the estate proportionately under the deed for the whole, and that he was not bound to value his security and rank for the balance only. *Beaty v. Samuel*, 29 Chy. 105.

The plaintiffs supplied B. with goods on the guarantee of M. M. made an assignment for the benefit of creditors under 48 Vict. c. 28 (Ont.) B. assigned in like manner a few days after. The plaintiffs proved their claim for the full amount on M.'s estate, and stated that they held as security their claim against B.'s estate, but did not value it. B. effected a composition with her creditors, and gave composition notes therefor. The defendant M.'s assignee refused to pay a dividend to plaintiffs until they had valued their security on B.'s estate. Upon a special case being stated for the opinion of the court, it was:—Held, that by B.'s assignment his estate was placed in custodia legis, protected from judgments and executions, and made available for the creditors who were thus potentially seized of their proper proportion of the assets. The original personal claim was thus transmuted into a claim in rem, and so could fairly be regarded as in the nature of a security, which the plaintiffs were bound to value under s. 18, sub-s. 4 (b). *Wyld v. Clarkson*, 12 O. R. 589.—Boyd.

A deceased person, of whom the plaintiff was executor, gave the defendants a guaranty in respect of goods sold and to be sold to another, in the following terms:—"I hereby undertake to guarantee you against all loss in respect of such goods sold or to be sold, provided I shall not be called on in any event to pay a greater sum than \$2,500." The principal debtor being indebted to the defendants in \$5,500, made an assignment under R. S. O. (1887) c. 124, and the defendants filed a claim with the assignee but did not in the affidavit proving the claim state whether they held any security or not. At a later date the plaintiff paid the defendants the \$2,500 and filed a claim with the assignee. The dividends from the estate were insufficient to pay the balance of the defendants' claim:—Held, that the guaranty was not a security which the defendants were required to value under the Act, and that the omission from their claim of a piece of information which could not affect it did not render it invalid:—Held, also, that this was a guaranty, not of part, but of the whole of the debt, limited in amount to \$2,500, that is a guaranty of the ultimate balance after all other sources were exhausted; and the plaintiff was not entitled to rank upon the estate in respect of the \$2,500, nor to recover any part of any dividend which the defendants had received. *Hobson v. Bass*, L. R. 6 Ch. 792, distinguished; and *Ellis v. Emanuel*, 1 Ex. D. 157, followed. *Martin v. McMullen*, 19 O. R. 230.—Street. Reversed, 20 O. R. 257.

#### 8. Effect of on Leases.

See *Graham v. Long*, 10 O. R. 248; *Baker v. Atkinson*, 11 O. R. 735; 14 A. R. 409; *Linton v. Imperial Hotel Co.*, 16 A. R. 337; *Fuchs v. Hamilton Tribune Co.*, 10 P. R. 409; *Eacrett v. Kent*, 15 O. R. 9, p. 113.

#### 9. Operation of Executions.

A writ of fi. fa. against the lands of one H. had been in the sheriff's hands since 1880. In 1887 the sheriff sold under it and received the purchase money. Afterwards, and before payment over by the sheriff to the execution creditors, H. assigned for the benefit of his creditors under R. S. O. 1887, c. 124. The assignee then claimed the money in the sheriff's hands:—Held, affirming the decision of Robertson, J., that the assignee was not entitled to the money. Per Boyd, C. R. S. O. (1887), c. 124, s. 9, applies to executions to which the Creditors' Relief Act applies, and where distribution has to be made under that Act, and did not apply to the writ in this case; and the writ in this case was executed by the sale of the lands and receipt of the money, which then became the property of the execution creditors:—Semble, that if R. S. O., (1887), c. 124, s. 9, is to receive such a construction as would pass the money in a case such as this to the assignee, thus giving him a higher right than the execution debtor had, then the enactment is ultra vires as a bankruptcy provision. Per Ferguson, J., the authorities clearly show that after receipt of the money by the sheriff, the writ was executed; and semble, that "completely executed by payment" in R. S. O., (1887), c. 124, s. 9, means voluntary or involuntary payment to the sheriff. *Sinclair v. Mc-*

*Dougall*, 29 Q. B. 388, specially referred to. *Clarkson v. Severs*, 17 O. R. 592.—Chy. D.

Held, (Burton, J. A., dissenting,) affirming the judgment of Armour, C. J., that under R. S. O., (1887) c. 124, s. 9, the costs for which the execution creditor has a lien are the costs not of the execution only but all the usual costs which could be recovered from the debtor under an execution. *Ryan v. Clarkson*, 16 A. R. 311, affirmed by Supreme Court, 17 S. C. R. 251. *Gwynne and Patterson, J.J.*, dissenting.

The precedence given to an assignment for the general benefit of creditors by R. S. O. (1887) c. 124, s. 9, over "all judgments and all executions not completely executed by payment" does not extend to a judgment for alimony registered under R. S. O. (1887) c. 44, s. 30, against the lands of a defendant prior to the registration of an assignment by him; and a plaintiff in such a judgment is not obliged to rank with the other creditors of the defendant. *Abraham v. Abraham*, 19 O. R. 256.—MacMahon.

See *Anderson v. Glass*, 16 O. R. 592, p. 101; *Clarkson v. Attorney-General of Canada*, 16 A. R. 202, p. 110.

#### 10. Notice of Claims.

H. A. B., being unable to pay his creditors in full, made an assignment to E. F. B. for their benefit. E. F. B. advertised in the Ontario Gazette and a local paper, under R. S. O. (1877) c. 107, as amended by 46 Vict. c. 9, (Ont.) for all creditors to send in their claims and by his clerk C. E. B. sent notices to each creditor from a list furnished by the assignor to said C. E. B., which list he said must have contained the names of the plaintiffs and C. & Co., who had assigned a claim they had to the plaintiffs. No claim was sent in under the notice by either the plaintiffs or C. & Co., and the defendant distributed the estate without regard to the plaintiffs or C. & Co. At the trial it appeared that E. F. B. had H. A. B.'s books, in which there was a credit to the plaintiffs and C. & Co.; that H. A. B. told him before he divided the estate that C. & Co. had sued him, and on the day of the division he received a letter from plaintiffs' solicitor notifying him. No proof was given of the posting of the individual notices to either plaintiffs or C. & Co.:—Held, that the defendant had notice of the plaintiffs' claim, and that he was liable to the plaintiffs for their and C. & Co.'s proper dividend on the estate. A trustee is not exonerated by the Act if he had actual notice of the claim before distribution, even though he may have sent the notice prescribed, and received no response to it. *Carling Brewing and Malting Co. v. Black*, 6 O. R. 441.—Ferguson.

#### 11. Proof of Claims.

F. agreed with the Bank of Montreal for a line of credit to be secured by the discount of certain bills and notes which he had himself discounted, and which he indorsed and delivered to the bank. He also arranged with the Merchants' Bank to discount his own notes to be secured by the deposit of his customers notes as collateral. F. then failed, being largely indebted to both banks, and made an assignment for the general

benefit of his on his estate tended that t on the amou on the collate assignment. entitled to sh the banks and lowing Rhode creditor is en of his debt, whole without curities he m that he must 20s. on the £. time the claim basis of the d be fixed by th moneys receiv to be credited such sources unless they, amount receive the \$. That the same pos hands. That line of credit real, and as lo the bank coul tract as the ori notes discount Eastman v. B Boyd.

W. made a benefit of his o 1884, H. filed ing (1) upon tv open account (3) upon certai for the accom delivered by V security for W. the claim the r who had there the T. notes w had thereupon against W.'s thereon. The n payment of ent from W. to H. ment to trustee ter brought thi standing all the still entitled to from the W. es indebtedness, filed:—Held, t were not entitl being separate the other inde to rank for the payment in full of Eastman v. provided that t than 100 cents prevent T. also had paid as co Spiers, 16 O. R.

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benefit of his creditors. In proving their claims on his estate before the assignee, the banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action by another creditor, entitled to share under the assignment, against the banks and the assignee. It was:—Held, following *Rhodes v. Moxhay*, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole without prejudice to his rights against securities he may hold, subject to the qualification that he must not ultimately receive more than 20s. on the £. The state of the accounts, at the time the claim is put in, is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee, as at that date. Any moneys received prior to that from collaterals are to be credited; those received afterwards from such sources need not be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cts. on the £. That substantially both banks were in the same position as to the securities in their hands. That there was a distinct contract for a line of credit to the debtor by the Bank of Montreal, and as long as that line was not exceeded, the bank could prove on the footing of that contract as the original debt, and hold the customer's notes discounted in pursuance of it as securities. *Eastman v. Bank of Montreal*, 10 O. R. 79.—Boyd.

W. made an assignment to trustees for the benefit of his creditors prior to 1884. In July, 1884, H. filed a claim against the estate, claiming (1) upon two mortgages on land; (2) upon an open account and certain notes made by W.; (3) upon certain notes made by T. in favour and for the accommodation of W., and indorsed and delivered by W. to H. as a general collateral security for W.'s indebtedness to H. After filing the claim the mortgage debts were paid to H., who had thereupon assigned the mortgages, and the T. notes were also paid by T. to H., and T. had thereupon filed a claim in respect to them against W.'s estate, and received a dividend thereon. The mortgages had been given to secure payment of entirely separate and isolated debts from W. to H. H. afterwards made an assignment to trustees for his creditors, and these latter brought this action, claiming that notwithstanding all the above circumstances, they were still entitled to rank on and receive a dividend from the W. estate on the whole of the above indebtedness, and on H.'s claim as originally filed:—Held, that as to the mortgage debts they were not entitled to receive a dividend, these being separate and distinct debts, but that as to the other indebtedness, they were still entitled to rank for the full amount, notwithstanding the payment in full of the T. notes, on the authority of *Eastman v. Bank of Montreal*, 10 O. R. 79, provided that they did not in all receive more than 100 cents on the dollar; and this did not prevent T. also ranking in respect to the sum he had paid as accommodation maker. *Young v. Spiers*, 16 O. R. 672.—Chy. D.

When a mortgagee is also a creditor in respect to a simple contract debt, he cannot tack the simple contract debt to the mortgage debt, and the creditor does not by reason of his debtor

having made an assignment for the benefit of his creditors, acquire any higher position in this respect than he occupied at the time of or immediately prior to the assignment. *Id.*

## 12. Priority of Claims.

A petition was presented by the husband of D. to declare his wife a lunatic which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrell*, 10 P. R. 216.—Boyd.

Power of Toronto Stock Exchange to pass by-laws giving preference to the claims of the exchange, and of members of the exchange for debts arising out of the stock exchange, transactions on moneys realized from the sale of insolvents' seats at the board. See *Clarkson v. Toronto Stock Exchange*, 13 O. R. 213.

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors. At the time of this assignment there was due by B. a large sum for duty on coal that had been previously imported by him and sold. The Crown claimed payment from the plaintiff, as assignee of B., of the amount due for duties in priority to the payment of the claims of the general creditors of the estate:—Held, affirming the judgment of Armour, C. J., (15 O. R. 632.), that the Crown was not entitled to such priority and that if it elected to come in under the assignment it was bound by the terms thereof and could take only ratably and proportionately with the other creditors. *Clarkson v. Attorney-General of Canada*, 16 A. R. 202.

By an agreement entered into before action, the Crown was placed in the same position as if a writ of extent had been issued against B. on the 19th February, 1887, for the recovery of the duty payable by B.:—Held, in this also affirming the judgment of Armour, C. J., that a writ of extent so issued would have availed the Crown nothing as far as any property covered by the assignment was concerned. *Id.*

See *Eacrett v. Kent*, 15 O. R. 9, p. 113.

## 13. Proceedings by Individual Creditors.

The mere fact that a creditor disputes the validity of an assignment made by his debtor for the general benefit of creditors, is no ground for the assignee refusing to pay such creditor his dividend out of the money realized from the estate; the assignment having been sustained in the action brought by the creditor to impeach it. The law on this question under assignments for the benefit of creditors prior to 22 Vict. c.

96, and the cases thereunder, considered. Decision of the Q. B. D., 10 O. R. 415, reversed. *Klepfier v. Gardner*, 14 A. R. 60; *Gardner v. Klepfier*, 15 S. C. R. 390.

See *Donovan v. Herbert*, 9 O. R. 89; *S. C.*, 12 A. R. 298, p. 122; *Macdonald v. McCall*, 9 O. R. 185; *S. C.*, 12 P. R. 9; *Hyman & Co. v. Howell*, 13 O. R. 400; *Coursoles v. Fookes*, 16 O. R. 691; *Keyes v. Kirkpatrick*, 19 O. R. 572, p. 112; *Fouchier & Son v. St. Louis*, 13 P. R. 318, p.

#### 14. Assignee.

The duties of an assignee under such an instrument as the one in question in this case are analogous to those of executors and trustees administering estates, and the court will consider that a year is the proper time within which the sale of the property assigned is to be made, where the assignment leaves the time and manner of such sale in the discretion of the assignee. If the sale be not made within a year the onus will be cast on the assignee of satisfying the court of his bona fides in seeking further delay. *Ontario Bank v. Lamont*, 6 O. R. 147.—Boyd.

The defendant, who was assignee for creditors of the mortgagor, was threatening to remove certain of the property comprised in the mortgage, acting, as he said, for the benefit of the creditors. The plaintiffs claimed an injunction to restrain him. In his defence he alleged that he was a creditor of the mortgagor at the time of the execution of the mortgage in question, and that after the commencement of this suit he recovered a judgment for the amount of his debt, and he claimed a right to the property taken by him as against the plaintiffs as such creditor:—Held, that he was entitled thus to avail himself of his position as a creditor at the date of the mortgage, notwithstanding the fact that in removing the goods he alleged that he had acted for the benefit of the creditors, and although he did not recover his judgment and execution before the commencement of the suit. *Robinson v. Cook*, 6 O. R. 590.—Ferguson.

An assignee for the benefit of creditors takes only such title as his assignor had to the property. *Id.*

As to power of judge to issue attachment against assignee for contempt. See *Re Paquette*, 11 P. R. 463.

In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not, by a plea in his own name, ask to have a conveyance, made by the debtor to the plaintiff prior to the assignment under which defendant claimed, rescinded or set aside as fraudulent against creditors. The nullity of a deed should not be pronounced without putting all the parties to it on cause en declaration de jugement commun:—Semble, that plaintiff, being a second purchaser in good faith and for value, acquired a valid title to the property which he could set up even against an action brought directly by the creditors. *Burland v. Moffatt*, 11 S. C. R. 76. But see *Porteous v. Reynar*, 13 App. Cas. 120.

Per *Burton and Patterson, J.J.A.*, sub-s. 3 of s. 3 of 48 Vict. c. 26 (now repealed) did not vest in an assignee the right to maintain an action to recover back moneys paid by a person in insolvent circumstances within one month of an assignment by him under the Act. *Clarkson v. Ontario Bank*, 15 A. R. 166. See *S. C.* 13 O. R. 636.

Where a creditor brought an action for an account against the assignee for the benefit of creditors of his debtor after demanding copies of the assignee's accounts, but without expressing any desire or making any attempt to inspect the accounts, and without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency the plaintiff was ordered personally to pay it. *Sandford v. Porter*, 16 A. R. 565.

An assignment for the benefit of creditors made to a sheriff under R. S. O. (1887), c. 124, is made to him as a public functionary, and on his death the care and administration of the estate assigned devolves upon his deputy, and thereafter upon his successor in office. It is not competent to the sheriff to disclaim or decline to act as such assignee. *Brown v. Grove*, 18 O. R. 311.—Chy. D.

A plaintiff, a creditor, served a notice on an assignee for creditors, pursuant to R. S. O. (1887), c. 124, s. 7, sub-s. 2, requiring him to take proceedings to set aside a certain bill of sale made by the insolvent, and afterwards served on him a notice of motion for an order giving him, the creditor, permission to bring the action. After being served with this notice, however, the assignee, believing that he had authority to do so, with the approval of a majority of the inspectors and creditors present at a meeting called for the purpose, made a settlement with the grantee of the bill of sale, which settlement, it also appeared, was advantageous to the estate. The plaintiff then, pursuant to his notice of motion, obtained an order from a Judge, giving him leave to bring this action impeaching the bill of sale, without, however, the settlement being brought to the notice of the Judge:—Held, that the settlement was valid and binding. *Keyes v. Kirkpatrick*, 19 O. R. 572.—Boyd.

#### 15. Dividend.

Where C., an insolvent, had assigned all his assets and stock-in-trade to S., as trustee for creditors, and the plaintiff claimed a specific lien on the same to the extent of certain trust moneys, which had come into C.'s hands, as trustee and executor for the plaintiff, under the will of his (the plaintiff's) father, but had been wrongfully converted by C. to his own use, and employed in his own business to pay his trading debts, but as to which there did not appear to be any identity or connection with the stock-in-trade assigned to S.:—Held, that the plaintiff as against S. was only entitled to a dividend with the other creditors, on the full amount, with interest down to the time of the assignment. *Culhane v. Stuart*, 6 O. R. 97.—Boyd.

As to the effect of receipt of a dividend. See *Milner v. Hamlin*, 2 O. R. 103; *Beemer v. Oliver*, 10 A. R. 656.

See *Klepfier v. C. R.* 390, p.

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Claim by wife used in his busi 16 S. C. R. 720.

See *Stewart v. Kelly*, 15 A. R.

#### II. DEED OF C

Action of debt a deed of compos of the assignee in whereby the del him. Plea, sett plaintiff covenan lectively and sev them fifty cents o against the said tion of the deed insolvent firm's e tial claims again of which "the insolvents their o



See *Klapfer v. Gardner*, 14 A. R. 60; 15 S. C. R. 390, p. 111.

### 16. Other Cases.

The rule in bankruptcy that interest should not be allowed after the date of the commission does not apply in the case of voluntary assignments for the benefit of creditors. *Stewart v. Gage*, 13 O. R. 458.—Proudfoot.

Held, following *Broddy v. Stuart*, 7 C. L. T. 6, that 48 Vict. c. 26 (Ont.), is intra vires the Provincial Legislature. *Clarkson v. Ontario Bank*, 13 O. R. 666.—Ferguson.

Where the plaintiff sought to invalidate certain payments of money made by an insolvent debtor within thirty days prior to his making an assignment under 48 Vict. c. 26 (Ont.), but before it came into force:—Held, on demurrer, that the claim could not be sustained either upon the ground that the statute was retrospective, or upon the ground that what the plaintiff sought to obtain was defined and given by section 3, sub-s. 3 of the statute. *Ib.* See *S. C.*, 15 A. R. 166.

"Transfer" used in Con. Rule 928 is not intended to cover an "assignment" for the general benefit of creditors, valid and sufficient under R. S. O. (1887), c. 124, and an assignee under that Act is not one of the persons to be subjected to examination under that Rule. *British Canadian Loan and Investment Company v. Britnell*, 13 P. R. 310.—Boyd.

The tenant of certain freehold premises executed an assignment under 48 Vict. c. 26 (Ont.), and afterwards, but before possession of the tenant's property had been taken by the assignee, or such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment:—Held, that the landlord's right of distress was not affected by the assignment:—Held, also, that goods so assigned were not to be therefore deemed in custodia legis. *Eacrett v. Kent*, 15 O. R. 9.—Q. B. D.

Assignment obtained by duress and improper use of the criminal process. See *Shorey v. Jones*, 15 S. C. R. 398.

Claim by wife of insolvent for money lent and used in his business. See *Warner v. Murray*, 16 S. C. R. 720.

See *Stewart v. Gage*, 13 O. R. 458; *Coats v. Kelly*, 15 A. R. 81.

### II. DEED OF COMPOSITION AND DISCHARGE.

Action of debt by the plaintiff claiming under a deed of composition and discharge, as assignee of the assignee in insolvency of a co-partnership, whereby the debt in question was assigned to him. Plea, setting out the deed whereby the plaintiff covenanted with all the creditors, collectively and severally, to pay them and each of them fifty cents on the \$ of their respective claims against the said insolvent firm, and on confirmation of the deed to pay the costs respecting the insolvent firm's estate \* \* \* and the preferential claims against the said firm, in consideration of which "the said creditors" released to the insolvent their claims against them, and directed

a conveyance of the insolvent firm's estate to them, and plaintiff averring that at the time of the assignment of the debt to the plaintiff there were separate debts of the insolvent, or one of them, unpaid and unsatisfied, which were not provided for by the deed:—Held, that the deed provided for the payment of firm creditors only, and did not include separate creditors, and therefore that the plaintiff's title to the debt failed. *McKittrick v. Haley*, 46 Q. B. 246.—Osler.

B. & Co., discounted with defendants a draft drawn by the former on the plaintiff for the amount of his indebtedness which plaintiff accepted, but did not pay at maturity. Subsequently B. & Co. made an assignment for the benefit of their creditors; and afterwards plaintiff also becoming embarrassed, procured his creditors, including B. & Co.'s estate to execute a deed of composition and discharge whereby plaintiff's creditors agreed to accept fifty cents on the dollar on their respective debts, payable thirty days from the date of the deed, one D. being surety for the said payment within the time limited. There was a covenant by plaintiff and his surety to pay the composition to the several creditors on or before a fixed date, and by the creditors with plaintiff not to sue for their several debts, and if plaintiff and his surety should observe and perform the covenants, etc. on their part, the creditors would release and deliver up the bills and notes, etc., held by them; and if any of the creditors should sue for their debts the deed might be pleaded in bar. The defendants refused to execute the deed of composition. They proved for the amount of the draft with other indebtedness against B. & Co.'s estate and received a dividend of fifty cents and threatened to sue plaintiff, and he, not knowing that they had received the dividend, paid them the amount of the draft, which they applied on B. & Co.'s general indebtedness and were thus paid in full, but on discovering the facts he brought this action to recover the amount received by them. The plaintiff had not paid B. & Co. the fifty cents or any part thereof:—Held, that the covenant not to sue in the deed of composition and discharge was not absolute, but merely conditional on payment being made within thirty days; and as plaintiff had not paid B. & Co. within the time limited he could not have claimed a release and set up the covenant as a bar to the action, (Rose, J., doubting); that the defendants were trustees for B. & Co. to the extent of forty cents in the dollar of the amount received from plaintiff, and that B. & Co.'s estate could compel the defendants to refund such amount to them, and therefore plaintiff had no right of action against the defendants. Per Rose, J. Had the deed of composition and discharge been effective the defendants could not have recovered from plaintiff more than sufficient to satisfy their own claim in full either in their own right or as trustees for B. & Co. *Andrews v. Bank of Toronto*, 15 O. R. 648.—C. P. D.

At a meeting of the defendant's creditors, at which the plaintiffs were not represented, an arrangement was made to accept forty cents on the \$, on the amount of the claims. A deed of composition with a covenant to accept the forty cents was prepared, and was executed by C. N., the manager of the plaintiffs' branch at L. The exe-



cution was "for Bank of Commerce, C. Nicholson," opposite to which was an ordinary seal. At the time the manager executed the deed, there were two creditors mentioned in the schedule who had not executed. Before either of these creditors had executed, and before the composition notes had been tendered to the manager, he wrote defendants' solicitor withdrawing from the arrangement. It did not appear that the head office had repudiated the manager's authority. The composition notes were subsequently tendered to the manager, but he refused to accept them. By the plaintiffs' Act of incorporation the management of the bank's affairs was to be by the directors who had authority to open branches and to appoint the officers. The chief place of business was to be at T., where the corporate seal was kept:—Held, that the deed was not binding on plaintiffs' corporation, not being under the corporate seal, nor under a signature or sign manual whereby it executed documents:—Held, however, on the evidence, that the manager had authority to agree to accept less than the whole of the claim, and did so agree, and that the debtor performed his part by tendering the notes; and that under R. S. O. (1887) c. 44, s. 53, sub-s. 7, the agreement was irrevocable. *Bank of Commerce v. Jenkins*, 16 O. R. 215.—C. P. D.

See *McGee v. Campbell*, 2 O. R. 130, p. 127; *Jennings v. Hyman*, 11 O. R. 65.

### III. IMPERIAL BANKRUPTCY ACTS.

An English bankruptcy carries all the real and personal property of the bankrupt in any part of the British Dominions; the theory of the English Bankruptcy Acts being that when once a forum had been established for the winding-up of an estate, it is expedient that the whole property of the bankrupt should be brought there in order that it may be ratably divided amongst all his creditors; and the assets of the bankrupt having been thus taken away from him, creditors will not be allowed to harass him with unnecessary litigation. The defendants in these actions carried on business in England and Canada, and had creditors in both countries, the plaintiffs being Canadian creditors. The defendants became subject to the English bankruptcy laws, and a trustee in bankruptcy was appointed, to whom the plaintiffs presented their claim against the estate of the defendants, which claim included the amount claimed in these actions, which were begun in Ontario. The English court made an order on the application of the trustee restraining the plaintiffs from further prosecuting these actions; and upon the application of the defendants an order was made in Chambers here staying proceedings in them:—Held, affirming the decision of Rose, J., (13 P. R. 86), who specially referred to *Howell v. Dominion of Canada Oils Refinery Co.*, 37 Q. B. 484; *Regina v. College of Physicians and Surgeons of Ontario*, 44 Q. B. 564; *Ellis v. McHenry*, L. R. 6 C. P. 228, that it was the duty of the court here to aid the English court; and that the plaintiffs by putting in their claim before the trustee had precluded themselves from objecting to the authority of the English court; and therefore that the order made in Chambers here was a proper order under the circumstances. Liberty

was reserved to the plaintiffs to apply for leave to proceed here after obtaining leave in England. *Maritime Bank v. Stewart*, 13 P. R. 262.—Q. B. D. Affirmed by Court of Appeal; 17, 491.

### IV. INSOLVENT ACTS OF 1864-69-75-79.

#### 1. Jurisdiction of Insolvent Court.

In 1875, J. M. and D. M. entered into partnership, certain assets of J. M. being transferred to the partnership, but nothing being said as to his liabilities. In 1876, the firm having become insolvent, B. was appointed assignee. The partnership creditors were paid in full, and a surplus remained. D. M. then petitioned the county judge in insolvency to divide the said surplus between him and J. M.—B. then commenced this suit against D. M. to have it declared that the said partnership deed was not binding upon him as such assignee, but that the partnership deed might be declared fraudulent and void, and that the court might take an account of the partnership property and make division, and for an injunction restraining D. M. from further proceeding with his petition:—Held, that the Insolvent Court had jurisdiction to deal with the matter, and this being so, was the proper tribunal to do so, and this court would not interfere. *Bell v. McDougall*, 2 O. R. 618.—Boyd.

#### 2. Who may Come Under.

One C., a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by C., and brought suit thereon against H., the assignee in insolvency of C. and D. and others, the owners of parts of the mortgaged lands. It was objected by D. that C. should have been made a party:—Held, that C. was not a trader within the meaning of the Insolvent Act and that nothing passed to the assignee in the insolvency proceedings. C. was therefore declared to be a necessary party, and leave was given to add him as a defendant. *Joseph v. Hagfner*, 29 Chy. 421.—Boyd.

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making the rule nisi taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants. The action was brought by C. as assignee of L. P. F., under the Insolvent Act of 1875, for several trespasses alleged to have been committed on the property known as the Shubenacadie Canal property, and for conversion by C. et al. to their own use of the ice taken off the lakes through which that canal was intended to run. The declaration contained six counts, the plaintiff claiming as assignee of F. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said plaintiff was not, nor is such assignee as alleged." After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with \$10 damages, subject to the opinion of the court, that the parties should be

entitled to tal evidence and have power to defendants w trial to be gra rule was take the minutes of cause, and th motion, it is herein forma ion of the cou tions arising o and with powe for or against aside with cost This rule was terms:—"On the rule nisi judgment entered plaintiff with pealed to the S was:—Held, (F versing the alle the defendants the verdict, an insolvency, and meaning of the evidence did no in the course of livelihood by bu tiff failed to pro Assuming F. to were entitled which had been agreement at n render a verdict ing as they shou law and the fact ing exercised th by this agreem the defendants, judgment on the the court below substantially co been objected th new trial the rule was erroneous, t technical to be a rule nisi, having ment at nisi pri rendered a verdi be upheld, excep mentum, which or struck off the trial could be bu at great expens R. 348.

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entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants with costs. A rule nisi for a new trial to be granted accordingly, and filed. The rule was taken out as follows:—"On reading the minutes of the learned Judge who tried the cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent subject to the opinion of the court, with power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants, with costs, be set aside with costs and a new trial granted herein." This rule was made absolute in the following terms:—"On argument, etc., it is ordered that the rule nisi be made absolute with costs and judgment entered for the defendants against the plaintiff with costs." Thereupon plaintiff appealed to the Supreme Court of Canada, and it was:—Held, (Henry, J., dissenting), that by traversing the allegation of plaintiff being assignee, the defendants put in issue the fact implied in the verdict, that the plaintiff was assignee in insolvency, and that F. was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that F. bought or sold in the course of any trade or business, or got his livelihood by buying and selling, that the plaintiff failed to prove this issue: Per Gwynne, J. Assuming F. to be a trader still the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at nisi prius authorized the court to render a verdict for plaintiff or defendant according as they should consider either party upon the law and the facts entitled; that the court, having exercised the jurisdiction conferred upon it by this agreement, and rendered judgment for the defendants, this court was also bound to give judgment on the merits, and as the judgment of the court below in favour of the defendants was substantially correct to sustain it; and it having been objected that as the rule nisi asked for a new trial the rule absolute in favour of defendants was erroneous, that such an objection was too technical to be allowed to prevail, and that the rule nisi, having, as it did, recited the agreement at nisi prius, and the court below having rendered a verdict for the defendants, it should be upheld, except as to the plea of liberum tenementum, which should be found for the plaintiff or struck off the record, and that to order a new trial could be but to protract a useless litigation at great expense. *Creighton v. Chittick*, 7 S. C. R. 348.

### 3. Assignee.

#### (a) Surety of.

Held, that where an official assignee in insolvency had given a bond as such with sureties, pursuant to the Insolvent Act of 1875, and amending Acts, and the creditors had duly appointed the same individual to be creditors' assignee, under section 29 of that Act, but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, and were not discharged by reason of such appointment as creditors' assignee. *Armstrong v. Forster*, 6 O. R. 129.—Proudfoot.

Semble, that one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; and the sureties to the bond are discharged by payment to any one who recovers judgment against them. *Id.*

Held, that where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee. *Letourneau v. Dansereau*, 12 S. C. R. 307.

#### (b) What Property Vests in.

Upon the death of one member of a firm, and the subsequent insolvency of the surviving partners, the joint estate passes to their assignee in insolvency. But where the capital of surviving partners having been lost, they, while the estate was supposed to be solvent, conveyed the same to a trustee for creditors upon the request of the executrix of a deceased partner in consideration of a release by her from all liabilities; and the executrix afterwards, upon obtaining probate, conveyed her interest to the trustee; and subsequently through a shrinkage in value the estate became insufficient to meet the liabilities, it was:—Held, that by the assignment to the trustee, at the request of the executrix, for valuable consideration, they had parted with all interest in the estate, and nothing passed to the plaintiff, as assignee, under proceedings in insolvency taken on the supposition that the assignment to the trustee was an act of insolvency, and that the assignment to the trustee not being questioned on the ground of fraud, the assignee of the survivors was precluded from any enquiry. *Davidson v. Papps*, 28 Chy. 91.—Proudfoot.

A mortgagor and mortgagee dealt together for some years without having any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off in favour of the mortgagor for the balance due him on their general dealings:—Held, affirming the finding of the Master, that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity. *Court v. Holland*, 29 Chy. 19.—Boyd.

The payee of a promissory note made and payable in Ontario, who had absconded to Michigan, while there, and after a writ of attachment in insolvency had issued against him in Ontario, endorsed the note for good consideration to the plaintiffs, who took it bona fide. Evidence was given to prove that by the law of Michigan the endorsement was sufficient to pass the note to the plaintiff:—Held, reversing the judgment of the County Court, that the plaintiffs could not recover, as the title to the note had vested in the assignee before the endorsement, and that his rights thereto could not be affected by the law of Michigan. *Jenks v. Doran*, 5 A. R. 558.

An assignee in insolvency is entitled to all the earnings of an insolvent which are earned after the assignment in insolvency, and before discharge, over and above what is necessary for the reasonable maintenance of the insolvent and his family. Therefore, where an insolvent, pending his discharge, applied part of his earnings in the purchase of land for the benefit of his wife:—Held, that to the extent of earnings so applied the assignee was entitled to a lien on the land. *Clarkson v. White*, 4 O. R. 663.—Boyd.

Held, also, that the repeal of the Insolvent Acts by 43 Vict. c. 1 (D), before claim made, was no bar thereto, the estate of the insolvent having vested in the assignee before April 1st, 1880, and there having been no reconveyance of the property to the insolvent, who had, however, obtained his discharge before action brought. *Ib.*

See *Troop v. Hart*, 7 S. C. R. 512; *Jones v. Kinney*, 11 S. C. R. 708, p. 126.

#### (c) Rights, Duties and Liabilities.

The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of such power, is also applicable to sales by a trustee or quasi trustee acting under a power;—the power must be followed and the rule applies with equal force to sales by an assignee of an insolvent estate, under the Act of 1869, s. 47, who in such cases acts under a statutory power authorizing a sale, "but only after advertisement thereof for a period of two months." *In re Jarvis v. Cook*, 29 Chy. 303.—Sprague.

An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale "for a period of two months" as prescribed by the Act, no sanction of the creditors thereto having been given:—Held, a good objection to the title by a vendee of the purchaser at such sale. *Ib.*

An assignee in insolvency bona fide suing in discharge of his duty as such assignee, will not be required to give security for costs on the ground that he is without means and not beneficially interested in the suit. *Vare v. Gould*, 8 P. R. 31.—Stephens, Referee.

The plaintiff, an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate and used his own name as the attorney on the record. The plaintiff obtained a verdict:—Held, that under section 32 of the Insolvent Act of 1875, he was entitled to tax disbursements only against the defendants. *Agnew v. Ross*, 8 P. R. 67.—Oaler.

Held, affirming the decision of the County Court, Burton, J.A., diss., that the assignee of an insolvent mortgagor can, for the benefit of creditors impeach a chattel mortgage for non-compliance with the Chattel Mortgage Act. *Re Barrett, an insolvent*, 5 A. R. 206.

In trover for goods against an assignee in insolvency:—Held, following the last case, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent just as an execution creditor or subsequent purchaser for value may do. *Snarr v. Smith*, 45 Q. B. 156.—Q. B. D.

Upon the insolvency of the lessees, there were goods upon the premises belonging to them, and other goods stored with them, sufficient to pay the taxes in arrear; and a warrant being issued, the bailiff notified the assignee, but forbore to distrain on the assignee's promise to pay, which promise was confirmed by the inspectors of the estate. The goods having been afterwards removed, an order was made directing the assignee to pay the taxes forthwith, with all costs. *In re Bowes, Insolvents*, 5 A. R. 353.—Burton.

Held, affirming the judgment of the County Court, that under section 67 of the Insolvent Act of 1875, all debts exceeding \$100 must be sold separately, unless where there is a sale of the whole estate en bloc; and the purchaser of such a debt, otherwise than the section directs, cannot recover against the debtor. *Fiske v. O'Neill*, 6 A. R. 99.

Retainer of solicitor by assignee under Insolvent Act 1875. Liability for Costs. See *Butterfield v. Wells*, 4 O. R. 168.

#### 4. Joint and Separate Creditors.

Where, upon the dissolution of a firm, the business is continued by one of the partners, who assumes the liabilities, the joint assets remaining in specie are primarily applicable to the payment of the joint creditors of the firm. *Re Walker, an Insolvent*, 6 A. R. 169.

Held, that under section 88 of the Insolvent Act of 1875, if the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid; if wholly out of separate estate, it belongs entirely to separate creditors till they are paid, and if partly out of each class of assets, it should be divided pro rata between each class of debts. *Ib.*

See *McKittrick v. Haley*, 46 Q. B. 246, p. 114.

#### 5. Creditors holding Security.

Under the Insolvent Act of 1875, a creditor holding security at the time of the insolvency, cannot realize the security, and prove on the estate for the balance. *Re Hurst*, 31 Q. B. 116, commented upon. *Re Beatty, an Insolvent*, 1 A. R. 40.

When an assignee in insolvency elects, under section 84 of the Insolvent Act, 1875, to allow a creditor to retain, at a valuation, the property which he holds as security for his debt, the creditor becomes a purchaser at that valuation, freed from any right or equity to redeem on the part of the insolvent or his estate. *Bell v. Ross*, 11 A. R. 459.

Where the secured creditor has valued his security for the purpose of proof, the policy and express language of the Insolvent Act, 1875, require that the decision of the assignee shall be promptly made. A formal resolution of the assignee allowing the creditor to retain the property is not necessary. Therefore where the assignee had ample means of knowing the value of the assets before the creditor proved his claim and valued his security in January, 1879, and where no meeting of creditors was held after that date till the 30th of July following, and the

estate was security; and by the assignee when he was filed shows; but Mr. Leitch puts your claim etc., it was filed his election the security, to redeem it

See *Beatty*

#### 6. Process

In ejectment deed from the Prior to the insolventy P. his brother L. that the deed under section on the assignee deed set aside from the the two creditors order under take the proceedings were aside. The land for being short to F., but in re conveyed. The and requested purchaser who creditors he refused obtained from the execute the deed and opposing section 68 the proceedings shall instituting the section 75, no s "has been sanctioned meeting, or at the purpose of the period of the a "by the creditor judge:—Held, sale and the d Galt, J. The draw the proper creditors, and t tors; and, so f this section, or statute meant general body of been sanctioned tion 78 had been C. J. Under from the proceed the litigating on the creditors re requisite; but c mere stranger to not in a positi Cameron, C. J. Insolvent Act 1 of a power, but conveyance by with the trusts the assignee.

estate was sold without any reference to the security; and where nothing further was done by the assignee until the 13th October following, when he wrote to the creditor: "Your claim as filed shows a balance over security of \$3,091.13, but Mr. Leitch (the purchaser of the estate) disputes your claim to any dividend, on the ground," etc., it was—Held, that the assignee had signified his election to allow the creditor to retain the security, and his abandonment of any right to redeem it for the estate. *Id.*

See *Beaty v. Samuel*, 29 Chy. 105, p. 106.

#### 6. Proceedings by Individual Creditors.

In ejectment plaintiff claimed title under a deed from the assignee in insolvency of P. D. Prior to the issue of the writ of attachment in insolvency P. D. had conveyed the property to his brother L. D. Two of the creditors claimed that the deed was fraudulent, and made a demand under section 68 of the Insolvent Act of 1875 on the assignee to take proceedings to have the deed set aside, which the assignee, on instructions from the creditors, refused to do, whereupon the two creditors obtained from the judge an order under that section authorizing them to take the proceedings on their own behalf. Proceedings were thereupon taken and the deed set aside. The land was advertised, the period thereof being shortened by the judge, and was sold to F., but in reality to the plaintiff to whom F. conveyed. The assignee was notified of the sale and requested to execute a conveyance to the purchaser which, under instructions from the creditors he refused to do, whereupon an order was obtained from the judge directing the assignee to execute the deed, the assignee's solicitor attending and opposing the making of the order. Under section 68 the "benefit derived from such proceedings shall belong exclusively to the creditor instituting the same for his benefit;" and under section 75, no sale is to be completed unless it "has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose or by the inspectors;" and also the period of the advertisement might be shortened "by the creditors with the approval of the judge:"—Held, *Rose, J.*, dissenting, that the sale and the deed thereunder was valid. Per *Galt, J.* The effect of section 68 was to withdraw the property from the general body of creditors, and to vest it in the litigating creditors; and, so far as regards proceeding under this section, creditors when referred to in the statute meant litigating creditors, and not the general body of creditors; and the sale having been sanctioned by such litigating creditors, section 78 had been complied with. Per *Cameron, C. J.* Under section 68 the benefit to accrue from the proceeding passed from the estate to the litigating creditors; and the sanction of all the creditors referred to in section 78 was not requisite; but even if it were, the defendant, a mere stranger to the insolvency proceedings, was not in a position to raise the objection. Per *Cameron, C. J.*, also. An assignee under the Insolvent Act 1875, is not merely the executor of a power, but takes the legal estate which on conveyance by him vests in his grantees clothed with the trusts with which it was invested in the assignee. Per *Rose, J.* The meaning of

section 68 was not that the litigating creditors were to have the exclusive benefit of the proceeding without limitation, but merely the benefit thereof as creditors, that is, payment of their debts in full; but any surplus must go to the other creditors: that on the deed to L. D. being set aside the property did not vest in the litigating creditors, but was in the assignee who held it in trust to so distribute it, and this being a matter for the general benefit of the creditors it was subject to the other provisions of the Act, and therefore to the provisions of section 78, which had not been complied with, so that no sale was made, and no title passed thereunder. Re *Jarvis v. Cook*, 29 Chy. 303, considered and commented on. The defendant set up that he had a title by possession; and that the title was outstanding in a mortgage; but the evidence failed to establish it. *Donovan v. Herbert*, 9 O. R. 89.—C. P. D. S. C., 12 A. R. 298.

#### 7. Set-off.

By a lease, made by the defendant to the insolvents, the lessees were "to get pay for improvements at a fair valuation, and to have the right of purchase during the term by paying the lessor first all claims by way of notes, or otherwise he holds, or may hold against the said lessees, and the sum of \$235.15 as purchase money," etc. In January, 1875, an attachment under the Insolvent Act of 1869, was issued; and in March defendant filed his claim, which included a note for \$500, most of which sum had been expended in improvements, and had been obtained for that purpose. There had been a valuation of the improvements at the end of the term in 1877, at \$275, in which defendant did not take part, and the assignee sued defendant for that sum on his covenant:—Held, *Armour, J.*, dissenting, that the note formed an equitable if not a legal set-off against the claim; that the right to such set-off was matter of procedure, and governed therefore by the Act of 1875, not the Act of 1869; and that defendant was not precluded by having proved his claim. Per *Armour, J.*, the question was governed by the Act of 1869, and the plaintiff's claim not being liquidated, the defendant's claim could not be the subject of set-off:—*Quere*, whether under the lease the payment of defendant's claim was not a condition precedent to his paying for improvements. *Mason v. Macdonald*, 45 Q. B. 113.—Q. B. D.

The difference between our insolvent law, as to set-off, and that in England and the United States remarked upon. *Id.*

#### 8. Interest.

After payment by an insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee:—Held, (reversing the decision of the court below) that notwithstanding the provisions of section 99 of the Insolvent Act, interest was payable on all debts originally bearing interest by contract or otherwise, but not where it was claimable by law as damages only:—Held, also, that the claim to such interest was properly brought before the court by petition filed by the inspectors, who, acting under a resolution of

creditors, had requested the assignee to pay such interest. *In re McDougall*, 8 A. R. 309.

See *Stewart v. Gage*, 13 O. R. 458, p. 113.

### 9. *Fraud and Fraudulent Preferences.*

(a) *Transactions Protected.*

A mortgage is a "contract" within the meaning of the Insolvent Act of 1875, section 130:—Held, under the circumstances stated in the report of this case, that the defendant might hold a mortgage in his favour created by a person in insolvent circumstances for certain advances made by the mortgages contemporaneously with the execution of the incumbrance, and also for future advances intended to be secured thereby, though it was not shewn that such advances were made for the purpose of enabling the mortgagor to carry on his business, but that such mortgage was not a valid security for antecedent advances made by the mortgagee, nor for notes endorsed by the mortgagee for the mortgagor, but not paid, in respect of which therefore he had been a surety only, not a creditor. *Smith v. Harrington*, 29 Chy. 502.—Sprague.

The defendants discounted at a bank a promissory note which A. had given them, and on maturity it was paid to the bank out of A.'s moneys within thirty days of his insolvency. In an action by the assignee to recover the amount from the defendants as being a payment without benefit of the Insolvent Act of 1875:—Held, reversing the decision of the County Court, that they were not liable, as the payment was not made to them, but to the bank, who were the actual creditors. *Miller v. Harvey*, 6 A. R. 203.

K. had a note of discount with the defendants of \$20,000, for which \$5,000 collaterals were deposited as security. Sometime afterwards his indebtedness to the bank was nearly doubled when the agent insisted upon obtaining additional security by deposit of further collaterals, and which some months before the insolvency were deposited. This was impeached by the assignee in insolvency of K. as being an unjust preference of the bank:—Held, affirming the decision of the Court below, (28 Chy. Fay. 449,) that the transfer to the defendants, of the securities as collaterals was valid, the plaintiff having failed to establish that K. contemplated insolvency:—Held, also, that the want of knowledge by the defendants' manager would not have availed the defendants, if the insolvent had, in fact, made the transfer in contemplation of insolvency. *Nelles v. Bank of Montreal*, 7 A. R. 743.

Another transfer had been made to the bank within thirty days of the insolvency, which was also impeached, but upon the faith of which the bank had made advances to K. exceeding the value of the securities so transferred, which would not otherwise have been made :—Held, that the bank had not thereby obtained an unjust preference, and therefore the transaction could not be impeached. *Ib.*

The insolvent made a cash payment of \$1,000 to the bank a few days before his insolvency, but it was sworn that he had been allowed to overdraw upon an agreement to cover it by this payment, and it was not shewn that the bank manager had, at that time, probable cause to

believe in his inability to meet his engagements in full :—Held, that this money could not be recovered back. *Ib.*

Upon the arrangement for a deed of composition and discharge, the creditors required security for payment of the composition, and one Meikle, a creditor, agreed to endorse the composition notes upon receiving a mortgage upon the property settled upon the insolvent's wife, securing him in respect of his endorsements, and on payment of \$250 in addition to his composition.—Held, not a fraudulent preference within the meaning of the Act. *Re Russell*, 7 A. R. 777.—Burton.

A post nuptial settlement upon his wife was made by an insolvent at a time when he was not aware of his inability to meet his liabilities, and while he had contracts on hand from which he might reasonably have expected to make a profit, though they afterwards proved unsuccessful:—Held, no ground for refusing the insolvent his discharge. *1b.*

W., the respondent, was a private banker who had had various dealings with one D., and had discounted for him at an exorbitant rate of interest notes received by D. in the course of his business. D.'s indebtedness on new transactions amounted to a large sum of money, but, being man of very sanguine temperament, he had entered into a new line of business, after obtaining goods on credit to the amount of \$4,000 or \$5,000, upon a representation to the parties supplying such goods that, although without any available capital, he had experience in business. About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to W., who advanced him \$300, part of which was applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of D.'s held by W.. D. executed a mortgage in favour of W. and was granted a reduced rate of interest on his indebtedness, and was told he would have to work carefully to get through. D. became insolvent about four months afterwards. In suit by McR., as assignee, impeaching the mortgage to W., it was :—Held, affirming the judgment of the Court of Appeal, (*McCrae v. Whyte*, 7 A. R. 103), that McR. had not satisfied the onus which was cast upon him by the Insolvent Act, of showing that the insolvent at the time of the execution of the mortgage in question contemplated that his embarrassment must of necessity terminate in insolvency. *McCrae v. White*, 9 S. C. R. 22.

G., in 1878, being unable, on account of depression in business, to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims, showing a surplus of \$8,000, after deduction of his bad debts. The creditors consented to grant his request, and agreed to accept G.'s notes at 4, 8, 12 and 16 months, on condition that the last of them should be endorsed to their satisfaction. N. (the respondent) agreed to endorse the last notes on condition that G. should deposit in a bank in his (N.'s) name \$75 per week to secure him for such endorsement, and G. signed an agreement to that effect. Thereupon N. endorsed G.'s notes to an amount of over \$4,000, and they were given to G.'s creditors. On 31st July, 1879, G., after

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having deposited with the  
Ville Marie Bank, and  
he had endorsed the  
as assignee of the bank,  
claiming that the  
were fraudulent and  
deposited might be  
the benefit of the  
the judgment of the  
(Que.) Ritchie, J.,  
ing, that the assignee  
which the mortgage  
became pledged to  
the Insolvent  
no fraud on the part  
tion of assets of the  
but a proper  
portion of G.'s  
contravention of the  
ing at the mortgage  
curity which was  
contemplation of  
ence. *Beauséjour*

See *Boustead*  
v. *Price*, 27 C.  
Chy. 483; S. C.  
7 A. R. 98.

(b)

The bill was of one T., to a shortly before the defendant T. M. \$2,000 made the question for the of his brother \$2,000 with which swore that he of a debt due to brother. J. M. moneys belonging evidence was called:—Held, V. C., that un which surround upon the defec debt was due that the mone thereof had been security of the evidence set of lish. The rule Clarke, 18 Ch kind should not by the uncorro thereto—appro 20.

The plaintiffs stone and brick were to receive tractors who al school board, p selves of the b tors for their d the contractors were at the time the plaintiffs k vency issued ag after the assign ing the judge transaction was



having deposited \$2,007.87 in N.'s name, in the Ville Marie Bank, failed, and N. paid the notes he had endorsed, partly with the \$2,007.87. B., as assignee of G., brought an action against N., claiming that the payments made to N. by G. were fraudulent, and praying that the money so deposited might be reimbursed by N. to B., for the benefit of all G.'s creditors:—Held, affirming the judgment of the Court of Queen's Bench, (Que.) Ritchie, C. J., and Fournier, J., dissenting, that the arrangement between G. and N., by which the moneys deposited in the bank by G. became pledged to N., was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstraction of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of G.'s assets in furtherance and not in contravention of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference. *Beausoleil v. Normand*, 9 S. C. R. 711.

See *Boustead v. Shaw*, 27 Chy. 280; *Darling v. Price*, 27 Chy. 331; *Davidson v. McGuire*, 27 Chy. 433; *S. C., Sub nom. Davidson v. Macguire*, 7 A. R. 98.

#### (b) Transactions Avoided.

The bill was filed by the assignee in insolvency of one T., to set aside a mortgage given by him shortly before his insolvency, alleging that the defendant T. N., who was endorser of a note for \$2,000 made by T., procured the mortgage in question for that amount to be made in the name of his brother J. N., and that he gave J. N. the \$2,000 with which the note was retired. T. N. swore that he paid J. N. the money in discharge of a debt due by him to J. N. and P. N., another brother. J. N. also swore that the mortgage moneys belonged to him and P. N., but their evidence was uncorroborated, and P. N. was not called:—Held, reversing the decree of Proudfoot, V. C., that under the suspicious circumstances which surrounded this case, the onus was wholly upon the defendants, to prove not only that a debt was due from T. N., J. N. and P. N., but that the money received by them in payment thereof had been honestly advanced to T. on the security of the impeached mortgage, which the evidence set out in the report failed to establish. The rule laid down in *Merchants' Bank v. Clarke*, 18 Chy. 594, that transactions of this kind should not be held sufficiently established by the uncorroborated testimony of the parties thereto—approved of. *Morton v. Nihan*, 5 A. R. 20.

The plaintiffs, who were sub-contractors for the stone and brick work of a public school, and who were to receive payment from the principal contractors who alone were recognized by the public school board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractors by the board. The contractors were at the time unable to pay their debts, which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim:—Held, affirming the judgment of Proudfoot, V. C., that the transaction was an unjust preference under sec-

tion 133 of the Insolvent Act of 1875; and, Semble, that it was also within the meaning of sections 130 and 132, and the plaintiffs could not maintain a suit to enforce payment of the balance assigned to them. *Griffiths v. Perry*, 6 A. R. 672.

F., a shipowner in Yarmouth, N. S., employed as his agents in Liverpool J. & Co., the defendant J. being a member of their firm, and as agents in New York he employed the firm of S. & B., of which the defendant S. was a member. In the course of his dealings with these agents he became indebted to both firms for acceptance by them of his drafts, made when he was in want of money, towards the payment of which they received the freights of his vessel and remittances in money. On one occasion he said that he would give to the Liverpool firm a mortgage on the "Tsernogora" or "Magnolia" when they should require it, and in a subsequent conversation with a member of the firm he agreed to give such mortgage on certain conditions which were not carried out. He also promised the firm in New York to give them security in case anything happened, and mentioned as such security a mortgage on the "Tsernogora." According to F.'s own statement he had sufficient property to pay his liabilities when these conversations took place. A few weeks after these conversations took place, F. executed a mortgage of  $\frac{1}{2}$  shares of the "Tsernogora" in favour of the defendants J. and S. and had the same recorded, and within thirty days thereafter a writ of attachment in insolvency was issued against him. The plaintiff, who was appointed assignee of F.'s estate by his creditors, filed a bill to have the mortgage set aside, claiming that it was void under section 133 of the Insolvent Act of 1875. The defendant J. did not answer the plaintiff's bill, and the other defendants denied that the mortgage was made in contemplation of insolvency, and also claimed that as it was made under the provisions of the Merchants' Shipping Act, (Imp.), it was not affected by the Insolvent Act of 1875. The Judge in equity, before whom the cause was heard, made a decree in favour of the plaintiff, and ordered the mortgage to be set aside, and the Supreme Court of Nova Scotia dismissed an appeal from that judgment. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the court below, (Henry, J., dissenting), that the promise to give security "in case anything should happen" could only mean "in case the party should go into insolvency," and that the transfer was void under section 133 of the Insolvent Act of 1875:—Held, also, that the provisions of the Merchants' Shipping Act did not prevent the property in the ship passing to the assignee under the Insolvent Act. *Jones v. Kinney*, 11 S. C. R. 708.

See *Smith v. Harrington*, 29 Chy. 502, p. 123; *Milloy v. Kerr*, 8 S. C. R. 474, p. 142.

#### 10. Fraudulent Concealment of Assets.

A final order of discharge obtained by an insolvent upon a deed of composition and discharge duly confirmed, will be vacated by this court, on bill filed by a creditor, party to the insolvency proceedings, where such discharge had been obtained by a fraudulent concealment of assets. An insolvent firm, on September 16th, 1878, made



an assignment under the Insolvent Acts. On October 2nd, 1878, a deed of composition and discharge, under the said Acts, was executed, whereby the said firm covenanted to pay a certain dividend, and on February 28th, 1879, the Judge in insolvency made an order for its confirmation, a sworn statement of the assets and liabilities of the firm having been first duly filed by the members thereof. Long afterwards one of the creditors, who had consented, on payment of a certain dividend, to assign his claim to S. as trustee for the insolvent firm, and for the purpose of executing the said deed, though he himself refused to execute it, discovered that C., one of the members of the firm had fraudulently concealed some of his assets, and he filed a bill in this court to have the said deed of composition, and the order confirming the same, declared void as against him:—Held, that the deed and order of confirmation must be vacated as regards C., and the insolvency proceedings reopened, so that there might be a due administration of the assets, thus withheld, and the assignment to S. must be prevented from being set up as a bar to such relief. *Mettee v. Campbell*, 2 O. R. 130, Chy. D.; reversing *S. C.* 28 Chy. 308.

Held, (Proudford, J., dubitante), inasmuch as the assets fraudulently concealed were C.'s private property, and not the property of the partnership, the discharge should only be vacated as to private estate of C. Per Proudford, J., the assignment to S. was invalid, being made without consideration, or for a consideration, which was no satisfaction, being the payment of a less sum for a greater; but even if it must be taken to have been for value, it was sufficient for the plaintiff to shew that it was entered into under a mistake caused by the insolvent firm, as to the true amount of the assets, whether the firm acted innocently or otherwise. *Ib.*

It also appeared that among C.'s assets was a certain sum received by him, or to which he had a claim from a certain railway company as compensation for services rendered as temporary acting president:—Held, that C. was bound to return as an asset the portion of the compensation payable for services rendered up to the date of the assignment in insolvency, but not the remainder. *Ib.*

It appearing that part of C.'s assets was certain railway stock, obtained by him on a contract, that he was to retain one-half, if he could give the stock a marketable value, but that if he could not do so within a certain time, extending beyond the period of the insolvency proceedings, the transaction was to be void, and he was to re-transfer:—Held, that the shares should have been returned in his sworn statement as part of his assets, for the language of the statute was large enough to cover such an interest. It was a valid executory contract, and as such passed on insolvency to the assignee. *Ib.*

#### 11. Fraud in Obtaining Goods on Credit.

Where a judgment has been recovered for a debt without fraud being charged under s. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action against the debtor charging the fraud,

even although the judgment was recovered by default, for the plaintiff might have declared, averring such fraud, and had the question tried. *Lighbound v. Hill*, 32 C. P. 249.—Cameron.

Quære, whether, where an insolvent's estate vested in an assignee under the Insolvent Act before its repeal, the action for the alleged fraud was a proceeding that might be continued thereunder under the terms of the repealing Act, 43 Vict. c. 1, Dom., or of the Interpretation Act, 31 Vict. c. 1, Dom.; and whether, also, the section 136 of the Insolvent Act of 1875 was ultra vires the Dominion Parliament. Remarks as to the difference between section 136, and the corresponding provision in section 92 in the Insolvent Act of 1869. *Ib.*

P. et al., merchants carrying on business in England, brought an action for \$4,000 on the common counts against J. S. et al., and in order to bring S. et al. within the purview of section 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by S. et al. from them on the 13th March, 1879, and another purchase on the 29th March of the same year; that when S. et al. made the said purchases they had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from P. et al., thereby becoming their creditors with intent to defraud P. et al. J. S. (appellant) amongst other pleas, pleaded that the contract out of which the alleged cause of action arose was made in England and not in Canada. To this plea P. et al. demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects resident and domiciled in Canada at the time of the purchase of the goods in question and had subsequently become insolvents under the Insolvent Act of 1875, and amendments thereto. Per Ritchie, C. J., and Fournier, J.: 1. That section 136 of the Insolvent Act of 1875 is intra vires the Parliament of Canada. 2. That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency over which subject matter the Parliament of Canada has power to legislate. 3. Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions of the 136th section of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed. Per Gwynne, J., the demurrer does not raise the question whether the section 136 of the Insolvent Act of 1875 is or is not ultra vires the Dominion parliament, for whether it be or not, the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore, if the appeal be entertained it must be dismissed. Per Strong, Henry, and Tasche-reau, J.J., there being nothing either in the language or object of the 136th section of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant, stated in the second

count of the unnecessary validity of appeal should equally divide out costs. *Sub nom. Pe-*

(a) Gr

Held, that a discharge Act of 1875, the case, did a dividend of by circumsta after the mai for which the sible within that section. ing to mail s required by t Christie, 5 A.

The insolvent the statement verterly omi which he attr ever, he made creditors, wh This defect was a year, and af for, and the affidavit suppli ing the decisi Court, that th within seven section 17, wa the right to co which had be section 57, the disentitle the i not wilful:—I stances more case, the oppo objecting to th ish, Insolvents.

Under sectio of 1875, a Judge vent his discha a cash book an trade, even alt due to any fra an Insolvent, 5

Where an account suitabl to an immediat Act of 1875, owing to any however, as the which although as a business re pended for th Insolvent, 5 A.

The insolvent vency, stated t surplus of \$40, that there was a the difference n accounted for.

count of the declaration. In this view, it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed. The court being equally divided, the appeal was dismissed, without costs. *Shields v. Peak*, 8 S. C. R. 579; *S. C.*, sub nom. *Peak v. Shields*, 6 A. R. 639; 31 C. P. 112.

## 12. Discharge.

### (a) Grounds for Refusing Discharge.

Held, that the insolvents were not entitled to a discharge under section 65 of the Insolvent Act of 1875, as the facts set out in the report of the case, did not shew that their failure to pay a dividend of fifty cents in the dollar was caused by circumstances arising more than one month after the mailing of the declaration of insolvency, for which they could not be justly held responsible within the meaning of the third proviso to that section. Quere, as to the effect of neglecting to mail such declaration to each creditor, as required by that section. *In re Galbraith and Christie*, 5 A. R. 358.

The insolvent swore to an affidavit verifying the statement of liabilities and assets, but inadvertently omitted the statement of the causes to which he attributed his insolvency, which, however, he made verbally at the first meeting of creditors, where the contestant was present. This defect was not pointed out for more than a year, and after the discharge had been applied for, and the insolvent then swore to another affidavit supplying the omission:—Held, reversing the decision of the Judge of the County Court, that the omission to furnish the statement within seven days from the assignment under section 17, was immaterial, as it expressly gave the right to correct or supplement the statement, which had been done:—Held, also, that under section 57, the omission complained of would not disentitle the insolvent to his discharge, as it was not wilful:—Held, also, that under the circumstances more fully set out in the report of the case, the opposing creditor was estopped from objecting to the omission. *Re Martin and English, Insolvents*, 5 A. R. 647.

Under sections 56 and 57 of the Insolvent Act of 1875, a Judge has no power to grant an insolvent his discharge, where he has failed to keep a cash book and account books suitable for his trade, even although such omission may not be due to any fraudulent intention. *Re Gooding, an Insolvent*, 5 A. R. 643.

Where an insolvent omits to keep books of account suitable for his trade, he is not entitled to an immediate discharge under the Insolvent Act of 1875, though such failure may not be owing to any improper motive. In this case, however, as the insolvent had kept certain books, which although imperfect were honestly meant as a business record, his discharge was only suspended for three months. *Re Bullivant, an Insolvent*, 5 A. R. 638.

The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of \$40,000. When he failed it appeared that there was a deficiency of about that amount, the difference not being satisfactorily, if at all, accounted for. He did not produce all his books,

but it was proved that they were kept in such a manner that they would not shew the true state of his affairs. The cash book had never been balanced, and no balance sheet was ever made out; bills were discounted which did not appear in any of the books, and goods were transferred from his wholesale to his retail place of business without entry in the books that were kept:—Held, reversing the order of the Judge below granting a discharge to the insolvent, 1, that though an insolvent may be guilty of the offence of not fully, clearly, and truly stating the causes of his insolvency, that is no ground for refusing the discharge, even after a conviction for the offence; 2, that the omission to keep any books prevents the judge from granting a discharge, whether the intent be fraudulent or not; but, 3, when they have been kept, it is not essential, on the one hand, that they should be kept in the most approved form nor are they sufficient, on the other, however carefully kept in some respects, if they fail to exhibit the insolvent's exact position; 4, that under the facts in this case the insolvent was not entitled to his discharge. Liberty to the insolvent to renew the application was given, if he should be so advised on his producing the remainder of his books. *In re Hill*, 7 A. R. 694.

Semble, that if an insolvent obtains the consent of the required number of creditors or the execution of a deed of composition and discharge he may at once make the application without waiting for the expiration of a year; he is not precluded however, from applying after the expiration of a year, under the 64th section of the Insolvent Act (1875). *Id.*

In order to absolutely disentitle an insolvent to his discharge on the ground of failure to keep proper books of account, where the case is not one of a commercial business, the party opposing the discharge must shew that there were no books; or, if there were, in what respect they were defective. *Re Russell*, 7 A. R. 777.

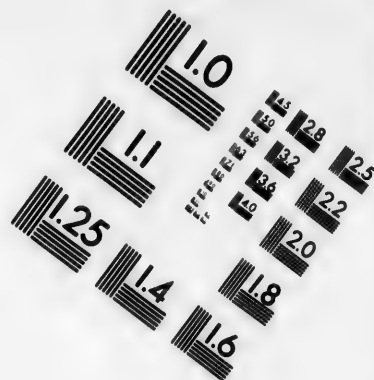
It is no objection to an application by an insolvent for a discharge under sections 64 and 65 of the Act, that a previous application under section 56 to confirm a deed of composition and discharge had been refused, where it appeared that the ground of refusal was that the deed was not executed by a sufficient number of creditors who had proved claims. *Id.*

Quere, whether an assignee would be justified in reconveying the estate to the insolvent under the directions contained in a deed so insufficiently executed. *Id.*

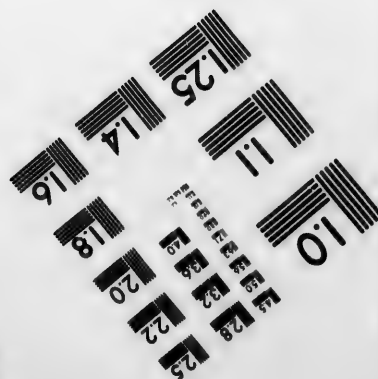
Upon his appointment the assignee took an inventory of the property, but owing to the execution of the deed of composition and discharge, afterwards declared inoperative, did not remove it:—Held, not a retention or concealment by the insolvent, so as to disentitle him to his discharge; in such a case the retention and concealment necessary to disentitle an insolvent to his discharge must be wilful and fraudulent. *Id.*

### (b) Effect of Discharge.

Held, affirming the judgment of Cameron, J., that under the Insolvent Act of 1864, s. 9, sub-s. 5, a discharge in insolvency would form no answer to proceedings upon a judgment against the



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defendant for seduction. *Benninger v. Thrasher*, 9 P. R. 206; *S. C.*, sub nom. *Beninger v. Thrasher*, 1 O. R. 313.—Q. B. D.

In 1866 judgment was recovered against the defendant in this action for breach of promise of marriage, and in another for seduction. The defendant then made an assignment under the Insolvent Act, 1864, having no assets, and his only creditors being the plaintiffs in the two actions. No creditors appeared, and after twelve months he petitioned for his discharge. The application was duly advertised, and no opposition being made, was granted. He subsequently acquired some property, and execution was then issued in this action. The Master in Chambers refused to set aside the execution on motion made by the defendant, and his order was reversed by Osler, J.:—Held, affirming the decision of Osler, J., that the want of assets at the time of making the assignment could not be set up on the application as a ground for avoiding the discharge, and as a matter for the consideration of the insolvent court upon the application therefor, and that unless attacked for fraud it was a complete answer to the plaintiff's claim:—Held, also, that the plaintiff's claim was one which was barred by the discharge. *Thomas v. Hall*, 6 F. R. 172, and *Parke v. Day*, 24 C. P. 619, commented upon. *Forrester v. Thrasher*, 9 P. R. 383; 2 O. R. 38.—Q. B. D.

To an action by a commercial traveller for wages, defendants pleaded a deed of composition and discharge in insolvency. The plaintiff replied that the claim was privileged:—Held, reversing the judgment of the Queen's Bench, (45 Q. B. 188), that privileged claims are not within the class of debts mentioned in section 63 of the Insolvent Act of 1875, to which a discharge does not apply without the consent of the creditor. *Fryer v. Shields*, 6 A. R. 57.

See *Beaty v. Samuel*, 29 Chy. 105, p. 106.

### 13. Repeal of Act.

The repeal of the Insolvent Act does not affect any insolvent whose estate has vested in the assignee prior to the repeal. *Cooper v. Kirkpatrick*, 8 P. R. 248.—Dalton, Q.C.

Held, that the doctrine of pressure which obtained before the insolvency laws now occupies the same position since their repeal. *Brayley v. Ellis*, 1 O. R. 119.—Ferguson. Affirmed on appeal. 9 A. R. 565.

See *Lighthound v. Hill*, 32 C. P. 249, p. 128; *Clarkson v. White*, 4 O. R. 663, p. 119.

### V. MISCELLANEOUS CASES.

Held, affirming the judgment of the Chancery Division (1 O. R. 167) Spragge, C.J.O., dissenting, that an assignment under the Insolvent Act 1875, by an insolvent mortgagor does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagee against the land. *Court v. Walsh*, 9 A. R. 294.

A creditor who attended a meeting of creditors after the execution of a deed of assignment, and assented to be appointed a trustee to aid the assignee in winding up the estate was—Held es-

topped from afterwards denying the validity of the assignment. *Gardner v. Kiepfner*, 7 O. R. 603.—Osler.

As to effect of extinguishment of mortgage after assignment in insolvency by mortgagor. See *In re Music Hall Block—Dumble v. McIntosh*, 8 O. R. 225.

Construction of words "insolvent and bankrupt" in a by-law. See *Temple v. Toronto Stock Exchange*, 8 O. R. 705.

Acceptation of an insolvent succession—when obtained by fraud. See *Ayotte v. Boucher*, 9 S. C. R. 460.

Priority of the Crown over other creditors to payment of moneys deposited in a bank that has become insolvent. See *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1; *The Liquidators of the Maritime Bank v. Regina*, 17 S. C. R. 657.

Held, that the statute 33 Vict. c. 40 (Dom.), which recites the insolvency of the Bank of Upper Canada, vests the property of the insolvent estate in the Crown as trustee for the creditors, and provides for its realization in order that the debts may be paid, is within the powers of the Dominion Parliament, under sub-section 21 of section 91 of the B. N. A. Act. *Regina v. County of Wellington*, 17 O. R. 615.—Q. B. D.

## BANKS.

### I. MANAGERS AND OFFICERS.

#### 1. Powers and Duties, 132.

### II. DEPOSITS, 133.

### III. DEPOSIT RECEIPTS, 135.

### IV. CHEQUES, 136.

### V. BILLS AND NOTES, 138.

### VI. TAKING COLLATERAL SECURITY.

#### 1. Generally, 138.

#### 2. Bills of Lading and Warehouse Receipts, 140.

### VII. PURCHASE OR SALE OF GOODS, 145.

### VIII. MISCELLANEOUS CASES, 145.

### IX. WINDING UP—See COMPANY.

### X. POWERS OF DOMINION PARLIAMENT AND LOCAL LEGISLATURES—See CONSTITUTIONAL LAW.

### I. MANAGERS AND OFFICERS.

#### 1. Powers and Duties.

Endorsement of note by bank manager—Sufficiency of. See *Small v. Riddell*, 31 C. P. 373.

Liability of bank on guarantee of local agent. See *Dobell v. Ontario Bank*, 3 O. R. 299. See *S. C.*, 9 A. R. 484.

A bank manager is not acting without the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day or on the happening of a specified event. *Grieve v. Molsons Bank*, 8 O. R. 162.—C. P. D.

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Deed of composition executed by local manager "for Bank of Commerce C. Nicholson" with ordinary seal:—Held, not binding on the bank. *Bank of Commerce v. Jenkins*, 16 O. R. 215.—C. P. D.

Power of local manager to compound claim of the bank. *Id.*

## II. DEPOSITS.

One McE., who was the assignee of an insolvent estate, kept the estate account as well as his private account, at the defendants' bank. Certain notes of the estate were deposited by him with defendants for collection, and the proceeds placed to the credit of the estate, which McE., as assignee, drew out by cheque, and redeposited with defendants to his private account, and then used for his own purposes. It did not appear that the bank derived any benefit from the transfer, or that McE. was indebted to them:—Held, that defendants were not liable to repay the amount to the estate. *Clench v. Consolidated Bank of Canada*, 31 C. P. 169.—C. P. D.

S. G. acquired during the life of his first wife, M. A. B., certain immovable property which formed part of the communauté de biens existing between them. At his death, after his marriage with H. S., his second wife, he was greatly involved. His widow H. S., having accepted sous bénéfice d'inventaire the universal usufructuary legacy made in her favour by S. G., continued in possession of her estate as well as that of M. A. B., the first wife, and administered them both, employing one G. to collect pay debts, etc. Shortly afterwards, at a meeting of the creditors of S. G., of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to the estate of S. G., with the advice of an advocate and the cashier of the respondents, and promising to ratify anything done on their advice, and the creditors resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned among S. G.'s creditors pro rata. G. continued to collect the fruits and revenues and rents, and acted generally for H. S. and under the advice aforesaid, and deposited both the moneys derived from the estate of S. G. and those derived from the estate of M. A. B., the first wife, with the respondents, under an account headed "Succession S. G." A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of Dame M. A. B.:—Held, per Strong, Taschereau and Gwynne, JJ., (Ritchie, C.J., and Fournier and Henry, JJ., contra,) that as between the heirs B. and the bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privacy whatever; and as the moneys collected by G. belonging to the heirs of B. were so collected by him as the agent of H. S., and not as the agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate of S. G., and as the representatives of H. S. were not parties to the action, the appellants could not recover the moneys sued for. *Giraldi v. La Banque Jacques Cartier*, 9 S. C. R. 597.

The plaintiffs were sureties to a bank for a debt due by a company, and for which the bank

held other notes as collaterals. Under a special agreement made in a prior suit, the receiver in such suit deposited the proceeds of such collaterals in such bank subject to the order of the court. The plaintiffs claimed to apply the proceeds so deposited to reduce the debt of the company, but the bank refused so to apply them without an order of court:—Held, (1) that the bank was constituted a stakeholder of such moneys, and could not so apply them without the sanction of the court: (2) that the bank was not chargeable with interest on the moneys so deposited, even though it might have made a profit on such moneys. *Hutton v. Federal Bank*, 9 P. R. 568.—Hodgins, Master-in-Ordinary.

The plaintiff placed in the hands of one J., a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a Loan Company, and which it was arranged, between the plaintiff and J., in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the Loan Company, amounting with interest to \$6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for \$3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff, and transmitted the same to the plaintiff on the 26th of August, 1881, telling the plaintiff in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th of September following:—Held, that the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof. *Bailey v. Jellett*, 9 A. R. 187.

After the deposit of the plaintiff's money J. recovered a sum of \$1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit always exceeded this sum:—Held, that the moneys so deposited by J. had been held by him in a fiduciary character, and might be followed by B. & S.; but (in this reversing the judgment of the court below) as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand. *Id.*

The bank claimed the right to charge against the account in priority to the claims of the plaintiff and S. cheques and notes of J. presented or matured after notice to the bank of J.'s death:—Held, that they could not do so, and in consequence of having made such claim both in this court and the court below, they were refused their costs. *Id.*

Where a deposit was made in a bank, and it was shown that at a directors' meeting, held the previous day, the necessity of seeking outside assistance or suspending payment had been considered and a resolution passed to suspend payment if such assistance were refused, and that





endorsement of the secretary alone, who had on several previous occasions cashed other cheques in the same way, and acted as general agent of the company.—Held, in an action by the company against the bank to recover the amount of the cheque, that the bank was justified in cashing the cheque, although the by-laws of the company required that the cheque should be countersigned by the president. *Thorold Manufacturing Co. v. Imperial Bank*, 13 O. R. 330.—Galt.

On the 26th June, P. and M. exchanged cheques for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st of July and it was alleged by P. but denied by M. that a similar restriction applied to the latter cheque. The private bankers suspended payment and closed their doors about noon on the 27th of June, having a large balance in their hands at the credit of M., who, on that day, served a writ on them in an action to recover this balance, (the amount of the cheque being included). His cheque was never presented for payment nor was any notice of dishonour given. The cheque of P. was presented and paid:—Held, affirming the decision of the Queen's Bench Division, that even assuming there was no agreement to postpone presentment, P. had the whole of the 27th of June to present M.'s cheque, and therefore had not been guilty of laches up to the time of the suspension of the bankers; that although the suspension would not in itself excuse non-presentment and want of notice of dishonour before action, yet this event and the bringing of the action by M., which operated as a countermand of payment, would do so. Per Osler, J. A. The defendant, having by his pleading and throughout the case rested his defence solely on the non-presentment of the cheque before the suspension of the bankers, must at this stage of the cause be treated as having waived presentment and notice of dishonour after that time, the evidence showing that he had no reason to expect that his cheque would then be honoured and that he could have sustained no loss in consequence of such non-presentment. *Blackley v. McCabe*, 16 A. R. 295. See also *S. C.*, p. 1.

The payees of a cheque took it to the bank on which it was drawn on the afternoon of the day on which they received it from the drawer and got it marked "good," the amount being charged to the drawer's account. They then took it away without demanding payment. The bank, on the evening of the same day, suspended payment, and on the following day, on presentation of the cheque payment was refused:—Held, affirming the judgment of Street, J., that the drawer of the cheque was discharged from all liability thereon. *Boyd v. Nasmith*, 17 O. R. 40.—C. P. D.

Power of partner to endorse his partners' names on cheques. See *Manitoba Mortgage Co. v. Bank of Montreal*, 17 S. C. R. 692.

See *Bailey v. Jellett*, 9 A. R. 187, p. 134; *Grieve v. Molsons Bank*, 8 O. R. 162, p. 132; *In re Summerfeldt v. Worts*, 12 O. R. 48, p. 172.

## V. BILLS AND NOTES.

Negligence in not giving notice to endorser. See *Steinhoff v. Merchants' Bank*, 46 Q. B. 25.

Endorsement of note by bank manager—Sufficiency of. See *Small v. Riddell*, 31 C. P. 373, 383.

Action to recover back amount paid by acceptor on a forged bill.—Denial of signature of drawer and endorser. See *Ryan v. Bank of Montreal*, 12 O. R. 39; 14 A. R. 553.

See *Black v. Strickland*, 3 O. R. 217, p. 168; *Dominion Bank v. Oliver*, 17 O. R. 402, p. 140.

## VI. TAKING COLLATERAL SECURITY.

### 1. Generally.

Section 23 of the revised regulations respecting the sale and management of timber on Crown lands in Quebec provides that "limit holders, in order to enable them to obtain advances necessary for their operations, shall have a right to pledge their limits as security without a bonus becoming payable," and it further provides that "if the party giving such pledge shall fail to perform his obligations towards his creditors, the latter \* \* \* may obtain the next renewal in his or their own name subject to payment of the bonus, the transfer being then deemed complete." In 1875 and 1876 one F., who was now represented by the plaintiffs, procured for the purposes of his business operations as a lumberman, certain pecuniary advances from the defendants, the National Bank, through B., their local manager, and to secure repayment, gave to the defendants certain promissory notes and valuable securities, and as collateral security also gave a written pledge dated 21st September, 1876, of certain timber limits in Quebec, which pledge purported on its face to be "for advances made and to be made" to him. In 1877, with the consent of B. F. cancelled this supposed pledge, and gave what purported to be a new pledge of the licenses to the National Bank, which simply stated that he thereby pledged all his rights, titles, and interests in the licenses to the defendants, and which new pledge was indorsed on subsequent renewals of the licenses. The defendants did not at any time bind themselves to make any further advances to F., but as a matter of fact in 1877, 1878, and 1879, F. continued to receive advances from the defendants. In 1882, F. being still indebted to them in a large sum, and the pledge of the timber limits still in force, the defendants, pursuant to the above section of the regulations, obtained an issue of the licenses directly to themselves. The plaintiffs now brought this action for discovery of the securities held by the defendants on account of F.'s indebtedness, and for redemption, and for a declaration that the defendants had no lien on the timber limits in question:—Held, that as to the advances made before the pledge was given the security was valid, but that as to the future advances, the pledge of the timber limits was invalid as being in contravention of 34 Vict. c. 5, s. 40, (Dom.):—Held, however, that inasmuch as the defendants, although they had obtained the issue of the licenses directly to themselves, and thus procured a complete title to the property, under the above section of the regula-

tions, nevertheless voluntary restricted their claim to a lien upon it for the whole amount of F.'s indebtedness, they were entitled to judgment declaring such lien, and that on payment of such indebtedness the defendants should convey the property to the plaintiffs:—Held, further, that it was open to the plaintiffs in this action to object to the transaction as contravening the Banking Acts, and it was not necessary for the purpose of such objection that the proceedings should be by the Crown. *Grant v. La Banque Nationale*, 9 O. R. 411.—Ferguson.

Semle, that if a mortgage upon lands be given to a bank as security for future advances in contravention of the Banking Acts, and after the debt has been contracted or advances made, another mortgage be executed upon the same property as additional security for the debt so contracted or advances made, the second mortgage will be valid. *Id.*

B., on the 19th January, 1876, transferred to the bank of T. (appellants) by notarial deed a hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B.'s credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C., to set aside a prior hypothec given by C. and to establish their priority:—Held, affirming the judgment of the court of Queen's Bench, that the transfer of B. to the bank of T. was not given to secure a past debt, but to cover a contemporaneous loan, and was therefore null and void, as being a contravention of the Banking Act, 34 Vict. c. 5, s. 40. (Dom.) *Bank of Toronto v. Perkins*, 8 S. C. R. 603.

The plaintiff, being indebted to the defendants as indorser in the sum of about \$7,000, and being pressed for payment, which he was unable to make, transferred to the defendants certain timber limits, which he stated had cost him \$25,000, to hold as security for his indebtedness, and for the purpose of enabling them to sell it and realize their debt. The regulations of the Crown Lands Department, however, forbade the recognition of any conditional transfer, and therefore the assignment was in terms absolute. The defendants, without adopting any means of ascertaining the probable value of the limits, offered them for sale by public auction, with the assent of the plaintiff, when, no sufficient offer having been made, they were withdrawn, and, without having made any further inquiry as to value, they were sold by private sale, without consulting the plaintiff, for \$6,000. The limits were subsequently sold by the purchaser for a very large sum. Previous to the attempted sale by auction the defendants had received several offers of sums more than sufficient to pay off their claim. In an action brought by the plaintiff against the defendants for selling at a grossly inadequate price, Armour, J., gave judgment in favour of the plaintiff, with \$19,654.38 damages, which, on appeal to this Court, was affirmed with costs, Hagarty, C. J. O., dissenting, on the ground that, under all the circumstances, there should be a new trial for the purpose of furthering investigation. Per Burton and Patterson, J.J.A. The defendants sold by private contract, without authorisation, and did not take proper steps to have the limits valued. Per Osler, J.A. The

defendants were bound to exercise proper care and discretion, and to adopt such means as would be adopted by a prudent man to get the best price that could be obtained. *Prentice v. Consolidated Bank*, 13 A. R. 69.

Where a bank, holding a mortgage as additional security for the payment of certain notes, substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in one and the same chain of liability, which is secured by the mortgage, although, as a matter of book-keeping, the bank may have treated the first notes, and the subsequent substituted notes as paid by the application of the proceeds from time to time of the renewals. *Dominion Bank v. Oliver*, 17 O. R. 402.—Boyd.

McK. gave a mortgage to the M. bank as security for the present indebtedness of, and future advances to, a customer of the bank. By the terms of the mortgage McK. was to be liable. Amongst other things, for the promissory notes, &c., of the customer outstanding at the date of the mortgage, and all renewals, alterations, and substitutions thereof:—Held, per Ritchie, C.J., Fournier, and Taschereau, J.J., that the bank having given up the said promissory notes, &c., and accepted as renewals thereof, forged and worthless paper, McK. was to the extent of such worthless paper relieved from liability as such surety:—Held, per Strong, J., that the bank having accepted the renewals in the ordinary course of banking business, and it not being shewn that they were guilty of negligence, the surety was not relieved:—Held, per Gwynne, J., that as there was a reference ordered to take an account of the notes alleged to be forged, the consideration of the surety's liability should be postponed until the account was taken. *Merchants' Bank of Canada v. McKay*, 15 S. C. R. 672.

On appeal by the liquidator:—Held, affirming the judgment of O'Connor, J., that the bank had the right to take the chattel mortgage in question. Sections 45-48 of the Banking Act (R. S. C. c. 120), do not prohibit a bank from taking security upon real, or as in this case upon personal property, and making such arrangements for its sale and disposition as they may think proper. What is forbidden is, the investing the money of the bank in trading. The transaction in question in this case was not a buying and selling of goods by investing the bank money therein, but was merely taking security for a debt already incurred, and the carrying out of an arrangement for the sale and realization of the property mortgaged for payment of the debt. *In re Rainy Lake Lumber Co.*—Stewart, Liquidator v. *Union Bank of Lower Canada*, 15 A. R. 749.

See *Nelles v. Bank of Montreal*, 7 A. R. 743, p. 123; *Canadian Bank of Commerce v. Woodward*, 8 A. R. 347, p. 169.

## 2. Bills of Lading and Warehouse Receipts.

C. & Co., carrying on business in Chicago, in the state of Illinois, for the manufacture of mill machinery, &c., had certain machinery manufactured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & Co. being pressed by plaintiffs, their bank-

ers in Chicago their notes plaintiffs, warehouse security of the retire them, that effect time and new one made out December, 188 to a trustee tors. On 22 of execution Co., under fraudulent Held, that could hold C. & Co. being the transfer that state a valid and effect subject to the warehouse therefore a transaction in the trustee's right the hands of the Bills of Sale Act as to receipts, did corporation. *Cargo v. Corcoran*.

At the request of whom the C. sum of money houseman to storing certain they could obtain to raise money for a year of which the warehouse consideration of gave him an advance should be for issued a warehouse receipt the property dard Bank which they appeared the on business acquired the house receipt an advance that he had had sent his the receipt. in insolvent K. et al., as possession of claiming the M. then sue the taking:—Gwynne, J. Court of Appeal never had a or property make the residences in within the in the Bank Fournier and

ers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by the plaintiffs, endorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & Co. not being able to retire them, in pursuance of an arrangement to that effect the warehouse receipts were cancelled and new ones, dated 12th October, 1883 were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee in Chicago for the benefit of creditors. On 22nd November defendant placed writs of execution in the sheriff's hands against C. & Co., under which these goods were seized. No fraudulent preference or intent was proved:—Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario; that C. & Co. being residents of the state of Illinois, the transfer must be governed by the law of that state according to which the transfer was valid and effectual; that, even if dealt with as subject to the law of Ontario, when M. & T. gave the warehouse receipts direct to the bank they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the plaintiffs, subject to the trustee's rights, if any; and the goods being in the hands of third parties and not of C. & Co., the Bills of Sale Act did not apply; and also that the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation. *Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527.—C. P. D.

At the request of the Consolidated Bank, to whom the Canada Car Company owed a large sum of money, M. consented to act as warehouseman to the company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted M. a lease for a year of a portion of their premises, upon which the wheels and iron were situated, in consideration of \$5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming when required, and he issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank. It appeared that M. was a warehouseman carrying on business in another part of the city; that he acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had sent his foreman to examine it before giving the receipt. In February, 1877, an attachment in insolvency issued against the company, and K. et al., as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. M. then sued K. et al. in trespass and trover for the taking:—Held, (per Strong, Taschereau, and Gwynne, JJ.), affirming the judgment of the Court of Appeal, 3 A. R. 35, and that of the court of Queen's Bench, 43 Q. B. 78, that M. never had any actual possession, control over, or property in, the goods in question so as to make the receipt given by M., under the circumstances in this case, a valid warehouse receipt within the meaning of the clauses in that behalf in the Banking Act. Per Ritchie, C. J., and Fournier and Henry, JJ., contra, that M. quoad

these goods was a warehouseman within the meaning of 34 Vict. c. 5, (Dom.), so as to make his receipt endorsed effectual to pass the property to the Standard Bank for the security of the loan made to the company in the usual course of its banking business. *Milloy v. Kerr*, 8 S. C. R. 474.

The appellants discounted for a trading firm, on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal as having been deposited by them, which was done, and the following receipt was given: "Received in store in Big Coal House warehouse at Toronto, from Merchants' Bank of Canada, at Toronto, fourteen hundred and fifty-eight (1,458) tons stove coal, and two hundred and sixty-one tons chestnut coal per schooners "Dundee," "Jessie Drummond," "Gold Hunter," and "Annie Mulvey," to be delivered to the order of the said Merchants' Bank to be endorsed hereon. This is to be regarded as a receipt under the provisions of the statute 34 Vict. c. 5 (Dom.)—value \$7,000. The said coal in sheds facing esplanade is separate from and will be kept separate and distinguishable from other coal. (Signed,) W. Snarr. Dated 10th August, 1878." The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt. The chancellor, who tried the case, found that the receipt given was a valid receipt within the provisions of the Banking Act, and was given by a warehouseman, and that the bank was entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for Ontario, and on appeal to the Supreme Court of Canada it was:—Held, reversing the judgment of the Court of Appeal, 8 A. R. 15, that it is not necessary to the validity of the claim of a bank under a warehouse receipt, given by an owner who is a warehouseman and wharfinger, and has the goods in his possession, that the receipt should reach the hands of the bank by indorsement, and that the receipt given by W. S. in this case was a receipt within the meaning of 34 Vict. c. 5 (Dom.) 2. (Ritchie, C. J., and Strong, J., dissenting,) that the finding of the chancellor as to the fact of W. S. being a person authorized by the statute to give the receipt in question should not have been reversed, as there was evidence that W. S. was a wharfinger and warehouseman. 3. (Per Fournier, Henry, and Taschereau, JJ.,) that sections 46, 47 and 48 of 34 Vict. c. 5 (Dom.), are intra vires the Dominion Parliament. *Merchants' Bank of Canada v. Smith*, 8 S. C. R. 512.

T. a miller gave warehouse receipts for wheat to the plaintiffs attached to notes made by him, payable to their order, to take up his overdue notes which were secured by like receipts. The receipts were in the following form: "Received in store in my warehouse or mill from farmers, 2,000 bushels of wheat, to be delivered to the order of myself, to be endorsed hereon. This is to be regarded as a receipt under the provisions of statute 43 Vict. c. 22. The said wheat is separate from and will be kept separate and dis-

tinguishable from other grain." The receipts were endorsed in blank. T. did not keep the wheat covered by the receipts distinct, but ground some of it into flour and allowed the remainder to be mixed with wheat subsequently brought in by farmers and others. Before assigning in trust for creditors, he pointed out to the plaintiffs one carload of flour made from the wheat covered by the receipts, and admitted that the wheat and flour in his mill was covered by the receipts, and the next day the bank took possession. The evidence shewed that there was about the same quantity of wheat and flour in and about the mill at the date of the last receipt as there was in dispute in this interpleader. T. subsequently assigned, and the defendants afterwards recovered a judgment against him. In an interpleader action to try the right of the bank under their warehouse receipts as against the defendants under their execution:—Held, that a special endorsement of the receipts to the plaintiffs was not essential, and that the endorsement in blank of the receipts satisfied all the requirements of the Banking Act, that Act not specifying any particular mode in which the property in the receipt is to be transferred, and that the notes and receipts attached might be read together;—Held, also, that the mode of acquiring the receipts, viz., by delivering up the overdue notes with receipts, was unobjectionable, the transaction being in fact a negotiation of the notes by the surrender of the antecedent lien upon the wheat of T.; or at any rate there was a mere substitution or continuation of securities according to the original understanding of the parties:—Held, also, that T., having undertaken to keep "the grain separate and distinguishable from other grain," and having failed to do so, it became his duty to enable the plaintiffs to recover what the receipts called for or its equivalent, and having done this while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him, and the plaintiffs were entitled to succeed against the execution creditors. *Bank of Hamilton v. John T. Noye Manufacturing Co.*, 9 O. R. 631.—Boyd.

In proceedings taken in the master's office to administer the estate of M., which was insolvent, the M. and D. banks brought in their claims as creditors. Other creditors opposed these claims on the grounds that the banks had been paid large sums in reduction of their debts by assets of the deceased, which they had taken after his death and before administration. The banks set up their right to the assets so taken under warehouse receipts therefor, signed by H. and held by them. It appeared that M., who was a provision merchant, in his lifetime had obtained advances from the banks on the faith of the receipts being valid securities, he representing to them that he had rented the cellar of his warehouse to H. as warehouseman, and that as such H. had sole charge of the cellar. Before the receipts matured, M. disappeared and was subsequently found dead. Before his death became known, H. and his solicitor took possession of the cellar and the property covered by the receipts, and posted up in the cellar a notice stating that H. held the property therein as warehouseman of the banks, to whom he had granted receipts. Two days after taking possession, H. refused to be any longer responsible for the property, which was subsequently taken by the

banks under their receipts and as it was rapidly deteriorating was sold by them. At the time of the sale there was no personal representative to M.'s estate, nor was there any execution creditor. It appeared by the evidence of H. that he had signed the receipts at M.'s request and as a matter of form, but that he had not leased the cellar, nor had he any control over it nor the property contained in it:—Held, that the receipts were good between the parties and by the result of the subsequent dealings they were rehabilitated so as to be valid against creditors by the act of intervention on H.'s part during the life of M., but in any event, there being no creditor who had any locus standi when the banks sold under the receipts, they had the right to apply the proceeds to reduce their claim against M.'s estate. Per Boyd, C.—There are two classes of persons authorised to issue warehouse receipts by section 7 of 43 Vict. c. 22 (Dom.), (substituted for 34 Vict. c. 5 s. 45 (Dom.), viz., bailees of goods and keepers of a warehouse, etc., and the same sort of proof is not required in the case of the latter as in the former. The test of their validity does not necessarily depend upon proving that the warehouseman was actually, visibly and continuously in possession of them from first to last. Per Proudfoot, J.—That section authorizes persons who are not warehousemen alone, but who may have other business also, to give receipts, but these are comprised in the definition of "warehouse receipts," previously given in the statute, which requires the goods to be in the "actual, visible and continued possession of the bailees." *Re Monteith—Merchant's Bank v. Monteith*, 10 O. R. 529.—Chy. D.

The execution debtors, C. & Son, bought the oats in question from persons who shipped them to Toronto consigned to their (the sellers') own order, or to the order of some bank other than the plaintiffs, sending the shipping receipt with draft for the price of the oats attached to C. & Son at Toronto. The latter then took the shipping receipt to the plaintiffs, who advanced the money thereon to pay the draft, returning the shipping receipt to C. & Son for the purpose of obtaining the oats from the carriers, after taking from C. & Son a receipt in these words: "Received in trust from the Dominion Bank bill of lading for — bushels oats, and I hereby undertake to sell the property specified for said bank and collect the proceeds of sale or sales thereof and deposit the same with the said bank, in Toronto, to the credit of same, I hereby acknowledging myself to be bailee of the said property for the said bank." C. & Son received the oats from the carriers and warehoused them, taking warehouse receipts in their own name, which they endorsed to the plaintiffs, who then gave up the bailee receipt:—Held, that no property in the oats had passed to C. & Son when the plaintiffs made the advance, and that the latter were therefore entitled, at least as equitable owners, as against execution creditors of C. & Son. The Chattel Mortgage Act could have no application, for when the oats first came into the possession of C. & Son, they came charged with or subject to the plaintiffs' title. *Dominion Bank v. Davidson*, 12 A. R. 90.

The simple renewal of notes by a bank is not a "negotiation" within the meaning of section 53, sub-s. 4, of the Bank Act, R. S. C. c. 120, so

as to validate lateral security being made, being given by the bank a new transaction in the condition giving of title. O. R. 402.

A miller gave on some wheat mill for advance about period wheat fresh wheat his death the large shortage commenced shortly and had continued the time. It appeared that of the wheat had been sold than the value administrator to the purchase of the fallow, I trade 299.—Boyd.

The Molson warehouse commercial paper of business, a of the goods paying the directly pledged ment to hold debts due by insolvent T., action against plus must be a general body of parties to the ment of the cedment was not Banking Act, goods were lav ed, after applying its proper note bank under the (Ritchie, C. J. senting). Per ought to have *Thompson v. J.*

#### VII. P.

By the Bank banks are pro goods or mere an action would bank for breach horse-power n Bank, 3 O. R.

See *In re Stewart Liquidation*, Canada, 15 A.

VIII. Loans made v. Federal Bank



as to validate a warehouse receipt taken as collateral security therefor, no such new advance being made, and no such valuable consideration being given or surrendered contemporaneously by the bank as would represent the inception of a new transaction, and no change being wrought in the condition of the parties except the mere giving of time. *Dominion Bank v. Oliver*, 17 O. R. 402.—Boyd.

A miller gave a warehouse receipt to a bank on some wheat "and its product" stored in his mill for advances made to him and died insolvent about two months after. During this period wheat was constantly going out of and fresh wheat coming into the mill. Just before his death the bank took possession and found a large shortage in the wheat which had commenced shortly after the receipt had been given, and had continued to a greater or less degree all the time. In the administration of his estate it appeared that during the period of shortage some of the wheat had been converted into flour which had been sold and the proceeds, which were less than the value of the shortage paid to the administrator:—Held, that the bank was entitled to the purchase money of the flour. *Re Goodfallow, Traders' Bank v. Goodfallow*, 19 O. R. 299.—Boyd.

The Molsons Bank took from H. & Co. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. & Co. H. & Co. having become insolvent T., as one of the creditors, brought an action against the bank, claiming that the surplus must be distributed ratably among the general body of creditors. H. & Co. were not made parties to the suit:—Held, affirming the judgment of the courts below, that the parol agreement was not contrary to the provisions of the Banking Act, R. S. C. c. 120, and that after the goods were lawfully sold the money that remained, after applying the proceeds of each sale to its proper note, could properly be applied by the bank under the terms of the parol agreement. (Ritchie, C. J., doubting, and Fournier, J., dissenting). Per Taschereau, J. That H. & Co. ought to have been made parties to the suit. *Thompson v. Molsons Bank*, 16 S. C. R. 664.

#### VII. PURCHASE OR SALE OF GOODS.

By the Banking Act, 34 Vict. c. 5, (Dom.), banks are prohibited from buying and selling goods or merchandise:—Held, therefore, that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. *Radford v. Merchants' Bank*, 3 O. R. 529.—C. P. D.

See *In re Rainy Lake Lumber Company—Stewart Liquidator v. Union Bank of Lower Canada*, 15 A. R. 749, p. 140.

#### VIII. MISCELLANEOUS CASES.

Loans made on deposit of stock. See *Carnegie v. Federal Bank of Canada*, 5 O. R. 418.

Transfer of stock. See *Smith v. Bank of Nova Scotia*, 8 S. C. R. 558.

Proving claims on Insolvent's Estate. See *Eastman v. Bank of Montreal*, 10 O. R. 79.

Priority of Crown over other creditors for payment of moneys deposited in a bank that has become insolvent. See *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1; *Liquidators of the Maritime Bank v. Regina*, 17 S. C. R. 657.

#### BARGAIN AND SALE.

See SALE OF GOODS—SALE OF LANDS.

#### BARRATRY.

See INSURANCE.

#### BARRISTER AT LAW.

I. COUNSEL FEE—See COSTS.

II. RETAINER—See SOLICITOR.

III. SOLICITOR—See SOLICITOR.

IV. COUNTY CROWN ATTORNEY—See COUNTY CROWN ATTORNEY.

V. LAW SOCIETY—See LAW SOCIETY OF UPPER CANADA.

Practising barrister dealing largely in land transactions, but not shewn to be dependent thereon for his living:—Held not a trader under the Insolvent Act. *Joseph v. Haffner*, 29 Chy. 421.—Boyd.

By 37 Vict. c. 20, N. S. (1874), the Lieutenant-Governor of the province of Nova Scotia was authorized to appoint provincial officers under the name of Her Majesty's counsel learned in the law for the province. By 37 Vict. c. 21, (N. S.), the Lieutenant-Governor was authorized to grant to any member of the bar a patent of precedence in the courts of the province of Nova Scotia. R., the respondent, was appointed by the Governor-General on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the province, and signed by the Lieutenant-Governor and Provincial Secretary, several members of the bar were appointed Queen's Counsel for Nova Scotia, and precedence was granted to them as well as to other Queen's Counsel appointed by the Governor-General after the 1st of July 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant-Governor, was published in the Royal Gazette of the 27th May, 1876, and the name of R., the respondent, was included in the list, but it gave precedence and preadience before him to several persons, including appellants, who did not enjoy it before. Upon affidavits disclosing



the above and other facts, and on producing the original commission and letters patent, R., on the 3rd January, 1877, obtained a rule nisi to grant him rank and precedence over all Queen's Counsel appointed in and for the province of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R.'s precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia, on the 26th March, 1877, and the decision of that court was in substance as follows:—1. That the letters patent of precedence, issued by the Lieutenant-Governor of Nova Scotia, were not issued under the great seal of the province of Nova Scotia; 2. That 37 Vict. c. 20, 21, of the Acts of Nova Scotia, were not ultra vires; 3. That 37 Vict. c. 21, s. 2, (N. S.) was not retrospective in its effect, and that the letters patent of the 26th May, 1876, issued under that Act could not affect the precedence of the respondent. On the argument in appeal before the Supreme Court of Canada the question of the validity of the great seal of the province of Nova Scotia was declared to have been settled by legislation, 40 Vict. c. 3, (Dom.), and 40 Vict. c. 2, (N. S.) A preliminary objection was raised to the jurisdiction of the court to hear the appeal:—Held, 1. That the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada; (Fournier, J., dissenting.) 2. Per Strong, Fournier and Taschereau, JJ.:—That 37 Vict. c. 21, (N. S.), has not a retrospective effect, and that the letters patent issued under the authority of that Act could not affect the precedence of the Queen's Counsel appointed by the Crown. 3. Per Henry, Taschereau and Gwynne, JJ.:—That the British North America Act has not invested the legislatures of the provinces with any control over the appointment of Queen's Counsel, and as Her Majesty forms no part of the Provincial Legislature as she does of the Dominion Parliament, no Act of any such Local Legislature can in any manner impair or affect her prerogative right to appoint Queen's Counsel in Canada directly or through Her Representative, the Governor-General, or vest such prerogative right in the Lieutenant-Governors of the provinces; and that 37 Vict. c. 20 and 21, (N. S.), are ultra vires and void. 4. Per Strong and Fournier, JJ.:—That as this court ought never except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question. *Lenoir v. Ritchie*, 3 S. C. R. 575.

The suppliant, an advocate of the province of Quebec, and one of Her Majesty's counsel, was retained by the Government of Canada as one of the counsel for Great Britain before the Fishery Commission, which sat at Halifax pursuant to the Treaty of Washington. There was contradictory evidence as to the terms of the retainer, but the learned judge in the Exchequer Court found "that each of the counsel engaged was to receive a refresher equal to the retaining fee of \$1,000, that they were to be at liberty to draw on a bank at Halifax for \$1,000 a month during the sittings of the Commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The

amount awarded by the Commissioners was \$5,500,000. The suppliant claimed \$10,000 as his remuneration, in addition to \$8,000 already received by him:—Held, per Fournier, Henry and Taschereau, JJ., that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that \$8,000 awarded him in the Exchequer Court was a reasonable sum. Per Fournier, Henry, Taschereau and Gwynne, JJ.: By the law of the province of Quebec, counsel and advocates can recover for fees stipulated for by an express agreement. Per Fournier and Henry, JJ.: By the law also of the province of Ontario, counsel can recover for such fees. Per Strong, J.: The terms of the agreement, as established by the evidence, shewed (in addition to an express agreement to pay the suppliant's expenses) only an honorary and gratuitous undertaking on the part of the Crown to give additional remuneration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered: and the suppliant could therefore recover only his expenses in addition to the amount so paid. Per Ritchie, C.J.: As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec: that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie. *Regina v. Doutre*, 6 S. C. R. 342.

Held, on appeal to the Privy Council, that in the absence of stipulation to the contrary, express or implied, he must be deemed to have been employed upon the usual terms according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the *lex loci contractus* or the *lex loci solutionis*. S. C., 9 App. Cas. 745.

Per Gwynne, J.: By the Petition of Right Act, s. 8, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances. By the laws in force there prior to 23 and 24 Vict. c. 34, (Imp.), counsel could not, at any time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover. S. C., 6 S. C. R. 342.

Held, further, that the Petition of Right, Canada, Act, 1876, s. 19, sub-s. 3, does not in such case bar the remedy against the Crown by petition. Kennedy v. Brown, 13 C. B. N. S. 677, commented upon. S. C., 9 App. Cas. 745.

Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders. *International Bridge Co. v. Canada Southern R. W. Co.*, and *Canada Southern R. W. Co. v. International Bridge Co.*, 7 A. R. 226, and see 19 C. L. J. 358.

As to right of different counsel representing defendants with common defence to cross-exam-

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Upon an interlocutory application the court will not hear more than one counsel for any party. *Langdon v. Robertson*, 12 P. R. 139.—C. of A.

To entitle an English barrister to practise at the bar of Her Majesty's courts in Ontario, he must be admitted to practise through the Law Society of the province. *In re De Sousa*, 9 O. R. 39.—C. P. D.

Exercise of disciplinary jurisdiction by Law Society for professional misconduct. See *Henderson v. Law Society of Upper Canada*, 16 O. R. 625; 17 O. R. 300; 17 A. R. 41.

Right of witness to presence of counsel upon examination under Con. Rule 576. See *Dominion Bank v. Bell*, 13 P. R. 471.

### BASTARD.

A mother some months before her death, consigned her illegitimate child, seven years of age, whose reputed father was dead, to the custody of a protestant institution, she being a Roman Catholic. Immediately before her death she signed a paper expressing her desire to have her child delivered up for nurture to a Roman Catholic institution.—Held, that the court had not power to compel the delivery up of the child, and that the express wish of the mother was no ground for interference. *In re Smith, an Infant*, 5 P. R. 23.—Hagarty.

Right of mother to recover damages against a railway company for death of her illegitimate child occasioned by the construction of an overhead bridge. See *Gibson v. Midland R. W. Co.*, 2 O. R. 658.

Devise to illegitimate child, who dies during lifetime of testator, leaving legitimate issue. See *Hargrave v. Keegan*, 10 O. R. 272.

The father of an illegitimate child has the right to the custody and care thereof, except as against the mother who has the right against the father. *O'Rourke v. Campbell*, 13 O. R. 563.—Rose.

To an action under R. S. O. (1877), c. 131, s. 1, by the plaintiff, the maternal grandmother of an illegitimate female child, for food, clothing, lodging, and other necessities, supplied to the child at the mother's request, the defendant set up as a defence that he demanded the child from the plaintiff and from the mother; and informed them that he would support the child, and had always been ready and willing to do so, and to furnish her with food, etc., yet the plaintiff and the said mother have and still refuse to deliver up the child or allow the defendant to support her.—Held, on demurrer, that this constituted no answer to the action. *Id.*

### BAWDY HOUSE.

See PUBLIC MORALS.

### BENEVOLENT SOCIETIES.

The "Act to secure to Wives and Children the Benefit of Life Insurance," 47 Vict. c. 20 (Ont.), applies to insurances in societies incorporated under the Benevolent Societies Act R. S. O. (1877), c. 167. *Burton, J. A.*, dissenting. *Swift v. Provincial Provident Institution*, 17 A. R. 66. Overruling *Re O'Heron*, 11 P. R. 422.

L. was expelled from membership in L'U. St. J., an incorporated benefit society, for being in default to pay six months' contributions. Article 20 of the society's by-laws, section 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the Collector-Treasurers to make known the names of those who are indebted in six months' contributions, or in a balance of their entrance fee, and then any one may move that such members be struck off from the list of members of the society." L. therefore brought suit under the shape of a petition, praying that a writ of mandamus should issue, enjoining the company to reinstate him in his rights and privileges as a member of the society. 1. On the ground that he had not been put on demeure in any way; and that no statement or notice had been given him of the amount of his indebtedness. 2. On the ground that many other members of the society were in arrear for similar periods, and that it was not competent for the society to make any distinction amongst those in arrears. 3. On the ground that no motion was made at any regular meeting. The Court of Queen's Bench for L. C. (appeal side) held, that L. should have had "prior notice" of the proceedings to be taken with the view to his expulsion.—Held, on appeal, that as L. did not raise by his pleading the want of "prior notice," or make it a part of his case in the court below, he could not do so in appeal. Per Taschereau and Gwynne, J.J.:—A member of that society who admits that he is in arrears for six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues. *L'Union St. Joseph de Montreal v. Lapierre*, 4 S. C. R. 164.

Members of charitable and provident societies should not be allowed to litigate their grievances within the society in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies. Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this court refused to interfere. *Essery v. Court Pride of the Dominion*, 2 O. R. 596.—Chy. D.

O. was a member of Court Maple of the defendants' order and was insured under the endowment provisions thereof for \$1,000. This court left the order in a body and joined another order of Foresters, and it was in consequence suspended. On joining the new order it was ar-

ranged that O., who was in ill-health and had gone to California for change, should be taken and insured with the others. By the rules of the defendants' order members of suspended courts in good standing at suspension were, on application within thirty days to the supreme secretary, and payment of a fee of \$1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days, they must pass a medical examination. O., on his return from California, on ascertaining that Court Maple had been suspended, within the thirty days, being then in good standing, applied to the defendants' supreme secretary for his card of membership, tendering \$1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having the card, was prevented from affiliating though he endeavoured to do so, with another court. By the endowment certificate the \$1,000 was payable to the widow, orphans, or legal heirs of O., and by endorsement thereon O. directed the amount to be paid to the plaintiff, the widow:—Held, that under the directions so given, as well as under R. S. O. (1877), c. 167, s. 11, the widow was entitled to recover the amount; and that the fact of O. being a member of another order did not ipso facto deprive him of his rights and membership of defendants' order. *Oates v. Supreme Court of the Independent Order of Foresters*, 4 O. R. 535.—C. P. D.

At the trial an amendment was asked to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the Judge.—Held, under the circumstances, the refusal was proper. The frame and effect of the pleadings in this case considered. *Id.*

Quere, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another Order might not, if properly pleaded, have required some consideration. *Id.*

W., who was a member of a subordinate court of the defendant society, died on the 6th of May, 1884. His administratrix claimed in this action the amount of an endowment certificate upon his life, which was subject to a condition that the assured should at the time of his death be a member of the society in good standing. W. had not paid his monthly assessment due 1st March, 1884, and by his failure to pay had become at once suspended by virtue of one of the by-laws of the society, and his name appeared upon the list of suspended members in the minutes of a meeting held that month. He had taken cold at Christmas, 1883, and by the end of February, 1884, it was apparent that he could not recover, and he never rallied up to the time of his death. Shortly before the 25th of April, 1884, a sum sufficient to pay his assessments due 1st March, 1st April, and 1st May was paid on his behalf to the financial secretary of the subordinate court. The conditions to be performed by a suspended member desirous of being reinstated after a suspension has been in force for thirty days were according to the by-laws, payment of arrears, passing medical examination, and being approved of by two-thirds vote of the subordinate court. It

was not possible for W. to have complied with the second condition, and he did not attempt to do so.—Held, that the by-laws were binding upon W. and the plaintiff, and that he, not having been reinstated in accordance therewith, was not a member in good standing at the time of his death. *Wells v. Supreme Court of the Independent Order of Foresters*, 17 O. R. 317.—Q. B. D.

It was contended that the fact of the receipt of the arrears by the financial secretary, and certain other circumstances, shewed a waiver or created an estoppel on the part of the defendants. It appeared that the financial secretary was not familiar with the by-laws, and thought and informed W. that he was restored to good standing by the payment of arrears; that he transmitted the assessments paid to the supreme secretary of the society, who received and retained them, but carried them to the credit of the subordinate court, instead of to the credit of W., because in his view the reinstatement was not completed; and that W. was reported reinstated by the subordinate court on 25th April, 1884. The financial secretary had the right, under the by-laws, to receive the arrears, but only as a first step towards reinstatement. Held, that in view of the fact that W. was hopelessly ill when the supreme secretary acknowledged the receipt of the assessments, there was no ground for the contention that the defendants were estopped from denying that they accepted the money with the intention of keeping the policy alive and of waiving the medical examination; and that, under all the circumstances, there was neither the intention nor the authority on the part of the supreme secretary to waive the examination. *Id.*

As the plaintiff had been led by the action of the supreme secretary and the officers of the Court below to believe that W. had been reinstated, no costs were given against her. *Id.*

The plaintiff's husband was the holder of two certificates of the defendants, a provident institution, whereby on his paying \$1.50 and \$2.50 respectively semi-annually on May 15th and November 15th, together with assessments, and conforming to the conditions thereof, the defendants promised to pay the plaintiff a certain amount on his death. Among the conditions were that thirty days default in payment would suspend him from membership and void the certificates, and that he should then be reinstated on furnishing satisfactory proof of good health within ninety days from such suspension, and paying arrears and in the meanwhile the certificates should be void, and of no effect. Plaintiff's husband was in his ordinary good health on August 27th, 1886, but died on September 2nd, 1886, having paid all dues and assessments regularly up to May 15th, 1886. It appeared that on August 14th, the plaintiff's husband received a letter from the defendants' secretary requesting payment of the dues due on May 15th 1886, and of a certain assessment, and the same day he remitted the money, and on August 21st, 1886, the defendants sent written receipts therefor, marked across their faces: "Conditional that you are in good health;" and also wrote demanding payment of a certain other assessment as due from the plaintiff's husband as a member,

which comm him. On A to the defen and on the s they had rec receipts to t that they tru The plaintiff defendants' bo the certifica peared that of the defen terms of the p this action ag the certifica Robertson, J was entitled t that there w death, and f vantage of hi of the mone clearly reviv dants could n fault in ord Per Boyd, C books and p ceased never v. *Provincia* 361.—Chy. 1

A society, Societies' Ac bers in case rules provide who "kept after notice the society th ber, was guil him directin expulsion, a passed expel from the soci tion to move opportunity explaining h sion was ille tice, and the land v. *L'Un*

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which communication, however, never reached him. On August 23rd, 1886, the plaintiff wrote to the defendants offering to pay the assessment, and on the same day the defendants replied that they had received the money, and forwarded the receipts to the plaintiff's husband, and added that they trusted that this would be satisfactory. The plaintiff's husband was retained on the defendants' books as a member all the while, and the certificates were never cancelled. It also appeared that it had not been the general practice of the defendants to hold members to the strict terms of the payments. The plaintiff now brought this action against the defendants to recover upon the certificates:—Held, affirming the decision of Robertson, J., 16 O. R. 382, that the plaintiff was entitled to judgment, for the evidence shewed that there was no intention, up to her husband's death, and for some time thereafter to take advantage of his default in payment, and the receipt of the money in August by the defendants, and their crediting him on the books therewith, clearly revived the certificate, and the defendants could not be allowed to fall back on the default in order to destroy the plaintiff's right. Per Boyd, C. Upon the record supplied by the books and practice of the corporation, the deceased never ceased to be a member. *Horton v. Provincial Provident Institution*, 17 O. R. 361.—Chy. D.

A society, incorporated under the Benevolent Societies' Act, for affording assistance to members in case of illness or death, by one of its rules provided for the expulsion of any member who "kept irregular and intemperate conduct" after notice to amend. On complaint made to the society that the plaintiff, a proprietary member, was guilty of such conduct, notice was sent him directing him to amend or be subject to expulsion, and a resolution was subsequently passed expelling him, and his name was erased from the society's books. No notice of the intention to move for his expulsion was given, or any opportunity afforded him of being present and explaining his conduct:—Held, that the expulsion was illegal as being contrary to natural justice, and the resolution therefor null and void. *Beland v. L'Union St. Thomas*, 19 O. R. 747.—Rose.

### REQUEST.

I. GENERALLY—See WILL.

II. WIDOWS' ELECTION—See DOWER.

### BETTING.

See GAMING—PARLIAMENTARY ELECTIONS.

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### BILLIARD TABLES.

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### XIII. PREMIUM NOTES—See INSURANCE.

### II. FORM.

Held, that the note in this case was not a negotiable promissory note, not being made payable absolutely and at all events, but only as collateral security for plaintiff's guarantee. *Sutherland v. Patterson*, 4 O. R. 565.—C. P. D.

It is no objection to the validity of a promissory note that it is for payment of a certain sum in currency. Currency must be held to mean "United States Currency," when the

note is payable in the United States. *Wallace v. Souther*, 16 S. C. R. 717.

One E., who had a contract with the defendant for certain carpenter's work, gave to the plaintiff an order on the defendant in the following form:—"Please pay to H. the sum of \$138.40 for flooring supplied to your buildings on D. road, and charge to my account."—Held, that this was not an equitable assignment, but a bill of exchange, and that in the absence of written acceptance by her, the defendant was not liable. Judgment of the County Court of York reversed. *Hall v. Pruttie*, 17 A. R. 306.

The statute R. S. C. c. 123, ss. 12-14, which requires notes given for the purchase of a patent right, before being issued to have the words "given for a patent right," written or printed thereon, provides that the endorsee or transferee of a note with such words thereon shall have the same defence as would have existed between the original parties, and subjects to indictment any one issuing, selling or transferring such notes without such words written thereon. One of the plaintiffs gave two notes to the defendant for the purchase money on the assignment of a patent right on which the required words were written. These notes were subsequently cancelled, and in lieu thereof the notes in question were given, made by both plaintiffs without having the said words thereon:—Held, that the notes were enforceable by defendant, these words not being required as between maker and payee, and, even if they were, the makers had the right to and did waive having the same thereon. *Girvin v. Burke*, 19 O. R. 204.—C. P. D.

See *Swaisland v. Davidson*, 3 O. R. 320, p. 158; *Harvey v. Bank of Hamilton*, 16 S. C. R. 714, p. 176; *Re Central Bank—Morton and Block's claim*, 17 O. R. 574, p. 135.

### III. STAMPS.

The plaintiffs refused to purchase a note from the holder, one C., because it was insufficiently stamped, whereupon C. affixed double stamps and transferred it to the plaintiffs, who did not notice that the stamps had not been properly cancelled until some time afterwards, when they at once double stamped it and cancelled the stamps under 42 Vict. c. 17, s. 13 (Dom.):—Held, reversing the decision of the County Court, that the plaintiffs, having taken the note in the full belief that it had been properly double stamped by C., who was at the time the holder, were entitled to double stamp it under the above section, upon discovering the defect. *Trou v. Moulton*, 5 A. R. 654.

Defendant having pleaded several distinct defences to an action on a promissory note, the Master in Chambers refused to allow him to add a plea that the note was not duly stamped, holding that under R. S. O. c. 50, s. 270, such amendment was not compulsory, but a matter of discretion. On appeal, Osler, J., affirmed his decision. *Coughill v. Clarke*, 9 P. R. 471.

In an action on a promissory note, which at its making was not stamped, but had been double stamped before action, and after the repeal of the Stamp Act by the 45 Vict. c. 1 (Dom.), the defendant denied the making of the note. At the trial Wilson, C. J., refused leave to plead insufficient

stamping on account of the repeal of the Stamp Act, but the plaintiff was allowed to amend by adding allegations shewing the consideration for the note, and gave judgment for the plaintiff:—Held, that the judgment was right. Per Hagarty, C. J. The learned Judge was not bound to allow a plea of insufficient stamping to be added by way of amendment, under the circumstances. Per Armour and Cameron, JJ. The amendment should have been allowed. Per Armour, J. The note even if unstamped or insufficiently stamped was admissible in evidence of the debt to the plaintiff, the Stamp Act not prohibiting such a use of it, and McKay v. Grinley, 30 Q. B. 54, contra, should not be followed. Per Hagarty, C. J., and Cameron, J. It is necessary, at all events since the Judicature Act, to plead specially want of stamps. Per Cameron, J. The unstamped note was in its inception valid, but became invalid by neglect to stamp it. The repeal of the Stamp Act leaves the law where it was before those Acts were passed, and the note being originally a valid transaction is valid. *S. C.*, 3 O. R. 269.—Q. B. D.

The note upon which this action was brought had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal:—Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note. *Baillie v. Dickson*, 7 A. R. 759.

Held, that a promissory note before being negotiated could be stamped by the maker on the day of the making thereof, though after it had been signed by him and indorsed by the payee. *Bank of Ottawa v. McLaughlin*, 8 A. R. 543.

Where the defendant, being sued on a promissory note, alleged that the said note was not duly stamped before the repeal of the Stamp Act, nor until after action brought, although he communicated the fact of the omission to the plaintiffs before he was sued, and the plaintiffs denied that the defendant had so notified them, and alleged that they double stamped the note as soon as they had knowledge of the omission to stamp, which was not till after action brought, and after the repeal of the Stamp Act; and the evidence shewed that when the note came to the plaintiffs' hands it appeared to be properly stamped:—Held, that the defendant could not be allowed, upon his own unsupported testimony, in such a case to escape liability. The onus was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was so intelligibly communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by him. *Bank of Ottawa v. McMorro*, 4 O. R. 345.

To cure a defect in stamping by double stamping forthwith was, under the Stamp Act, 42 Vict. c. 17, s. 13, an inherent right existing during the currency of the instrument, and accompanying its possession; and by virtue of the Interpretation Act, 31 Vict. c. 1 ss. 3 and 7, sub-s. 36, the same right still exists notwithstanding the repeal of the Stamp Act. *Id.*

On an appeal from a report of a master who had allowed the claim of a creditor based on a

promissory note being made, and until after the Vict. c. 1 (1) double stamping note, such right "existing or a that no distinction note that was due. Coughill of Ottawa v. 1 to and commenced 229.—Boyd.

An action was to recover the appeared that received by T. knew then the quired to be thought, and was not stamped attorney for 1880, and they The bill was reserved to the the learned judge as a fact the stamped when stamps were not intentional attention was 1880;—Held, the holder of stamps upon as the state of ledge within t (Dom.) is a que not for the ju That the "kn actual knowle knowledge, and shewed that T first time on t amount of the 3. That the y time is not a (Gwynne, J., 8 S. C. R. 543.

R. remitted Fundy Quarry of an account superintendent V., was unst quired by the them as of th was at least t they were act paid, and an a pleaded, acco New Brunawi did not make was offered i ground that i plaintiff havi manner in wh having also s to stamps at t subject to lea for a non-suit was again off The trial resu suit should be



promissory note unstamped at the time of its being made, and not properly double stamped until after the repeal of the Stamp Acts by 45 Vict. c. 1 (Dom.) it was:—Held, that such double stamping was sufficient to validate the note, such right being reserved under the words, "existing or accruing rights are preserved," and that no distinction could be made between a note that was current and a note that was overdue. *Caughill v. Clarke*, 3 O. R. 272, and *Bank of Ottawa v. McMorro*, 4 O. R. 345, referred to and commented on. *Card v. Cooley*, 6 O. R. 229.—Boyd.

An action was brought by T. et al. against G. to recover the amount of a bill of exchange. It appeared that the draft when made, and when received by T. et al., had no stamps; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought, and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and they immediately put on double stamps. The bill was received in evidence, leave being reserved to the defendant to move for a non-suit; the learned judge stating his opinion that though as a fact the plaintiffs knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880;—Held, 1. That the question as to whether the holder of a bill or draft has affixed double stamps upon an unstamped bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 Vict., c. 12, s. 13, (Dom.) is a question for the judge at the trial and not for the jury. (Gwynne, J., dissenting.) 2. That the "knowledge" referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case shewed that T. acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880. 3. That the want of proper stamping in due time is not a defence which need be pleaded. (Gwynne, J., dissenting.) *Chapman v. Tufts*, 8 S. C. R. 543.

R. remitted by mail to V. a draft on Bay of Fundy Quarrying Co., Boston, Mass., in payment of an account of the company, of which R. was superintendent. The draft, when received by V., was unstamped, and V. affixed stamps required by the amount of the draft, and initialed them as of the date the draft was drawn, which was at least two days prior to the date on which they were actually affixed. The draft was not paid, and an action was brought against R., who pleaded, according to provisions of Cons. Stats. New Brunswick, c. 37, s. 83, sub-s. 4, "that he did not make the draft." On the trial the draft was offered in evidence and objected to on the ground that it was not sufficiently stamped, the plaintiff having previously testified as to the manner in which the stamps were put on, and having also sworn that he knew the law relating to stamps at the time. The draft was admitted, subject to leave reserved to defendant to move for a non-suit, and at a later stage of the trial it was again offered with the double duty affixed. The trial resulted in counsel agreeing that a non-suit should be entered with leave reserved to de-

fendant to move for a verdict, the court to have power to draw inferences of fact. On motion, pursuant to such leave reserved, the Supreme Court of New Brunswick set aside the non-suit and ordered a verdict to be entered for the plaintiff on the ground that the defect in the draft of want of stamps should have been specially pleaded. On appeal to the Supreme Court of Canada:—Held, Strong and Gwynne, J.J., dissenting, that double duty should have been placed on the note as soon as it came into the hands of the drawee unstamped, and that it was too late at the trial to affix such double duty, the plaintiff having sworn that he knew the law relating to stamps, which precludes the possibility of holding that it was a mere error or mistake:—Held, also, that under the plea that defendant did not make the draft, he was entitled to take advantage of the defect for want of stamps. Per Strong, J., that the note was sufficiently stamped, and plaintiffs were entitled to recover. Per Gwynne, J., that if the note was not sufficiently stamped the defence should have been specially pleaded. *Roberts v. Vaughan*, 11 S. C. R. 273.

If a note is insufficiently stamped, the double duty may be affixed as soon as the defect comes to the actual knowledge of the holder. The statute does not intend that implied knowledge should govern it. *Wallace v. Souther*, 16 S. C. R. 717.

#### IV. ALTERATION.

D. gave C. two promissory notes, payable to C. or bearer, but having endorsed on them contemporaneously with their making, and in the case of one of them on the edge of the paper, the words "the within notes not to be sold," which endorsement the evidence shewed formed part of the contract between the parties. The notes were transferred to S., with the word "not" in the above endorsement, in the case of one of them erased, and the whole of the said endorsement in the case of the other, in which it was written along the edge, torn off, but without destroying any part of the face of the note:—Held, that whether the words of the above endorsement were underwritten or endorsed was immaterial, they being part of the original contract, and the effect of it was to prevent C. disposing of the notes to a holder for value, so as to preserve to the makers all defences and equities, as against the first holder and volunteers under him, thus qualifying their negotiability. *Stewart v. Davidson*, 3 O. R. 320.—Boyd.

Held, that the notes having been altered in a material part, D. was discharged, and S. could not be protected on the ground of any negligence on D.'s part in respect to the note in which the endorsement was written along the edge of the paper, inasmuch as the notes were issued in a perfected shape, and the doctrine of negligence does not apply to such perfected instruments. *Id.*

It appeared that S. was a private banker; that he had been informed before taking the notes that they were given in purchase of patent rights; that he noticed the erasure in the one of them first purchased, and that he paid much less than the commercial value of them, while they both bore marks of infirmity and indeed of knavery:—



Held, S. could not be considered an innocent holder of the notes. *Id.*

After a promissory note, made by three persons, in these words: "We, either three of us, promise to pay D. P. or bearer," had been transferred to the plaintiff's testator, the payee's name was added to the foot of the note, apparently as maker. It did not appear how it came there, but it was not his signature:—Held, affirming the judgment of the County Court, Morrison, J. A., dissenting, that it was such a material alteration as to vitiate the note; and that this would have been so even if the name had been placed there by the payee or by his authority:—Held, also, that *prima facie* the name was placed there improperly; that it would have lain upon the testator, if alive, to account for the alteration, and his death did not dispense with this requirement. *Reid v. Humphrey*, 6 A. R. 403.

Per Morrison, J. A.—As the name of the payee was forged, it was ineffectual to alter the character of the note, and therefore, did not vitiate it; and in the absence of evidence to shew how the name was added, the presumption would be that, if genuine, it was placed there as an endorsement. *Id.*

#### V. TRANSFER AFTER MATURITY.

In an action on a promissory note it was shewn that after maturity, and while the payee continued to be the holder, the maker supplied the payee and others with board, etc., the value of which it was agreed should be applied in payment or reduction of the note:—Held, (reversing the judgment of the county judge), that a subsequent transfer of the note could only be made subject to the claim of the maker for such board, etc.; and that such claim was an equity which attached to the note in the plaintiff's hands. *Ching v. Jeffery*, 12 A. R. 432.

See *Canadian Securities Co. v. Prentice*, 9 P. R. 324, p. 175; *Torrance v. Livingstone*, 10 P. R. 29; *Black v. Strickland*, 3 O. R. 217, p. 168; *McGregor v. Bishop*, 14 O. R. 7, p. 171.

#### VI. PRESENTMENT, PROTEST AND NOTICE OF DISHONOUR.

The defendants made a joint and several promissory note with one H., as sureties for him, payable to the plaintiff:—Held, affirming the judgment of the County Court, that in default of payment at maturity their liability to pay became absolute; and that it was no defence for them that the plaintiff neglected to present the note for payment, or give notice of non-payment by H., of which they were ignorant, and that believing the note had been paid by H., they took no steps to recover from him, although he was able to pay, and before they became aware of such non-payment H. had become insolvent. *Wilson v. Brown*, 6 A. R. 87.

Defendants were maker and endorser respectively of a promissory note for the accommodation of D., who discounted it with the plaintiffs, they having knowledge of the facts. On the maturity of the note plaintiffs handed it to D., who was their solicitor, for protest. D. did not protest or notify defendants of its dishonour, but

delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, and after that defendants were for the first time notified of the non-payment of the note. In an action against defendants on the note they pleaded, on equitable grounds, the above facts, and that by the laches of the plaintiffs they were prevented from obtaining indemnity from D., and that if compelled to pay the note, they would be defrauded out of the amount:—Held, a good defence, and that the defendants were discharged. *Canadian Bank of Commerce v. Green*, 45 Q. B. 81.—Cameron.

The plaintiff, a customer of the defendants' branch bank at Chatham, handed to the manager there for collection a note made by G. C. to and endorsed by T. C., both of whom lived at Detroit, where the note was made and payable. The Chatham branch stamped above the endorsement of T. C. a special endorsement to themselves, but the Chatham manager without endorsing the note sent it to their Windsor branch for collection—Windsor being their nearest branch for Detroit—without any instructions as to the place of residence of the endorser, who, however, was well known in Detroit. The manager of the Windsor branch endorsed it to the cashier of the First National Bank, their agent there, and sent it to him for collection. Payment having been refused upon presentation they handed it to a notary, who duly protested it but enclosed the notice for T. C., the endorser, in the envelope containing the notice to the Windsor branch, addressed to the manager of that branch. A clerk in the Windsor branch sent the notice for T. C. to the Chatham branch; which was duly posted at Windsor, but was never received from the Chatham post office, and T. C., the endorser, never received any notice. The Chatham manager received the protest by due course of mail, and could have seen from it, in time to rectify the mistake, that the notice for T. C. had been addressed to the Windsor agent. The endorser having been sued in Detroit escaped on the ground of want of notice, and the maker being worthless, the payee sued defendants for neglect with regard to such notice. It appeared that in Detroit it was the custom for the notary to send notices for the endorser to the bank from which the note was received. It was contended for defendants that the branches were for this purpose distinct; that the notice was properly sent to Windsor, and thence to the Chatham branch, whence the note came: and that but for the neglect of the Post Office the notice would have been duly received at Chatham and sent to the endorser. But Held, that the defendants were liable: that on sending the note to their Windsor agent they should have given proper information as to the residence of the endorser for the guidance of the notary: and that the Chatham branch having notice from the protest, which they should have examined, that the notice for the endorser had been sent to Windsor, they should at once have had a proper notice served in Detroit, which they could have done at a time. *Steinhoff v. Merchants' Bank*, 46 Q. B. 25.—Q. B. D.

A notary at Montreal, Quebec, protested a note upon which the defendant, an attorney practising at Belleville, Ontario, was endorser. The

notary could but made an and in the sup addressed to of Ontario. and constant ville post off Belleville in defendant's e tested by th swore that he but his clerks letters from The notice to "Belleville I Held, (Camer tation of the the notice ad imitation of d and such notic have been suf tination or n senting), that should be a Court were ju tion of defe as good as th that if it can addressed, it and the plain Per Cameron, made the not Cameron, J., the endorser, Court of App 167; 7 A. R.

The endorse during the cu dorsed as sure protest was se last will and and received his children i wife had occu had been gra sufficient. *M* 413.—Boyd.

In an action of a promisso der Rule 80, judgment, the note, who it dorsers, swore of dishonour. produced by t the motion:— in Chambers there was no received noti denial by ther have been re P. R. 561.—F

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The note w ing," and sin so called was Port Arthur, exactly corr

notary could not read the defendant's signature, but made an imitation of it upon the notices and in the superscription of the letter which was addressed to "Belleville, P. O.," i. e., Province of Ontario. The defendant was well known at, and constantly received letters from the Belleville post office. There was proved to be a Belleville in New Brunswick. Other notes with defendant's endorsement thereon, had been protested by the same notary. The defendant swore that he had never received the notice; but his clerks, who were accustomed to take his letters from the post office, were not called. The notice to another endorser, addressed to "Belleville P. O.," was received by him:—Held, (Cameron, J., dissenting), that if the imitation of the defendant's signature put upon the notice addressed to Belleville, was an exact imitation of defendant's signature upon the note, and such notice was posted at Montreal, it would have been sufficient, whether it reached its destination or not. But, Held, (Armour, J., dissenting), that upon the facts in evidence, there should be a new trial. Per Armour, J.—The Court were justified in inferring that the imitation of defendant's signature in the address was as good as the imitation of it in the protest, and that if it came to the Belleville post office so addressed, it would have been delivered to him; and the plaintiff was entitled to the verdict. Per Cameron, J.—The illegibility of the address made the notice insufficient. Upon a new trial Cameron, J., delivered judgment, discharging the endorser, which judgment was upheld in the Court of Appeal. *Bailie v. Dickson*, 46 Q. B. 167; 7 A. R. 759, 765.

The endorser, a married woman, died intestate during the currency of a note which she had endorsed as surety for her husband, and notice of protest was sent to "James Bell, executor of the last will and testament of M. A. Bell, Perth," and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted:—Held, that the notice was sufficient. *Merchants' Bank v. Bell*, 29 Chy. 413.—Boyd.

In an action against the maker and endorsers of a promissory note, in answer to a motion under Rule 80, O. J. Act, (Con. Rule 739) for judgment, the defendants, the endorsers of the note, who it was said were accommodation endorsers, swore that they had received no notice of dishonour. The protest of the note was not produced by the plaintiffs on the first return of the motion:—Held, (on appeal from the Master in Chambers who ordered judgment), that as there was no evidence that the defendants had received notice of dishonour, and a distinct denial by them of such notice, the motion should have been refused. *Ontario Bank v. Burke*, 10 P. R. 561.—Rose.

The protest having been produced after an enlargement:—Held, that being only presumptive evidence of the posting of the notice, it was not sufficient, in the face of the denial. *Id.*

The note was dated "Prince Arthur's Landing," and since the making of the note the place so called was incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. One of the endorsers

C. C. B. resided at Bowmanville:—Held, that the sufficiency of a notice addressed to C. C. B. at Port Arthur, was open to argument, upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered. *Id.*

The appellants discounted a note, made by P. and endorsed by S., in the Bank of Commerce. S. died, leaving the respondent, his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the note was dated, under 37 Vict. c. 47, s. 1, (Dom). The appellants who knew of S.'s death before maturity of the note, subsequently took up the note from the bank, and, relying upon the notice of dishonour given by the bank, sued the defendant: Held, reversing the judgment of the Court of Appeal, (5 A. R. 458), which affirmed the judgment of the Queen's Bench, (45 Q. B. 32), that the holders of the note sued upon when it matured, not knowing of S.'s death, and having sent him a notice in pursuance of 37 Vict. c. 47, s. 1, gave a good and sufficient notice to bind the defendant, and that the notice so given enured to the benefit of the appellants. *Cosgrave v. Boyle*, 6 S. C. R. 165.

In an action upon an overdue promissory note payable at a particular place, it is not necessary to show that there were not funds at the place named wherewith to retire the bill; all that is necessary in such case, even as against an indorser, is to show presentment, non-payment, and notice of dishonour. *McDonald v. McArthur*, 8 A. R. 553.

The defendant, a married woman, was entitled to dower in the lands of a former husband who died in 1866, but dower had not been assigned to her. After the death of her said husband she continued to reside on the lands till 1882, when she indorsed a note for the accommodation of her son, and to an action thereon she set up that she had no separate estate, but even if she had, being an accommodation indorser only, she was not liable. A judgment having been rendered against her, she moved for a new trial, alleging in addition to her former defence, want of notice of dishonour. That application having been refused she appealed to this court, when the ruling of the learned Judge below was affirmed, as the production of the protest for non-payment was sufficient evidence of the notice of dishonour, and there was not any merit in the other defence sought to be raised. *Southam v. Ranton*, 9 A. R. 530.

The Merchants' Bank of Halifax (appellants) as holders of promissory notes endorsed by McN. (respondent) brought an action against him for their amount. The notes were dated at Summerside, and were payable at the agency of the Merchants' Bank of Halifax, Summerside. The defendant resided at the town of Summerside, and his place of business was there. Notices of dishonour were given to defendant by posting such notices, addressed to the defendant at Summerside, at 1 o'clock p.m. on the day after the day on which the notes matured, the postage on such notices being duly prepaid in both cases. There is no local delivery by letter carriers from

that post office in Summerside. No evidence was given by defendant that he did not receive the notices of dishonour, nor was any evidence given by the plaintiffs that the defendant had received them. The jury found for the defendant, contrary to the charge of the learned Judge. A rule nisi having been granted to set aside this verdict, and for a new trial, the court discharged this rule nisi and directed the verdict to stand, on the ground that the posting of the notices of dishonour to the defendant was not sufficient notice of dishonour, inasmuch as both plaintiff and defendant resided in the same town, and the notices of dishonour should have been delivered to the defendant personally, or left at his residence or place of business;—Held, reversing the judgment of the court below, that since the passing of 37 Vict. c. 47, s. 1, (Dom.), the notices given in the manner above set forth were sufficient. *Merchants' Bank of Halifax v. McNutt*, 11 S. C. R. 126.

Where it is intended to designate under the provisions of R. S. C. c. 123, s. 5, a place to which notice of dishonour may be sent other than the place at which the bill or note is dated it is sufficient if the name of a place is written under or beneath the signature of the party. "Under his signature" does not mean that the name of the place must be written by the party's own hand; it may be written by another person if that other person had in any manner any kind of authority from the party to write it. *Hay v. Burke*, 16 A. R. 463.

Where a place has been so designated by any party, the holder of the instrument may send notice to that place, even if he has reason to think or even knows that such place is not the party's place of residence or place of business. *Cosgrave v. Boyle*, 6 S. C. R. 165, considered and applied. Judgment of the First Division Court of Wentworth affirmed. *Id.*

Non-presentment of cheque before suspension of bankers. See *Blackley v. McCabe*, 16 A. R. 295.

## VII. ACCEPTOR AND MAKER.

### 1. Officers of Companies.

Section 5 of 16 Vict. c. 241, gives power to the Midland Railway Co., to become parties to bills, and enacts: "Any bill of exchange drawn, accepted, or endorsed by the president of the company, with the countersignature of the secretary of the company, or any two of the directors of the company, and under the authority of a quorum of a majority of the directors, shall be binding upon the company, and every . . . bill of exchange . . . accepted . . . by the president of the company, or any two of the directors as such, with the countersignature of the secretary, shall be presumed to have been properly . . . accepted . . . for the company until the contrary be shewn . . . nor shall the president or directors, of the company so . . . accepting . . . be thereby subjected individually to any liability whatever." A bill of exchange addressed "To the President, Midland Railway, Port Hope," was accepted as follows: "For the Midland Railway of Canada accepted H. Read, secretary; Geo. A. Cox, president," the latter being then the president of the com-

pany:—Held, per Burton, J. A. and Osler, J., affirming the judgment of the Queen's Bench, 44 Q. B. 542, that the defendant Cox was personally liable. Per Patterson and Morrison, J.J.A., that he was not so liable. *Madden v. Cox*, 5 A. R. 473.

The plaintiff made an arrangement in T. with Y., an employee of a certain company, to discount their draft on B. & Co., for \$4,989.65, at three months, and in pursuance of this arrangement a draft was drawn in H. by Y. in the company's name, on plaintiff payable on demand to their own order, for \$4,800, dated 23rd July, 1883. This draft was taken by Y. to defendants banking house at H., and there discounted by him, and the proceeds drawn by cheques in the name of the company. The draft was then forwarded by the defendants to their branch in T., and by them presented to the plaintiff for acceptance and payment. Plaintiff then discounted the first mentioned draft with the defendants at T., and with the proceeds paid the draft for \$4,800. Plaintiff, about 11th September, 1883, discovered that both drafts had been forged by Y., and immediately notified defendants, at the same time demanding payment of the amount of the forged draft for \$4,800 which was refused by defendants. Plaintiff paid the first mentioned draft at maturity:—Held, that although the plaintiff, by acceptance and payment, was estopped from disputing the signature of the company, the drawers, yet he was not estopped from denying their signature as endorsers, even though it was on the bill at the time of acceptance and payment:—Held, also that defendants, having no title to the bill the endorsement being a forgery were not entitled to receive payment, and having been paid plaintiff was entitled to recover back the amount so paid:—Held, that plaintiff had not lost his right of action by his delay in discovering the forgery, there being no actual genuine party on the bill against whom defendants could have recourse, and no remedy having been lost by them by such delay. *Ryan v. Bank of Montreal*, 12 O. R. 39.—Q. B. D.; 14 A. R. 533.

Action against the defendant as the maker of a promissory note. Before the defendant's signature was, as alleged, the word "per," and underneath was the name "William Stockdale, manager." The alleged note was given in renewal of a note made by the Toronto Patent Wheel and Waggon Company, limited, and was brought to the defendant by plaintiff for the purpose of having it executed by the company, when defendant, who was the secretary of the company, signed it, the intention being that the company's name should be filled in over defendants by the company's manager, by stamping it with defendant's stamp, but which was not done. After the note became due, the plaintiff proved on it against the company who had gone into insolvency, and obtained a dividend:—Held, that the defendant was not liable. Per Cameron, C. J. The defendant, must be treated as maker of the note, extrinsic evidence not being admissible to change its legal effect: that the word "per" as written, would not assist defendant for it might be treated as merely a flourish to the initial letter to defendant's name; but, even if assumed to be per, i.e., by, it would merely signify that the name Wm. Stockdale was written by defendant,

which the but that the pany on the on, had el thereby abe A. The def of a note, fo strument ne this was no admission of to alter a no upon which performed: 79 of 40 Vict note, as it d by or on beh land, 9 O. R 750.

See *Harve* 714, p. 176.

Power of h authority fro 5 A. R. 535.

Per Burton against the t note if it fail *Horner v. Ke*

## VIII.

Held, that the benefit of tain a joint a R. S. O. (187 the full amou separately in contribution: not refer to p *Riddell*, 31 C.

Quære, wh the manager,

Rights of See *Harper v*

Where a ne for money len ber thereof character in will be imple note is give the particular were here he guarantor. —MacMahon

See *Canada* Q. B. 31, p. 171; *Jents v. del*, 31 C. P.

The bill of 1st Decembe December, 1 ing), that the

which the evidence shewed was not the case; but that the plaintiff by proving against the company on the note and accepting a dividend thereon, had elected to look to the company, and thereby absolved the defendant. Per Osler, J. A. The defendant could not be treated as maker of a note, for the evidence shewed that the instrument never was perfected as a note; and that this was no infringement of the rule as to the admission of parol evidence, for its effect was not to alter a note but to shew that the condition upon which it was to become a note had not been performed:—Held, that the provisions of section 79 of 40 Vict. c. 43 (Dom.), did not apply to this note, as it did not purport to be a note signed by or on behalf of the company. *Brown v. Howland*, 9 O. R. 48.—C. P. D., affirmed 15 A. R. 750.

See *Harvey v. Bank of Hamilton*, 16 S. C. R. 714, p. 176.

## 2. Other Cases.

Power of husband to sign notes. Evidence of authority from wife. See *Cooper v. Blacklock*, 5 A. R. 535.

Per Burton, J. A., where an action is brought against the two makers of a joint and several note if it fail against one it must fail as to both. *Horner v. Kerr*, 6 A. R. 30.

## VIII. DRAWER AND ENDORSER.

Held, that a third person holding a note for the benefit of one joint endorser, cannot maintain a joint action against the co-endorsers under R. S. O. (1877), c. 116, ss. 2, 3, as endorsers for the full amount of the note, but must sue each separately in a special action for his share of the contribution:—Held also, that the Act does not refer to partnership transactions. *Small v. Riddell*, 31 C. P. 373.—C. P. D.

Quere, whether the endorsement as made by the manager, was sufficient. *Ib.*

Rights of endorser against principal debtor. See *Harper v. Culbert*, 5 O. R. 152.

Where a non-negotiable promissory note, given for money lent to a firm, is made by one member thereof and endorsed by the other, the character in which the endorsement is made, will be implied from the purposes for which the note is given, the endorsement obtained, and the particular circumstances of the case, which were here held to make such indorser liable as guarantor. *McPhee v. McPhee*, 19 O. R. 603.—MacMahon.

See *Canadian Bank of Commerce v. Green*, 45 Q. B. 31, p. 180; *Cross v. Currie*, 5 A. R. 31, p. 171; *Jenks v. Doran*, 5 A. R. 558; *Small v. Riddell*, 31 C. P. 373, p. 173.

## IX. ACTIONS ON.

### 1. At what Time.

The bill of exchange in this action fell due on 1st December, 1875, and the writ issued on 1st December, 1881:—Held (Cameron, J., dissenting), that the statute began to run on the 2nd

December, 1875, and therefore this action was commenced in time. *Sinclair v. Robson*, 16 Q. B. 211, remarked upon. *Edgar v. Magee*, 1 O. R. 287.—Q. B. D.

Per Armour, J. Though the holder of a bill may put himself in a position to commence his action on the day the bill falls due by demanding, and being refused payment, he is not bound to do so: and if he does not, the acceptor has the whole of the day of maturity on which to pay the bill, and the statute does not commence to run until the day after:—Quere, whether, even in case of such demand and refusal, the statute will begin to run on that day. *Ib.*

Per Cameron, J. Inasmuch as by C. S. U. C. c. 42, s. 15, the bill might have been protested at any time after three o'clock, on the day it fell due it was then overdue, and the action was commenced too late. *Ib.*

Held, that the plaintiff, under the facts stated in the report of this case, had established his right to sue upon the bill. *Ib.*

After the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment upon it out of his own moneys and on his own account was made by the surviving maker who was also the sole executor of his deceased comaker:—Held, that such payment did not take the debt out of the Statute of Limitations as regards the estate of the latter. *Paxton v. Smith*, 18 O. R. 178.—C. P. D.

See *Re Cannon—Oates v. Cannon*, (2) 13 O. R. 705, p. 168.

### 2. Pleas.

The C. L. P. Act, R. S. O. (1877), c. 50, s. 120, empowers the court or a Judge to strike out pleas not merely where they are embarrassing, because confused in terms and so difficult to understand, but where they combine several defences in one plea, or are repetitions of a defence, already pleaded, and may thus be embarrassing or prejudice a fair trial. In this case being an action on promissory notes, the defendant having pleaded total failure of consideration, added other pleas repeating that defence, and setting up besides another agreement, not necessarily connected with the notes, and so stated as to leave it uncertain whether it was intended as a separate defence or as supporting the other defence:—Held, affirming the judgment of Cameron, J., that such pleas were properly struck out. *Abell v. McLaren*, 31 C. P. 517.—C. P. D.

Upon an application under Rule 127, (b) O. J. Act, (See Con. Rule 374) a counter claim for libel and slander against the plaintiffs in an action on a promissory note was struck out. *Central Bank of Canada v. Osborne*, 12 P. R. 160.—C. P. D.

### 3. Interest Recoverable.

A promissory note was dishonoured at maturity, but was not protested by the holders (a banking corporation) because of a waiver by the indorsers of presentment and notice:—Held, that the indorsers were not liable to pay interest thereon as a debt. Nor could a contract to pay

interest be deduced from a usage of banks to charge interest on overdue debts, and to collect it if possible:—Sembles, the indorsers would be liable to pay interest as damages for breach of their contract. *Re McDougall*, 12 A. R. 265.

A note dated 11th January, 1862, payable to and endorsed by one S. H., was for \$3,000, with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment:—Held, that the proper construction of the terms of both the note and the covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John v. Rykert*, 10 S. C. R. 278.

See *Bank of Hamilton v. Harvey*, 11 P. R. 145.

#### 4. For Non-Acceptance.

On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it telegraphed him, that if unable to pay it to draw on them for the amount. The acceptor took the telegram to the manager of the plaintiff's bank, who on the faith of it discounted a sight bill drawn by the acceptor on the drawers with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so redrawn:—Held, that the telegram having been sent for the purpose of inducing persons to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced:—Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal v. Thomas*, 16 O. R. 503.—C. P. D.

#### 5. Other Cases.

Admissibility of evidence as to circumstances connected with the endorsement where the endorser denies his endorsement. See *Bank of Hamilton v. Isaacs*, 16 O. R. 450.

O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed. O. thereupon redelivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove on them in the administration proceedings:—Held, that the order for administration prevented the

bar of the Statute of Limitations:—Held, also, that H. & Co., might now assert their title to the notes, and prove on them, notwithstanding the former champertous agreement with O. *Re Cannon—Oates v. Cannon*, (2) 13 O. R. 705.—Proudfoot.

A promissory note made payable to John Souther & Son was sued on by John Souther & Co.:—Held, that it being clear by the evidence that the plaintiffs were the persons designated as payees, they could recover. *Wallace v. Souther*, 16 S. C. R. 717.

See *Horner v. Kerr*, 6 A. R. 30, p. 165.

### X. DEFENCES TO ACTIONS.

#### 1. Plaintiff not the Holder.

The possession of bills of exchange by the endorser after he has specially endorsed them, is *prima facie* evidence that he is the owner of them, and that they have been turned to him, and taken up in due course of time upon their dishonour, although there be no re-endorsement; so that by the possession he is remitted to his original rights. *Black v. Strickland*, 3 O. R. 217.—Chy. D.

In July, 1877, W. drew a bill of exchange on the defendants, payable to his own order, and the latter accepted it. The bill was first specially endorsed to the Bank of O., which specially endorsed it for collection, to the Bank of C. It was dishonoured and protested, and came again into the hands of the Bank of O., which returned it to W. on or before December, 1877. Afterwards, but how did not appear, it got back into the hands of the Bank of O. In 1881 the plaintiff who was W.'s agent, got it from the Bank of O., along with other papers of W., and W., in November, 1881, endorsed it to the order of the plaintiff, who now sued the acceptors. When produced the bill appeared with all the special endorsements struck out, leaving only the signature of W., to the first special endorsement, and with the last endorsement to the order of the plaintiff. There was no re-endorsement from the Bank of O. to W. or to the plaintiff:—Held, reversing the decision of Ferguson, J., who had not cited the plaintiff, that in the absence of evidence it was to be inferred that W., had satisfied any claim of the Bank of O., and had thereby procured or had the right to make the cancellation of previous special endorsements. *Callow v. Lawrence*, 3 M. & S. 95, cited and followed. *Id.*

#### 2. Consideration as a Ground of Defence.

##### (a) Accommodation or Want of Consideration.

Declaration upon a promissory note. Third plea—"That the defendant made the said note with and for the accommodation of one W. C., at the request of the plaintiffs, in respect of a pre-existing debt, then due to the plaintiffs by the said W. C. alone, and the said note was drawn payable on demand, with interest at 10 per cent., and except as aforesaid there was never any value or consideration for the making or payment of the said note by the defendant." Fourth plea—"On equitable grounds. That the defendant made the note jointly and severally with W. C. for his accommodation, and as his surety only, to secure

a debt due to the plaintiffs, and that the note became a debt of the plaintiffs by the operation of the Statute of Limitations. Held, that the plaintiffs were entitled to recover the amount of the note, and that the fourth plea must be allowed. "Upon equitable grounds." *Bank v. Robt.*

The defendant M. to assist the plaintiffs in their own note for the purpose of obtaining credit with them. When M.'s note was then renewed for \$100,000, the plaintiffs were not aware of it, and it was not until after the plaintiffs had sent by M. to the defendant that the defendant had obtained credit from the Bank of C. 347.

The M. made the course of the notes for making transferred to the security to the credit. The plaintiffs upon their own for their own up of the last agent, had given him, which company. H. company a large The bank made the defendant's notes to be replaced then applied notes sued on accounts between a small balance notes were transferred to the plaintiffs, and another had guaranteed the extent of \$50,000 self, resigned pay off the company and take all the board was M. company the company to the plaintiff the requisite by pledging company, and bank to hold repay the amount of the loan company notes sued on the plaintiff their character between the company Held, that the



a debt due to the plaintiffs, and that after the note became due the plaintiff gave W. C. an extension of time for the payment of the note;—Held, that the third plea was good, for it shewed that no extension of time had been given, and therefore that there was no consideration; and that the fourth was not an equitable plea and must be amended by striking out the words: "Upon equitable grounds," and the jury notice served with it allowed to stand. *Merchants' Bank v. Robinson*, 8 P. R. 117.—Dalton, Q. C.

The defendants made a note for \$200, to one M. to assist M. in retiring paper in which defendants were interested. M. discounted his own note for \$200 with the plaintiffs, depositing with them the defendants' note as collateral. When M.'s note fell due, the defendants' note being then overdue, he paid \$25 and gave a renewal for \$175, leaving defendants' note with the plaintiffs. Per Wilson, C. J.—Defendants' note was not an accommodation note; but assuming it to be so:—Held, that the proper inference from the evidence was that it was transferred to the plaintiffs as security for the debt represented by M.'s note, not for the note specially; and that the defendants remained liable. *Canadian Bank of Commerce v. Woodward*, 8 A. R. 347.

The M. manufacturing company, in the usual course of their business, took from their agents, notes for machines supplied to them, which were transferred by the M. company as collateral security to a bank where they had a line of credit. The agreement with the agents was that upon their substituting their customers' notes for their own, they were entitled to the delivery up of the latter. The defendant, who was the agent, had given notes for machines supplied him, which were handed to the bank by the company. He afterwards transferred to the company a large number of his customers' notes. The bank manager finding some of the defendant's notes overdue, demanded that they should be replaced by fresh paper, and the company then applied to the defendant, who gave the notes sued on without getting an adjustment of accounts between them, though there was but a small balance due to the company; and these notes were transferred to the bank and the old notes given up. The M. company got into difficulties, and the bank sued B., their president, and another who, jointly with the M. company, had guaranteed the company's account to the extent of \$50,000. B., in order to protect himself, resigned the presidency, and undertook to pay off the company's indebtedness to the bank, and take all their securities. A resolution of the board was passed approving of this, and the M. company directed the bank to transfer to B. the company's securities on payment. B. applied to the plaintiff for the money, and he advanced the requisite amount, having obtained the same by pledging stock and other securities to a loan company, and took all the notes held by the bank to hold for collection to pay expenses, repay the advances, pay their indebtedness to the loan company, and to account to B. The notes sued on were amongst those transferred to the plaintiff, who took them without notice of their character, or the state of the account between the defendant and the M. company:—Held, that he stood in the place of the bank, and

succeeded to all its rights, and that the defendant was liable to the full amount of his notes in the plaintiff's hands. *Cowan v. Doolittle*, 46 Q. B. 398.—Q. B. D.

Where, after a note is completed, so far as the intention of the parties is concerned, it is signed by a third person, or is so signed by him after maturity, without any consideration moving directly to such third person, or any agreement to extend the time of payment, such third person is not liable thereon. *Crofts v. Beale*, 11 C. B. 172, followed; and *Currie v. Misa*, L. R. 10 Ex. 153, 1 App. Cas. 554, and *McLean v. Clydesdale Banking Co.*, 3 App. Cas. 95, distinguished. *Ryan v. McKerral*, 15 O. R. 460.—C. P. D.

See *Southam v. Ranton*, 9 A. R. 530, p. 162; *Fletcher v. Noble*, 8 O. R. 122, p. 172; *Leggatt v. Clarry*, 13 O. R. 105.

#### (b) Partial Failure of Consideration.

The defendant agreed with the plaintiff that whatever goods P. should order of the plaintiff he would become surety for. P. sent a written order to the plaintiff, who in addition to the goods ordered, sent others, and the whole consignment was invoiced at prices higher than those quoted by the plaintiff and than those at which P. had ordered some of the goods. Without disclosing these facts to the defendant, but in perfect good faith, the plaintiff presented a bill of exchange upon P. for signature by the defendant, who signed the same supposing that it was for the price of the goods ordered. P. accepted the bill and kept the goods:—Held, reversing the judgment of the Queen's Bench, (45 Q. B. 386,) that the defendant was liable to the extent of the goods ordered, and that the consideration for the bill failed as to the excess only. *Barber v. Morton*, 7 A. R. 114.

K., acting as agent for the plaintiff company, his wife, but which was in reality a trading name for his own business, fraudulently represented that certain goods manufactured by himself, possessed curative or medicinal qualities and were saleable, and thereby induced the defendant to buy a quantity and to give his promissory note therefor. In an action on the note by the plaintiff company, the defendant counter-claimed for part of the amount of the note, which he had been obliged to pay to an innocent holder. The jury found that the articles sold were valueless; that the defendant had been induced to purchase by the misrepresentations, and that he had received no consideration for the note, except as to some of the pads, which he had sold:—Held, that the plaintiff could not recover, for the partial failure of consideration, being for an amount capable of definite computation, could be set up as an answer pro tanto, and the consideration received had been more than covered by the sum paid:—Held, also that the defendant was entitled to recover against the plaintiff company the damages sustained, without having previously offered to return the goods. *Star Kidney Pad Co. v. Greenwood*, 5 O. R. 28.—Q. B. D.

The defendants purchased the stock-in-trade of one C. for \$5,500, and an agreement under seal was executed by the parties whereby defendants covenanted to pay the said sum. The



agreement also provided that a portion of the consideration should be secured by four promissory notes of \$1,100 each. After the last note became due, C. endorsed it "without recourse" to the plaintiff. To an action on the note the defendants pleaded that the value of the goods had been misrepresented to them by C. and that before said note became due, C. agreed to allow a reduction of \$500 from its face value, and that plaintiff took the note after it had become due. They paid \$626.50 into Court, being the balance due on the note with interest. At the trial the plaintiff, in his evidence, admitted that he did not claim to occupy any different position from C. The defendants' evidence shewed a verbal agreement to make the reduction of \$500, but C. swore he had never made the agreement. The Judge at the trial found that C. had promised to make the reduction, and that the plaintiff stood in the same position as C., and he dismissed the action with costs:—Held, that the defendants had a right to enforce the agreement for the allowance of \$500, there being a partial failure of consideration for an ascertained and liquidated amount. *McGregor v. Bishop*, 14 O. R. 7.—Q. B. D.

(c) *Fraud and Illegal Consideration.*

The defendant was arrested on the charge of embezzling fines which he had received as a justice of the peace on the information of the reeve of the township claiming the fines, who took the proceedings with a view to force the defendant into a settlement. He was brought before justice and committed for trial, and while under arrest pressure was brought to bear on him to compromise by giving security to procure his release, and the plaintiff, who proposed to act on his behalf, gave a note to the township for the amount claimed and induced the defendant to give him a note for the amount, endorsed by his wife. The note included the amount of the fines, and also expenses incurred by the township in an investigation of the defendant's alleged default, to which the latter was not a party. The defendant was then brought before the deputy county Judge, but no evidence was offered, and it was stated that the affair had been settled, and the charges would not be proceeded with, whereupon the defendant was discharged. The plaintiff now sought to recover from the defendant's note:—Held that the consideration therefor being the stifling of a prosecution for felony was illegal, and rendered the note void, and that the plaintiff was in no better position than the township would have been had they taken the note. *Bell v. Riddell*, 2 O. R. 25.—Q. B. D.; 10 A. R. 544.

B. endorsed a promissory note made by C. for the purpose of retiring another similar note which he had previously endorsed for C.'s accommodation, and gave it to C. Instead of retiring this note, however, C. handed it to the plaintiff in payment of a debt, who took it in good faith, but made no inquiry respecting C.'s title to the note or his authority so to deal with it:—Held, affirming the judgment of the Queen's Bench, (43, Q. B. 599), that the plaintiff was entitled to recover against B. *Cross v. Currie*, 5 A. R. 31.

J., an infant gave to M. a promissory note for the purchase money of a buggy, endorsed by his father, who was of unsound mind, and unable to understand what he was doing. The father received no consideration, and M. was not aware of his condition.—Held, on appeal from the master at Woodstock, affirming his decision, that the father's estate was not liable. *Re James*, 9 P. R. 88.—Boyd.

To an action on four promissory notes made by the defendant and one H. payable to the plaintiff, the defendant set up that the notes were given for the purchase of the plaintiff's interest in certain Homestead lands in the State of Michigan, H. being the purchaser and defendant surety; that under the laws of Michigan only persons of 21 years of age could homestead lands; and that the plaintiff was under that age. There was no representation that plaintiff was of age, and H. obtained from plaintiff a surrender of his interest in the land whereby he was enabled to have himself located in his stead, which he otherwise might have had difficulty in doing, and he got the same rights which he would have got if the plaintiff had been of full age:—Held, that it could not be said that there was no consideration for the notes, nor any misrepresentation; and the plaintiff was therefore held entitled to recover. *Fletcher v. Noble*. 8 O. R. 122.—C. P. D.

Counter-claim alleging fraud in obtaining note. See *Morrison v. Earle*, 5 O. R. 434; *Garland v. Thompson*, 9 O. R. 376.

A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within section 53, sub-section 3 R. S. O. (1877) 47, and such a security is void under 9 Anne, c. 14, even in the hands of a bona fide holder for value. *In re Summerfeldt v. Worts*, 12 O. R. 48—Q. B. D.

Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The domicile of the defendant was, at the time, in Ontario, and the drawees were also domiciled there. The draft was protested for nonacceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York Stock Exchange, and that, as such, it was under the law of New York, an illegal contract and invalid:—Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario; for the contract of the drawer was to pay the money at the place where he entered into the contract, in default of the drawee paying, and the domicile of the drawer did not affect the rule as stated. *Story v. McKay*, 15 O. R. 169.—Falconbridge.

See *Star Kidney Pad Co. v. Greenwood*, 5 O. R. 28, p. 170.

### 3. *Payment.*

A promissory note for \$6,200, made by the president and secretary of a syndicate formed for completing the Hamilton and Dundas street

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railway, in fact, was endorsed or order. On respectively \$8, \$4,200, the time directed to the plaintiff for it. "The to J. S.," then Charles, married the defendant plaintiff could shew that satisfy the need directly related partnership partners, S. thereon, and only the same recover. *Smith*

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See *Black*  
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R. 355.

Held, that the statute does not extend for the purpose of a note payable to order. *Per Galt, J.* It is possible, by the facts, that the time was of course of course had failed to be entitled to the same. *Per Galt, J.*

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railway, in favour of O., S., and the defendants, was endorsed by them to the Bank of Commerce or order. On the day the note fell due O. and S. respectively paid the same, O. paying \$2,000 and S. \$4,200, the remaining sum due thereon, S. at the time directing the bank agent to endorse it to the plaintiff, who it appeared gave no value for it. The agent endorsed it as follows: "Pay to J. S., the plaintiff 'or order. D. Hughes Charles, manager." The plaintiff thereupon sued the defendants as endorers:—Held, that the plaintiff could not recover, for the evidence shewed that S., by his payment intended to satisfy the note, which being made for a purpose directly relating to and not collateral to the partnership of which S. and defendants were partners, S. could not recover against defendants thereon, and as the plaintiff was found to have only the same right as S., neither could he recover. *Small v. Riddel*, 31 C. P. 373.—C. P. D.

Plea of payment to garnishee. See *Roblee v. Rankin*, 11 S. C. R. 137.

Payment by giving renewals. See *Dominion Bank v. Oliver*, 17 O. R. 402; *Blackley v. Kenney*, 19 O. R. 169.

See *Black v. Strickland*, 3 O. R. 217, p. 168; *Healey v. Dolson*, 8 O. R. 691, p. 174.

#### 4. Time given for Payment.

A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for \$1,200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands:—Held, (reversing the judgment of the court below) that the married woman was a surety in respect of the note for her son; and that the authority to the son as to using the note did not extend to keeping it afloat after maturity without her knowledge; and that she had been discharged by the extension of the time of payment. *Devanney v. Brownlee*, 8 A. R. 355.

Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible. Per Galt, J. Even if the evidence was admissible, by the terms of the agreement, in this case, the time was to be suspended only on performance of certain conditions, which the defendant had failed to do, and therefore the plaintiff was entitled to enforce immediate payment. *Porteous v. Muir*, 8 O. R. 127.—C. P. D.

On the 29th August, 1877, defendant R. made a note of that date for \$700, at eighteen months, in favour of D., and for his accommodation, which R. gave to D. without any restriction as to its use. D. endorsed the same and handed it to the plaintiff; and at the same time gave the plaintiff his, D.'s own note of the same date at three months, taking from plaintiff the following receipt: "Received from R. a note endorsed by D., payable eighteen months after date, for \$700, which note is given me only as collateral security for the payment of certain note endorsed by me for D., and when said note is fully paid, I agree to return same." On the 24th September, a state-

ment of account took place between the plaintiff and D., when D. took up the note of the 29th of August, by giving plaintiff another note for the like amount at three months:—Held, Rose, J., dissenting, that the true construction of the agreement was, that D. should have eighteen months, or so much thereof as the plaintiff chose to give him, in which to pay off the \$700, and that D.'s note might be renewed from time to time, so long as payment was not extended beyond the eighteen months; and that under the circumstances the note of the 24th September could not be deemed to have been taken as a payment of the note of 29th of August. *Devanney v. Brownlee*, 8 A. R. 355, distinguished. Per Rose, J. The effect of the agreement was, that the note was given as collateral security for the payment within the time limited by D.'s note, namely, three months; and the fact that R. had eighteen months to make payment, could make no difference; and, that, apart from the question whether the transaction of the 24th of September constituted a payment or not, it operated as a suspension of R.'s rights, whereby she was discharged. *Healey v. Dolson*, 8 O. R. 691.—C. P. D.

After the maturity of a note for \$300, and after an action had been commenced against the defendant, one of the endorers thereof, alleged to be a surety, the principal debtor executed a document whereby he acknowledged his liability on the note, notwithstanding that defendant had been sued solely thereon, the Statute of Limitations or any legal or equitable defence that might be set up; and he covenanted to pay the note and interest by half-yearly payments of \$50 each. There was contradictory evidence as to the acceptance of the document by the plaintiff:—Quære, whether the document, if accepted by plaintiff, constituted a discharge of the surety by the giving of time; and whether the statement of the pendency of the action against defendant could be looked upon as a reservation of plaintiff's rights against him. *Pirie v. Wyld*, 11 O. R. 422.—C. P. D.

The holders of certain promissory notes agreed with the maker thereof, and certain of the endorers to extend the time for payment. The agreement expressly reserved all rights and remedies against persons other than parties to the agreement:—Held, that under these circumstances a subsequent endorser, not privy to the said agreement, was nevertheless not released thereby, for that his rights against the maker and prior endorers were not prejudiced, inasmuch as the reservation of the rights of the holder against him, involved the reservation of his rights against the others. *Canadian Bank of Commerce v. Northwood*, 14 O. R. 207.—Boyd.

An endorsement on the back of a note of the payment of interest up to a future date beyond the maturity of the note, in the absence of evidence of mistake, is to be deemed an extension of time for the payment of the note to such date, so as to discharge a party thereto who is merely a surety for the payment thereof. *Ryan v. McKerrall*, 15 O. R. 460.—C. P. D.

At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for

part of the amount due and two renewal notes for the balance, the total amount including a sum for interest or the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit to the amount of the cheque:—Held, by Street, J., in Chambers, refusing a motion for judgment under Rule 80, (Con. Rule 739) that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn:—Held, by Queen's Bench Division, on appeal, that on the state of facts presented the plaintiffs were not entitled to the indulgence of a speedy judgment and execution. *Lowden v. Martin*, 12 P. R. 496.

The appellant claimed that he was only a surety for his codefendants, and that he was discharged by time being given to the principal to pay the note:—Held, that the fact of time being so given being negatived by the evidence, it was immaterial whether appellant was principal or surety. The judgment of the Supreme Court of Nova Scotia (20 N. S. Rep. 509) affirmed. *Wallace v. Souther*, 16 S. C. R. 717.

#### 5. Other Defences.

A promissory note made by the defendant had been held by the Consolidated Bank, and after its maturity, the defendant transferred certain timber limits to the bank as collateral security for the payment of the note, which limits the bank sold. The plaintiffs became holders of the note for value after dishonour, and after the timber limits transaction, and brought this action upon the note. A counter-claim against the plaintiffs and the bank by the defendant, setting up that the bank has sold the timber limits without authority and for an insufficient price, and were thereby guilty of a breach of trust, and claiming that the defendant should be permitted to set off so much of his claim therefor against the bank as would satisfy the balance claimed upon the note, was held bad, and struck out, as not being properly a counter-claim. Per Cameron, J., unless required by the clear legal rights of the defendant for his protection against the plaintiff's action, counter-claims are not to be favoured. *Canadian Securities Co. v. Prentice*, 9 P. R. 324.—Dalton, Master.—Cameron.

In an action by the plaintiffs as endorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counter-claim against the plaintiffs, and H. & G. as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming \$10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation of the bill, and other bills in the same transaction. Upon the application of H. & G. the Master in Chambers struck out the counter-claim, and the names of H. & G. as defendants:—Sembie, that as against the plaintiffs, the defence

should have been pleaded as a defence to the claim on the bill. *Torrance v. Livingstone*, 10 P. R. 29.—Dalton, Master.—C. P. D.

An action was brought by the Bank of P. E. I. against the appellant on a promissory note, to which he pleaded set-off of a draft made by the plaintiffs and endorsed to him; to this there was a replication that the defendant was a contributory on the stock-book of the bank, and knew that the bank was insolvent when the draft was purchased; the defendant demurred on the ground that the replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory:—Held, reversing the judgment of the court below, that the replication was bad in law. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265.

H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the Hamilton Bank who discounted it and paid over the proceeds to the company. H. knew that the note was discounted, and before it fell due he had in writing acknowledged his liability on it. In an action on the note by the Hamilton Bank against H.:—Held, affirming the judgment of the Court of Appeal, and that of the Divisional Court, (9 O. R. 655) Strong, J., dissenting, that although, in fact, the note was not negotiable, the bank, in equity, was entitled to recover, it being shown that the note was intended by makers to have been made negotiable, and was issued by them as such, but, by mistake or inadvertence, it was not expressed to be payable to the order of the payee. *Harvey v. Bank of Hamilton*, 16 S. C. R. 714.

Forgery of name of defendants to bill of Exchange—Estoppel from denying liability by conduct of defendants prejudicial to the plaintiffs. See *Merchants' Bank v. Lucas*, 13 O. R. 520; 15 A. R. 573. Affirmed by the Supreme Court.

Held, that the fact that the agreement between the holders of certain notes with the maker thereof, and certain of the endorsers, provided that upon payment and satisfaction of the holders certain collateral securities were to be assigned to one of the other parties to the agreement did not discharge the subsequent endorser, for the said arrangement was not absolute but limited to those who were parties to it as between themselves only, and did not affect the subsequent endorser's claim to the possession of the said securities if he paid the holders. *Canadian Bank of Commerce v. Northwood*, 14 O. R. 207.—Boyd.

Where promissory notes of third persons were transferred by the defendant without endorsement as collateral security for a debt due by him to the plaintiff, who now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral note, and that he had not notified the defendant of their nonpayment:—Held, that if the defendant had been injured by such laches or want of notice, and to the extent to which he had been injured, he should be ex-

onerated from that the trial for against the plaintiff the laches and it was a conclusion followed to the 18 O. R. 409.—

See *Wilson v. Federal Bank* and *Bank v. Turley*

#### XI.

Where certain collateral for the for \$1,000, which note given, such debt is discharged, yard, 10 P. R. 496.

Securing end *Barber v. Mac*

Action to re ceptor on a for drawer and en Montreal, 12 O.

Forging endo no maker's nam Regina v. Fee,

See *Hall v. Motsons Bank*, A. R. 476; *MacKinnon v.*

#### BILLS OF LA

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Held, that th been made in deprive plaintiff c. 116, for not pleadings, but Quebec law was and in the abse to be the same. 497.—C. P. D.

#### BILLS OF

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operated from payment, but not otherwise; and that the trial judge had pushed the law too far against the plaintiff in holding that having found the laches and want of notice as a matter of fact it was a conclusion of law that detriment had flowed to the defendant. *Ryan v. McConnell*, 18 O. R. 409.—Chy. D.

See *Wilson v. Brown*, 6 A. R. 87, p. 159; *Federal Bank v. Hope*, 6 O. R. 209; *Molson's Bank v. Turley*, 8 O. R. 293.

#### XI. MISCELLANEOUS CASES.

Where certain securities had been assigned as collateral for the payment of a promissory note for \$1,000, which note was partly paid and a new note given, such security may be held until the debt is discharged by payment. *Wiley v. Ledyard*, 10 P. R. 182.—Hodgins, *Master-in-Ordinary*.

Securing endorser by chattel mortgage. See *Barber v. Macpherson*, 13 A. R. 356.

Action to recover back amount paid by acceptor on a forged bill—Denial of signature of drawer and endorser. See *Ryan v. Bank of Montreal*, 12 O. R. 539; 14 A. R. 533.

Forging endorser's name to a promissory note, no maker's name being thereto at the time. See *Regina v. Fee*, 13 O. R. 8.

See *Hall v. Griffith*, 5 O. R. 478; *Lionais v. Molsons Bank*, 10 S. C. R. 526; *Jack v. Jack*, 12 A. R. 476; *Purdum v. Nichol*, 16 O. R. 699; *MacKinnon v. Keroack*, 15 S. C. R. 111.

#### BILLS OF LADING AND WAREHOUSE RECEIPTS.

I. POWERS OF DOMINION AND PROVINCIAL LEGISLATURES—See CONSTITUTIONAL LAW.

II. CONSTRUCTION OF—See SHIP.

III. ASSIGNMENT TO BANKS—See BANKS.

Held, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. (1877), c. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario; and in the absence of proof it would be assumed to be the same. *Langdon v. Robertson*, 13 O. R. 497.—C. P. D.

#### BILLS OF SALE AND CHATTEL MORTGAGES.

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2. *Other Cases*, 181.

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1. *Affidavit of Bona Fides*, 182.

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3. *Change of Possession*, 184.

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2. *To Secure Endorser*, 188.

3. *Other Cases*, 189.

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#### VIII. RIGHTS AND LIABILITIES OF MORTGAGORS AND MORTGAGEES AND THOSE CLAIM- ING UNDER THEM.

1. *As to Possession*, 194.

2. *Other Cases*, 195.

#### IX. WHO MAY IMPEACH, 196.

#### X. MORTGAGE OF SHIPS—See SHIP.

#### I. GENERALLY.

Remarks upon the policy of the Chattel Mortgage Act. See *Barker v. Leeson*, 1 O. R. 114.

The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the bona fide purpose of further securing the debt without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act. *Trust and Loan Co. v. Lawrason*, 6 A. R. 286; 10 S. C. R. 679.

A chattel mortgage is a transfer of property and effects within the meaning of 49 Vict. c. 16, s. 12, (Ont.) *Blakeley v. Blause*, 12 P. R. 565.—MacMahon.

Semble, that a sale of growing timber does not come within the operation of the Bills of Sale and Chattel Mortgage Act. *Steinhoff v. McRae*, 13 O. R. 546.—C. P. D.

A formal defect in a chattel mortgage may be cured by a conveyance at any time before an execution reaches the sheriff's hands, but such conveyance whether effected by a deed or by delivery only, has no retroactive operation, and if void for intent to prefer under R. S. O. (1877) c. 118, would not suffice to cure the defects. *Smith v. Fair*, 11 A. R. 755.

Held (overruling *Robertson v. Thomas*, 8 O. R. 20), that assignments for the benefit of creditors were until 48 Vict. c. 26 (Ont.), within the Act relating to chattel mortgages and bills of sale, R. S. O. (1877), c. 119. *Whiting v. Hovey*, 13 A. R. 7.

An assignment by the directors of a joint stock company of all the estate and property of the company to trustees for the benefit of creditors is not ultra vires such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders. Quare, Is such an assignment within the provisions of the Chattel Mortgage Act of Ontario, R. S. O. (1877) c. 119. *Hovey v. Whiting*, 14 S. C. R. 516.

Where such an assignment was made, and the property was formally handed over by the directors to the trustees, who took possession and subsequently advertised and sold the property under the deed of assignment:—Held, that if the assignment did come within the terms of the Act its provisions were fully complied with, the deed being duly registered and there being an actual and continued change of possession as required by section 5. *Ib.*

Right of bank to take chattel mortgage. See *In re Rainy Lake Lumber Co.*—*Stewart, Liquidator, v. Union Bank of Lower Canada*, 15 A. R. 749.

Per Proudfoot, J.—The “advances” referred to in R. S. O. (1877), c. 119, s. 6, need not be pecuniary. *Goulding v. Derming*, 15 O. R. 201.

See *Furlinger v. McDonald*, 45 Q. B. 233, p. 190; *Morris v. Martin*, 19 O. R. 564, p. 192.

## II. PARTIES.

Where an arrangement had been entered into between the partners of a firm whereby, although moneys were to be advanced by the firm, the securities therefor were to be taken in the individual name of each partner according as each was willing to accept the security of the person seeking to borrow:—Held, that a chattel mortgage so taken was valid as against creditors, and that the mortgagee could properly make the affidavit of bona fides.—*Semble*, there is no legal objection to a loan being made by one member from the moneys of a firm, and the taking as a security therefor a chattel mortgage to himself. *Hobbs Hardware Co. v. Kitchen*, 17 O. R. 363.—*Toyd*.

By an antenuptial settlement executed 25th March, 1885, made between J. C. of the first part, M. H. (the plaintiff) his intended wife of the second part and one M. of the third part, in consideration of the intended marriage, certain lands and the goods in question consisting of horses, cows, and several articles of household furniture described as being in and upon and around the premises and appurtenances used and occupied by the said J. M. and being city number, etc., were conveyed and assigned to M. to hold to the use of J. C. until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators, and assigns. The marriage took place on the 27th of March. Within five days from the execution of the assignment it was duly registered in the proper office as a bill of sale. The affidavit of bona fides was made by the plaintiff after the marriage, she being described therein as the bargainee. The goods were afterwards seized by an execution creditor of the husband; the plaintiff claimed them and an interpleader issue was directed by the High Court to be tried in the County Court. At the trial it was objected that the trustee should have been the claimant and plaintiff in the issue, and on this ground judgment was given for the defendant:—Held, (reversing the judgment of the court below) that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. *Schneider v. Harnett*, 28 L. T. N. S. 702 followed: (2) That the plaintiff was a person who, as bargainee,

might properly make the affidavit of bona fides. (3) That the goods were sufficiently described and identified:—*Semble*, per Hagarty, C. J. O., and Osler, J. A., that a marriage contract or settlement in the form of the instrument in question, was not a sale of personal property within the Act and that registration therefore was not necessary. Per Patterson, J. A.—(1) That the transaction was within the statute and (2) that the legal title to the goods was in the plaintiff. *Whiting v. Hovey*, 12 A. R. 119; *Dominion Bank v. Davidson*, 12 A. R. 90, referred to, *Connell v. Hickock*, 15 A. R. 518.

## III. PROPERTY PASSING.

### 1. After Acquired Property.

Held, that the terms of the agreement in this case were not sufficiently comprehensive to cover the substituted, renewed, or added stock in trade. *Kitching v. Hicks*, 6 O. R. 739.—*Chy. D.*

In May, 1880, the defendant D., being indebted to the plaintiffs in the sum of \$8,000, gave them a chattel mortgage on all his stock in-trade, chattels and effects then being in the store of the said defendant D., on Granville street, in the city of Halifax; and by the said mortgage the said defendant D. further agreed to convey to the plaintiffs all stock which, during the continuance of the said indebtedness, he might purchase for the purpose of substitution in place of stock then owned by him in connection with his said business, which goods were never so conveyed to the plaintiff. By the terms of the mortgage, the debt due to the plaintiffs was to be paid in three years, in twelve equal instalments at specified times, and if any instalment should be unpaid for fifteen days after becoming due, the whole amount then due the plaintiffs would become immediately payable, and they could take possession of and sell the said mortgaged goods. It was further agreed between the defendant D. and the plaintiffs, that to save the business credit of D. the said mortgage was not to be filed and was to be kept secret, and it was not filed until the 12th December, 1881. On the 13th December, 1881, D. made an assignment of all his property, real and personal, to the defendant F., in trust for the benefit of his (D.'s) creditors, and such trust deed was executed by D., F. and one creditor of D., and subsequently by a number of other creditors. F. had no notice of the mortgage to the plaintiffs. F. took possession of the goods in the store on Granville street, and refused to deliver them to the plaintiffs, who demanded them on the 14th December, default having been made in the payments under the mortgage, and the plaintiffs brought this suit for the recovery of the goods and an account. Previous to the suit being commenced the defendant F. delivered to the plaintiffs a small portion of the goods in the store, which, as he alleged, were all that remained from the stock on the premises in May, 1880:—Held, affirming the judgment of the court below (Strong, J., dissenting), that the legal title to the property vested in the defendant F. must prevail, the plaintiffs' title being merely equitable, and the equities between the parties being equal. *McAllister v. Forsyth*, 12 S. C. R. 1.

A chattel mortgage of the stock-in-trade reported to be enforceable was described as a mortgage. The stock proceeded: “At any time may be and kept in the whether now in chased and placed the judgment of after-acquired stock in the ordinary to the chattel creditors of the mortgagor their writs were the time such a new; the equitable such agreement goods reaching the A. R. 503.

J. R., by an instrument, sell his business and by it provided was to remain his that all after-acquired of substitution become his property purchase money, have the right to Some seven years been made, he took off by auction. ment for the benefit brought by the sons to restate Held, that the legal of sale was to rest stock in the vendor equitable title inquired, and to give sion for default been made, and of the assignee of that act clothed by the assignment executed:—Held, not need to be registered against subsequent Chattel Mortgage covering the capable interests in property. The case and the action giving publication. *Banks v.*

The mortgage (Armour, J., dissenting) incapable of discharge without change mortgage as to Mortgage Act. 127.

The plaintiff “wishes lying river Moira,” instrument, no owner, assumed



A chattel mortgage conveyed to the plaintiff the stock-in-trade of the mortgagor, which purported to be enumerated in a schedule (A.) and was described as being on certain named premises. The schedule after setting out the goods proceeded: "And all goods \* \* \* which at any time may be owned by the said mortgagor and kept in the said store for sale \* \* \* and whether now in stock or hereafter to be purchased and placed in stock!"—Held, (affirming the judgment of the County Court of York) that after-acquired stock brought into the business in the ordinary course thereof, became subject to the chattel mortgage as against execution creditors of the mortgagor, notwithstanding that their writs were in the hands of the sheriff at the time such stock was brought into the business; the equitable right of the mortgagee under such agreement attaching immediately on the goods reaching the premises. *Coyne v. Lee*, 14 A. R. 503.

J. R., by an instrument in writing, agreed to sell his business and stock-in-trade to his sons and by it provided that all the existing stock was to remain his property until it was paid for; that all after-acquired property brought in by way of substitution for existing stock, was to become his property by way of security for the purchase money, and that on default he should have the right to re-enter and take possession. Some seven years afterwards, default having been made, he took possession and began selling off by auction. The sons then made an assignment for the benefit of creditors. In an action brought by the assignee and some creditors of the sons to restrain J. R. from selling. It was Held, that the legal operation of the instrument of sale was to retain the property in the existing stock in the vendor, and to confer upon him an equitable title in the stock to be afterwards acquired, and to give him the right to take possession for default in payment. Default having been made, and possession taken before the rights of the assignee or of any execution creditor arose, that act clothed J. R. with the legal title in the after acquired goods, which was not affected by the assignment for creditors subsequently executed:—Held, also, that the instrument did not need to be registered to make it operative, against subsequent creditors, the Bills of Sale and Chattel Mortgages Act, R. S. O. (1887) c. 125, not covering the case of agreements creating equitable interests in nonexisting and future-acquired property. The effect of the transaction in this case and the advisability of making provision for giving publicity by registration commented on. *Banks v. Robinson*, 15 O. R. 618.—Boyd.

## 2. Other Cases.

The mortgage covered growing crops:—Held, (Armour, J., dissenting), that such crops being incapable of delivery or change of possession without change of occupation of the land, the mortgage as to them was not within the Chattel Mortgage Act. *Hamilton v. Harrison*, 46 Q. B. 127.

The plaintiff sued for conversion of certain "wishes lying on the island in the mouth of the river Moira," claimed by him under a written instrument, not under seal, whereby A., the owner, assumed to assign the wishes to the plain-

tiff, as security for money lent. The defendants asserted a lien on the wishes for advances to A., and also alleged that there had been an actual delivery thereof to them, under which they had taken possession prior to the plaintiff's mortgage:—Held, that the instrument was a good mortgage, though without seal, and was not void for want of registration as against the defendants claiming under the alleged prior delivery. The alleged lien for advances could not be enforced against the plaintiff, who was found by the jury to be an innocent mortgagee for value; and the jury having upon contradictory evidence found against the alleged prior delivery, the refusal of the Judge of the County Court of Hastings to disturb the verdict was affirmed. *Paterson v. Maughan*, 39 Q. B. 371, approved of and followed. *Hall v. Collins Bay Rafting and Forwarding Company*, 12 A. R. 65.

See *Gunn v. Burgess*, 5 O. R. 685, p. 185.

## IV. REGISTRATION AND CHANGE OF POSSESSION.

### 1. Affidavit of Bona Fides.

Held (1) (reversing the judgment of the Court below, 32 C. P. 43), that it need not appear on the affidavit, or the mortgage, or the papers filed therewith, that the agent of the mortgagee, making the affidavit, was aware of the circumstances connected with such mortgage. *Carlisle v. Tait*, 7 A. R. 10.

The affidavit of bona fides in a chattel mortgage purported to be sworn before "T. B. F." without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R., etc."—Held, no objection to the affidavit of bona fides. *Hamilton v. Harrison*, 46 Q. B. 127.—Q. B. D.

The affidavit annexed to a chattel mortgage omitted the words, "or accruing due," after those "so justly due":—Held, that the debt might be stated as due when it really was due, and that it need not be necessarily stated as either due or accruing. *Farlinger v. McDonald*, 45 Q. B. 233.—Q. B. D.

The affidavit stated that the mortgage was not granted for the purpose of protecting the goods and chattels against the creditors of the two mortgagors, naming them, or preventing the creditors of the said mortgagor from obtaining payment for any claim against him, the said mortgagor:—Held, sufficient, for that the word mortgagor would mean each of the mortgagors previously mentioned. *Id.*

The omission of the word "him," at the conclusion of the affidavit of bona fides registered with a chattel mortgage, has the effect of destroying the security as against an execution creditor who has seized while the goods remained in statu quo, but does not impair the instrument as between the parties. *Davis v. Wickson*, 1 O. R. 369.—Boyd.

It is sufficient if one of several mortgagees make the affidavit required by R. S. O. (1877), c. 119, s. 2. *Tidey v. Craib*, 4 O. R. 696.—Ferguson.

The mortgage did not state the amount of the indebtedness; and the affidavit of bona fides was



equally defective, as it merely stated that the mortgagors "are fully indebted to me," the mortgagees, "in a large sum of money," no sum being mentioned:—Held, void as against the plaintiffs, the amount of indebtedness existing or created by the mortgage not being mentioned therein, and in the affidavit of bona fides as required by the first and second sections of R. S. O. (1877) c. 119. *Stevens, Turner & Burns Foundry and General Manufacturing Co. (Limited) v. Barfoot*, 9 O. R. 692.—Cameron; 13 A. R. 366.

The affidavit of bona fides in a chattel mortgage taken to secure the mortgagee against his endorsement of two promissory notes, which were referred to in a recital, stated that the mortgage "was executed in good faith and for the express purpose of securing me, the said mortgagee therein named, against his endorsement of a certain promissory note for (sic) or any renewal of the said recited promissory notes."—Held, that "his endorsement" might be read "my endorsement," as this was clearly a clerical error, but that even with this correction, the clause remained vague and incomplete, and that the affidavit was therefore fatally defective. *Boldrick v. Ryan*, 17 A. R. 253.

One partner can make the affidavit of bona fides. *Ross v. Dunn*, 16 A. R. 552.

See *Driscoll v. Green*, 8 A. R. 366, p. 189; *Connell v. Hickock*, 15 A. R. 518, p. 180; *Hobbs Hardware Company v. Kitchen*, 17 O. R. 363, p. 179.

## 2. Registration.

Where the goods forming the subject of a chattel mortgage are in bond, it is not necessary that the mortgage should be registered. *May v. Security Loan and Savings Co.*, 45 Q. B. 106.—Q. B. D.

A chattel mortgage was duly executed on the 12th of July, and filed on the 18th, the 17th having been Sunday:—Held, affirming the judgment of the County Court, that such registration was too late, the Act R. S. O. (1877) c. 119, requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days, and that Rule 457, O. J. Act (Con. Rule 476) did not apply. *McLean v. Pinkerton*, 7 A. R. 490.

The mortgage, besides being a security for \$1,400 actually advanced, provided that it should also be a security for further advances, if necessary, of goods and merchandise to enable the mortgagor "to carry on business,"—not "to enter into and carry on" as in the statute, which should "be repaid on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto":—Held, that the omission of the words "to enter into" could not render it unnecessary to register the mortgage, as regarded the \$1,400. Quære, per Wilson, C. J., whether the clause for future advances was not void as enabling payment to be delayed beyond the year. *Ib.*

K. having become security for repayment by H. of \$600, an agreement in writing was entered into that in consideration thereof H. did assign to K. "all his right and claim to the goods and stock-in-trade in the store of H. to an amount

sufficient to reimburse K. whatever he may pay in consequence of becoming such surety as afore-said, and should there not be stock enough for that purpose in the store at such time, the balance after deducting the value of the said stock, shall be made up of the book debts then on the books of H." This agreement was not registered. H. subsequently made an assignment for the benefit of his creditors to C., at which time only about \$20 worth of the stock was the same as had been in the store at the time of the said agreement, and K.'s administratrix now brought this action against H. for payment, and in default, for payment by C. out of the proceeds of the stock and book debts of H., (C. as well as H. F. & Co., creditors of H. who had executed the assignment to C., being made parties defendant with H.):—Held, reversing the decision of Proudfoot, J., that, so far as the book debts were concerned as to which registration was unnecessary, the agreement was valid and binding as against the creditors as well as H. *Taylor v. Whittemore*, 10 Q. B. 440, cited and approved of; *Short v. Rutan*, 12 Q. B. 79, not followed. *Kitching v. Hicks*, 6 O. R. 739.—Chy. D.

Quære whether registration is necessary to support as against creditors, an instrument by which a charge upon future acquired chattels is created. *Ib.*

Held, affirming the decision of Proudfoot, J., that though an assignee for the benefit of creditors could not take advantage of the want of registration, yet creditors themselves might, although not creditors by judgment and execution at the time of the assignment; and following *Parke v. St. George*, 2 O. R. 342, and *Meriden Silver Co. v. Lee*, 2 O. R. 451, that the assignment did not prevent them from impeaching it. *Ib.* See *Parke v. St. George*, 10 A. R. 496.

See *Kelsey v. Rogers*, 32 C. P. 624; *Robinson v. Cook*, 6 O. R. 590; *Hall v. Collins Bay Rafting and Forwarding Co.*, 12 A. R. 65, p. 182; *Banks v. Robinson*, 15 O. R. 618, p. 181; *Connell v. Hickock*, 15 A. R. 518, p. 180; *In re Rainy Lake Lumber Co., Stewart, Liquidator, v. Union Bank of Lower Canada*, 15 A. R. 749, p. 198.

## 3. Change of Possession.

It was alleged that the plaintiff, who was living with his mother, gave the horses in question to her for his board, but no price was fixed for them, and they were kept at the house and used by the plaintiff as before:—Held, that there was no sufficient change of possession to dispense with a registered bill of sale, and the sale was void as against the assignee in insolvency of the plaintiff. *Snarr v. Smith*, 45 Q. B. 166.—Q. B. D.

B., a drygoods dealer in Ottawa, consigned his stock-in-trade to S. S. & Co., auctioneers in Toronto, for sale, the proceeds to be applied (1st) in payment of \$800 advanced to B. by S. S. & Co., and (2nd) in payment of \$250 advanced by McE. & Co. After the goods had reached the warehouse of S. S. & Co., B. gave other orders on the proceeds, which they accepted conditionally. After the sale had been advertised, but before the time appointed for selling, the sheriff levied on the goods under an execution sued out by the defendants, who, on ascertaining the nature

and amount of S. to them, and allowed to proceed from being paid who should hold parties were assigned caused the several Held, affirming 31 O. P. 320, several orders of able assignment that the assignment complete and continuing under the circumstances and therefore Chattel Mortgage if that could be having by their subrogated to priority to all the proceeds for *v. Garland*, 8 A.

Where possession given personally mortgage; it may or bailie for him the claim of such with further *S. C.*, 31 C. P. 3.

A. having purchased a celebrated horse money \$50 more on the understanding take care of the horse to have her, and be shared equally was, that they purposes and share the year, and was seized and sold against B., but the sheriff and put the mare had a time of the sale. the purchaser at tened that the 119, avoided the execution, it was tended to apply of specific ascertainment, and capable assessed in specie sible chattel like and B. were told that B.'s possession or exclusive possession both; that the interest in the mare came a co-owner in the colt followed an owner *Gunn v. Burgess*

The defendant of McL. under plaintiffs the B assignees under by McL. to one indebtedness. T Afterwards Mc the goods as subsequently the B to take possession

and amount of S. S. & Co.'s claim, paid the same to them, and the sale by arrangement was allowed to proceed, the amount realized therefrom being paid into the hands of the sheriff, who should hold the same until the rights of all parties were ascertained. The sheriff thereupon caused the several claimants to interplead:—Held, affirming the judgment of the Court below, 31 C. P. 320. *Armour, J.*, diss., that the several orders on S. S. & Co. operated as equitable assignments of the goods or their proceeds; that the assignment to S. S. & Co. was as complete and continuous a change of possession as under the circumstances it was possible to effect, and therefore no necessity existed under the Chattel Mortgage Act for registering the orders, if that could be done; and that the defendants having by their payment to S. S. & Co. been subrogated to their rights, were entitled in priority to all the other claimants to rank upon the proceeds for the sum so advanced. *McMaster v. Garland*, 8 A. R. 1.

Where possession is changed it need not be given personally to the creditor, purchaser, or mortgagee; it may equally be given to a trustee or bailee for him; and the debtor may increase the claim of such bailee, or may charge the goods with further sums in favour of other persons. *S. C.*, 31 C. P. 320.—C. P. D.

A. having purchased from B. a half interest in a celebrated brood mare, paid in his purchase money \$50 more than the half interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was, that they were to keep her for breeding purposes and share the profits equally. During the year, and while in B.'s possession, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was in gremio at the time of the sale. In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act R. S. O. (1877) c. 119, avoided the plaintiff's title as against the execution, it was:—Held, that the Act was intended to apply to personal chattels susceptible of specific ascertainment and of accurate description, and capable of being transferred and possessed in specie, and did not apply to an indivisible chattel like that in the present case; that A. and B. were tenants in common of the mare; that B.'s possession of the mare was not his sole or exclusive possession, but the possession of both; that the sheriff's sale passed only B.'s interest in the mare, and C. by his purchase became a co-owner with A.; and that the property in the colt followed that of its dam, and that A. was an owner of an undivided moiety in both. *Gunn v. Burgess*, 5 O. R. 685.—Boyd.

The defendants seized goods in the possession of McL. under an execution against him; and the plaintiffs the Bank of M., claimed the goods as assignees under a registered bill of sale given by McL. to one F., as collateral security for indebtedness. There was no change of possession. Afterwards McL. agreed with the bank to hold the goods as tenant at will at a rental, and subsequently the bank made an ineffectual attempt to take possession:—Held, (reversing the judg-

ment of the County Court of Lambton), that the attempt to take possession of the goods was not sufficient to satisfy R. S. O. (1877), c. 119, and that the defendant was therefore entitled to succeed. *Parke v. St. George*, 10 A. R. 496, distinguished. *McKellar v. McGibbon*, 12 A. R. 221.

Held, reversing the judgment of Ferguson, J., 9 O. R. 314, that in this case there had been such an actual and continued change of possession as to defeat the executions against the company. *Parke v. St. George*, 10 A. R. 496, and *Scribner v. Kinloch*, 12 A. R. 367, followed. *Whiting v. Hovey*, 13 A. R. 7; See *S. C.*, sub. nom. *Hovey v. Whiting*, 14 S. C. R. 515.

The purchaser of the stock of a trader, where the change of ownership is open and notorious, may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may still be "an actual and continued change of possession," as required by R. S. O. (1877), cap. 119, s. 5. *Ontario Bank v. Wilcox*, 43 Q. B. 460, distinguished. *Kinloch v. Scribner*, 14 S. C. R. 77; *S. C.*, sub. nom. *Scribner v. McLaren*, 2 O. R. 265; *S. C.*, sub. nom. *Scribner v. Kinloch*, 12 A. R. 367.

In a chattel mortgage containing no redemise clause there may be an implied contract that the mortgage shall remain in possession until default, of equal efficacy with an express clause to that effect; and such an implied contract necessarily arises from the nature of the instrument, unless it be very expressly excluded by its terms. *Porter v. Flintoff*, 6 C. P. 335, distinguished. *Dedrick v. Ashdown*, 15 S. C. R. 227.

A chattel mortgage made by D. to McL. was given to secure a sum made up of debts due to McL. and two other persons: McL. made the usual affidavit of bona fides, asserting that the whole sum was due him; no trust of any kind appeared upon the mortgage, though the intention was that McL. should hold it as trustee for the other two. The mortgage was filed within the proper time after its execution. McL. assigned the mortgage to the plaintiffs, who afterwards obtained judgment against D., and under the execution the sheriff seized the property covered by the mortgage. After this seizure the plaintiffs instructed the sheriff to withdraw, and then took and held possession of the property under the mortgage. The defendants placed writs of execution against the goods of D. in the hands of the sheriff after the plaintiffs had taken possession under their mortgage. D. was solvent when he gave the chattel mortgage, but insolvent when the plaintiffs took possession:—Held, that the fact that no trust was declared on the face of the mortgage was nothing more than an informality, and was cured by the taking possession before the rights of creditors had attached on the chattels; and neither the insolvency of the mortgagor at the time of taking possession, nor the fact of the seizure under execution before taking possession, affected the position of the plaintiffs:—Held, also, that the taking possession could not be viewed as a preference within 48 Vict. c. 26, s. 2 (Ont.) *Bank of Hamilton v. Tamblin*, 16 O. R. 247.—Q. B. D.

See *Oliver v. Newhouse*, 32 C. P. 90; 8 A. R. 122; *Commercial National Bank of Chicago v.*

*Corcoran*, 6 O. R. 527, p. 141; *Totten v. Bowen*, 8 A. R. 602; *Dominion Bank v. Davidson*, 12 A. R. 90, p. 144; *In re Rainy Lake Lumber Co.—Stewart, Liquidator, v. Union Bank of Lower Canada*, 15 A. R. 749; *Ross v. Dunn*, 16 A. R. 552, p. 192.

#### 4. Refiling.

Held, affirming the decision of the County Court, that the subsequent purchasers and mortgagees mentioned in section 10 of the Chattel Mortgage Act, R. S. O. (1877) c. 119, are those becoming such after the expiration of a year from the filing of the mortgage. Where therefore the mortgage was registered in August, 1878, and the plaintiff purchased the property in March, 1879, and the mortgage was not refiled:—Held, that the plaintiff was not entitled, as against the defendant, who took the property from him in December, 1879. *Hodgins v. Johnson*, 5 A. R. 449.

*Kissock v. Jarvis*, 9 C. P. 156, as to the necessity of the renewal of a chattel mortgage from year to year, approved of and followed, notwithstanding the subsequent legislation contained in R. S. O. (1877) c. 119. *Baumont v. Cramp*, 45 Q. B. 353.—Q. B. D.

The plaintiff held a chattel mortgage made by one G., which was dated 9th May, 1879, and filed 13th May. Defendants' mortgage from the same mortgagor was dated in the December following. On the 12th April, 1880, the plaintiff made affidavit of the amount due up to the 10th April, and refiled the mortgage under R. S. O. (1877) c. 119, s. 10. The defendants were landlords of the mortgagor and illegally distrained for rent, whereupon the plaintiff brought trover for goods levied upon by them and contained in his mortgage.—Held, that the defendants were neither creditors nor subsequent purchasers or mortgagees within the statute, and therefore could not object to the mortgage because the affidavit verifying the statement of the amount due was not made within the thirty days next preceding the expiration of the year. *Semble*, that such affidavit and statement should be made within the thirty days. *Griffin v. McKenzie*, 46 Q. B. 93.—Q. B. D.

B., the customer of a bank, executed a chattel mortgage on his household effects, by way of collateral security, in favour of the bank, which was allowed to run into default, whereupon the mortgagees proceeded to a sale, and appointed W., their bailiff, for that purpose, who had the property appraised and sold it to the plaintiff, a creditor of B., by private sale for \$900; and executed a bill of sale thereof. The plaintiff, in his evidence, swore that B. owed him about \$1,000, and he thought there was ample security for the \$900 and also additional security for B.'s indebtedness to himself, and that the goods seemed to be worth about \$5,000; and the plaintiff, without disturbing in any way the possession of B., retook the property to him, and he remained, as he had theretofore been, in possession. In order effectually to carry out the proposed arrangement with B., the bank by special power appointed their local manager agent to accept the chattel mortgage and as such agent to make the affidavits required to be made by mortgagees:—Held, (*Patterson, J. A.*, dissenting), that

as under the circumstances stated the chattel mortgage was satisfied quoad the goods, the mortgage could not properly be refiled; and notwithstanding the continued possession of the mortgagor (B.) it was not necessary for the plaintiff to file a bill of sale from the bank to himself in order to preserve his rights as against execution creditors of or bona fide purchasers from B., the mortgagor. *Carlisle v. Tait*, 7 A. R. 10.

See *Barker v. Leeson*, 1 O. R. 114, p. 196; *Tidey v. Craib*, 4 O. R. 696, p. 190.

#### V. CONSIDERATION AND BONA FIDES.

##### 1. To Secure Future Advances.

See *McLean v. Pinkerton*, 7 A. R. 490, p. 183; *Goulding v. Deeming*, 15 O. R. 201.

##### 2. To Secure Endorser.

A mortgage to secure the plaintiff as endorser of notes not payable within a year:—Held, invalid. *May v. Security Loan and Savings Co.*, 45 Q. B. 106.—Q. B. D.

*Semble*, it is not essential to the validity of a chattel mortgage to secure the mortgagee against the endorsement of any bill or note, etc., under s. 6 of R. S. O. (1877), c. 119, that it should set forth fully the agreement between the parties and the amount of the liability intended to be created, and that the liability which it professes to secure, should be truly stated. *Barber v. Macpherson*, 13 A. R. 356.

In November, 1881, the plaintiff endorsed a note for the accommodation of M. for \$550 at three months, and as indemnity against any liability in respect thereof, or of any renewal, took from M. a chattel mortgage which was only renewed once, although the note remained unpaid until the 4th of November, 1882, when \$50 was paid by M. on account, and a new note at six months was given for \$500, in which the plaintiff joined as maker instead of as endorser, and after this note became due and remained unpaid for six months the plaintiff obtained a second mortgage from M., reciting that he had endorsed a note for \$550, which had not been paid, and that plaintiff was still liable thereon, or on the renewal thereof, and was liable to be called upon at any time to pay the amount, and the plaintiff was called upon to pay, and actually did pay the note and interest amounting to about \$590. In an interpleader proceeding at the instance of an execution creditor of M.:—Held (affirming the judgment of the County Court), that the mortgage was void as against such creditor. The distinction between mortgages under the 1st and under the 6th section of the Act, considered and acted on. The distinction between the two classes of cases provided for by the 6th section considered. *Keough v. Price*, 27 C. P. 309; *O'Donohoe v. Wilson*, 42 Q. B. 329; *Ontario Bank v. Wilcox*, 43 Q. B. 463, commented on. *Id.*

In November, 1881, a chattel mortgage was made to secure the plaintiff as indorser of a promissory note of the mortgagor, dated 4th October, 1881, at two months. A recital in the instrument stated that it had been given "as security to the mortgagee against his indorse-

ment of said note shall not extend beyond one year against any loss by reason of such any renewal it was made "for the mortgagee's liability for the promissory note or notes accommodation renewals of the (reversing the) as the mortgagee vit covered all part of the affidavit to the end w vitiate the sec 309, remarked 366.

A chattel mortgage to secure the mortgagee incurred faith in pursuing promise, is not assignments and ly because it w with the endorser's requirements of the Act, R. S. O. (1 agreement in the ges to secure f therein mention under that sect incurred by an that is necessary not extending from the date of ently described ence in such renewal or ext not been agree not bound to gage if, in other *West*, 15 A. R.

Held, (Hag the mortgagee previous mortg given to secure certain notes, notes referred renewal, there latter mortgag to abandon the Dougall, 10 Q. v. Smith, 17 458, referred to 64; Ramsden distinguished. *Id.*

See *Tidey v.*

The mortgage as only become day, but the money acknowledgment of the property given to secure the mortgage given for a pro

ment of said note, or any renewal thereof that shall not extend the liability of the mortgagee beyond one year from the date thereof; and against any loss that may be sustained by him by reason of such endorsement of said note, or any renewal thereof." The affidavit stated it was made "for the express purpose of securing the mortgagee against the payment of such his liability for the said mortgage by reason of the promissory note therein recited, or any future note or notes which he may endorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise."—Held, (reversing the judgment of the court below), that as the mortgage itself was good, and the affidavit covered all that is required by the Act, that part of the affidavit from "or any future note" to the end was unnecessary, and could not vitiate the security. *Keough v. Price*, 27 C. P. 309, remarked upon. *Driscoll v. Green*, 8 A. R. 366.

A chattel mortgage to indemnify an indorser or to secure the mortgagee against liabilities otherwise incurred for the mortgagor, if given in good faith in pursuance of an antecedent absolute promise, is not avoided by the Act relating to assignments and preferences by insolvents, merely because it was not given contemporaneously with the endorsement or other liability. The requirements of section 6 of the Chattel Mortgage Act, R. S. O. (1877) c. 119, as to setting forth an agreement in the mortgage apply only to mortgages to secure future advances for the purposes therein mentioned. In the case of a mortgage under that section as security against liabilities incurred by endorsing, or in any other way; all that is necessary is that the liability shall be one not extending for a longer period than one year from the date of the mortgage, and shall be sufficiently described or identified therein. The reference in such a mortgage to a possible future renewal or extension of the liability which has not been agreed for and which the mortgagee is not bound to grant, does not invalidate the mortgage if in other respects sufficient. *Embury v. West*, 15 A. R. 357.

Held, (Hagarty, C. J. O., dissenting), that the mortgagee was entitled to fall back on a previous mortgage covering the same chattels, given to secure him against his endorsement of certain notes, of one of which one of the two notes referred to in the later mortgage was a renewal, there being evidence that when the latter mortgage was taken it was not intended to abandon the earlier one. *McMartin v. McDougall*, 10 Q. B. 399, commented on. *Boulton v. Smith*, 17 Q. B. 400, in Appeal, 18 Q. B. 458, referred to. *Smale v. Burr*, L. R. 8 C. P. 64; *Ramsden v. Lupton*, L. R. 9 Q. B. 17, distinguished. *Boldrick v. Ryan*, 17 A. R. 253.

See *Tidey v. Craib*, 4 O. R. 696, p. 190.

### 3. Other Cases.

The mortgage shewed the debt in the proviso as only becoming due and payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, and the evidence shewed it was given to secure an overdue debt:—Held, that the mortgage could be upheld, regarding it as given for a present debt to be paid at a future

day. *Farlinger v. McDonald*, 45 Q. B. 233.—Q. B. D.

The consideration in the mortgage was stated as \$1,148; but it appeared in evidence that the amount actually owing was only \$1,030.80. At the trial the plaintiff was nonsuited, on the ground that the consideration was not truly stated, and that the mortgage was therefore void as against the defendant, an execution creditor:—Held (Armour, J., dissenting), that the nonsuit was wrong, for the erroneous statement of the consideration did not avoid the mortgage as a matter of law, but was a circumstance for the jury to consider when deciding the issue of fraud or no fraud. *Hamilton v. Harrison*, 46 Q. B. 127.—Q. B. D.

Where two mortgagees, the defendants in this action, took a chattel mortgage to themselves, to secure certain moneys, having at the time knowledge of a pre-existing debt from the mortgagor to T., and of a prior, but unrenewed chattel mortgage to T. to secure the same:—Held, that such conduct did not amount to mala fides, and T.'s unrenewed mortgage was void as against them under R. S. O. (1877) c. 119. *Tidey v. Craib*, 4 O. R. 696.—Ferguson.

Held, that the fact that as to part of the consideration for their mortgage the defendants had not made an actual advance, but were merely liable on promissory notes, did not invalidate the mortgage, R. S. O. (1877) c. 119 not requiring, as does the corresponding English Act, that the consideration should be truly expressed. *Id.*

Part of the consideration of the mortgage was covered by a draft drawn by the mortgagee, a merchant in the course of business, on the mortgagor, a customer, and discounted at a bank:—Held, that the mere fact of the draft having been discounted at the bank would not justify the Court in assuming that the debt represented by the draft was paid, and that the remedy on the draft was to be alone looked to; and therefore that the amount of the indebtedness in the mortgage could not be said to be untrue stated. *Meriden Silver Plating Co. v. Lee*, 2 O. R. 451, commented on. *Hepburn v. Park*, 6 O. R. 472.—Osler.—C. P. D., followed in *Hyman v. Cuthbertson*, 10 O. R. 443.

Q. and A. carrying on business as licensed victuallers were indebted to the defendant S., a wine merchant, to the amount of \$1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefor, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtedness, and Q. and A. accordingly on the 24th of January, 1882, executed a mortgage to S. on all their stock-in-trade, securing \$2,400, S. agreeing to make the further advances in money and goods, as they should require them in the course of their business, and he did in fact between the date of the execution of the mortgage and the 3rd of March following, advance to them \$300 in money and goods, and the balance of the further advance was ready to be given to them at any time during that period. The affidavit of indebtedness in the sum of \$2,400 was in the usual form, and the mortgage was duly registered. On the last mentioned date Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, where-

upon S., treating this assignment as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee and sold the same, undertaking to hold the proceeds subject to the order of the court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand due at the date of the mortgage, instituted proceedings seeking to recover payment of his claim for \$101.94 and interest, and also seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee:—Held, that even if the fact of the mortgage being expressed on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as might render the security void under R. S. O. (1877) c. 119, as against creditors, yet it being clearly shewn that everything between the parties in connection therewith was done bona fide, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the court (Patterson, J.A., dissenting), reversed the judgment of the court below (2 O. R. 342.) Per Patterson, J.A., the mortgage and the affidavits accompanying it, though in their form and statements complying with all that is prescribed by the statute, being untrue in fact rendered the security void. Per Burton, J.A., although no ground was shewn for impeaching the transaction as a fraudulent preference, the mortgage under the Chattel Mortgage Act, R. S. O. (1877) c. 119, was invalid as against creditors who were in a position to attack it, which the plaintiff here was not, and as any informalities in the transaction were cured by the mortgagees having taken possession of the property, the plaintiff could not maintain the action. *Barker v. Leeson*, 1 O. R. 114, dissented from. Per Osler, J.A., the agreement between the mortgagors and mortgagee might be looked upon as having been really one for a present advance, though the amount was to be paid out to them as they required it. It was not necessary therefore that it should be set forth in the mortgage under section 6 of the Chattel Mortgage Act, R. S. O., (1877) c. 119. *Parkes v. St. George*, 10 A. R. 496.

A mercantile firm to whom a customer was indebted on unmatured paper, part of which was under discount at a bank, in good faith and in the honest belief that it would enable him to carry on his business agreed to make a fresh advance to him of about one half of his indebtedness to them, and took from him to one of the firm a chattel mortgage for the whole amount, the mortgagee making the usual affidavit of bona fides. When the mortgage was executed a cheque for the fresh advance was given to the customer who, pursuant to a subsequent arrangement, did not use it, but afterwards drew at intervals on the firm until the amount of the cheque was paid, when it was returned:—Held, (Burton, J.A., doubting but expressing no opinion on this point), affirming the finding of fact at the trial, that even if the mortgage was defective under the Chattel Mortgage Act yet the plaintiffs' execution creditors were not entitled to prevail, because the mortgagee had taken actual possession of the goods before the delivery of the writ to the sheriff:—Held, also, that the mortgage was valid. (1) Under the Chattel mortgage Act; though the debt was due to the partner-

ship, one partner could properly take the mortgage and make the affidavit of bona fides, and it was a mortgage to secure a present actual advance, and not future advances so as to come within section 6 of the Act. (2) Under the Assignments and Preferences Act; because the advance was made in the bona fide belief that the mortgagor would thereby be enabled to continue his business and pay his debts in full. Per Burton, and Osler, J.J.A. Even if the mortgage had been invalid and the mortgagee had taken possession and sold after the delivery of the writ an action for an account of the proceeds would not lie against him at the suit of the execution creditor. His only remedy would be to follow the goods, and seize them under his execution. Judgment of Boyd, C., affirmed. *Ross v. Dunn*, 16 A. R. 552.

A husband executed to his wife a chattel mortgage to secure her against loss by reason of her having barred her dower in certain mortgages of land. The goods were seized by his execution creditors, claimed by her and sold pending interpleader proceedings. The husband was still living:—Held, that the money, the proceeds of the goods, must remain in Court to abide further order, so that the wife could have the same security that she had by the mortgage; and if she could not hereafter become entitled to the money, it would be available to the husband's creditors:—Held, also, that the chattel mortgage was valid, notwithstanding anything in R. S. O. (1887) c. 125, s. 6. *Morris v. Martin*, 19 O. R. 564.—Chy. D.

See *Stevens, Turner & Burns Foundry and General Manufacturing Company (Limited)*, v. *Barfoot*, 9 O. R. 692, p. 183; *Macfie v. Hunter*, 9 P. R. 149; *Kitching v. Hicks*, 6 O. R. 739, p. 184; *River Slave Co. v. Sell*, 12 O. R. 557; *Robinson v. Cook*, 6 O. R. 590; *Furlong v. Reid*, 12 O. R. 607; *Gibbons v. Wilson*, 17 A. R. 1.

#### VI. DESCRIPTION OF GOODS.

In a bill of sale certain goods were described as "one brown stallion, ten years old; one bay horse, eight years old; one black mare, nine years old:—Held, a sufficient description. *Cornell v. Abell*, 31 C. P. 107.—Wilson.

Semble, that the description of goods as "in bond," means in the customs warehouse, and is a sufficient description as regards locality. *Moy v. Security Loan and Savings Co.*, 45 Q. B. 106.—Q. B. D.

Semble, that a piano on board of a vessel would not pass to a mortgagee under the words "with her boats, guns, ammunition, small arms, and appurtenances." *St. John v. Bullivant*, 45 Q. B. 614.—Q. B. D.

M. owning parts of lots 13 and 14, in the 2nd concession of Murray, gave a chattel mortgage of certain crops, grain, hay, etc., described as "now being on the premises situate on the north-east half of lot 14 in the 2nd concession, and north half of lot 14 in the said concession of Murray:—Held, that crops and hay upon lot 13 could not pass. *Grass v. Austin*, 7 A. R. 511.

The goods and chattels were described in a chattel mortgage as follows:—Certain specific articles were first enumerated in the mortgage,

and the description of the stock of gold, electro-silver in the possession of the store" (being therebefore the electro-plated, and mixed, and held, a sufficient description. *Segal v. O. R.* 413.—

In an action for the defence of the goods, subsequently, on the part of him, and horn Lake, Su covered by a goods in which "now in and Pigeon Creek, Scugog River, The evidence were well known and forming no part of the goods upon" the latter mortgage, "the goods to which were the mortgage, and could not *nelly v. Hall*,

In a deed of donors, goods of the stock-in-trade, including, among other things, their store and drew:—Held, the kind of stock mentioned. The present uncertainty assignee to take *v. Donnelly*, 4

The Consolidated Act, s. 5, enacted in this Act which goods and chattels sufficient description thereby recognized:—dissenting, the mortgage, were de goods, chattels hereinafter part and particular schedule hereunder which goods are and being, etc., mises), without the goods on full and sufficient of the above was void as *v. Wolff*, 13 S.

In a deed described as "certain goods and chattels (company) which they are to which they are of any interest of any



and the description then proceeded, "also the stock of gold and silver watches, jewellery, and electro-silver plate, which, at the date hereof, is in the possession of the mortgagor in his said store" (being a certain store of the mortgagor thereinbefore specified). The evidence shewed the electro-plated goods and watches were numbered, and might have been identified thereby:—Held, a sufficient description of the goods mortgaged. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R. 413.—Boyd.

In an action against a sheriff for false return the defence was that the goods seized and subsequently, in his being indemnified, abandoned by him, and which were on Bald Lake, Buckhorn Lake, Sandy Creek, and Squaw River, were covered by a chattel mortgage to a bank, the goods in which mortgage were described as being "now in and upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scuggog River, and the shore adjacent thereto." The evidence shewed that the former were well known as such, and as distinct from and forming no part of the latter, and that no part of the goods seized had ever been "in and upon" the latter:—Held, that the words in the mortgage, "now in and upon," expressly limited the goods to which they referred to those goods which were then upon the waters mentioned in the mortgage, and the shore adjacent thereto, and could not include the goods seized. *Donnelly v. Hall*, 7 O. R. 581.—Q. B. D.

In a deed of assignment for the benefit of creditors, goods and chattels were described as all the stock-in-trade, goods and chattels, etc., including, among other things, all their stock-in-trade which they, the assignors, "now have in their store and dwelling in the village of Renfrew":—Held, description insufficient, in that the kind of stock-in-trade should have been mentioned. The safest course in these cases, in the present uncertain state of the law, is for the assignee to take possession and keep it. *Nolan v. Donnelly*, 4 O. R. 440.—C. P. D.

The Consolidated Statutes of Manitoba, c. 19, s. 5, enact: "All the instruments mentioned in this Act whether for the sale or mortgage of goods and chattels, shall contain such a full and sufficient description thereof that the same may be thereby readily and easily known and distinguished."—Held, Strong and Henry, JJ., dissenting, that where goods in a chattel mortgage, were described as "all and singular the goods, chattels, furniture, and household stuff hereinafter particularly mentioned and described and particularly mentioned and described in the schedule hereunto annexed marked A.; all of which goods and chattels are now situate, lying and being, etc." (particularly describing the premises), without stating that such goods were all the goods on the said premises, there was not a full and sufficient description within the meaning of the above enactment and the mortgage was void as against execution creditors. *McCall v. Wolf*, 13 S. C. R. 130.

In a deed of assignment the property was described as "all the real estate, lands, tenements and hereditaments of the said debtors (company) whatsoever and wheresoever, of or to which they are now seized or entitled, or of or to which they may have any estate, right or interest of any kind or description, with the ap-

purtenances, the particulars of which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock-in-trade, goods, chattels \* \* and all other the personal estate, and effects whatsoever and wheresoever, whether upon the premises where the debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever." The schedule annexed specifically designated the real estate and included the foundry, erections and buildings thereon erected, and all articles such as engines, etc., in or upon said premises:—Held, that this was a sufficient description of the property intended to be conveyed to satisfy section 23 of R. S. O. (1877) c. 119. *McCall v. Wolf*, 13 S. C. R. 130, approved and distinguished. But see now 48 Vict. c. 28, s. 12, passed since this case was decided. *Hovey v. Whiting*, 14 S. C. R. 515. See *S. C.*, *sum. nom. Whiting v. Hovey*, 13 A. R. 7; 9 O. R. 314.

Semble, A description of property in a bill of sale or chattel mortgage as "the stock-in-trade" of the grantor in a specified locality, such as his store or warehouse in such a place or street is sufficient. *Nolan v. Donnelly*, 4 O. R. 440, observed upon. *McCall v. Wolf*, 13 S. C. R. 130, followed. *Id.*

What is a sufficient description of chattels and animals discussed. See *Boldrick v. Ryan*, 17 A. R. 253.

See *Connell v. Hickock*, 15 A. R. 518, p. 180.

#### VIII. RIGHTS AND LIABILITIES OF MORTGAGORS AND MORTGAGEES, AND THOSE CLAIMING UNDER THEM.

##### 1. As to Possession.

The plaintiff, carrying on the business of a druggist, mortgaged his stock-in-trade to the defendant; the instrument by which it was effected, stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure repayment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff; other money being part of the profits of the business was thus reinvested in new stock; some of the old stock remaining in specie. The matter was referred to the master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, the plaintiff applied on petition for the appointment of a receiver, on the ground that the mortgage had been paid in full:—Held, (1) that as the new stock belonged to the mortgagee himself and the plaintiff could could therefore have no claim upon it, and as the master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a receiver; (2) that although the defendant's right on default, was to sell the original stock en bloc after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the



defendant's control, he had the right so to conduct it, subject to being called on to account. *Foster v. Morden*, 29 Chy. 25.—Boyd.

Semble, per Wilson, C. J., that the purchaser from the mortgagee under the power of sale contained in the mortgage, leaving the mortgagor in possession, is protected so long as the mortgage under which he bought has the protection given it by registration; but when the term of the mortgage expires the purchaser is no longer protected, unless he takes actual possession, or procures and registers a bill of sale from the mortgagee. *Carlisle v. Tait*, 32 C. P. 43.

The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession, and sell in case the goods should be taken in execution by any creditor of the mortgagor. These goods were so taken and the defendant, to whom the mortgage had been assigned by H., took possession and sold under it, for which the plaintiff sued in this action, alleging that H. the mortgagee, verbally agreed to pay these executions which were made part of the money secured:—Held, that defendant as assignee, took subject to such agreement (which did not vary the terms of the mortgage), though without notice of it: and that the plaintiff was therefore improperly nonsuited. *Martin v. Bearman*, 45 Q. B. 205.—Q. B. D.

The chattel mortgage contained no redemise clause, but did contain a clause that the mortgagee might take the goods if the mortgagor attempted to sell, dispose of, or part with the possession of the goods:—Held, that the mortgagee had the right under the circumstances, of this case to take the goods, although default in payment had not been made. *Whimsell v. Giffard*, 3 O. R. 1.—Q. B. D.

In a chattel mortgage of the stock-in-trade and business effects of a trader there was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the said goods the mortgagee might take possession of the same as in case of default of payment:—Held, that this proviso only prohibited the sale of goods other than in the ordinary course of business. (*Ritchie, C.J.*, contra.) *Dedrick v. Ashdown*, 15 S. C. R. 227.

See *Robins v. Clark*, 45 Q. B. 362; *Whimsell v. Giffard*, 3 O. R. 1, p. 196.

## 2. Other Cases.

The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge:—Held, that the debt under the chattel mortgage was not extinguished. *Beaty v. Samuel*, 29 Chy. 105.—Ferguson.

Held, affirming the decision of the County Court (Burton, J.A., dissenting), that the assignee of an insolvent mortgagor can, for the benefit of creditors impeach a chattel mortgage for noncompliance with the Chattel Mortgage Act. *Re Barrett, an Insolvent*, 5 A. R. 206.

In trover for goods against an assignee in insolvency:—Held, following the last case that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent, just

as an execution creditor or subsequent purchaser for value may do. *Snarr v. Smith*, 45 Q. B. 156.—Q. B. D.

A chattel mortgage which has expired by effluxion of time under R. S. O. (1877) c. 119, s. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgagor then existing; and a sale on default in good faith, made by the mortgagee, with the consent of the mortgagor, though good as between the parties to the mortgage, only passes to the purchaser a title subject to the rights of any creditors who may take steps to follow the goods. *Barker v. Leeson*, 1 O. R. 114.—Boyd.

The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on the 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff, hearing that the goods were going to be seized for rent, took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenants waiving an inventory, advertising, etc., sold them within two days to a nephew of the landlord:—Quære, whether a tenant can waive all statutable formalities as to inventory, etc., as regards the mortgages. *Whimsell v. Giffard*, 3 O. R. 1.—Q. B. D.

Where a sheriff seizes goods under writs of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the executions, does not necessarily amount to a waiver of his claim under the mortgage. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R. 413.—Boyd.

H., in consideration of his relieving C. from executions against him, procured from C. and his wife, the plaintiff, a promissory note for the amount thereof, and also a chattel mortgage on the goods of both as collateral security. He discounted the note at a bank, and with the proceeds paid off the executions. Afterwards, but before the maturity of the note, and while it was in the bank's hands, claiming that there was a breach of the mortgage by the removal of certain goods which was disproved, and refusing to allow the mortgagors to redeem, he took the goods thereunder, and sold them, selling goods, beyond the amount required to satisfy the mortgage, including the plaintiff's own goods to the amount of \$137.50. In an action by the plaintiff to recover the damage thereby sustained, the jury gave \$275:—Held, that the plaintiff was entitled to recover: 1. The note being the principal security, and the chattel mortgage merely collateral, H. could not proceed on the mortgage while the note was thus outstanding. 2. The sale was illegal by reason of the refusal of redemption. 3. Even if the sale were merely irregular in selling for a supposed breach, the plaintiff was entitled to recover the value of the excess of the goods sold, and other damages be-

yond nominal the verdict of goods mortgagee behalf, and Cochran v.

Where a damage bill—"If the the writer this policy that a chattel was not an such condition v. Peter

A. C., owing to a loan contract successive mortgage in 1887, A. and in January of this wheat properly registered the harvest, conveyed to H. to what was small addition to H. On the property to A. wheat was registered G. sent and A. J. C. its value:—Hence from A. were merged, against an mortgage debts might as chattel of time to the dismissed. A. have had the crops as part son, 17 O. R.

See *King v. Clark*, 45 Q. B. 362; *Barker v. Leeson*, 15 O. R. 618, p.

## IX.

A judgment to impeach a contract an irregularity the document, with the proviso R. S. O. (1877) in a position to property, cannot instrument decision can of the security of fraud. Par

The plaintiff W., who the mortgage in trust for the defendant was creditor had been the plaintiff's mortgage, demanded contained in it this action was of the defendant's director of W., the

yond nominal for her interest in the goods; and the verdict was held not excessive. A removal of goods to justify a seizure under a chattel mortgage must be by the mortgagors or on their behalf, and not a wrongful removal by others. *Cochrane v. Boucher*, 3 O. R. 462.—C. P. D.

Where a policy of insurance against loss or damage by fire contained the following provision:—"If the property insured is assigned without the written consent of the head office, this policy shall thereby become void:"—Held, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition. *Sovereign Fire Ins. Co. of Canada v. Peters*, 12 S. C. R. 33.

A. C., owner of certain lands, mortgaged them to a loan company, and afterwards executed two successive mortgages to one H. Afterwards, in 1887, A. C. sowed a quantity of fall wheat, and in January, 1888, made a chattel mortgage of this wheat to G., which chattel mortgage was properly registered. On 4th April, 1888, before the harvest, under pressure from H., A. C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages, and a small additional unsecured debt due from him to H. On the 5th April, 1888, H. leased the property to A. J. C. for a year. When the fall wheat was ripe, A. J. C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A. J. C. now brought this action to recover its value:—Held, that on his taking the conveyance from A. C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G.'s rights as chattel mortgagee became prior in point of time to the title of H., and the action must be dismissed. As mortgagee, H. would no doubt have had the right to take possession of the crops as part of his security. *Cameron v. Gibson*, 17 O. R. 233.—Street.

See *King v. Duncan*, 29 Chy. 113; *Robins v. Clark*, 45 Q. B. 362; *Brown v. Sweet*, 7 A. R. 725; *Barker v. Leeson*, 1 O. R. 114; *Banks v. Robinson*, 15 O. R. 618, p. 181.

#### IX. WHO MAY IMPEACH.

A judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the document, or by reason of its non-compliance with the provisions of the Chattel Mortgage Act R. S. O. (1877) c. 119; but a creditor who is not in a position to seize or levy on an execution on the property, cannot maintain an action to have the instrument declared invalid. A creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud. *Parkes v. St. George*, 10 A. R. 496.

The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor, and before any creditor had been informed of the assignment the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the Master in chambers ordered M.

to be added as a party defendant, in order to test the validity of the plaintiffs' mortgage:—Held, affirming the order of Galt, J., who rescinded the master's order, that the defendant was not entitled to the order, for when the plaintiff demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment. *Hyman v. Bourne*, 5 O. R. 430.—C. P. D.

Held, following *Parkes v. St. George*, 10 A. R. 496, that the plaintiffs, not being execution creditors, could not maintain an action to set aside the mortgage on the ground that the debt was incorrectly stated therein. *Hyman v. Cuthbertson*, 10 O. R. 443.—Q. B. D.

Quere, whether the liquidator of a company under the Winding-Up Act of Canada, R. S. C. c. 129, can object to the want of registration or other formal defects in a chattel mortgage as an execution creditor or subsequent mortgagee could do. *In re Rainy Lake Lumber Co., Stewart, Liquidator, v. Union Bank of Lower Canada*, 15 A. R. 749.

See *Griffin v. McKenzie*, 46 Q. B. 93, p. 187; *Barker v. Leeson*, 1 O. R. 114, p. 196; *Kitching v. Hicks*, 6 O. R. 739, p. 184; *Macdonald v. McCall*, 13 S. C. R. 247.

#### BOARD OF AUDIT.

See COUNTY CROWN ATTORNEY.

#### BOARDING HOUSE.

See INNKEEPER.

Upon the evidence in this case the county court Judge decided that the defendant was not a boarding house keeper within R. S. O. (1877) c. 147. *Wilson, J.*, indicated that he would have decided otherwise. See *Rees v. McKee*, 7 A. R. 621.

J. and his wife took rooms in premises kept by defendant R. A., called the "Shandon House," partly furnishing them and agreeing to pay \$50 per month for rooms and board. Subsequently they rented from plaintiff a piano. They left the "Shandon House" in debt for board and lodging to R. A., who thereupon detained the piano, which was claimed by the plaintiff:—Held, that the relation between the defendant R. A. and J. was not that of innkeeper and guest, but of boarding house keeper and boarder:—Held, also, that as the piano was not the property of J. and his wife, defendant had no lien on it for board and lodging under R. S. O. (1877) c. 147. *Newcombe v. Anderson*, 11 O. R. 665.—Q. B. D.

Quere, whether the house kept by defendant R. A. was an "inn" within the meaning of R. S. O. (1877) c. 147, s. 1. *Id.*

#### BOND.

##### I. PARTICULAR BONDS.

1. Appeal.—See COURT OF APPEAL—PRIVY COUNCIL—SUPREME COURT.

2. *Debentures*—See DEBENTURES.
3. *Division Court*—See DIVISION COURTS.
4. *Replevin*—See REPLEVIN.
5. *Railway*—See RAILWAYS AND RAILWAY COMPANIES.
6. *Security for Costs*—See COSTS.
7. *Surety*—See PRINCIPAL AND SURETY.

By husband to wife. See *Glass v. Burt*, 8 O. R. 391.

The bond contained a stipulation that in the event of any sum being found due by M. to the bank, interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty:—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank v. Springer*; *Exchange Bank v. Barnes*, 13 A. R. 390.

Defence to an action on a bond against sureties that the bond when executed had no seals. See *Marshall v. Municipality of Shelburne*, 14 S. C. R. 737.

Forfeiture of condition in bond and mortgage to carry on a factory for twenty years, etc., in consideration of receiving a municipal bonus. See *Village of Brussels v. Ronald*, 4 O. R. 1; 11 A. R. 605.

A solicitor for a party will not be accepted by the court as a bondsman for such party. *Re Gibson*, 13 P. R. 359.—Robertson.

Evidence of being executed in blank—estoppel of defence from denying execution. See *Regina v. Chesley*, 16 S. C. R. 306.

## BONUS.

- I. TO MANUFACTURERS—See MUNICIPAL CORPORATIONS.
- II. TO RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

## BOOKS.

See COPYRIGHT.

## BOUNDARY.

- I. DESCRIPTION OF LAND—See DEED.
- II. PARTY WALLS—See BUILDINGS.
- III. POSSESSION UNDER MISTAKE IN BOUNDARIES—See LIMITATION OF ACTIONS.
- IV. SURVEY—See SURVEY.
- V. BY WATER—See WATER AND WATER COURSES.

Estoppel of adjoining proprietor from disputing line run by surveyor with his acquiescence after building operations had been commenced. *Grasett v. Carter*, 10 S. C. R. 105.

The clause in the Act of Incorporation of the Town of St. Johns, P. Q., extending the limits of the town to the middle of the Richelieu River, a navigable river, is *intra vires* the Provincial Legislature. *Central Vermont R. W. Co. v. Town of St. Johns*, 14 S. C. R. 288; 14 App. Cas. 590.

See *Mooney v. McIntosh*, 14 S. C. R. 740; *McArthur v. Browne*, 17 S. C. R. 61.

## BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE.

## BREED.

See MUNICIPAL CORPORATIONS.

## BRIBERY.

See CRIMINAL LAW—PARLIAMENTARY ELECTIONS.

Bonus by-law procured by bribery. See *in re Langdon and The Arthur Junction R. W. Co.* 45 Q. B. 47.

## BRIDGE.

- I. CONSTRUCTION AND MAINTENANCE OF,
  1. *By Municipalities*—See WAY.
  2. *By Railway Companies*—See RAILWAYS AND RAILWAY COMPANIES.
- II. INTERNATIONAL BRIDGE COMPANY—See INTERNATIONAL BRIDGE COMPANY.

Nominal damages and costs awarded against defendant for infringing the rights of the plaintiff's ferryage, by building a temporary bridge across the river, defendant having removed the bridge. See *Galarneau v. Guilbault*, 16 S. C. R. 579.

## BRITISH NORTH AMERICA ACT, 1867.

See CONSTITUTIONAL LAW.

## BROKER.

Action against the defendants, stock-brokers at Toronto, for breach of duty in not buying certain stock for the plaintiff. On 25th March, the plaintiff by telegraph instructed defendants to buy the stock at 114 or less, which defendants by letter in reply agreed to do, but said that the telegram was received too late to enable them to act on it that day. On Monday following, the

27th, defendants had cancelled the order, which was unfavourable to the plaintiff. The plaintiff, waiting five o'clock, went to the same place to the plaintiff's defendant, and received a receipt for the telegram, and a definite expression of opinion, and thereupon he had given the plaintiff, (1) the plaintiff's course of conduct, and exercise of discretion, and not for the damage was plaintiff's decision not to sue. *Smith v. Forster*.

The plaintiff, under an agreement, was to keep ten per cent. and authorize "to sell or to notice, and to of the said account before default, loaned or sold or consent; and the amount of paid, and the additional securities, although the and forwards until default was sold before, and for 552, that a lot the plaintiff or affirm the profits made measure of the stock market the next default the bank was notice; but on the advance, the proceeds, which the transaction had been transacted of Canada, 5

In his plea, the plaintiff transferred to the bank, as being the loan stock and real whereof he went to trial was in the defendant. In the master's issue as to hold the bank

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27th, defendants telegraphed plaintiff that they had cancelled his order in the meantime, as there were unfavourable rumours about the stock, and that they were writing. The plaintiff received this about noon the same day, but did not answer it, waiting for the letter, which he received about five o'clock the following day, the 28th, being to the same effect as the telegram, and asking the plaintiff to repeat the order if he wished defendant to buy for him. The plaintiff on the receipt of the letter wrote, that from defendants' telegram he expected something more tangible and definite than mere general unfavourable impression and suspicion for not filling his order, and therefore waited for defendants' letter; that he had given a positive order to buy, etc. :—Held, (1) that the correspondence shewed that the plaintiff ratified or assented to the defendants' course of conduct in disobeying his instructions and exercising their discretion; that the construction of the correspondence was for the court and not for the jury; (2) that at all events no damage was proved, as on the Monday when the plaintiff became aware that defendants had decided not to buy, the stock was still at 114. *Smith v. Forbes*, 32 C. P. 571.—C. P. D.

The plaintiff pledged with the defendants, certain shares of bank stock, as security for a loan under an agreement in writing, providing that he was to keep up a cash margin of not less than ten per cent. above the market price of the stock, and authorizing the bank, in the event of default, "to sell or dispose of the said security without notice, and to apply the proceeds in liquidation of the said advance." The plaintiff claimed that before default was made, the bank wrongfully loaned or sold his stock without his knowledge or consent; and that he was entitled to credit for the amount realized, and to a return of interest paid, and damages for being compelled to give additional security. The defendants alleged that although the stock was transferred backwards and forwards by way of loan, it was never sold until default was made :—Held, that if the stock was sold before default made, such sale was tortious, and following ex parte Dennison, 3 Ves. 552, that a loan of the stock was a sale; and that the plaintiff might elect, either to claim damages, or affirm the sale and claim the proceeds and profits made by the bank; one element of the measure of damages being, the highest point of the stock market between the conversion and the next default. But that if default was made, the bank was entitled to sell the stock without notice; but only for the purpose of liquidating the advance, and that credit must be given for the proceeds, at the current rates of the days on which the transfers were made, until the shares had been transferred. *Carnegie v. Federal Bank of Canada*, 5 O. R. 418.—Boyd.

In his pleadings, in an action for an account the plaintiff set up that on 23rd April, 1878, he transferred to the defendant 160 shares of a certain bank, as a security for a loan, and that pending the loan the defendants had sold the said stock and realized more than the indebtedness, whereof he claimed an account, and the parties went to trial on admissions that the bank stock was in the defendants' hands at the said date. In the master's office, the plaintiff sought to raise an issue as to whether the defendants actually did hold the bank stock on that date, or whether,

having held it previously as security for another loan, they had not parted with it before the said date, and falsely represented to the plaintiff that they still held it, and whether they were not liable to be charged with its market value as of that date :—Sembie, that inasmuch as it appeared that the defendants held at the date of the loan 160 shares of the bank in question: and inasmuch as the particular shares were not identified or earmarked in any way, it could not be considered proved that the defendants had not 160 shares applicable to the plaintiff's loan on the date in question. *S. C. 8 O. R. 75*.—Boyd.

The plaintiff, a broker, pledged certain stock with the defendants, brokers, for advances, and it was agreed that the plaintiff might call for his stock or the defendants for their money on two days' notice. The defendants being in need of that stock immediately used it for the purpose of filling their own engagements. Subsequently the defendants alleged that the plaintiff was in default, and the plaintiff, not being aware that they had disposed of his stock, gave them his promissory notes for the amount claimed by the defendants. He subsequently discovered that they had sold the stock. The defendants set up in defence to this action for the wrongful sale an alleged custom of brokers that upon stock being pledged to a broker he might use it as his own, being ready to return to the pledgee when called upon an equal number of shares of the same stock :—Held, that no such custom was proved, nor would such a custom be valid; that the parties might have agreed to be bound by such manner of dealing, but in this case no such agreement was proved. *Mara v. Coz*, 6 O. R. 359.—C. P. D.

Held, that the defendants might lawfully have repledged the stock to enable them to raise the advances to the plaintiff, but that the sales and other dispositions of the stock by the defendants without notice to the plaintiff, and when he was not in default, were wrongful, and that the plaintiff was entitled to recover from the defendants the prices at which they sold the stock. *Ib.*

The jury found that the settlement which resulted in the plaintiff giving notes to the defendants was made by him with full knowledge of his rights, but under pressure, and on this and other findings a verdict was returned for the defendants. The court, being of opinion that the plaintiff was entitled to a verdict but for this finding, and that the finding was against law and evidence, directed a new trial. *Ib.*

Plaintiff employed F. as his broker to purchase shares in Federal Bank stock and to carry the same for him until 1st December on margin, depositing with him a large sum of money for that purpose. F. transferred his business to the defendants in July and with it paid over to them the whole of the money which had been left in his hands by the plaintiff and they assumed F.'s contract with the latter. On the 10th of August they informed him of this by letter. On the 12th October the defendants called upon plaintiff to put up \$2,000 additional margin, the stock having fallen in value, and on default they professed to sell and represented to him that they had sold his shares at a loss and charged him with the difference thereon—upwards of \$2,000.

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It appeared that F. had never bought shares for the plaintiff; that he had not transferred and that the defendants had never received any shares from him for the plaintiff. The alleged sale of these shares with the loss or difference on which the defendants had charged the plaintiff was a mere pretence, defendants never having had any shares of the plaintiff to sell and the broker with whom they had made the arrangement to become the pretended purchaser having bought none from them:—Held, affirming the judgment of the Common Pleas Division, 6 O. R. 505, that the plaintiff was entitled to recover the money he had deposited with F. and which the defendants had received from him, as money had and received. *Sutherland v. Cox*, 15 A. R. 541, affirmed by the Supreme Court.

A contract by a broker to purchase stock for a customer is not satisfied by the broker holding himself liable to account for the market value of the stock when the customer calls upon him to do so or then purchasing stock to comply with the demand. If any such custom existed among brokers, of which there was no evidence, it would not be binding on the customer, unless he knew of it and specially submitted to its conditions. *Ib.*

A firm of brokers purchased twenty shares of bank stock for the defendant, the latter agreeing to repay to the former the price paid therefor on demand with interest, the brokers to hold the stock as collateral security and receive a ten per cent. margin and one quarter per cent. commission. The brokers took the stock in their own names, and then transferred it to a loan company together with other stock of the same character, the transfer by them, though absolute in form, being in fact a pledge to secure the repayment of a much larger amount than the sum payable by the defendant. The pledge had no reference to the transaction with defendant, but was for the brokers' own purposes. The defendant was not informed of the transfer, and calls for further margins were made from time to time as the stock fell. On the 27th June, 1884, the brokers suspended payment, at which date the stock had fallen considerably; and on the 26th December they made an assignment for the benefit of creditors to the plaintiff. Neither at the time of the suspension or assignment, was any unpledged or unhypothecated stock held for or by the brokers, nor was any transferred to the plaintiff, there being only a right in him to redeem any stock undisposed of by the pledgees. On the 4th August, 1885, after the stock had, by legislative enactment, been reduced to one-half its original par value, or from \$100 to \$50 per share, the plaintiff offered to transfer twenty shares of the reduced stock, which the defendant refused to accept. The plaintiff then brought this action against defendant to recover the alleged balance due on the stock:—Held, there could be no recovery, for that the delivery of the stock and payment of the price were concurrent acts, and the brokers were not in a position after the time of insolvency to deliver the same, while at the time of the plaintiff's offer there was no stock of the nominal value per share of that which the brokers purchased for the defendant. *Clarkson v. Snider*, 10 O. R. 561.—C. P. D.

See *Rice v. Gunn*, 4 O. R. 579; *In re The Central Bank of Canada—Baines' Case*, *Nasmyth's*

*Case*, 16 O. R. 293; 16 A. R. 237, p. 256; *Duggan v. London and Canadian Loan and Agency Co.*, 19 O. R. 272, p. 256.

## BUILDING CONTRACT.

I. CONTRACT—See WORK AND LABOUR.

II. MECHANICS' LIEN—See LIEN.

## BUILDING SOCIETY.

See COMPANY.

Held, under C. S. U. C., c. 53, s. 40, and 38 Vict. c. 104, s. 9 (Dom.), that the plaintiffs, a loan and savings society, were empowered to make loans by way of mortgage of real estate to a person not a member thereof, and to take as collateral security therefor the promissory note of a person also not such member. *Fitchold Loan and Savings' Society v. Farrell*, 31 C. P. 453.—Wilson.

By section 3 of 37 Vict. c. 50, (Dom.) borrowers from building societies incorporated under C. S. U. C. c. 53, though not members of the society or signing the rules, are made subject to all rules in force at the time of becoming borrowers, so that by virtue of such rules the society, on a sale of land under a mortgage given by such borrower to the society on default before the expiration of the term fixed by the mortgage, are not restricted to the amount originally advanced with the then accrued interest, but are entitled in addition thereto to discount the future repayment at such rate of interest, and at such terms as the directors determine. The costs of sale and commission thereon were held to be properly chargeable, but not a charge for insurance and survey, or the costs of an action on the covenant, as not coming within the rules. *Green v. Hamilton Provident Loan Co.*, 31 C. P. 574.—C. P. D.

A mortgage was made, pursuant to 9 Vict. c. 90, to the president and treasurer of a building society, their successors and assigns, in trust for the society. The society having subsequently exercised the power of sale, the then president and treasurer, successors of the original mortgagees, conveyed to the purchaser by a deed under seal not being the society's seal. The purchaser sold to G., who objected to the title:—Held, that the lands were conveyed in fee simple to the president and treasurer by the mortgage, and that these officers for the time being had the power to convey in fee, that the power was duly exercised by them, and G. was bound to accept the title. *Re Inglehart and Gagnier*, 29 Chy. 418.—Proudfoot.

A circular was issued, with the knowledge of the directors of the defendants' company, which, amongst other things, set out that "loans can be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw this circular exposed in the office of

an appraiser loan was effected mortgage he be repayable (affirming the plaintiff could according to such right be of the contract effect of which the society, was put forward the society, the mortgage and independent Loan and D

Held, that the mortgage having subordinated stock, which advance on request yet without the mortgagor could subsequently even if he could the operation considered a amount of his liability could words of his any but the t

L. Cie de V under Con. S the 21st Aug object of the lots, and to be about \$1,000 In order to through its directors the shareholders chased the p laws and cont four cottages each of the sh year elapsed, built and dra the members. vendors of the ing of the co Dominion Bu the same as c them by the a purchase and company acc moneys on ac ment acte de between the b based the suit of the Domi (which name Dominion Bu (Dom.), again argued on the of the lots and by the direct company:—H court below, was for the p of the society it was not ul JJ., dissentin Cap Gibraltar



an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan:—Held, (affirming the decree of the court below), that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, while the evidence showed that what was put forward in the circular as the rule of the society, was one of the rules referred to in the mortgage; or on the footing of a collateral and independent contract. *Hodgins v. Ontario Loan and Debiture Co.*, 7 A. R. 202.

Held, that although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society had agreed to pay him in advance on receiving that security therefor, etc., yet without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on be considered a member when he had received the amount of his shares; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the then existing rules. *Id.*

*L. Cie de V.*, a building society incorporated under Con. Stats. L. C. c. 69, by its by-laws, on the 21st August, declared that the principal object of the society was to purchase building lots, and to build on such lots cottages costing about \$1,000 each for every one of its members. In order to obtain its object the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-laws and contracted for the building of twenty-four cottages at \$1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed, during which the cottages were built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages borrowed money from the Dominion Building Society, and transferred to the same as collateral security the moneys due them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some moneys on account, and finally a deed of settlement acte de reglement de compte was executed between the two companies, upon which was based the suit by H., the respondent, as assignee of the Dominion Mortgage Loan Company, (which name was substituted for that of "The Dominion Building Society," by 40 Vict. c. 80 (Dom.), against the appellants. The question argued on the appeal was whether the purchase of the lots and contract for building entered into by the directors was intra vires the appellant company:—Held, affirming the judgment of the court below, that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its views, it was not ultra vires. (Strong and Gwynne, JJ., dissenting). *La Compagnie de Villas du Cap Gibraltar v. Hughes*, 11 S. C. R. 537.

## BUILDINGS.

- I. PARTY WALLS, 206.
- II. MISCELLANEOUS CASES, 209.
- III. FIXTURES—See FIXTURES.
- IV. LATERAL SUPPORT—See LATERAL SUPPORT.
- V. IMPROVEMENTS—See IMPROVEMENTS ON LAND—LANDLORD AND TENANT.
- VI. MUNICIPAL POWERS AS TO—See MUNICIPAL CORPORATIONS.
- VII. BUILDING CONTRACT—See LIEN, —WORK AND LABOUR.
- VIII. COVENANTS IN LEASES—See LANDLORD AND TENANT.

### I. PARTY WALLS.

Where the defendant raised the height of a party wall beyond that of the building of the plaintiff, the adjoining owner, with the latter's consent, and subsequently opened a window through the said wall, so raised, so as to overlook the plaintiff's premises:—Held, that by piercing the window defendant had distinctly given notice that he ceased to regard the wall as a party wall; that it was an unauthorized user of the party wall; and the plaintiff was entitled to an injunction to restrain the further continuance of such window. *Sproule v. Stratford*, 1 O. R. 335.—Boyd.

The plaintiff was the surviving trustee under the will of one J. B. of certain land on which was erected a two storey brick house, the westerly wall of which formed the boundary of one L.'s land, immediately adjoining the plaintiff's on the west. L. leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two storeys higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant:—Held, that the plaintiff, under the Ontario Judicature Act, Rule 95, (Con. Rule 309) was entitled to maintain an action as representing the estate, without making the cestui qui trustent parties; and that he was entitled to a decree that the defendant should desist from further using the wall built on the plaintiff's wall, or the ends of the joists which he had placed therein, but not to a direction that the defendant should pull down such wall, which the defendant had not erected:—Held, also, that the plaintiff was entitled to recover as damages the expense of removing such wall, so erected on his wall, and the damages occasioned by his wall being weakened, but not damages for the loss of a sale of the property by reason of the erection. *Brooke v. McLean*, 5 O. R. 209.—C. P. D.

On the 26th September, 1877, S. contracted to erect a proper and legal building for W. on his (W.'s) land, in the city of St. John. Two days after, a by-law of the city of St. John, under the Act of the legislature, 41 Vict. c. 6, "The St. John Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances.



By his contract, W. reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail or execution of the work without avoiding the contract, etc. By the contract it was also declared that W. had engaged B. as superintendent of the erection—his duty being to enforce the conditions of the contract, furnish drawings, etc., make estimates of the amount due, and issue certificate. While W.'s building was in course of erection, the centre wall, having been built on an insufficient foundation, fell carrying with it the party wall common to W. and McM., his neighbour. On an action by McM. against W. and S. to recover damages for the injury thus sustained, the jury found a verdict for the plaintiff for general damages, \$3,952, and \$1,375 for loss of rent. This latter amount was found separately, in order that the court might reduce it, if not recoverable. On motion to the Supreme Court of New Brunswick for a nonsuit or new trial, the verdict was allowed to stand for \$3,952, the amount of the general damages found by the jury. On appeal to the Supreme Court and cross-appeal by respondent to have verdict stand for the full amount awarded by the jury:—Held, (Gwynne, J., dissenting) that at the time of the injury complained of, the contract for the erection of W.'s building being in contravention of the provisions of a valid by-law of the city of St. John, the defendant W., his contractors and his agent (S.) were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to McM. charged in the declaration. That the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained, and therefore the verdict should stand for the full amount claimed and awarded. Per Gwynne, J., dissenting, that W. was not, by the terms of the contract, liable for the injury, and even if the by-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it. *Walker v. McMillan*, 6 S. C. R. 241.

R. (the appellant) brought an action against H. (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, etc. H. pleaded, inter alia, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable rejoinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one C., who then owned R.'s property, granted by deed to H. the privilege of piercing the south wall, carrying his stovepipe into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than R.'s. R. purchased in 1872 the property from the Bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R.'s solicitor, in searching the title, did not search under C.'s name after the registry of the deed by which the title passed out of C. in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was

evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen:—Held, that the continuance of illegal burdens on R.'s property since the fee had been acquired by him, were, in law, fresh and distinct trespasses against him, for which he was entitled to recover damages, unless he was bound by the license or grant of C. *Ross v. Hunter*, 7 S. C. R. 289.

Action to have verbal agreement relating to party wall put in writing and executed for the purpose of registration. See *Brooks v. Conley*, 8 O. R. 549.

M. having purchased lot 14 for a building lot resisted completion of the contract on the ground that a party wall of the width of nine inches had been built on the line between lots 14 and 15, which at some places came over on to lot 14 to the extent of six inches, and at another place to the extent of nine inches, and that he could not get rid of the wall without engaging in a lawsuit with the owner of lot 15, and that the party wall was not suitable to the class of buildings which he desired to put up, and was worse than useless to him. The evidence showed the wall did not depreciate the value of the land:—Held, that this being so, and under all the circumstances of this case, specific performance must be decreed, though the matter complained of might have been proper for compensation, had such been sought under the condition of sale relating thereto. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

C. and the defendant were owners of adjacent lots and C. being about to build on his lot agreed by writing under his seal to erect a party wall on the dividing line, and equally upon both lots. Defendant agreed to pay for the half of the front forty feet thereof when erected, and for the rear portion thereof whenever the defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants, and the plaintiffs entered into possession. Some years later defendant erected a building on his lot, making use of the rear part of such party wall, by reason of which he became liable to pay \$98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in said land, against the defendant to recover the sum so due in respect of such wall:—Held, that the plaintiffs were not entitled as vendees of C. to recover, the right to payment of the sum stipulated to be paid for the wall under the covenant with C. not having passed under the conveyance by C. to the plaintiffs. *Kenny v. Mackenzie*, 12 A. R. 346.—Hagarty.

The plaintiffs claimed that the wall between theirs and the defendant's buildings was a party wall: that defendant had, without plaintiffs' consent, raised it a foot above the plaintiffs' premises, and altered the roof from a flat to a slanting one, whereby water was discharged on the plaintiffs' premises and injured them, for which they claimed damages; and also asked for a declaration that the wall was a party wall: that defendant should be restrained from preventing plaintiffs from using the wall, together with the new part, on payment by plaintiffs of half the cost thereof

and also from on plaintiffs' be wholly or constituting seven inches rested the joists of the wall. The party wall, and the damages. J. tiffs and a declaration to the plaintiff not a party from which a thereof, could direction in that the user possess for over wall for at a ment for such in question, to continue such use was also miscland would be between the the tenant of under a twenty the lessor, as the buildings to show that parties to the 13 O. R. 115.

Sub-section Act, (R. S. O. internal walls the same own they should s different own —C. P. D.

## II.

Destruction See *Stephenson* Liability for snow falling *Landreville v.*

Owners in removal by one See *Wray v.*

Action for way by the used in removal city to another and so impeding *Railway Co. v.*

Per O'Connor within the mention of an insurance *London Fire &*

Duty of arc of buildings. 494.

Two houses in a terrace or race, and the inside walls be the adjoining tensions and t

and also from allowing the water to be discharged on plaintiffs' premises. The wall was proved to be wholly on the defendant's land. The part constituting the cellar foundation projected some seven inches, upon which the plaintiffs' had rested the joists of their building in the cellar, the joists of the upper floors being let into the wall. The jury found that the wall was a party wall, and that the plaintiffs' had sustained \$35 damages. Judgment was entered for the plaintiffs and a decree made as asked:—Held, on motion to the Divisional Court, that the wall was not a party wall, nor was there any evidence from which a grant of, or the right to use a part thereof, could be presumed: that it was misdirection in the learned Judge to tell the jury that the user of the said wall for the said purposes for over twenty years constituted it a party wall for at most it would merely give an easement for such purposes. This, however, was not in question, as plaintiffs' claim was not to continue such use, but to extend it: and that there was also misdirection in stating that the defendant would be bound by any arrangement made between the plaintiffs' predecessors in title and the tenant of the defendant's predecessors in title under a twenty years' building lease, and whereby the lessor, at the expiration of the term, took the buildings at valuation, for there was nothing to show that the defendant's predecessors were parties to the arrangement. *James v. Clement*, 13 O. R. 115.—C. P. D.

Sub-section 18 of section 406 of the Municipal Act, (R. S. O. 1887, c. 184) does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners. *Regina v. Copp*, 17 O. R. 735.—C. P. D.

## II. MISCELLANEOUS CASES.

Destruction by fire after contract for sale. See *Stephenson v. Bain*, 8 P. R. 258.

Liability for injury occasioned by ice and snow falling from the roof of a house. See *Landreville v. Gouin*, 6 O. R. 455.

Owners in severalty of halves of a house. Removal by one owner of one-half of the house. See *Wray v. Morrison*, 9 O. R. 180.

Action for damages occasioned to a street railway by the breaking down of the machinery used in removing a building from one part of the city to another, when crossing the railway track, and so impeding their traffic. See *Toronto Street Railway Co. v. Dallery*, 12 A. R. 679.

Per O'Connor, J., a tug is not a "building" within the meaning of the 10th statutory condition of an insurance policy. *Mitchell v. City of London Fire Ins. Co. (Limited)*, 12 O. R. 706.

Duty of architect in superintending erection of buildings. See *Badgley v. Dickson*, 13 A. R. 494.

Two houses were built with extensions in rear in a terrace or row, the outside walls of the terrace, and the extensions being brick, but the inside walls between the houses themselves and the adjoining houses, and also between the extensions and the main houses to the height of

the roofs of the extensions being of wood and the outside rear walls of the houses, above the roofs of the extensions were brick resting upon timbers at the top of the wooden wall below. In an action for specific performance:—Held, not to be "solid brick" houses. Semble, they were not "brick houses." *Stevens v. McHenry*, 16 O. R. 139.—Ferguson.

Powers of municipal councils to prescribe of what materials or of what thickness internal walls of buildings should be. See *Regina v. Copp*, 17 O. R. 738.

## BUTTER MANUFACTORIES.

The "Act to Provide against Frauds in the supplying of Milk to Cheese or Butter Manufactories," 51 Vict. c. 32 (Ont.), though penal in its nature, does not deal with criminal law within the meaning of section 91, sub-section 27, of the B. N. A. Act, but merely protects private rights and is *intra vires*. The judgment of the Queen's Bench Division, 17 O. R. 58, reversed. *Regina v. Wason*, 17 A. R. 221.

See *Regina v. Dowling*, 17 O. R. 698, p. 219.

## BY-LAWS.

I. OF CORPORATIONS GENERALLY — See COMPANY.

II. OF MUNICIPAL CORPORATIONS — See MUNICIPAL CORPORATIONS.

III. OF SCHOOL BOARDS — See PUBLIC SCHOOLS.

IV. RELATING TO THE SALE OF LIQUOR — See INTOXICATING LIQUORS.

Held, that the validity of a by-law may be questioned on a motion to quash the conviction made under it. *Regina v. Cuthbert*, 45 Q. B. 19.—Oaler.

By-laws must be reasonably clear and unequivocal in their language in order to vary or alter the common law. *Crowe v. Steeper*, 46 Q. B. 87.—Q. B. D.

No seal was affixed to a municipal by-law, but an impression of the seal was made thereon:—Held, sufficient. *Re Croome and the City of Brantford*, 6 O. R. 188.—Rose.

As to power to repeal by-laws. See *Wright v. Incorporated Synod of the Diocese of Huron*, 11 S. C. R. 95.

## CABS.

CAB STANDS—See MUNICIPAL CORPORATIONS.

Held, that R. S. O. (1877) c. 174, s. 415, which provides that the board of commissioners of police shall in cities regulate and license the owners of cabs, etc., used for hire, does not authorize the imposition of a license fee upon the driver of

such vehicle; nor does 42 Vict. c. 31, s. 23, which empowers the board to license any trade, calling, business or profession, or the person employed in such trade, etc., give power over persons not within its jurisdiction before so as to authorize the imposition of such a license fee. *Regina v. Reeves*, 1 O. R. 490.—Cameron.

### CALLS ON STOCK.

See COMPANY—INSURANCE.

### CANADA TEMPERANCE ACT, 1878.

See INTOXICATING LIQUORS.

### CANCELLING STOCK.

See COMPANY.

### CANONS.

See CHURCH—EVIDENCE.

### CANVASSERS.

See PARLIAMENTARY ELECTIONS.

### CAPIAS.

See ARREST.

### CAPIAS AD RESPONDENDUM.

See ARREST.

### CAPIAS AD SATISFACIENDUM.

See ARREST.

### CARETAKER.

See LIMITATION OF ACTIONS.

### CARRIERS.

#### I. PASSENGERS AND LUGGAGE.

##### 1. Generally, 212.

##### 2. By Railways—See RAILWAYS AND RAILWAY COMPANIES.

##### 3. By Ship—See SHIP.

#### II. CONVEYANCE OF GOODS.

##### 1. Liability Generally, 213.

##### 2. By Railways—See RAILWAYS AND RAILWAY COMPANIES.

##### 3. By Ship—See SHIP.

#### III. DEMURRAGE—See DEMURRAGE.

#### I. PASSENGERS AND LUGGAGE.

##### 1. Generally.

Conveying travellers on Sunday. See *Regina v. Daggett*; *Regina v. Fortier*, 1 O. R. 537. *Attorney-General ex rel. Hobbs v. Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 19 O. R. 824.

The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured.—Held, Osler J. dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act.—*Emerson v. Niagara Navigation Company*, 2 O. R., 528.—C. P. D.

It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. Per Wilson, C. J. This, under 32-33 Vict. c. 20, s. 45 (Dom.), through a release to the purser, did not constitute any bar to the present action against the company. *Ib.*

Held, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Ib.*

The defendants, who were carriers by water of passengers and goods, made a special contract with the Commercial Travellers' Association for the season of 1885, by which members of the Association were entitled to receive tickets for passage at a reduced rate of fare upon certain conditions, one of which was expressed thus:—"with allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties:—Held, upon the evidence, that the agreement had been continued for, and was binding during the period of 1886. *Dixon v. Richelieu Navigation Company*, 15 A. R. 647.

In July, 1886, the plaintiff D., a commercial traveller for a jeweller's firm, received a ticket upon the above condition for passage from Montreal to Toronto. He took on board with him three trunks, known as commercial travellers' trunks, exceeding the allowed weight, containing jewellery, jewellers' tools, and other valuables, the whole comprising the usual outfit of a traveller for a jewellery house, and valued at about \$15,000. The jury found that the trunks did not contain personal baggage but goods and merchandise, and that they were received by

the defendant. The property of the defendant was relieved of carriage:—(1) that the defendants intended to "owner's risk other than with defendants. merchandise of a plaintiff travelling business. Per not personal permitted to but was comm chandise which entitled to charge even in the a not have been at common la carriers by w That whatever buted to "ov other part of tie," qualifie by the owner include a loss defendants. 1 3 Q. B. D. 195 Co., 4 A. R. 6 Cas. 503, com Q. B. D. and

Injuries to RAILWAY COM

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The plaintiff consigned to England, a qua the same to the at Waterford l ing carried to agent the usual had left the An the plaintiff d and applied to resident in To payment of the bill of lading, a don. The char nicated by B Black Rock, w the necessary of the passage of United States, sequence of wh that instead of 12th February, 22nd of March,

the defendants with knowledge of that fact. The property was damaged by the negligence of the defendants, but they contended that they were relieved from all liability by the conditions of carriage:—Held, (Osler, J. A., dissenting), (1) that the terms of the condition protected the defendants from all liability for negligence. The words "against all casualties" were merely intended to extend the meaning of the term "owner's risk" to all possible contingencies other than wilful misconduct on the part of the defendants. (2) The goods, though in one sense merchandise were to be treated as the personal baggage of a person in the position of the plaintiff travelling with samples in the course of his business. Per Osler, J. A., (1) The property was not personal baggage, such as a passenger was permitted to take with him without extra charge, but was commercial travellers' baggage or merchandise which the company would have been entitled to charge for, and for the loss of which, even in the absence of conditions, they would not have been liable, as personal baggage, either at common law, or under the Act respecting carriers by water, 37 Vict. c. 25, sec. 2. (2) That whatever might be the meaning to be attributed to "owner's risk" standing alone, the other part of the condition "against all casualties," qualified it by limiting the risk assumed by the owner to accidents, which would not include a loss caused by the negligence of the defendants. *Lewis v. Great Western R.W. Co.*, 3 Q. B. D. 195; *Fitzgerald v. Grand Trunk R.W. Co.*, 4 A. R. 601; *Wilson v. Xantho*, 12 App. Cas. 503, considered. The judgment of the Q. B. D. and of the trial Judge reversed. *Id.*

Injuries to passengers. See RAILWAYS AND RAILWAY COMPANIES.

## II. CONVEYANCE OF GOODS.

### 1. Liability Generally.

Held, under the circumstance of this case Her Majesty could not be held liable as a common carrier. *Regina v. McFarlane*, 7 S. C. R. 216.

Claim of carrier for excess in quantity named in Bill of Lading: See *Murton v. Kingston and Montreal Forwarding Co.*, 32 C. P. 366.

The plaintiff, a dealer in grains, etc., in Canada, assigned to his correspondent in Liverpool, England, a quantity of clover seed, and delivered the same to the agent of the defendant company at Waterford in Ontario, for the purpose of being carried to Liverpool, receiving from such agent the usual bill of lading. Before the seed had left the American frontier for the sea-board the plaintiff desired to change the consignee, and applied to one B., an agent of the company, resident in Toronto, for that purpose who, on payment of the additional freight, granted a fresh bill of lading, agreeing to carry the seed to London. The change of destination was duly communicated by B. to the agent of the company at Black Rock, whose duty it was to have made the necessary changes in the instrument securing the passage of the goods duty free through the United States, but this he omitted to do, in consequence of which the seed went to Liverpool, so that instead of being delivered in London on the 12th February, it did not reach there until the 22nd of March, too late for the sowing trade, so

that the seed had to be sold at a heavy loss:—Held (affirming the judgment of the court below, 1 O. R. 47.) (1) That the Toronto agent was authorized to make the change in the destination of the seed, and (2) that the defendants were bound to indemnify the plaintiff against the loss sustained by reason of the fall in the market value of the seed, together with the additional sum paid for the freight from Liverpool to London:—Sembles, that the same rule applies where the goods are not intended for immediate sale at their place of destination. *Monteith v. Merchants' Despatch and Transportation Co.*, 9 A. R. 282.

The plaintiff agreed with the M. D. T. Co. for the conveyance of butter from London in Ontario to England. The butter was carried from London to the Suspension Bridge by the G. W. Ry. Co. from the Bridge to New York by the N. Y. C. R. R. Co., and from New York to England by the Steamship Co., bills of lading being given at London to the plaintiff by a person who signed as agent severally and not jointly for the M. D. T. Co., the G. W. Ry. Co., and the G. W. Steamship Co. The plaintiff sued for damage sustained by the butter, joining the three companies as defendants under the O. J. Act s. 91. It appeared that the damage occurred while the butter was on a lighter of the N. Y. C. R. R. Co. in New York harbour, and before it was actually delivered at the pier or on board a vessel of the Steamship Co.:—Held, that the M. D. T. Co. by virtue of its through contract was liable for the damage: that the responsibility of the Steamship Co. had not attached until after the damage was done, one of the terms of the bill of lading being that "this contract is executed and accomplished and the liability of the G. W. Ry. and its connections as common carriers thereunder terminates on the delivery of the goods or property to the steamer or Steamship Company's pier at New York, where the responsibility of the Steamship Co. commences, and not before;" and that inasmuch as the butter had been received in England by the consignees without objection, the Steamship Company would have been protected by conditions which by the bill of lading were made part of the contract, one of which was to the same effect as the condition in question in *Moore v. Harris*, 1 App. Cas. 318; *Quere*, by Patterson, J. A., if the M. D. T. Co. and the G. W. S. S. Co. could properly have been held jointly liable in this action. The judgment of Osler, J. A., 4 O. R. 623, as to the defendants the Merchants' Despatch Company was affirmed. *Hately v. Merchants' Despatch Transportation Co.*, 12 A. R. 201.

Breach of contract to carry by a particular route. Recovery of damages caused by consequent payment of higher rates: See *Langdon v. Robertson*, 13 O. R. 497.

## CASE RESERVED.

See CRIMINAL LAW.

## CATTLE.

INJURIES TO—See RAILWAYS AND RAILWAY COMPANIES.

## CENSUS

See MUNICIPAL CORPORATIONS.

**CENTRAL PRISON.**

Under the authority conferred by section 6 of R. S. O. c. 217 (1877), on the Inspector of Prisons to "make rules and regulations for the management, discipline, and police of the Central Prison, and for fixing and prescribing the duties and conduct of the warden and every other officer or servant employed therein," the following rules were made, providing, amongst other things, (Rule 201) that any officer or employee who should knowingly bring or attempt to bring in to any prisoner any tobacco, should be at once dismissed and criminally prosecuted: and (Rule 219) that all officers or other employees of the contractors who may, under the regulations, be permitted to enter the prison workshops or yard must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison, and any infraction of such rules and regulations by such employees of contractors will be promptly dealt with. By section 27 of the Act, any person giving any tobacco to any convict, (except under the rules of the institution), or conveying the same to any convict, shall forfeit and pay the sum of \$40 to the warden, to be by him recovered for the use of the prison in any Court of competent jurisdiction. The plaintiff, a workman in the Central Prison, in the employment of a contractor therein, was detected conveying tobacco to a convict, whereupon the warden directed a constable to arrest him, which he did, and though under no apprehension of plaintiff making any attempt to escape, handcuffed him, and led him through the public streets of Toronto to the police station. On the charge preferred the plaintiff was indicted:—Held, that the plaintiff was subject to an indictment and therefore the arrest was legal. Per Galt, C.J., and Rose, J.—Under section 6, authority was conferred to make the rules, and for disobedience thereof the plaintiff was subject to indictment, the remedy not being limited to that prescribed by section 27. Per MacMahon, J.—The power conferred by section 6 is limited to the objects therein expressed, and does not authorize the making of a rule to conflict with section 27, or which would cause an offence to be created indictable at common law, but that the plaintiff was by virtue of section 25 of R. S. C. ch. 173, subject to indictment under section 27, the remedy thereunder not being limited to the recovery of the penalty:—Held, however, that under the circumstances the handcuffing was not justifiable, and the constable was liable in trespass therefor, but no liability attached to the warden as the evidence failed to shew that he was a party to it. *Hamilton v. Massie*, 18 O. R. 585.—C. P. D.

**CERTAINTY.**

I. In AWARD — See ARBITRATION AND AWARD.

**II. IN PLEADING—***See* PLEADING.

**CERTIFICATE.**

**I. OF TAXATION—See COSTS.**

## II. OF DISCHARGE OF MORTGAGE—See MORTGAGE.

**CERTIORARI.**

**I. IN CIVIL CASES, 216.**

## II. IN CRIMINAL CASES.

1. *To Bring up Information and Commitment*, 216.

## 2. To Bring up Convictions.

(a) *When it lies*, 217.

(b) *Notice of Application*, 219.

(c) *Other Cases*, 219.

(d) *Under Canada Temperance Act, 1878, and Liquor License Act.*  
—See INTOXICATING LIQUORS.

3. *To Bring up Inquisitions*, 219.

4. *Recognizance and Return of Writ*, 220.

5. *Costs*, 220.

### I. IN CIVIL CASES.

A motion for a writ of certiorari to bring up into this Court all the proceedings, etc., before the Minister of Agriculture, including his decision therein, on an application made before him to have a patent declared void for noncompliance with the provisions of section 28 of the Patent Act of 1872 was refused. *In re Bell Telephone Company*, 9 O. R. 339.—C. P. D.

This case was tried before the Division Court judge, who gave his decision in favour of the plaintiff, but formally reserved the giving of judgment to a subsequent day, to enable the defendants to move for prohibition or certiorari. In the meantime the defendants gave the required notice:—Held, that the defendants could not thus wait and take the chances of a decision in their favour, and finding it adverse, apply for a writ of certiorari and properly obtain it. *Black v. Wesley*, 8 U. C. L. J. 277; *Gallagher v. Bathie*, 2 U. C. L. J. N. S. 73, and *Holmes v. Reeve*, 5 F. R. 53, followed. *In re Knight v. United Townships of Meiora and Wood*, 11 O. R. 138.—Q. B. D.; 14 A. R. 112.

Held that the Divisional Court had no power to remove proceedings by certiorari in order that the decision of a judge might be quashed or rescinded as made in excess of his authority as a special tribunal under the Railway Act. *Re McQuillan and The Guelph Junction R. W. Co.*, 12 P. R. 294.—Chy. D.

## II. IN CRIMINAL CASES.

### 1. To Bring up Information and Commitment

Where a defendant has been committed for trial, but afterwards admitted to bail and discharged from custody, a superior court of law has still power to remove the proceedings on certiorari, but in its discretion it will not do so where there is no reason to apprehend that he

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will not be fairly tried. *Regina v. Adams*, 8 P. R. 462.—Cameron.

## 2. To Bring up Convictions.

### (a) When it lies.

Held, following *Re Bates*, 40 Q. B. 284, that the conviction being for the breach of a by-law the writ of certiorari was not taken away by R. S. O. (1877) c. 74. *Regina v. Washington*, 46 Q. B. 221.—Oaler.

Per Armour, J. The Divisional Court of Queen's Bench has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect to such adjudication; and s. 71 of 32-33 Vict. c. 31 (Dom.), does not take away the certiorari in such a case. *McLellan v. McKinnon*, 1 O. R. 219.

Quere, whether the right to a certiorari was taken away by an appeal to the Quarter Sessions. *Regina v. Sparham*, 8 O. R. 570.—Rose.

The defendants having been convicted by a police magistrate of an offence against the provisions of C. S. C. c. 95, appealed to the Quarter Sessions, and the convictions were affirmed. Defendants now applied for a certiorari to remove the convictions, notwithstanding that 32-33 Vict. c. 31, s. 71 (Dom.), as amended by 33 Vict. c. 27, s. 2 (Dom.), expressly takes away the right to certiorari where there has been an appeal to the Sessions:—Held, that where the magistrate has jurisdiction over the offence charged, and the right to certiorari is taken away, the court cannot examine the evidence to see if the magistrate had jurisdiction to convict, and the certiorari was refused. *Regina v. Scott*, 10 P. R. 517.—Rose.

Held, that a defendant is not entitled to remove proceedings by certiorari, to a superior court from a police magistrate or a justice of the peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court and no motion made to quash it. But—Held, that even had the conviction in this case been moved to be quashed, and an order nisi applied for upon the magistrate and prosecutor for a mandamus, to the former to hear further evidence which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the court would not interfere. *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

The writ of certiorari is not taken away by section 28 of 32-33 Vict. c. 32, (Dom.) S. C. 11 P. R. 95.—Oaler.

Held, that though not expressly so enacted, 49 Vict. c. 49 (Dom.), is retrospective in its operations and applies to convictions whether made before or after the passing of the Act, and that under section 7 the right to certiorari is taken away upon service of notice of appeal to the Sessions, that being the first proceeding on an appeal from the conviction. *Regina v. Lynch*, 12 O. R. 372.—Wilson.

Application was made to the Chief Justice of the Supreme Court of Canada in Chambers, on behalf of a person arrested on a warrant issued on a conviction by a magistrate, for a writ of habeas corpus, and for a certiorari to bring up the proceedings before the magistrate, the application being based on the lack of evidence to warrant the conviction. The application was dismissed. On appeal to the full court:—Held, (Henry, J., diss.), the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion at which he arrived as to the prisoner's guilt, the Supreme Court could not go behind the conviction and inquire into the merits of the case by the use of a writ of habeas corpus, and so constitute itself a Court of Appeal from the magistrate's decision. *In re Melina Trepanier* 12 S. C. R. 111.

The only appellate power conferred on the court in criminal cases is by the 49th section of the Supreme and Exchequer Court Act, and it could not have been the intention of the legislature while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all summary convictions before police or other magistrates throughout the Dominion. *Id.*

Section 34 of the Supreme Court Amendment Act of 1876, does not in any case authorize the issue of a writ of certiorari to accompany a writ of habeas corpus granted by a judge of the Supreme Court in chambers; and as the proceedings before the court on habeas corpus arising out of a criminal charge are only by way of appeal from the decision of such judge in Chambers, the said section does not authorize the court to issue a writ of certiorari in such proceedings; to do so would be to assume appellate jurisdiction over the inferior Court. *Id.*

The defendant was convicted by two justices of the peace under the Weights and Measures Act, 42 Vict. c. 16, s. 14, sub-s. 2 (Dom.), as amended by 47 Vict. c. 36, s. 7 (Dom.), of obstructing an inspector in the discharge of his duty, and was fined \$100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress. At the hearing before the justices the defendant tendered his own evidence, which was excluded. The defendant appealed to the Quarter Sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed. On motion for certiorari:—Held, that the conviction having been affirmed in appeal certiorari was taken away except for want or excess of jurisdiction, and that there was no such want or excess of jurisdiction, inasmuch as the justices and the Quarter Sessions had jurisdiction to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by certiorari. *Regina v. Dunning*, 14 O. R. 52.—Q. B. D.

The right to certiorari is not taken away in cases arising under the Act to provide against Frauds in the supplying of Milk to Cheese and Butter Manufactories (51 Vict. cap. 32, Ont.), but even if it had the court would not be



justified in refusing to examine the evidence to see if the magistrate had jurisdiction. *Regina v. Dowling*, 17 O. R. 698.—C. P. D.

See *Regina v. Green*, 12 P. R. 372, *infra*.

#### (b) Notice of Application.

Where, on an application made after notice to the convicting justices for a rule for a certiorari, the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was—Held, that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices. Cameron, J., dissenting, being of opinion that a substantive motion should be made to quash the writ of certiorari; and that the conviction being before the court under a writ of certiorari superseded, the validity of the conviction should be inquired into. *Regina v. McAllan*, 45 Q. B. 402.—Galt.—Q. B. D.

#### (c) Other Cases.

In shewing cause to a rule nisi to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made. *Regina v. McAllan*, 45 Q. B. 402.—Q. B. D.

Held, that a conviction once regularly brought into, and put upon the files of the court, is there for all purposes, and that a defendant may move to quash it, however or at whosever instance it may have been brought there. Where, therefore, on an application for a habeas corpus, under R. S. O. (1877) c. 70, a certiorari had issued, and in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate, or recognizance. *Regina v. Leveque*, 30 Q. B. 509, distinguished. *Regina v. Wehlan*, 45 Q. B. 396.—Q. B. D.

Held, that the defendant having had the certiorari directed to the magistrate who had convicted was estopped from objecting that the conviction was in reality made by three justices as appeared from the memorandum of conviction which was signed by them. *Regina v. Smith*, 46 Q. B. 442.—Osler.

Where the proceedings before a magistrate are removed under 29-30 Vict. cap. 45, the judge is not to sit as a court of appeal from the findings of the police magistrate upon the evidence which that officer has taken; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a general rule except upon an appeal. *Regina v. Green*, 12 P. R. 373.—Street.

#### (3) To Bring up Inquisitions.

The improper reception of evidence is no ground for a certiorari to bring up a coroner's

inquisition. *Regina v. Ingham*, 5 B. & S. at p. 260, specially referred to. *Regina v. Sanderson*, 15 O. R. 106.—MacMahon.

#### 4. Recognizance and Return of Writ.

On a motion to quash a conviction by a justice of the peace which had been appealed to the county judge, an objection that the writ of certiorari was improperly directed to, and returned by the clerk of the peace and county attorney, instead of the county judge or magistrate, was overruled. *Regina v. Frawley*, 45 Q. B. 227.—Osler.

Where the recognizance to prosecute a certiorari, returned after allowance of the latter by the convicting justices, together with the conviction is substantially and clearly bad, and the conviction may possibly be upheld, the allowance of the certiorari may be quashed on the return of the rule nisi to quash the conviction, without a substantive motion for that purpose; but otherwise, where the objection is a trivial one, or the conviction is clearly defective and must inevitably be quashed. *Regina v. Cluff*, 46 Q. B. 565.—Osler.

Held, that an amended conviction cannot be put in after the return of a writ of certiorari. *Regina v. MacKenzie*, 6 O. R. 165.—Rose.

A magistrate can amend his conviction at any time before the return of the certiorari. *Regina v. McCarthy*, 11 O. R. 657.—Galt.

Held, that on the return of a writ of certiorari, a recognizance is unnecessary. *Regina v. Nunn*, 10 P. R. 395.—Rose.

Held, that since the passing of the Dominion Statute 49 Vict. c. 49, s. 8, there is no longer necessity for a defendant, on removal by certiorari of a conviction against him, to enter into the recognizance as to costs formerly required:—Held, also, that the words "shall no longer apply" in section 8 mean that from the day of the passing of the statute the Imperial Act 5 Geo. II. c. 19, shall no longer apply, not that the Imperial Act shall cease to have application in Canada upon a general order being passed under section 6 of the Dominion Act. *Regina v. Swatwell*, 12 O. R. 391.—Wilson.

#### 5. Costs.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into this court, and the defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. The Court, however, has power to make payment of costs a condition of any indulgence granted in such a case such as the postponement of the trial or a new trial. *Regina v. Hart*, 45 Q. B. 1.—Q. B. D.

### CESTUI QUE TRUST.

See TRUST AND TRUSTEE.

### CHAMPER.

Where one judgment against him in his own name sold under the count for certain after such sale entitled so to judgment was respecting chamberlain *per v. Culbert*,

After the hearing, argued, a motion out of the list and it was shewn J. P. D., did not but that as he and churchward used as appellants latter as to maintenance in mal sense, and Per Proudfoot, The decree of the hearing to come Dunmoulin, 7 O.

It is not a chancery association of persons was politically of the petition champertous, the son to stay the North Simcoe E. C. 617.

O., assuming he was a member \$300 against the intestate, ascertained one of over \$7,000 to induce H. & the administrator they declined to their claim to have refused to accept, of any valuable assignment of H. collecting it, unless was to pay H. & Co. did not pay any costs. O. against M. E. C. who, not knowing H. & Co. notes, order; but when Master's office, disallowed by the order set a

## CHALLENGE OF JURY.

See TRIAL.

## CHAMBERS, JUDGE'S.

See PRACTICE.

## CHAMPERTY AND MAINTENANCE.

Where one having obtained an assignment of a judgment against a mortgagor brought an action in his own name against the mortgagee who had sold under the power of sale to make him account for certain surplus moneys left in his hands after such sale:—Held, that the plaintiff was entitled so to sue, and that such assignment of judgment was not in contravention of the law respecting champerty and maintenance. *Harper v. Culbert*, 5 O. R. 152.—Ferguson.

After the hearing and before the appeal was argued, a motion was made to strike the case out of the list, on the ground of maintenance, and it was shewn that the defendant, the Rev. J. P. D., did not wish to proceed with this suit; but that as he was pressed to do so by his vestry and churchwardens, he allowed his name to be used as appellant upon being indemnified by the latter as to costs. Per Boyd, C.—There was maintenance in the suit though not in the criminal sense, and the case should be struck out. Per Proudfoot, J.—There was no maintenance. The decree of Ferguson, J., was, however, varied by allowing the costs of all parties up to the hearing to come out of the fund. *Langtry v. Dumoulin*, 7 O. R. 644.

It is not a champertous transaction that an association of persons, with which the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition. *North Simcoe Election—Edwards v. Cook*, 1 H. E. C. 617.

O., assuming that the firm of T. & O. of which he was a member had a small claim of about \$300 against the estate of A. M. C., a deceased intestate, ascertained that H. & Co. had a large one of over \$7,000 on promissory notes, and tried to induce H. & Co. to join him in an action for the administration of A. M. C.'s estate which they declined to do. H. & Co. offered to sell their claim to him for \$2,000, which offer O. refused to accept, but finally, without the payment of any valuable consideration, obtained an assignment of H. & Co.'s claim for the purpose of collecting it, under an agreement by which he was to pay H. & Co. one half of the amount collected on said claim after payment of costs. H. & Co. did not make themselves responsible for any costs. O. obtained an administration order against M. E. C. the administratrix of A. M. C. who, not knowing anything of the claim on the H. & Co. notes, did not resist the making of the order; but when the facts were elicited in the Master's office, and when O.'s own claim was disallowed by the Master, filed a petition to have the order set aside on the grounds of cham-

perty:—Held, that as a decree for administration is for the benefit of all the creditors, and as another creditor had established a claim under it, the administration order could not be set aside:—Held, also, that the agreement between O. and H. & Co. was champertous or so strongly savouring of it that it could not be maintained, and that O. could not prove on the notes in this administration suit. *Reynell v. Sprye*, 1 D. M. & G. 671, and *Hutley v. Hutley*, L. R. 8 Q. B. 112, considered. *Re Cannon, Oates v. Cannon*, 13 O. R. 70.—Proudfoot.

O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed: (See the last case). O. thereupon, redelivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove on them in the administration proceedings:—Held, that the order for administration prevented the bar of the Statute of Limitations:—Held, also, that H. & Co. might now assert their title to the notes, and prove on them notwithstanding the former champertous agreement with O. *Re Cannon—Oates v. Cannon* (2), 13 O. R. 705.—Proudfoot.

B. became holder of forty shares upon transfers from D. et al., in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non-payment of dues. Subsequently by a Superior Court judgment rendered in a suit of one C., other shares, which had been confiscated for similar reasons, were declared to be valid and to have been illegally forfeited. Thereupon B. by a petition for writ of mandamus asked that he be recognized as a member of the society and be paid the amount of dividends already declared in favour of and paid to other shareholders. B.'s action was met, amongst other pleas, by one setting forth that B. had acquired under the transfers in question litigious rights and that, by law, he was only entitled to recover from the respondents the amount he had actually paid for the same, together with legal interest thereon, and his cost of transfers. Held, affirming the judgment of the court below, Fournier and Henry, J.J., dissenting, that at the time of the purchase of said shares, B. was a buyer of litigious rights within the provisions of Art. 1583 Civil Code (Que.) and under Art. 1582 could only recover from the liquidators the price paid by him with interest thereon.—Also, that the exception in Art. 1584 § 4 of C. C. only applies to the particular demand in litigation which has been confirmed by a judgment of a court, or which having been made clear by evidence is ready for judgment. *Brady v. Stewart*, 15 S. C. R. 82.

See *McQueen v. Regina*, 16 S. C. R. 1.

## CHANGE OF POSSESSION.

See *BILLS OF SALE AND CHATTEL MORTGAGES—FRAUDULENT CONVEYANCES.*

**CHANGING PLACE OF TRIAL.***See PLEADING.***CHANGING REFERENCE.***See PRACTICE.***CHARGING IN EXECUTION.***See PRISONER.***CHARITY.****I. BENEVOLENT SOCIETIES**—*See BENEVOLENT SOCIETIES.***II. DEVISE TO**—*See WILL.*

There can be no marshalling of assets in favour of a charity. *Becher v. Hoare*, 8 O. R. 328.—*Ferguson*.

*See Attorney General of Nova Scotia v. Azford*, 13 S. C. R. 294.

**CHARTER PARTY.***See SHIP.***CHattel MORTGAGE.***See BILLS OF SALE AND CHATTEL MORTGAGES.***CHATTELS.****I. ASSIGNMENT OF**—*See BILLS OF SALE AND CHATTEL MORTGAGES.***II. CONVERSION OF**—*See TROVER.***III. GIFT OF**—*See GIFT.***IV. HIRE OF**—*See HIRING.***V. LEASE OF**—*See LEASE.***VI. MORTGAGE OF**—*See BILLS OF SALE AND CHATTEL MORTGAGES.***CHEESE.***See BUTTER MANUFACTORIES.***CHEMISTS.***See PHARMACY.***CHEQUE.***See BANKS—PAYMENT.*

A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within section 53, sub-section 3, R. S. O. (1877), c. 47, and such a security is void under 9 Anne c. 14, even in the hands of a bona fide holder for value. *In re Summerfeldt v. Worts*, 12 O. R. 48.—Q. B. D.

Power of partner to endorse cheque in absence of express authority—Estoppel by acquiescence in bank account. *See Manitoba Mortgage Co. v. Bank of Montreal*, 17 S. C. R. 692.

**CHILD.***See INFANT—PARENT AND CHILD.***CHOSE IN ACTION.****I. ASSIGNMENT OF**, 224.**II. ATTACHMENT OF DEBTS**—*See ATTACHMENT OF DEBTS.***III. PARTIES TO ACTIONS**—*See PLEADING.***IV. RELEASE OF**—*See RELEASE.***V. EFFECT OF SEQUESTRATION**—*See SEQUESTRATION.***I. ASSIGNMENT OF.**

By the terms of a deed of surrender of a lease of a farm to the plaintiff, the lessee W. was to have the privilege of reaping or selling the fall wheat sown, on payment of the rent in advance, or securing it by first of October, 1878. On that date arriving without such payment or security, the plaintiff refused to allow its removal, whereupon W. offered to give plaintiff an order for \$299.85, the amount of rent alleged to be due, on the defendant, a commission merchant to whom W. was accustomed to send his grain for sale, if defendant would accept it. The plaintiff accordingly saw defendant, who said he would accept it if it was all right, and drew up an order in plaintiff's favour, which W. signed. The grain was then shipped to defendant, and sold by him. Before the grain arrived, or at all events before it was sold, W. verbally notified defendant not to pay plaintiff, and the defendant requiring written notice, W. wrote defendant stating that he had found plaintiff's account incorrect, and not to pay plaintiff without further instructions. The defendant thereupon, although expressly notified by the plaintiff's solicitor, that the plaintiff insisted on his right to be paid, paid over the amount of the order to W. :—Held, affirming the judgment of the Queen's Bench, 44 Q. B. 398, that there was a good equitable assignment, and the plaintiff was therefore entitled to recover. *Mitchell v. Goodall*, 5 A. R. 164.

Declaration, that D., by writing, for valuable consideration, duly assigned to plaintiff the sum of \$500, money due and to become due to D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff,

etc. :—Held, forth any promise to plaintiff. *Mitchell v. Bannister*, *Smith v. A. Oslar*.

The second indebted to plaintiff for payment, and to become done by D. : defendants notified defendant that if he were they had exacted before December to him : that was prevented recover said sum, and on said proceedings, of plaintiff, fully refused good, as disclosure for work and a promise such debt.

The plaintiff secure certain the mortgagee the goods shown creditor of the so taken, and had been assigned sold under it, this action, a verbally agreed were made payable that the defendant such agreement of the mortgage and that the plaintiff nonsuited. *M. Q. B. D.*

The plaintiff payment of \$4, his favour to assignment, as defendant giving to to "reassign" interest. On alleging that Court (Spragg) tion in favour defendant having hold the security *Livingston v. W.*

Held, that the plaintiff was entitled in a mortgage respecting short an equitable assignment effected. *Green Royal Ins. Co.*

Held, that the plaintiff was entitled to account for the money recovered by the plaintiff

etc. —Held, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law. *Mitchell v. Goodall*, 44 Q. B. 398, and *Brice v. Bannister*, L. R. 3 Q. B. D. 569, distinguished. *Smith v. Ancaster Township*, 45 Q. B. 86.—Oslar.

The second count stated that D., being largely indebted to plaintiff, and being pressed by him for payment, it was agreed that D. should assign to plaintiff, to secure part of said debt, \$500 due and to become due to D. by defendants for work done by D.: that D. gave plaintiff an order upon defendants to pay same to plaintiff: that plaintiff notified defendants, who represented to plaintiff that if he would present said order as soon as they had examined said work, which would be before December, 1879, they would pay the \$500 to him: that by said representation plaintiff was prevented from proceeding against D. to recover said \$500: that afterwards and before said December, defendants being liable to pay said sum, and well knowing that plaintiff, relying on said representation, refrained from such proceedings, paid the same over to D., in fraud of plaintiff, and defendants thereafter wrongfully refused to pay same to plaintiff:—Held, good, as disclosing a cause of action upon an assignment of a debt due by defendants to D. for work and labour performed for them by D., and a promise on their part to plaintiff to pay such debt. *Id.*

The plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession and sell in case the goods should be taken in execution by any creditor of the mortgagor. These goods were so taken, and defendant, to whom the mortgage had been assigned by H., took possession and sold under it, for which the plaintiff sued in this action, alleging that H., the mortgagee, verbally agreed to pay these executions, which were made part of the money secured:—Held, that the defendant, as assignee, took subject to such agreement (which did not vary the terms of the mortgage), though without notice of it; and that the plaintiff therefore was improperly nonsuited. *Martin v. Bearman*, 45 Q. B. 205.—Q. B. D.

The plaintiff transferred a covenant for the payment of \$4,000, executed by four persons in his favour to the defendant by an absolute assignment, as security for \$2,000; the defendant giving to the plaintiff a separate agreement to "reassign" on payment of the loan and interest. On a bill to obtain a reassignment, alleging that such loan had been repaid, the Court (Sprague, C.) made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof. *Livingston v. Wood*, 27 Chy. 515.

Held, that the usual covenant to insure contained in a mortgage executed under the Act respecting short forms of mortgages operates as an equitable assignment of the insurance when effected. *Greet v. Citizens' Ins. Co.*; *Greet v. Royal Ins. Co.*, 5 A. R. 596; 27 Chy. 121.

Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under

two certain contracts therefor, the defendant, under R. S. O. (1877) c. 116, ss. 7, 10, and the Judicature Act, ss. 12, 16, and Rule 127, (Con. Rule 373) can set up as a defence a claim for damage for the nondelivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Oslar, J., his right to do so depended wholly upon R. S. O. c. 116, s. 10. In this case the learned judge, at the trial, having refused to entertain the former defence, a new trial was ordered. *Exchange Bank v. Stinson*, 32 C. P. 158.—C. P. D.

B. and D. having a claim against a company, B. assigned his interest on it to D. upon certain trusts, in which, however, B. had no interest:—Held that the assignment was absolute and B. entitled to sue:—Held, also, that B. having been president of the company when the costs were incurred was no objection. *Duff v. Canadian Mutual Fire Insurance Co.*, 9 P. R. 292—Proudfoot.

Held,—Rose, J., expressing no opinion on the point—that where an assignment of a mortgage on land was absolute in form, though as a matter of fact the assignor retained a right to part of the money, an action on the covenant in the mortgage must be brought in the name of the assignee. *Ward v. Hughes*, 8 O. R. 138.—C. P. D.

While the defendants C. & E. were negotiating with the defendant J. for the purchase of his stock of goods, the plaintiffs presented to C. & E. an order upon them for part of the anticipated purchase money, which order they had obtained from J. in payment of a debt due by him to the plaintiffs. This order C. & E. refused to pay or accept. The sale was subsequently completed, and the price paid in full to J.:—Held, that no charge on the purchase money had thus been created, and payment therefore could not be enforced against C. & E. *Mitchell v. Goodall*, 5 A. R. 164, and *McMaster v. Garland*, 8 A. R. 1, observed upon and explained. *Brown v. Johnston*, 12 A. R. 190.

A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where by an ex parte order made in the action in which the plaintiff was appointed receiver, he was authorized to bring action in his own name for the collection of debts due to a certain grange, and brought this action pursuant thereto, it was—Held, that an amendment should be made adding the grange as coplaintiffs without security being given for their costs, they being insolvent. If there were no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the receiver. *McGuin v. Fretts*, 13 O. R. 699.—Chy. D.

S. recovered a judgment against S. S., and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under the will of the latter. The share not being paid over plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action:—

Held, that the right of action was in S. S. and not the plaintiff: by his appointment the plaintiff became entitled to receive the amount, and the defendants, the executors, having notice of his appointment could not safely pay over the money to any other, and in case of their refusal to pay, the plaintiff's duty was to apply for leave to bring an action in S. S.'s name. *McGuin v. Fretta*, 13 O. R. 699, cited and followed. *Stuart v. Grough*, 14 O. R. 255.—Robertson.

Held, that the fact that L. had assigned to his wife his claim against the company for payment for services rendered by him after the winding-up order had been acted on, made no difference to a claim of the company against him for a debt based upon a breach of trust since any such assignment would be subject to all the equities against such claim, and against the assignor as a director and trustee of the company's funds in the proceedings under the winding-up order. *Re Bolt and Iron Co.—Livingston's Case*, 14 O. R. 211.—Boyd; 16 A. R. 397.

See *McMaster v. Garland*, 8 A. R. 1, 185; *Armstrong v. Farr*, 11 A. R. 186; *Friendly v. Canada Transit Co.*, 10 O. R. 756; *Langdon v. Robertson*, 13 O. R. 497; *Hall v. Prittie*, 17 A. R. 306, p. 155.

## CHURCH.

### I. CHURCH OF ENGLAND, 227.

### II. OTHER RELIGIOUS INSTITUTIONS, 232.

### III. DEVISES AND BEQUESTS TO—See WILL.

#### I. CHURCH OF ENGLAND.

Under the Church Temporalities Act, 3 Vict. c. 74, ss. 2, 3, 6, a vestry capable of electing churchwardens, forming a corporation under the Act, so as to be capable as such of suing or being sued, must be composed of persons holding pews in the church by purchase or lease, or holding sittings therein by lease from the churchwardens. The churchwardens of a church where the sittings were wholly free, were therefore held not liable on a contract made by their predecessors for building the church. *Anderson v. Worters*, 32 C. P. 659.—Cameron. See 47 Vict. c. 89.

Where a testator bequeathed unto the incumbent of a certain church all the property she might die possessed of, to be used for the relief of the poor of the church, to be dispensed by the said incumbent, and the churchwardens brought an action, on behalf of themselves and all the members of the congregation, against the executors, to have the estate administered, and for a declaration that the incumbent was entitled to distribute the fund, and an order for payment over of all such sums as should have been distributed by the incumbent among the poor of the church:—Held, on demurrer to the statement of claim, that it was bad in substance, for the churchwardens had no title to maintain the action, since they could not be said to represent the incumbent, to whom the bequest was made, and who was not a member of the congregation in the same sense as the plaintiffs and the other members, and section 6 of the Church Temporalities

Act, 3 Vict. c. 74, did not authorize them to sue. *McClenaghan v. Grey*, 4 O. R. 329.—Proudfoot.

Seemable, that the said section gives churchwardens authority in certain specified matters, in which all the members of the church are interested, but here the bequest was only to a particular class, viz., the poor of the church, and therefore not within the section. *Clowes v. Hilliard*, L. R. 4 Chy. D. 413, and *New Westminster Brewing Co. v. Hannah*, 24 W. R. 999 followed, and *Werderman v. Société Générale d'Electricité*, L. R. 19 Chy. D. 246 distinguished. *Id.*

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the Synod to be from time to time passed for that purpose." In 1860 a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each \$200, with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the church society) repealed all previous by-laws respecting the fund, and made a different appropriation of it:—Held, affirming the judgment of the court below, 9 A. R. 411, which reversed the decision of Proudfoot, J., 29 Chy. 348, *Fournier and Henry, JJ.*, dissenting, that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and making a different appropriation of it, for the support and maintenance of the clergy of the diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition. *Wright v. Incorporated Synod of the Diocese of Huron*, 11 S. C. R. 95.

The Rev. J. H. being the incumbent of a parish in the Diocese of Ontario, which was endowed, and having acted in such capacity and performed the duties thereof for several years, discontinued the services in two other churches which were attached to his parish. A commission was issued by the Bishop under the canon in that behalf of the Synod of the said Diocese No. 8, "To enquire into the causes which led to the closing of the said churches, and to report whether there was lawful excuse for the said Rev. J. H.'s discontinuance of the exercise of his ministerial offices in said churches, and to report whether there was sufficient *prima facie* ground for instituting further proceedings against the said Rev. J. H. as provided by said canon." The commissioners reported that the churches had been closed "because the members of the church refused to attend and provide for the ministrations of the Rev. J. H. in these churches;" that an estrangement existed between the said Rev. J. H. and his parishioners, and they declined his ministrations. But that in the opinion of the commissioners, the proofs adduced were not of such a nature as could be relied on to procure a conviction in an Ecclesiastical Court: and

they declined further legal proceedings, as there was no hope of usefulness. *facie* grounds against him were of opinion, and other and adduced, that would not r. pline under. After the marriage. Rev. J. H. bency, the H. revoked, or and appointed and the Synod. J. H.) the a. Upon an act to compel the. Held, that the second section charged with tried, under and has the under section the power to plaintiff, either trial by the court. If the plaintiff must succeed word "immutability" not restricted particular of the same nature. *v. Incorporated Synod of Huron*, 7 O. R. 67.—

The church rectory "at township (York) c. 31, s. 38, in certain times with Toronto, and When the land c. 16, and the the Synod of were incumbents Toronto and was contended city parishes distribution. the opinion of city of Toronto grant erecting being within township of benefit of both one territory. churches in the c. 69, s. 2, be in the fund: have been no rectory in this township. of Toronto v. Synod of Huron

Certain land Crown, dated J. B. R., and and benefit of York for ever ground for the York, and ap



they declined to recommend the prosecution of further legal action, although they believed there was no hope of a restoration of his ministerial usefulness there, and that there was a *prima facie* ground for instituting further proceedings against him as provided by the canon; but they were of opinion that without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said canon being sustained. After the making of this report, and upon the said Rev. J. H. refusing to resign his said incumbency, the Bishop, by an instrument under seal, revoked, or purported to revoke, his license, and appointed the Rev. A. E. T. as his successor, and the Synod declined to pay him (the Rev. J. H.) the annual proceeds of the endowment. Upon an action being brought by the Rev. J. H. to compel the Synod to pay him such proceeds:—Held, that the offences (if any) came within the second section of the canon; that any one charged with such an offence has the right to be tried, under section one, by the diocesan Court, and has the right of appeal to the metropolitan, under section thirteen; that the Bishop had not the power to cancel and annul the license of the plaintiff, either without or for cause, without a trial by the diocesan Court; and that the plaintiff must succeed:—Held, also, that the general word "immorality" as used in the canon was not restricted by the words following, specifying particular offences, for such offences were not of the same nature as the general word. *Hallivell v. Incorporated Synod of the Diocese of Ontario*, 7 O. R. 67.—Ferguson.

The church of St. James was erected into a rectory "at the city of Toronto within the said township (York)," by patent under 31 Geo. III. c. 31, s. 38, in 1836, and was endowed at different times with lands situate some in the city of Toronto, and some in the township of York. When the lands were sold under 29 & 30 Vict. c. 16, and the proceeds had to be distributed by the Synod of Toronto under 41 Vict. c. 69, there were incumbents of parishes in the city of Toronto and in the township of York, and it was contended that only the incumbents of the city parishes were entitled to participate in the distribution. On a special case being stated for the opinion of the Court, it was—Held, that the city of Toronto was, for the purposes of the grant erecting the rectory to be considered as being within and a part of the territory of the township of York, and the grant was for the benefit of both the township and the city as one territory, and that the incumbents of the churches in the township must, under 41 Vict. c. 69, s. 2, be included among the participants in the fund:—Semble, there would appear to have been no authority for the creation of a rectory in this province other than a rectory for a township. *Incorporated Synod of the Diocese of Toronto v. Lewis*, 13 O. R. 738.—Ferguson. *Synod of Huron v. Smith*, 13 O. R. 755 n.

Certain land was granted by patent from the Crown, dated December 26th, 1817, to D. B., J. B. R., and W. A. as trustees, for the sole use and benefit of the parishioners of the town of York for ever, as a churchyard and burying ground for the inhabitants of the said town of York, and appurtenant to the church then built

thereon. This patent was surrendered to the Crown, and another, dated September 4th, 1820, was issued to the same trustees, reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so appropriated, and that such part of the said land as was not so required for the use of the parishioners should be held upon and for the trusts and uses hereinafter stated, which trusts were as follows:—"In trust to hold the same for the sole use and benefit of the resident clergyman of the said town of York, and his successors appointed or to be appointed rectors of the Episcopal Church therein to which the said land is appurtenant, to make lease of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use." \* \* \* and when a rectory was erected, and an incumbent appointed \* \* \* the trustees should convey to such incumbent \* \* \* and his successors for ever as a corporation sole to and for the same uses and upon the same trusts." Certain other lands were also granted by another patent from the Crown, dated 26th April, 1819, to W. D. P., J. B., and J. S., upon trust to observe such directions, and to consent to and allow such appropriation and disposition of them, and to convey the same in such manner as should thereafter be directed by order in council. These lands were subsequently conveyed by W. D. P., J. B., and J. S. to the other trustees, D. B., J. B. R., and W. A., by deed, dated July 4th, 1825, reciting an order in council dated December 2nd, 1824, requiring the grantors to convey the said lands to the grantees for the use of the church and of the clergyman incumbent thereon for the time being (which recital was the only evidence of the contents of the order in council), "upon trust, nevertheless, that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the town of York, and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal Church, according to the rites and ceremonies of the Church of England therein, to which the said lands are appurtenant," which deed contained a proviso for conveyance by the trustees, upon the erection of a parsonage or rectory and presentation thereto, in the same terms as that contained in the patent of the 4th of September, 1820. The town of York was subsequently incorporated as the city of Toronto, and by letters patent, dated 16th January, 1836, a parsonage or rectory was erected and constituted in the said city of Toronto, designated as the first parsonage or rectory within the township of York, otherwise known as the parsonage or rectory of St. James, and 800 acres of land were set apart as a glebe or endowment, to be held appurtenant with the said parsonage or rectory, and the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or rectory of St. James, and by deed poll, dated the 10th February, 1841, reciting the patent of the 4th September, 1820, the deed of the 4th July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A., and J. G. S., the then trustees, granted the said lands described in the said patent and deed to the said the Hon. and Rev. J. S., rector of St. James, and his successors in the said rectory for ever as a corporation sole, to and for the same



uses and upon the same trusts as are mentioned and expressed in the patent and deed. The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent on the 16th February, 1847, and was in possession of the said lands, and in receipt of the rents and profits thereof until the time of his death, which happened on the 20th March, 1852. In the year 1866 the statute 29 & 30 Vict. c. 16, entitled, "An Act to provide for the Sale of Rectory Lands in this Province," was passed by the parliament of Canada, which gave the Incorporated Synod of any Diocese of the United Church of England and Ireland in Canada, or the Church Society, with the consent of the Synod where the Synod was not incorporated, "full power and authority to sell and absolutely dispose of any lands granted by the Crown in such diocese, as a glebe of, or as appurtenant or belonging to, or appropriated for, any rectory of the said Church in such diocese, by whatever name the same may be called, or in whomsoever the title thereto may be vested." In a suit brought by the incumbents of several rectories which were subsequently erected in the said city of Toronto, and the Synod of the Diocese of Toronto, to have the lands covered by the patent of 1820, and the deed of 1825 divided up under the provisions of that Act, it was—Held (affirming the judgment of Ferguson, J., 7 O. R. 499), that the lands in question were covered by the terms of the Act: that prior to the year 1866 there were rectory lands derived directly from the clergy reserves, and lands specially granted to trustees, which were treated as endowments for rectories, and that the legislature intended to deal with both classes: that the delivery up and cancellation of the patent of 1817, being to correct an error, could not be held to be such a consideration as would make the patent of 1820 a grant for value; that Crown grants which were of a quasi public character were different from private gifts, and the Synod, in the case of the former, had petitioned for and obtained the power they desired: that 14 & 15 Vict. c. 176, s. 2 (C. S. C. c. 74), afforded strong evidence that prior to the year 1866 there had been endowments for rectories out of the public domain, as well as out of the clergy reserves. *Langtry v. Dumoulin*, 7 O. R. 644.—Chy. D. See *S. C.*, *Dumoulin v. Langtry*, 13 S. C. R. 258.

As to evidence to prove the contents of a canon of the Church Society or Synod. See *Langtry v. Dumoulin*, 7 O. R. 499.

As to evidence to establish the status of certain rectors. See *S. C.*, 7 O. R. 499.

Upon an application by the churchwardens of St. James' Church for leave to appeal from the judgment of the Chancery Division Court (7 O. R. 644) in their own names, or in the name of the rector, the defendant (who declined to carry the case further) as their trustee:—Held, that the rector was not a trustee for the applicants, but would himself, if the contention should prevail, be beneficially entitled to the fruits of the litigation; and that the applicants had not such an interest as entitled them to be made parties to the action, and the application was therefore refused. The event rendered it unnecessary to consider whether or not the application should have been made in this court or in the court below. *S. C.*, 11 A. R. 544; See *S. C.*, *sub nom. DuMoulin v. Langtry*, 13 S. C. R. 258.

## II. OTHER RELIGIOUS INSTITUTIONS.

Held, under the circumstances of this case, that the trustees of a congregation of the Methodist Church had power to borrow money and secure it by chattel mortgage. *Brown v. Sweet*, 7 A. R. 725.

In 1821 J. Bowerman and J. Bull joined in conveying certain lands to three persons, trustees of the West Lake meeting of friends, appointed by the monthly meeting to secure the titles of meeting house lots, and burying grounds, "to have and to hold said parcel of land hereby granted unto the aforesaid trustees of said monthly meeting for the time being, and for their successors in trust as said meeting shall from time to time see cause to appoint, for the only use and benefit of said meeting," and in 1835 Bowerman executed a further conveyance of a portion of those lands of which he had been the owner to two of the said trustees, "and to their successors, in trust for said meeting so long as the members constituting it shall remain and be from time time continued in religious unity with the yearly meeting of friends (called Quakers) as now established in London, Old England, and no longer;" habendum "unto the aforesaid trustees of the said monthly meeting, and to their successors in trust for the time being as said meeting shall from time to time see cause to appoint, for the only use, behoof, and benefit of the said monthly meeting." The defendants contended that the identity of the existing monthly meeting with that described in these deeds had been lost by reason of departures from the principles which governed the society of friends at the time the trusts were created, as well in matters of discipline and practice as in points of faith and doctrine, and that the plaintiffs were consequently no longer entitled to the use and possession of the land:—Held, reversing the judgment of Proudfoot, J., (7 O. R. 17,) that the criterion as to the monthly meeting was not the adherence to the doctrines and practices which prevailed at the time the trusts were created, but its continued existence as a monthly meeting of the organization of the society of friends to which it belonged at those times, and possibly to its members continuing in religious unity with the London yearly meeting: and that the defendants, never having been recognized by or in connection with the Canada yearly meeting, had no rights as an organization which a court of law could recognise or enforce. *Dorland v. Jones*, 12 A. R. 543; *S. C.*, *sub nom. Jones v. Dorland*, 14 S. C. R. 39.

Semble, that R. S. O. (1877), c. 216, s. 10, as to the appointment of trustees of lands by religious bodies does not require the mode of appointment to be determined at one meeting and the appointment itself made at another. Both things may be done at the one meeting. *S. C.*, 7 O. R. 17.—Proudfoot.

## CIRCUITY OF ACTION.

See ACTION.

## CLEARING LAND.

See FIRE—WASTE.

Held, that municipality printed to effect the condition Township of

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**CLERGY RESERVES.**

Held, that Clergy Reserve moneys which the municipality by by-law had specifically appropriated to educational purposes, were not within the condition of a township treasurer's bond. *Township of Oakland v. Proper*, 1 O. R. 330.

**CLERK.**

- I. OF THE CROWN AND PEAS—*See* PRACTICE.  
 II. OF THE PEACE—*See* COUNTY CROWN ATTORNEY.  
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**CLOUD ON TITLE.**

*See* SALE OF LAND.

**CLUBS.**

*See* INTOXICATING LIQUORS.

**COBOURG HARBOUR.**

Semble, that "The Commissioners of the Cobourg Town Trust" are a corporation under 22 Vict. c. 72. *See* *McSherry v. The Commissioners of the Cobourg Town Trust*, 45 Q. B. 240.

Gradual accretion occasioned by harbour works. *See* *Standly v. Perry*, 3 S. C. R. 356.

**COGNOVIT.**

*See* FRAUDULENT JUDGMENT.

**COLLATERAL SECURITY.**

TO BANKS—*See* BANKS.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand. *Synod v. De Blaquiere*, 27 Chy. 536. — Proudfoot. Affirmed by the Court of Appeal. *Ib.* 550 n.

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages and to sue at law, in different actions, the same parties on notes held by the plaintiffs, to which the mortgages were collateral:—Held, that only one suit in equity was necessary, as all

parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits, and the court would not be deterred from granting relief by the circumstance of a decree being complicated. *Merchants' Bank v. Sparkes*, 28 Chy. 108.—Spragge.

Where R. assigned a certain mortgage to M. to secure payment of two promissory notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a certain judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a reassignment thereof to R., until not only the amount due on the promissory notes, but also that the balance due under the said mortgage was paid:—Held, that R. was entitled to a reassignment on payment of what was due on the notes only, for the plaintiff's interest in the mortgage was not properly exorable by the sheriff under R. S. O. (1877), c. 68. *Ross v. Simpson*, 23 Chy. 553, distinguished. *Rumohr v. Marx*, 3 O. R. 167.—Ferguson.

Right of Building Societies to take collateral securities. *See* *Freehold Loan and Savings Society v. Farrell*, 31 C. P. 453.

Proceeding on a chattel mortgage for breach of its terms before the note is due, for which the mortgage was held as collateral security. *See* *Cochrane v. Bucher*, 3 O. R. 462.

Where certain securities have been assigned as collateral security for the payment of a promissory note of \$1,000, which note has been partly paid and a new note given, such securities may be held until the debt is discharged by payment. *Wiley v. Ledyard*, 10 P. R. 182.—Hodgins, *Master in Ordinary*.

Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid. *Ib.*

Note given as collateral security to secure an endorser. Effect of giving time to maker. *See* *Healey v. Dolson*, 8 O. R. 691.

D. J. endorsed a promissory note for the accommodation of W. J., who discounted it, and gave D. J. a mortgage on certain land to indemnify him against his liability as indorser on the note. W. J., during the currency of the note absconded, after obtaining from M. by false pretences a cheque for a large sum, which he cashed, and gave part of the proceeds to D. J. to take up the note, which D. J. did before maturity. W. J. told D. J. that he had got the money from M., with whom he had dealings, as D. J. knew, but D. J. had no notice of any wrong doing in connection with the money:—Held, affirming the judgment of Boyd, C., (10 O. R. 1), that the mortgage ceased to be an incumbrance on the land when the note was retired; that M. could not follow his money into the note, and was therefore not entitled to stand in the shoes of D. J., as to the security held by him, even if it had been a mortgage to secure the payment of the note. *Jack v. Jack*, 12 A. R. 476.

Sale, at a grossly inadequate price, of timber limits held by a bank as collateral security. *See* *Prentice v. Consolidated Bank*, 13 A. R. 69.

The plaintiffs had obtained a mortgage from one of defendants as collateral security for a debt, which they had assigned to a bank. The court directed that judgment for a declaration of lien for debt and costs, and sale to realize it, was to be entered for the plaintiffs only on the production of the mortgage, and a reconveyance or discharge thereof to the mortgagor. *Sarnia Agricultural Implement Manufacturing Co. v. Hutchinson*, 17 O. R. 676.—Proudfoot.

Where notes have been given as collateral security for the price of sale of a property, and the property not having been paid for, the plea of prescription as to the notes could not avail against an action for the price. *Mitchell v. Holland*, 16 S. C. R. 687.

Effect of laches of holder of notes given as collateral security in not proceeding for payment of same or notifying principal debtor. See *Ryan v. McConnell*, 18 O. R. 409.

See *Cowan v. Doolittle*, 46 Q. B. 398; *Hutton v. Federal Bank*, 9 P. R. 568, p. 134; *Canadian Bank of Commerce v. Woodward*, 8 A. R. 347, p. 169; *Canadian Bank of Commerce v. Northwood*, 14 O. R. 207, p. 176; *Pardom v. Nichol*, 16 O. R. 699; 15 A. R. 244; 15 S. C. R. 610.

### COLLECTORS OF TAXES.

See ASSESSMENT AND TAXES.

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### COMMISSION OF ENQUIRY.

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### COMMISSION TO EXAMINE WITNESSES.

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1. A.

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## I. CORPORATE NAME AND EXISTENCE.

The plaintiff sued "The Commissioners of the Cobourg Town Trust," in whom the harbour at Cobourg is vested in fee by 22 Vict. c. 72, for damages for loss of his vessel, caused by the negligence of defendants, who by their plea merely traversed the negligence. At the trial plaintiff was nonsuited, on the objection that defendants were sued as a corporation, but were not so under the statute:—Held, that this objection should have been raised by plea, and was not open to defendants on this record; and semble, that if open, defendants were a corporation. Leave was granted to amend, if desired, by substituting the names of the commissioners. *McSherry v. Commissioners of the Cobourg Town Trust*, 45 Q. B. 240.—Q. B. D.

Changing the name of a company by statute does not affect its right to maintain actions in like manner as if the name had not been changed. *Provincial Insurance Co. v. Cameron*, 31 C. P. 523.—C. P. D.

A deed to defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed:—Held, a sufficient descriptio personae to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681.

## III. FORMATION.

1. *Promoters and Prospectus*.

- (a) *Fraud and Misrepresentation*.

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had become embarrassed; that they then concocted a scheme of forming a joint stock company; that the sole object of the proposed company was to relieve the members of the firm from personal liability for debts incurred in the said business and induce the public to advance money to carry on the business; that appli-



certain instalments thereon. It was proved that the company never had, and could not obtain, the choice compact tract stated, nor any special privileges as to the exclusion of liquors:—Held, that these were material misrepresentations; and defendant, having been induced to enter into the agreements thereby, was therefore entitled to have them rescinded, and to recover back the money paid by him. *Temperance Colonization Co. v. Fairfield*, 16 O. R. 544.—C. P. D.

See *Morrison v. Earls*, 5 O. R. 434; *Stevens v. London Steel Works Co.—Delano's Case*, 15 O. R. 75, p. 248; *Nelles v. Ontario Investment Association*, 17 O. R. 129, p. 280.

(b) *Infants and Married Women as Promoters.*

Held, reversing the judgment of the court below, that by reason of the infancy of one of the five subscribers, the company, which was formed for the purchase of a road under R. S. O. (1877), c. 152, had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract. *Hamilton and Flamborough Road Co. v. Townsend*; *Same Plaintiff v. Platt*, 13 A. R. 534.

Quere, whether a married woman can legally be one of the five members required by R. S. O. (1877), c. 152, to form a joint stock company for the purpose of purchasing a road. *Id.*

#### IV. STOCK.

##### 1. *Allotment, Subscription and Acceptance.*

The defendants, as partners, had been appointed agents of the plaintiffs, on condition that they should become holders of 200 shares of the capital stock of the company. In pursuance of this agreement they were entered in the stock register of the company for that number of shares, under the partnership name; and 200 shares of the original stock were allotted to them and the usual certificate sent. They did not, however, formally subscribe for the stock. A draft upon the firm for the first call was accepted and paid, as arranged with one of the defendants. Subsequently, E. wrote to the plaintiffs that he was about retiring from the firm, and desiring to be informed as to the position of the "stock subscribed for by them;" signing the letter as "senior partner," etc.:—Held, in an action for calls, that the defendants were liable, and could not be heard to say that they had not subscribed for the stock:—Held, also, that it was unnecessary to show that any specific shares had been allotted to the defendants; or that the calls were made by properly constituted directors. *National Insurance Co. v. Egleston*, 29 Chy. 406.—Boyd.

Claim: calls upon shares for which the defendant's testator had subscribed, and upon which he had paid ten per cent. at the time of subscription. Defence: by a by-law of the plaintiff company no subscriber of stock should be a shareholder until the same had been allotted to him by order of the board. The testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was

ever made:—Held, on demurrer, bad; for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vict. c. 93, s. 2 (Ont.), the plaintiff company's Act of incorporation. *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 453.—Wilson.

In addition to fifty shares personally subscribed by the defendants O. and S. and upon which they were held liable, the plaintiffs claimed that they were holders, respectively, of seventy-five and sixty shares, for which they had not subscribed:—Held, on the evidence, set out in the report, that O. was not such holder, but that S. was, and was therefore liable thereon. *Union Fire Ins. Co. v. O'Gara*; *Same Plaintiff v. Shoolbred*, 4 O. R. 359.—Osler.

The plaintiff, a creditor of a railway company, sued the defendant, as a shareholder therein, for unpaid stock. The defendant had signed the stock-book which was headed with an agreement by the subscribers to become stockholders for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all further calls. A resolution was subsequently passed by the company instructing their secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, the one for the defendant representing that the company "in accordance with your application for fifty shares," etc., "have allotted you shares amounting to \$5,000." These certificates were not sent to the shareholders, but were handed to the company's brokers for delivery to them. The brokers published a notice in a daily paper that these certificates were lying at their office, but did not send written notices to the subscribers. The defendant never called for or received his certificate of allotment and never paid the ten per cent. He swore that he signed upon a verbal agreement with one L., a promoter and a provisional director of the company, that he and another should receive the contract for building the road, which was never awarded to them; and that he never had any notice of the allotment having been made to him. The learned judge at the trial was unable to say whether the defendant received actual notice of allotment, but found that the company sent notices to him of calls; and that his name was published as a shareholder in a newspaper to which he was a subscriber. The only evidence of the notices being sent to the defendant was the general statement of the secretary, that he directed notices to be sent ten months after the allotment, to those shareholders likely to pay, that their calls were due:—Held, reversing the judgment of the Queen's Bench, Moss, C. J. A., dissenting, that the defendant was not liable, as the evidence, more fully set out in the report of the case, was not sufficient to prove notice of allotment to him:—Held, also, that if he had received notice of allotment, the fact that the contract was not awarded, as promised, would have formed no defence, as L. had no power to bind the company by annexing such an agreement to his subscription. Per Burton, J. A., that even if a notice of calls were sufficient to prove notice





the board a condition precedent to his becoming a shareholder:—Held, that the entry by the accountant of B.'s name as a stockholder was equivalent to an entry by C., to whom the power was given, and was no delegation of any discretionary power, but a mere ministerial act:—Held, also, following *National Insurance Co. v. Egleston*, 29 Chy. 406, that it was not material that the name was not entered in the subscription book, nor that there was no specific allotment of stock; and that B. was properly placed on the list. *S. C.—Barber's Case*, 7 O. R. 448.—Proudfoot. Reversed on appeal, 12 A. R. 486.

This case was somewhat similar to the last case, but there was an understanding that the calls were to be paid in work, and \$100 worth of work was so done and credited in the books of the company; and C., C. & Co. printed the pads, saw the advertisement in the paper, and received notices of the calls:—Held, that they were contributories. *S. C.—Copp, Clark & Co.'s Case*, 7 O. R. 448.—Proudfoot. Reversed on appeal, 12 A. R. 486.

C. signed the power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock, but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years; and he was appointed solicitor under the seal of the company, received notices of meetings and calls, and did not expressly repudiate his liability:—Held, that he was properly made a contributory. *S. C.—Caston's Case*, 7 O. R. 448.—Proudfoot. Affirmed on appeal, 12 A. R. 486; 12 S. C. R. 644, Henry, J., dissenting.

A contract between a company and a person who makes application for shares must be dealt with as ordinary contracts; there must be an offer by the one to take shares, and an acceptance of such offer by the company. One H., subscribed for shares in a company, but no shares were formally allotted to him by the directors. C.'s were made by the general manager, and notices of such calls were sent by the secretary to, and received by H., but the calls had never been authorized by the directors:—Held, that the unauthorized acts of the officers named could not be construed to be an allotment, or a notification of an allotment of stock, so as to bind the company or prove an acceptance of H.'s subscription for stock. *Re Bolt and Iron Company—Hovenden's Case*, 10 P. R. 434.—Hodgins, Master in Ordinary.

K. signed a stock-book headed as follows: "We, the undersigned, do hereby subscribe for shares of the capital stock of the Alliance Insurance Company, and agree to take the number of shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company ten per cent. of the amount of stock subscribed by us respectively within thirty days from the day of our several subscriptions." The Act incorporating the Alliance Company vested the shares of the company in the persons who should subscribe for the same. Before any stock was actually allotted to K. the Alliance Company was amalgamated, by 46 Vict. c. 58 (Ont.), with the Standard Insurance Company, which company was

ordered to be wound up:—Held, that K. was rightly made a contributory. *Nasmith v. Manning*, 5 S. C. R. 417, distinguished. It was contended that K. never agreed to become a shareholder in the Standard Company; but—Held, that the statute answered this objection, and that being within the jurisdiction of the local legislatures, it could not be objected to as unjust. *Re Standard Fire Ins. Co.—Kelly's Case*, 7 O. R. 204.—Ferguson. Reversed on appeal, 12 A. R. 486.

Appeal from master's report, which placed certain parties on the list of stockholders as contributories to the extent of their unpaid stock. C., having been communicated with by the president of the company, agreed to act as a director, and gave his note for \$500, in order to obtain a qualification. The president subscribed for fifty shares stock for him, on which the \$500 would pay ten per cent. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on fifty shares, and he at once communicated with the president, who told him not to mind, and that the secretary would be instructed, and he was not troubled again about it. At this time his note had been carried by the company, and he had paid nothing. The president then absconded, and he was notified of a five per cent. call, and gave a note for \$250 in payment of same, not (as he alleged) because he was liable, but because he was told that would settle his total liability, and he did not wish to enter into a suit:—Held, that he was properly placed on the list of contributories. *S. C.—Chisholm's Case*, 7 O. R. 448.—Ferguson.—Proudfoot.

C. purchased shares in a certain company in 1878, but the papers required to make a formal transfer to him in the books of the company were not furnished to the company till December 20th, 1881. On February 11th, 1882, C.'s name was entered on the list of shareholders, but there was no formal approval of the transfer by the board of directors until May 10th, 1883. Before this, however, on November 15th, 1882, C. was notified of a call on the shares for which he was sued, and defended the action, but the action, for some reason not explained, was not proceeded with. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no enquiries from the company subsequently to December 20th, 1881. The company ceased to do business on May 13th, 1883, and the winding-up order was made on October 9th, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding-up proceedings; nor did he shew any prejudice resulting to him from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company:—Held, that under the above circumstances C. was rightly placed on the list of contributories in the winding-up proceedings. *Sichell's Case*, L. R. 3 Chy. 119, distinguished. *Re Cole and The Canada Fire and Marine Insurance Co.—Close's Case*, 8 O. R. 92.—Boyd.

In the winding-up proceedings of the Q. C. R. Co., the master placed the subscribers to the stock-book upon the list of contributories. The

contributories appealed upon the ground that although they were subscribers for stock still no stock had been allotted to them by the directors:—Held, that the master was right; that the contract signed was an unqualified taking of shares, and that the Act R. S. O. (1877) c. 150 contemplates two modes of acquiring stock, by subscription and by allotment. *In re The Queen City Refining Co. of Toronto (Limited)*, 10 O. R. 264.—Boyd.

C. subscribed for 160 shares in the H. company, the subscription list being headed: "We subscribe for and agree to take the number of shares of the capital stock of the H. company set opposite our signatures, and to pay on account thereof fifty per cent. to the secretary-treasurer of the company in quarterly payments of 12½ per cent. each of the amounts subscribed for by us respectively, the first of such payments to be made on February 1st, 1882." C. was at the first shareholders' meeting elected a director, and remained so until the final winding-up of the company. One of the by-laws of the company provided for the calling of the second fifty per cent. of the stock subscribed at any time after November 1st, 1882, on thirty days' notice. In August, 1883, the president of the company arranged with C. that he should sign for eighty shares on the terms of a new stock-book which had been opened, and that C.'s original stock was to be treated as cancelled. C. accordingly signed the new book. This arrangement with C. was never communicated to the shareholders of the company. In January, 1884, a winding-up order was made, and C. was subsequently declared a contributory to the amount of 160 shares. C. now appealed, claiming to be a contributory only to the amount of eighty shares, on the ground that the arrangement of August, 1883, was a valid compromise, entered into with him because he subscribed originally on the understanding, (1st) that the company was not to go into operation before all the stock was subscribed for; and (2nd) that only fifty per cent. of his subscription would have to be paid:—Held, that whether directors have inherent power to compromise with shareholders or not, there was nothing to support the compromise here set up. As to (1st) C.'s actions as director were totally at variance with this contention; and as to (2nd,) the subscription was unconditional, and though expressly providing for payment of fifty per cent. it was not inconsistent with the balance being paid when required. Moreover the by-laws, at the adoption of which C. was present, recognized the right to call up the whole stock, and C. appeared to have made no dissent. *Fuchs v. Hamilton Tribune Printing and Publishing Co.—Copp's Case*, 10 O. R. 497.—Boyd.

The plaintiff, suing as assignee of an appeal bond given by the defendants to G. & M. on an appeal, which was dismissed, by S. and the N. R. H. company from a judgment recovered by G. & M., claimed the amount of the judgment with costs and interest, less a sum realised by the sheriff on G. & M.'s *fi. fa.* goods by the sale to the plaintiff of a mill and fixtures erected by the N. R. H. Co., on crown lands which the company occupied under a letter of license from the commissioner of crown lands. The defendants were shareholders in the company, and after

the sheriff's sale they and the plaintiff agreed to take steps to reorganise the company, the plaintiff to accept shares in satisfaction of his claim. This agreement, which the plaintiff had refused to carry out, was relied on as a defence to this action. At the trial the learned judge held that the agreement was too vague for specific performance, and was therefore no defence; and being of opinion that nothing passed by the sheriff's sale to the plaintiff, he gave judgment for the whole amount of the original judgment of G. & M. with costs and interest, against the wish of the plaintiff, who claimed only the reduced amount. The defendants moved against the judgment respecting the agreement, and a Divisional Court of two judges, while agreeing that it was too vague for specific performance, differed as to its affording a defence to the action. The plaintiff also moved to reduce his judgment by deducting the amount of his bid at the sheriff's sale; but that order, by reason of the judges disagreeing, was not granted. On appeal by the defendants it was:—Held, that the agreement was only to accept shares in case the company was reorganised, and such agreement afforded no defence to this action; and that the judgment could properly be varied by entering it for the reduced amount. The appeal was therefore dismissed, with costs. *Brundage v. Howard*, 13 A. R. 337.

P. signed a subscription list undertaking to take shares in the capital stock of a company to be incorporated by letters patent under 31 Vict. c. 25 (Que.), but his name did not appear in the notice applying for letters patent, nor as one of the original incorporators in the letters patent incorporating the company. The directors never allotted shares to P. and he never subsequently acknowledged any liability to the company. In an action brought by the company against P., for \$10,000 alleged to be due by him on 100 shares in the capital stock of the company it was:—Held, affirming the judgment of the court below, that P. was not liable for calls on stock. *Magog Textile and Print Co. v. Price; Same Plaintiff v. Dobell*, 14 S. C. R. 664.

One D. signed his name as subscriber for a certain number of shares at the foot of a prospectus of a proposed company, in which it was stated that the capital was to be \$75,000. Without D.'s knowledge or acquiescence, the company, as afterwards incorporated, had a capital of \$150,000. In accordance with the terms of the subscription, and before the incorporation of the company, D. paid up half the amount of his shares. There was no allotment of stock to D., no entry of his name in any stock-book, and no acting on his part as shareholder. The company being in process of liquidation, it was claimed that D. was a contributory:—Held, that the change made in the capital of the company was a material one, and there being no acquiescence or laches on D.'s part, he was not liable as a contributory. *Pitchford v. Davis*, 5 M. & W. 2, specially referred to. *Stevens v. London Steel Works Co.—Delano's Case*, 15 O. R. 75.—Boyd.

One B. subscribed for twenty-five shares of capital stock of the Central Bank of Canada, but did not at the time of subscription, nor within thirty days thereafter, make any payment thereon. About eight months later, however, payment was made by B. to the bank, and the

bank accepted the dividend check in favour of B. paid. Per *Mc* paid after the properly treated again wrote requirement by holding the paid, and note. *In re Baines' Case*

Per Burton an actually actual receipt of a payment equal to the subsequent receipt that number of subscription could not be presumed, as the Bank was each other it was reckoned stockholder.

Per Macleod ing been made original subscription payment endorsement operated as

P. signed subscription to be incorporated Stock Company he agreed with thereto, to transfer to his name reporting to be a company no B. were not Patent, and to them, but shareholders, demands for payment and in winding up on the list of being no commitments in question constitute binding without more contributories. *Co.—Pearce's Co.—Boulton*

The shareholders the letters are named thereby; and may afterwards constitute the Central Refining Co.

C., after the Ontario Joint Act, R. S. O. subscription book "We, the undersigned, in behalf of ourselves and respectively

bank accepted payment from him of twenty per cent. of the amount subscribed, and subsequently dividend cheques were issued by the bank in favour of B., were endorsed by him, and were paid. Per Hagarty, C. J. O. When B. in fact paid after the prescribed time it could be properly treated as a new subscription, whether he again wrote his name or not. The substantial requirements of the statute are complied with by holding that as soon as the ten per cent. was paid, and not till then, the signature was complete. *In re The Central Bank of Canada—Baines' Case*, 16 A. E. 237.—16 O. R. 293.

Per Burton and Osler, J.J.A. Where there is an actually signed subscription contract, an actual receipt by the Bank from the subscriber of a payment on account of a number of shares equal to those mentioned therein, and a subsequent receipt by that person of dividends on that number, an acknowledgment of the subscription contract at a time within which a payment could be effectually made thereon, is to be presumed, and under the circumstances B. and the Bank were respectively estopped as against each other from denying that his subscription was reacknowledged and that he had been a stockholder. *Ib.*

Per MacLennan, J.A. The payment not having been made within the prescribed time the original subscription was void, but the subsequent payment accepted by the bank, and the endorsement by B. of the dividend cheques, operated as a new subscription. *Ib.*

P. signed an instrument purporting to be a subscription for shares in a company "proposed to be incorporated" under the Ontario Joint Stock Companies' Letters Patent Act, in which he agreed with the company and the signatories thereto, to take the number of shares set opposite to his name. B. signed an instrument purporting to be an agreement to accept shares in a company not at the time incorporated. P. and B. were not incorporators named in the Letters Patent, and no shares were in fact ever allotted to them, but they were entered in the books as shareholders, and notices of meetings and demands for payment of calls were sent to them, and in winding-up proceedings they were placed on the list of contributors:—Held, that there being no company in existence when the instruments in question were signed, they did not constitute binding contracts to take shares so as, without more, to make P. and B. liable as contributors. *In re The London Speaker Printing Co.—Pearce's Case; In re Speight Manufacturing Co.—Boulbee's Case*, 16 A. R. 508.

The shareholders at the date of the issue of the letters patent are those persons only who are named therein and to whom stock is allotted thereby; and it is these persons and others who may afterwards become shareholders who constitute the company. *In re The Queen City Refining Co.*, 10 O. R. 264, explained. *Ib.*

C., after the incorporation of a company under the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. (1877), c. 160, signed a share subscription book with the following heading:—"We, the undersigned, do hereby severally on behalf of ourselves, our and each of our several and respective executors and administrators,

acknowledge ourselves to be subscribers to the capital stock of the Zoological and Acclimatization Society of Ontario for the number of shares and to the amount set opposite our several and respective names and seals hereunder; and we do hereby covenant, promise, and agree, each with the other of us, and with S., to pay the amount of our said several subscriptions and all calls thereon, when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies' Letters Patent Act, or under any by-laws which may be passed by the said company, and we request the number of shares for which we subscribe hereunder to be allotted to us." No shares were allotted to C., he was not entered in the books of the company as a shareholder, and never made any payments. Four years after this document was signed by C., the company was wound up, and he was held liable as a contributory.—Held, reversing the Order of Boyd, C., (17 O. R. 331), that this document did not, in the absence of any recognition by the company of C.'s position as a shareholder, alone and ex proprio vigore create the liability contended for. *Re The Zoological and Acclimatization Society of Ontario—Cox's Case*, 16 A. R. 543.

The petitioner's father signed her name to a stock subscription-book of a bank, paid the calls, and received the dividend cheques, which were endorsed by her at her father's request, the moneys being received by him. The bank was put into liquidation by winding-up proceedings, and the order for call against contributories was made three months before she came of age. A year after the liquidation commenced she took proceedings to have her name removed from the list of contributories:—Held, that she was not liable as a contributory, and that her name must be removed from the list. *Re Central Bank and Hogg*, 19 O. R. 7.—Boyd.

See *Long v. Guelph Lumber Co.*, 31 C. P. 129, p. 273; *Provincial Ins. Co. v. Cameron*, 31 C. P. 523, p. 258; *Page v. Austin*, 10 S. C. R. 132, p. 255; *Christopher v. Noxon*, 4 O. R. 672 p. 268; *Wheeler and Wilson Manufacturing Co. v. Wilson*, 6 O. R. 421, p. 257; *Nelles v. Ontario Investment Ass'n*, 17 O. R. 129, p. 280.

## 2. Calls.

### (a) Notice of.

Per Spragge, C. J. O., and Hagarty, C. J.—Notice of a call published in a newspaper in one district is sufficient to render the shareholders residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held. Per Burton and Patterson, J.J.A., the enactment as to notice ought to be construed strictly; particularly if by a literal reading of the other provision calls were held valid though payable at shorter intervals than thirty days. *Provincial Insurance Co. v. Worts*, 9 A. R. 56; *S. C.*, sub nom. *Provincial Insurance Co. v. Cameron*, 31 C. P. 523.

The charter of a company, 35 Vict. c. 104, (Dom.), provided that one month's notice of calls "shall be given." Per O'Connor, J. Sending such notice by post was not a compliance with this provision. *Ross v. Machar*, 8 O. R. 417.

The notice of two calls, one payable on the 27th of July, the other on the 27th of August, was mailed at Montreal, on the 27th of June, addressed to the firm at Ottawa, which was received by one of the defendants. There was not any affirmative evidence that it was not communicated by him to his co-partner:—Held, that such notice was insufficient as "not less than thirty days' notice" was required; and, therefore the mailing of a notice on the 27th of June, requiring a call to be paid on the 27th of July, was not in time:—otherwise the notice was sufficiently established. *National Ins. Co. v. Egleson*, 29 Chy. 406.—Boyd.

The 37 Vict. c. 93, s. 7 (Ont.), under which the calls sued for were made, provided that thirty days' notice of every call should be given. The resolution making the call, was passed on the 3rd of August, 1881, the call to be payable on the 6th of September. Notice to the defendants, F. & B., was mailed in Toronto, on the 5th day of August, and would reach Ottawa post-office, where F. & B. lived, at 7 p.m., on the 6th. The post-office closed at 7.30 p.m., but the letter could not have been obtained on that evening without personal application to the postmaster. It was received on Monday the 8th of August:—Held, affirming the judgment of Hagarty, C. J., Wilson, C. J., doubting, that the notice must be deemed to have been given upon the mailing, and therefore it was good. Per Wilson, C. J.—If the thirty days were to be computed from the time when the notice had or should have reached its destination, they should begin on the Monday. *Union Fire Ins. Co. v. Fitzsimmons*, 32 C. P. 602.—Hagarty.—C. P. D.

The defendant, S., it appeared, had made an assignment in insolvency, but the stock had not been returned by him as part of his assets, and that the assignee had never accepted it. The notice of call was sent to the assignee, but he directed his bookkeeper to forward it to S., which he stated he had done, but the defendant denied its receipt. The plaintiff's manager stated that after the call was due, he paid S. a dividend on the stock, and S. then said the call would be paid:—Held, that S. was still a stockholder, and must be deemed to have had notice. *Ib.*

A call was made by resolution of the 3rd August, payable on the 6th September, and notice of it was mailed at Toronto on the 5th August, addressed to defendants at Ottawa, but not received until the 8th:—Held, sufficient, following the last case. *Union Fire Ins. Co. v. O'Gara; Same Plaintiffs v. Shoolbred*, 4 O. R. 359.—Osler.

See *Provincial Insurance Co. v. Worts*, 9 A. R. 56, p. 252; *Nasmith v. Manning*, 5 A. R. 126; 5 S. C. R. 417, p. 243.

#### (b) Other Cases.

The plaintiffs by their Act of incorporation were authorized to call in the stock by instalments as the directors should appoint, subject to a proviso that "no instalment shall exceed ten per cent., or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held:—Held, per Spragge, C.J.O., and Hagarty, C.J., that the times fixed for the

payment of instalments need not be thirty days apart; but that instalments might be made payable at any time, provided no call exceeded ten per cent., and thirty days intervened between the date of notice of the call and the day on which it was payable. Per Burton and Patterson, J.J.A., that no instalment could lawfully be made payable in less than thirty days from the day for payment of the next preceding instalment. *Provincial Ins. Co. v. Worts*, 9 A. R. 56; 5 S. C. sub nom. *Provincial Ins. Co. v. Cameron*, 31 C. P. 523.

Held, that the resolution of directors and not the notice made the call; and that a variation in the days of payment between the resolution and the notice invalidated the call, but not as to defendant Cameron, or her testator, who had made payments on or promised to pay such calls. *S. C.*, 31 C. P. 523.

It was objected that the calls had been rescinded by resolutions subsequently passed, and set out in the case:—Held, that such resolutions referred only to the terms or time of payment. *Ib.*

Held, that upon the facts stated in the case there had been no such preference or discrimination between different classes of shareholders as to invalidate the calls. *Ib.*

Interest was allowed from the time when the last call became due. *Ib.*

Action to recover calls on stock. The defendant's Act of incorporation enabled the directors to make calls at such times as they might deem requisite, provided that successive calls should be made at intervals of not less than two months between such calls, that no call should exceed ten per cent., and that thirty days' notice should be given of every such call:—Held, not necessary that the calls should be made by law, but that a resolution was sufficient, and that the resolution need not name the place of payment of the calls, but that this could be done in the notice. *Union Fire Ins. Co. v. O'Gara; Same Plaintiffs v. Shoolbred*, 4 O. R. 359.—Osler.

A resolution was passed by which a call was made of ten per cent., payable on the 1st March, and it was thereby further resolved that a further call of ten per cent. be made payable on 1st September:—Held, clearly not a call of twenty per cent. but two calls of ten per cent. each; and that the fact of the second call being illegal did not invalidate the first call, because contained in the same resolution. *Ib.*

An alleged third call was objected to as being a fourth call, in that the illegal call before referred to had not been abandoned; but:—Held, that the evidence clearly shewed such abandonment. *Ib.*

Where certain shareholders of the G. L. Company sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of a certain unwritten agreement alleged to have been entered into between all the promoters, when the G. L. Company was formed:—Held, that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made. *Christopher v. Noxon*, 4 O. R. 672.—Proudfoot.

Where a confirmed act purporting to be held on the day as prescribed. Held, that of a resolution should be held on the ground, and where complained of, strain the same.

Where shareholders approved and approved object that the

Where a without discussion will never in necessary, or

Semble, however such a way as and impose an equity might be.

Held, that 41, a shareholder calls, is absent shareholders action by him which was on ground that the above of by the company assigned at the

Calls on in license. See Q. B. 471; 32 C. P. 602.

Under the defence set out J., dissenting contents of shewing the properly rejected 417—Q. B. 1

See Field v. Machar, & Iron Company p. 245; Fuchs and Publishing p. 247.

The stock company, consequently, exclusively the charter of the should be a less than three hold stock to it having been purpose of company, the two convey to M order to qua they did ac thenceforth a funds for the the road, were



Where a by-law making a call on stock was confirmed at a general meeting of shareholders, purporting to be the annual meeting, but not held on the proper day for such annual meeting, as prescribed by the by-laws of the company:—Held, that one who, as a director, had seconded a resolution of the directorate that the meeting should be held on the day it was held on, was estopped from objecting to the calls on this ground, and so, therefore, were all those who were coplaintiffs with him in an action to restrain the said call. *Ib.*

Where shareholders have assisted in making and approved of calls, they cannot afterwards object that the calls were improperly made. *Ib.*

Where a call is made upon all stockholders without discrimination, or partiality, the Court will never interfere to determine whether it was necessary, or not. *Ib.*

Semble, however, that if calls were made in such a way as to favour one set of stockholders, and impose an unequal burden upon others, an equity might, perhaps, be found for interference. *Ib.*

Held, that, under R. S. O. (1877) c. 150, ss. 37, 41, a shareholder, who is in arrear for unpaid calls, is absolutely debarred from voting at a shareholders' meeting; and in any subsequent action by him to restrain a call, the by-law for which was ratified at such a meeting, on the ground that his vote was wrongfully excluded, the above objection can be taken advantage of by the company, though that was not the ground assigned at the time for excluding the vote. *Ib.*

Calls on insurance stock after suspension of license. See *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 471; *Union Fire Ins. Co. v. Fitzsimmons*, 32 C. P. 602.

Under the circumstances shewn in the evidence set out in the report:—Held, O'Connor, J., dissenting, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected. *Ross v. Machar*, 8 O. R. 417—Q. B. D.

See *Field v. Galloway*, 5 O. R. 502, p. 261; *Ross v. Machar*, 8 O. R. 417, p. 286; *Re Bolt and Iron Company—Hovenden's Case*, 10 P. R. 434, p. 245; *Fuchs v. Hamilton Tribune Printing and Publishing Co.—Copp's Case*, 10 O. R. 497, p. 247.

### 3. Transfer.

The stock of an incorporated street railway company, consisting of 2,000 shares, was owned exclusively by two brothers (G. & W.). The charter of the company required that there should be a board of directors consisting of not less than three members, each of whom should hold stock to the amount of not less than \$100. It having become necessary to raise funds for the purpose of carrying on the business of the company, the two brothers agreed that they should convey to M. (their father) one share each in order to qualify him as a director, and which they did accordingly assign; the father from thenceforth acted as the third director, and the funds for the construction and improvement of the road, were obtained and expended thereon.

By his will the father bequeathed these two shares to his daughter S., who, after the death of her father, continued to exercise when necessary, the functions of director. After some time G. became dissatisfied with the manner in which S. discharged her duties as director, alleging that she acted simply as the nominee of W., and finally asserted that the shares had been originally assigned to the father for the avowed purpose of qualifying him to act, but in reality as trustee for G. & W., and that he had not power to dispose of them by will, and filed a bill seeking to have it declared that M. had during his lifetime, and that S. since his death had held these shares simply as trustee of G. & W., and that S. might be ordered to reassign them. The court, under the circumstances, dismissed the bill, with costs. *Kiely v. Smyth*, 27 Chy. 220.—Spragge.

The charter of the company provided that the stock "shall be transferable in such way as the directors shall by by-law direct":—Held, that this did not prevent the transfer of the stock until such a by-law should be passed, but left it as at common law, so that it might be transferred by word of mouth. *Ib.*

Upon the facts stated in the report of this case:—Held, that a transfer was sufficiently shewn. *Ib.*

Semble, that the plaintiff, one of the directors, should be estopped from alleging that M. was not properly qualified as a director, the effect of which would have been to injuriously affect the value of bonds of the company, to the issue of which the plaintiff was a party. *Ib.*

Held, in this case, that the transfer to M. was not without consideration, the agreement by the two brothers with each other to make it being sufficient. *Ib.*

Bank of L. brought an action against S., the appellant (defendant), as shareholder, to recover a call of ten per cent. on twenty-five shares held by him in that bank. By the 7th plea, and for defence on equitable grounds, the defendant said, "that before the said call or notice thereof to the defendant, the defendant made in good faith and for valid consideration in that behalf, a transfer and assignment of all the shares and stock which he had held in the Bank of L. to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays, that the said Bank of L. shall be compelled and decreed to make and complete the said transfer, and to do all things required on its part to be done to make the said transfer valid and effectual, and the said Bank of L. be enjoined from further prosecution of this suit." The plaintiffs filed no replication to this plea, but at the trial of the action, which took place before James, J., without a jury, they attempted to justify the refusal to permit the transfer of the shares upon the ground that at a special general meeting of the shareholders of the Bank of L. held on the 26th June, 1873, it was resolved "that, in the opinion



of the meeting, the Bank of L. should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect." The defendant was not present at the meeting when this resolution was passed, and it appeared from the evidence that the Bank of L. effected a loan of \$80,000 from the Bank of S. upon the security of one B., who to secure himself, took bonds to lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares. This he did in 1877 to certain persons then in good standing, and powers of attorney executed by defendant and the purchasers respectively, were sent to the manager of the Bank of L., in whose favour they were drawn, to enable him to complete the transfer. The directors of the Bank of L. refused to permit the transfer, but the defendant was not notified of their refusal, nor did they make any claim against him for any indebtedness on his part to the bank; and it appeared also from the evidence that subsequently to the resolution of the 26th of June, 1873, and prior to the sale by defendant of his shares, a large number of other shares had been transferred in the books of the Bank. In October, 1879, the Bank of L. became insolvent, and the Bank of S., the respondents, obtained leave to intervene and carry on the action. At the trial a verdict was found by the judge in favour of the appellant; but the Supreme Court of Nova Scotia, (James, J., dissenting), made absolute a rule nisi to set aside the verdict. On appeal to the Supreme Court of Canada, it was:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that the resolution of the 26th June, 1873, could not bind shareholders not present at that meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right under the Banking Act to transfer his shares and to have the transfer recorded in the books of the bank; and the 7th plea was therefore a good equitable defence to the action. *Smith v. Bank of Nova Scotia*, 8 S. C. R. 558.

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. Per Strong and Henry, JJ., (Gwynne, J., contra), that although A., a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. *Page v. Austin*, 10 S. C. R. 132; 7 A. R. 1.

No special directions as to the transfer of shares had been formally adopted by the directors, but the transfer-book had been prepared for, and adapted to, the system of marginal transfer. One C. transferred certain shares in blank, subject, by marginal note, initialed by C., to the order of a broker, and subject by a subsequent

marginal note, initialed by the broker, to the order of B. B. signed an acceptance of the shares immediately under the transfer in blank signed by C., and was entered in the books of the bank as the holder of the shares, the intermediate transfers to and from the broker being omitted. The transfer to B., and the acceptance by him, to place within a month of the time of the suspension of the bank:—Held, affirming the decision of Boyd, C., (16 O. R. 293), that this transfer and acceptance were a sufficient compliance with, or at least not in any way a violation of, the statutory provisions, and that B. became the legal holder of the shares, and was liable as a contributory. *In re the Central Bank of Canada—Baines' Case*, 16 A. R. 237.

Where ten per cent. was not paid at the time of original subscription of bank shares, nor within thirty days thereafter, as required by the Banking Act, R. S. C. c. 120, s. 20, but was paid before the first transfer took place, and was accepted by the bank:—Held, that subsequent transferees of the shares were properly placed upon the list of contributories in winding-up proceedings. *In re the Central Bank of Canada—Baines' Case; Nesmith's Case*, 16 O. R. 293.—Boyd. 16 A. R. 237.

The provision as to payment is for the protection of the public, and till payment is made the person subscribing may not be able to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment. *Id.*

Where it appeared that in one such case the transferee did not sign the acceptance, but that he subsequently dealt with the shares by selling and transferring them:—Held, that the transferees from him were properly placed upon the list of contributories, notwithstanding anything in the Banking Act, R. S. C. c. 120, s. 20. *Id.*

Certain shares not numbered or capable of identification, transferable on the books of a company, were transferred by the plaintiff to brokers, "in trust" as security for the payment of a loan. The plaintiff's transferees afterwards transferred the shares to others as security for other and larger sums due by them than were due by plaintiff to them. Each transfer subsequent to that of the brokers was make "in trust." The plaintiff was aware that the brokers were raising money on his shares, but was assured by them that he could redeem his stock on payment of the amount due by him. The brokers being unable to redeem the shares, in an action by the plaintiff against the last transferees, who had sold them for a large sum after tender by plaintiff of amount due by him, to compel them to account for their value:—Held, that the form of the transfer to the last holders was sufficient to put them on enquiry, and that they were chargeable with notice of the facts and of the plaintiff's rights in regard to the shares; and that he was entitled to the value of the stock after payment of the amount he had borrowed on it from the brokers, and that the value of the shares was to be taken at their highest market value between plaintiff's tender and the conclusion of the trial herein. *Duggan v. London & Canadian Loan and Agency Co.*, 19 O. R. 272.—Street.

See *Proton* 523; 9 A. R. 4 O. R. 67, and *Martin Cole and T. ance Co.—re the Central Bank of Canada*, 16 A. R. 237, 82, p. 222.

The defendant's joint stock company, was ele prepared by published by pany was in ten per cent statement d in the compo that the stat legal procee stock, where ing the book amination th and the co meeting of th a by-law pas defendant's s before the c defendant beco statement, th company. T issued a writ the company amount of th that the plain was power to lation was du was not guil son Manufact C. P. D.

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See *Provincial Ins. Co. v. Cameron*, 31 C. P. 523; 9 A. R. 56, p. 258; *Christopher v. Noxon*, 4 O. R. 672, p. 268; *Thompson v. Canada Fire and Marine Ins. Co.*, 9 O. R. 284, p. 266; *Re Cole and The Canada Fire and Marine Insurance Co.—Close's Case*, 8 O. R. 92, p. 246; *In re the Central Bank of Canada—Baines' Case*, 16 A. R. 237, p. 295; *Brady v. Stewart*, 15 S. C. R. 82, p. 222.

#### 4. Cancelling.

The defendant, an original stockholder in a joint stock company, his stock being fully paid up, was elected a director, after a statement prepared by the company's secretary had been published by them, setting forth that the company was in a flourishing condition earning a ten per cent. dividend. On the faith of such statement defendant subscribed for new shares in the company, but soon afterwards suspecting that the statement was incorrect, he threatened legal proceedings to compel them to cancel the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false, and the company practically insolvent. A meeting of the shareholders was then called, and a by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before the defendant became aware of the falsity of the statement, the plaintiff became a creditor of the company. The plaintiff after such cancellation, issued a writ and obtained a judgment against the company, and then sued defendant for the amount of the new stock unpaid by him:—Held, that the plaintiff could not recover: that there was power to cancel the stock: that the cancellation was duly made; and that the defendant was not guilty of any laches. *Wheeler & Wilson Manufacturing Co. v. Wilson*, 6 O. R. 421.—C. P. D.

A trading corporation has authority as an incident of its existence to compromise all bona fide claims made against it, and therefore has power to compromise claims made by a shareholder to be relieved of his shares either by reason of fraud or misrepresentation or any other cause which would enable the Court to decree such relief; but as the Court, if a shareholder were to make a claim against the corporation for compensation in damages in respect of some matter not connected in any way with the validity of the shares held by him, could not decree a cancellation pro tanto of those shares, so the corporation itself cannot validly compromise a claim for damages against it by accepting the surrender of and by cancelling shares of its capital stock held by the claimant. Judgment of the Common Pleas Division reversed. *Livingstone v. Temperance Colonization Society*, 17 A. R. 379.

See *Long v. Guelph Lumber Co.* 31 C. P. 129, p. 273.

#### 5. Forfeiture.

In an action for unpaid calls the shares held by the defendant Cameron as executrix and in her own right, were transferred under powers of attorney, which were not produced:—Held, that

there was sufficient evidence to shew the existence of such powers, and to let in secondary evidence thereof, the defendant and the testator having fully admitted their liability as owners of the shares; and that the evidence also shewed that there had been no forfeiture, as was urged, of such shares, the alleged forfeiture having been conditional and never completed:—Held, also, that the change in the corporate name of the plaintiffs, as set out in the report, could under the circumstances form no objection to their recovery. *Provincial Ins. Co. v. Cameron*, 31 C. P. 523.—C. P. D.

It was urged that the shares of certain other shareholders had not been legally forfeited, the directors under the original charter not having the power to do so:—Held, that they had such power; but that in any event this could not affect the liability of these defendants. *Id.*

The plaintiff on becoming a member of the defendant company, agreed to accept his shares subject to the rules of the company. Rule 6 was to the effect that in case of default of payment of dues for a year, the directors might forfeit any share so in default. The plaintiff being in default for a year and upwards the directors declared his shares forfeited, and this proceeding was afterwards confirmed at a meeting of the shareholders. The plaintiff thereupon instituted proceedings to have such forfeiture declared invalid, on the grounds, (1) that notice of the intention to forfeit had not been given to him; (2) that notice of the forfeiture had not been served on him, so that he had been unable to appeal to the shareholders; (3) that the resolution did not expel the plaintiff from membership; (4) that the plaintiff's name was not set forth in full in such resolution, it did not specify the shares to be forfeited, and other persons were included whose shares were jointly forfeited; (5) that no notice had been given of the holding of the annual meeting for the election of directors, so that the directorate was not legally constituted; (6) that one of the directors who voted for the forfeiture had become insolvent under the Act of 1875, although his shares continued to stand in his name in the books of the company; (7) that it was not shewn that proper and sufficient notice had been given of the meeting of the directors at which such forfeiture had been declared; (8) that the plaintiff had capital at his credit in the company out of which the arrears might have been paid; and that by a by-law of the company, "all fines and forfeitures should be charged to members liable, and, if not paid, deducted from capital at the credit of such member":—Held, that these objections could not prevail, and that as to the last, this was not such a forfeiture as was referred to in the rules. *Nellis v. Second Mutual Building Society of Ottawa*, 29 Chy. 399.—Boyd.

When on May 31st, 1880, the directors of a company passed a by-law reducing the number of the directorate from five to three, and this was confirmed at an adjourned general meeting of shareholders on June 1st, 1880, and a new board of three forthwith appointed, but, it appeared, no notice had been given either before the original, or the adjourned meeting of the intention of making any such change in the directorate:—Held, that the appointment of the new board was not a legal one, and a resolution by them to

forfeited stock for nonpayment of calls was invalid:—Held, also, that the company were properly made parties to an action to restrain such forfeiture, the reduction of the directorate to a board of three being its act. *Christopher v. Noxon*, 4 O. R. 672.—Proudfoot.

See *Brady v. Stewart*, 15 S. C. R. 82, p. 222.

#### 6. Increasing.

The Ontario Wood Pavement Company, incorporated under 27 & 28 Vict. c. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from \$130,000 to \$250,000 before the original capital stock had been paid in. P. et al., execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of sci. fa. against A. as holder of shares not fully paid up in said company. It appeared from an examination of the books that the shares alleged to be held by A. were shares of the increased capital and not of that originally authorized:—Held, affirming the judgment of the Court of Appeal, 7 A. R. 1, which reversed 30 C. P. 108, that as there was evidence that the original nominal capital of \$130,000 was never paid in, the directors had no power to increase the stock of the company, and as the stock held by A. consisted wholly of new unauthorized stock, P. et al. were not entitled to recover. Gwynne, J., dissenting, on the ground that the objection not having been taken by the defendant or tried, the court, under section 22, R. S. O. (1877), c. 38, should put the questions of fact upon which the validity and sufficiency of the objections suggested by the court rested, into a course for trial in due form of law. *Page v. Austin*, 10 S. C. R. 132.

Held, affirming the judgment of the C. P. D. 11 O. R. 444, (Burton, J. A. diss.), that the duty of the Provincial Secretary of Ontario in issuing the notice of the increase of the capital stock of an incorporated company required to be given under 27 & 28 Vict. c. 23, s. 5, sub-s. 18, is merely ministerial and that on the requirements of the Act being complied with he has no discretion in the matter, but must issue the notice. *Re The Massey Manufacturing Co.*, 13 A. R. 446.

Held, Burton, J. A. doubting, that the power conferred of increasing the capital stock by sub-s. 16, 17, and 18 of s. 5, is a general power not limited to a single occasion. *Ib.*

Held, that there is nothing in the Act which makes a prior subscription and payment of the new stock, or a part of it, a prerequisite to the right of the company to have the notice published. *Ib.*

Per Burton, J. A. The object with which the statute was passed was to avoid the necessity and expense of applying in each case to the legislature for a charter, thus delegating the power to grant the same to the executive under certain conditions; there was, therefore, conferred upon the executive the same right to control the increase of capital, as without such statute would have remained with the legislature. *Ib.*

Held, that mandamus was the proper mode of enforcing the issue of the notice. *S. C.*, 11 O. R. 444.—C. P. D.

#### 7. Voting on.

See *Christopher v. Noxon*, 4 O. R. 672, p. 268.

#### 8. Mortgage of.

Duty of mortgagee to take proceedings against purchaser of stock sold by him at auction to complete the purchase. See *Daniels v. Noxon*, 17 A. R. 206.

#### 9. Sale of under Execution.

See *Connecticut and Passumpsic Rivers R. W. Co. v. Morris*, 14 S. C. R. 318.

#### V. LIABILITY OF SHAREHOLDERS TO CREDITORS.

In an action brought by McK. under the provisions of the Con. Stat. Can. c. 63, against K. et al., as stockholders of a joint stock company incorporated under said Act, to recover the amount of an unpaid judgment they had obtained against the company, the defendants K. et al., pleaded inter alia that they had paid up their full shares and thereafter and before suit had obtained and registered a certificate to that effect:—Held, affirming the judgment of the Court of Common Pleas, that under ss. 33, 34, and 35, Con. Stat. Can., c. 63, as soon as a shareholder has paid up his full shares and has registered, although not until after the thirty days mentioned in section 35 a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always debts to employees, as specially mentioned in section 36. Ritchie, C. J., and Fournier, J., dissenting. *McKenzie v. Kittridge*, 4 S. C. R. 368; 27 C. P. 65; 24 C. P. 1.

After plaintiff had commenced an action against the defendant to recover from him in respect of his unpaid stock in a joint stock company, the sum of \$442.29, being the amount of an unsatisfied judgment recovered by the plaintiff against the company one B. recovered a judgment against the company for \$4,333.08, and assigned it to one G., who assigned part of the money recovered to the extent of \$500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim:—Held, that the procuring of such assignment by defendant being for such purpose, and being a voluntary act on the defendant's part, and with notice of plaintiff's claim, did not constitute a defence to it; but Semble, if the set-off had accrued to the defendant in his own right, although after action brought, it would have been otherwise. G. assigned the remainder of his judgment to M., who after the commencement of the plaintiff's action, and with knowledge thereof, recovered a judgment against defendant for \$526.21 without defence, and to give M. a preference in respect of his unpaid stock, which defendant paid to M., who released the company from their liability on the judgment

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so recovered against them to the extent of \$500:—Held, that the judgment so recovered, and the payment thereunder constituted a good defence to the plaintiff's claim; and that the prior commencement of the plaintiff's action was immaterial. *Field v. Galloway*, 5 O. R. 502.—C. P. D.

In an action under 40 Vict. c. 43, s. 47, (Dom.), brought in Ontario against a shareholder there resident of a company whose head office was in another province, where judgment had been obtained by the plaintiff against the company and execution thereon had been returned unsatisfied:—Held, reversing the judgment of Rose, J., 7 O. R. 435, that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario. *Brice v. Munro*, 12 A. R. 453.

See *Wheeler & Wilson Manufacturing Co. v. Wilson*, 6 O. R. 421, p. 257; *Page v. Austin*, 10 S. C. R. 132, p. 255, 259; *Harvey v. Harvey*, 9 A. R. 91; *Flatt v. Waddell*, 18 O. R. 539.

See also Subhead XV. 3, p. 286.

## VI. DIRECTORS.

### 1. Qualification.

See *Kiely v. Smyth*, 27 Chy. 220, p. 254; *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175, p. 263.

### 2. Election.

At a meeting of the shareholders of a company, the capital stock of which was held by a few, a chairman was elected by a majority of the votes of those present, without regard to the stock held by them. Two of the shareholders who were also provisional directors, and who were candidates for reelection, were appointed scrutineers in the same manner, and directors were then elected, excluding the plaintiff. The plaintiff was president of the company, and held a large amount of stock, sufficient with that held by those who were favourable to him to have controlled the vote if it had been taken according to shares. It was the duty of the scrutineers to decide as to what votes were valid, and they also, with the aid of legal advice, interpreted an instrument under which the plaintiff had advanced a large sum of money to start the company, and which provided for the future disposition of the shares of the company, held by the plaintiff as a security for his advances, and allowed certain persons to vote as being equal to trusts of a portion of such shares:—Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate that they were disqualified from so acting, and the election was set aside, and a new election ordered, with costs to be paid by the defendants. *Dickson v. McMurray*, 28 Chy. 533.—Proudfoot.

An election of officers obtained by a trick or artifice cannot be considered a bona fide election, but when shares have been actually purchased and paid for, the fact of their being purchased with a view to influence the election is no objection. *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175.—Proudfoot.

The plaintiffs were a company incorporated under The Canada Joint Stock Companies' Act, 40 Vict. c. 43. By section 29, the directors were to be elected by the shareholders in general meeting assembled, at such times as the by-laws of the company should prescribe; and by section 30, in default of other express provisions therefor in the letters patent or by-laws, such election should take place yearly, upon notice; that at all general meetings each shareholder who had paid all calls should be entitled to vote on each share held by him; and that all questions should be determined by the majority of votes. By section 31, the failure to elect directors at the proper time should not dissolve the company; but such election should take place at any general meeting of the company duly called for the purpose, the retiring directors to continue in office until the election of their successors. By section 32, power is given to the directors to pass by-laws for, amongst other things, the time, etc., of the holding of the annual meeting of the company, the calling of meetings, regular and special, of the directors and of the company, the quorum at such meetings; but every such by-law, unless confirmed at a general meeting of the company, should only be in force until the next annual meeting thereof; one-fourth in value of the shareholders could at all times call a special meeting for the transaction of such business as might be specified in the notice given therefor. By a by-law passed by the directors the last Tuesday in September was fixed as the date of the annual general meeting, and the quorum for such meeting was to consist of five members; but at a special meeting they were required in addition to represent one-third of the capital stock. In 1884 there was no election of directors at the appointed time, owing to the office where the meeting was to have been held therefore being locked up and the defendant refusing to attend the meeting or give up the books, etc.; and in October a special general meeting of the shareholders was held, called on notice, stating the object thereof, on a requisition by one-fourth in value of the shareholders, and directors were elected, who appointed a new secretary. At the meeting there were present three-fourths of the qualified vote and one-third of the subscribed capital, but considerably less than that amount of the nominal capital. In an action by the company against the defendant for the non-delivery of the books, etc., to the new secretary, the defendant set up as a defence that he was still secretary, because, as he alleged, the directors who appointed the new secretary was not duly elected, and that there was not a quorum at the meeting to transact business:—Held, under the circumstances, there was authority to call the special general meeting for the election of directors; and that it was duly called by the proper number of shareholders:—Held, also, that the directors could by by-law determine the quorum and all other formal proceedings for the control and conduct of the meetings of the board and shareholders; that there was a proper quorum present at the meeting under the by-law; and if the by-law had required such one-third to be of the whole capital stock it would have been ultra vires as opposed to section 32. Per Rose, J., the words of section 31, "any general meeting of the company duly called for the purpose," properly describe a special meeting, which may be called

as provided by section 32:—Held, also, that on the evidence the defendant must be deemed to have unlawfully detained the books, etc., that there was an election of directors de facto, and a suit in the company's name; and an officer of the company could not be permitted to withhold what belonged to the company. In any event the defence set up was not the proper way of testing the election of directors, which should have been by motion to stay or set aside the proceedings. *Austin Mining Co. (limited) v. Gemmell*, 10 O. R. 696.—C. P. D.

See *Christopher v. Noron*, 4 O. R. 672.

### 3. Meetings.

Five of the nine of the provisional directors of a railway company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in alleged pursuance of such advertisement without advertisement or notice under the statute:—Held, that the meeting of the six directors did not constitute a duly organized meeting of directors, though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournment it might have cured the irregularity. *McLaren v. Fiske*, 28 Chy. 352.—Spragge.

R. S. O. (1877) c. 150, requires that companies incorporated thereunder shall have not less than three directors, who shall not be appointed directors unless they are shareholders, and it was provided by the by-laws of the plaintiffs' company that a director should not only be qualified when elected, but that he should continue to be so. The plaintiffs' company was managed by three directors, and one of them disposed of his stock:—Held, that he thereupon ceased to be a director, and the directorate then became incomplete and incompetent to manage the affairs of the company. Semble, also, even assuming that a quorum (2) of the directors could manage the business, yet, where neither the statute nor the by-laws gave the president a casting vote, resolutions passed by such vote, at a meeting attended only by the president and one other director, were invalid. *Toronto Breving and Malting Co. v. Blake*, 2 O. R. 175.—Proudfoot.

### 4. Powers.

#### (a) Appointment of Agents.

The defendant company was a foreign corporation, whose directors had authority to appoint such subordinate officers as the business of the corporation might require. By power of attorney under the corporate seal, they appointed a general agent at Toronto, to take charge of, conduct and manage the business of the agency at Toronto, and of its sub-agencies, giving him power to do everything necessary and requisite to all intents and purposes as fully as the company could do. He appointed the plaintiff a sub-agent for a year, and at the end of that and each succeeding year he renewed the appointment for a year. The plaintiff was paid \$15 a week and a commission on sales. He was summarily dismissed. Evidence was given for the defence that the corporation were in the habit of appointing their agents and sub-agents at will:—

Held, Spragge, C.J.O., dissenting (affirming the judgment of the Court below refusing an order nisi for a nonsuit), that the appointment from year to year was clearly within the authority of the directors, that the general authority was delegated to the general agent, and that the plaintiff had a right to rely upon the authority so given when he entered into the engagement. Per Spragge, C.J.O. Though the defendants acquiesced in the appointment of the plaintiff, there was no acquiescence in the terms of the appointment, and it appeared that their practice was to engage their agents at will only. The power of attorney, if it gave power to appoint sub-agents at all, did not give power to appoint them by the year; and the general agent was not held out by the company as having any such authority. *Hosworth v. Singer Manufacturing Co.*, 8 A. R. 264.

See *Falkner v. Grand Junction R. W. Co.*, 4 O. R. 350; *Clarke v. Union Fire Ins. Co.—Cus-ton's Case*, 10 P. R. 339, p. 276.

#### (b) Other Cases.

Held, that the directors of a Mutual Insurance Co. may under R. S. O. (1877) c. 161, s. 29, borrow money on promissory notes or debentures without passing a by-law under seal. *Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476.—Cameron.

The defendants in the deed of assignment covenanted that the mortgages were good and valid charges on the lands, and that the defendants had not done or permitted any act, etc., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes:—Held, per Osler, J., that the covenant was not ultra vires the company or the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold. *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. 476.

In a sheriff's interpleader, the defendants Bank claimed the property in question as security for advances made by them to a certain company incorporated under R. S. O. (1877) c. 150, by virtue of warehouse receipts covering the property, and deposited with them by the said company as security. Under R. S. O. (1877) c. 150, s. 28, "The directors shall have full power in all things to administer the affairs of the company, and may make \* \* any description of contract which the company may, by law, enter into"; and by sub-section 2 of section 30 of that Act express power is given to the directors under the sanction of a by-law approved of by not less than two-thirds in value of the shareholders to hypothecate and pledge the real and personal property of the company to secure any sum borrowed, etc. There was no by-law in this case, but the board of directors was well aware of the nature and extent of the transaction with the bank and the hypothecation of the goods, and adopted what was done:—Held, that the property in the goods passed to the bank, and inasmuch as the company could not have resumed possession thereof without satisfying the banks' lien, neither could the execu-

tion ered property also, that ing, requi plaint had of its sha -or inform here, an e to interfe or illegali Held, how the deposi the raising seemed to successful and to be a competenc through th dealing he Hancock, G

The judg route again a reference were the ho pany of the was due to before the n the compan ventures of H. S., G. J. directors of five per cen against the who had obt contented t the amount, they could n to themsel the decision much as the transaction, as the trans competent f the same ol impugn the J. B. If th as to get an company, it orators to c so attack the cognize the action to con tive. Bank and Marmor

A board of cers or to th allot stock, Co.—Hovend Master in Or company of a company to b is not ultra v quire special assent of the v. Whiting, l Whiting v. H

See *Toronto Blake*, 2 O. R. (Limited) v. Waddell, v. C. P. 281.



tion creditors, who had no higher rights as to property seized than the original debtor:—Held, also, that even if a by-law were, strictly speaking, requisite in such a case, yet, where no complaint had been made by the company, or any of its shareholders, because of any irregularity or informality in what was done, as was the case here, an execution creditor could not be allowed to interfere, there being no imputation of fraud or illegality in its broad and culpable sense:—Held, however, upon the evidence in this case, the depositing of the goods in a warehouse, and the raising of money upon the security thereof, seemed to be an important constituent for the successful prosecution of the company's business, and to be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing here. *Merchants' Bank of Canada v. Hancock*, 6 O. R. 285.—Boyd.

The judgment in an action by the Bank of Toronto against the C. Railway Company, directed a reference as to who, other than the plaintiffs, were the holders of bonds of the defendant company of the same class, and an account of what was due to such bondholders, and it appeared before the master that the managing director of the company had issued a great number of debentures of the same class as the plaintiffs' to J. H. S., G. J. S., and J. B., who were themselves directors of the company at a discount of twenty-five per cent., in satisfaction of their claims against the company. The plaintiffs thereupon who had obtained their debentures subsequently, contended that these parties could only claim the amount actually advanced by them, and that they could not as directors, sell the debentures to themselves at a discount:—Held, affirming the decision of the Master in Ordinary, that inasmuch as the company did not complain of the transaction, nor any shareholders, and inasmuch as the transaction was not ultra vires, it was not competent for the holders of the debentures of the same class, such as the plaintiffs were, to impugn the position of J. H. S., G. J. S., and J. B. If the directors abused their position so as to get an advantage at the expense of the company, it was for the corporation or its creditors to complain. To permit the plaintiffs to attack them on this ground would be to recognize the validity of the transfer of a right of action to complain of a fraud, actual or constructive. *Bank of Toronto v. Coboury, Peterborough and Marmora R. W. Co.*, 10 O. R. 376.—Boyd.

A board of directors cannot delegate to its officers or to third parties its statutory powers to allot stock, or make calls. *Re Bolt and Iron Co.—Hovenden's Case*, 10 P. R. 434.—Hodgins, Master in Ordinary.

An assignment by the directors of a joint stock company of all the estate and property of the company to trustees for the benefit of creditors is not ultra vires such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders. *Hovey v. Whiting*, 14 S. C. R. 515; *S. C.*, *sub nom. Whiting v. Hovey*, 13 A. R. 7.

See *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175, p. 278; *Austin Mining Co. (Limited) v. Gemmel*, 10 O. R. 696, p. 203; *Waddell v. Ontario Canning Co.*, 18 O. R. 41, p. 281.

### 5. Personal Liability.

One E. advanced \$4,000 to I. & M. on the guaranty of the defendant company, clearly acting ultra vires, who obtained, as security for such guaranty, an order from I. & M., on the water works company, for the amount. I. & M. afterwards induced the defendants to give up the order on replacing it by orders for half the amount. E. recovered judgment by default against the defendants, and by *sci. fa.* realized the amount of his loan:—Held, affirming the master's report, that B., who was one of the directors of the defendant company, and who had been instrumental in procuring the above guaranty, was properly charged with the amount the defendants had lost through the delivery up of the order on the water works company; but that he was not liable for the balance of the claim of E., since it had been made up to the defendants by the moneys realized on the orders by which the order so delivered up had been replaced. *Walmley v. Rent Guarantee Co.*, 29 Chy. 484.—Proudfoot.

When the shareholders of a certain company brought an action against the company and certain of its directors, alleging that the latter, being a majority of the directorate, had negotiated a transfer of a number of their own shares to one C., who subsequently became manager, knowing him to be a man of no sufficient means to pay calls thereon, but wishing to escape liability for certain impending calls; and claimed that the said directors should make good to the company or to them the amount of calls due upon the shares so transferred to C. and unpaid by him; and the said directors alleged acquiescence and laches on the plaintiffs' part in respect of the matters complained of; and the plaintiffs proved the transfer as alleged:—Held, reversing the judgment of Boyd, C., 6 O. R. 291, that the defendant directors in allowing the transfers complained of, were upon the evidence guilty of no fraud towards the shareholders, and that such act was within the scope of the prescribed powers and duties of directors, and as neither fraud nor a breach of trust was proved, the cross-appeal was allowed, and the action dismissed with costs. *Thompson v. Canada Fire and Marine Ins. Co.*, 9 O. R. 284.—Chy. D.

On bills and notes. See *Madden v. Cox*, 5 A. R. 473; *Brown v. Howland*, 9 O. R. 48; 15 A. R. 750.

See *Walmley v. Rent Guarantee Co.*, 29 Chy. 484, p. 279; *Thames Navigation Co. (Limited) v. Reid*, 13 A. R. 303, p. 277.

### 6. Managing Director.

By-law 17 of the B. & I. Company provided that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting." The only provision made at a general meeting was on 27th January, 1883, as follows: "The salary of the managing director was fixed until October 31st next, as at the rate of \$4,000 per annum." L., the managing director sought to recover for services rendered as such subcommittee to October 31st, 1883:—Held, that he could not do so. *Re Bolt and Iron Co.—Livingstone's Case*, 14 O. R. 211.—Boyd. 16 A. R. 397.



The position of L. as managing director rendering services for which remuneration was given, was not that of a servant hired by the company, but of a working member of the company, whose rights as to payment were to be measured by the provisions of the charter and by-laws of the company. *Ib.*

L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services:—Held, that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, under the special provisions of R. S. C. c. 129, and as to which no set-off was permissible against any debt or dividend due from the company to L. *Ib.*

Held, also, that the master had jurisdiction under section 83 of the said Act to investigate this transaction in these proceedings, which were for the winding up of the company, and no formal objection should be allowed to affect the proper operation of that section. *Ib.*

Held, further, that the fact that L. had assigned his said claim against the company to his wife, after the winding-up order had been acted on, made no difference, since any such assignment would be subject to all the equities against such claim, and against the assignor as a director and trustee of the company's funds in the proceedings under the winding-up order. *Ib.*

See *Canada Central R. W. Co. v. Murray*, 8 S. C. R. 313, p. 277; *Re Briton Medical and General Life Association (Limited)*, 11 O. R. 478, p. 294.

#### 7. Contracts between Directors and Company.

Where a voidable contract, fair in its terms and within the powers of the company, has been entered into by its directors with one of their number as sole vendor:—Held, that such vendor was entitled to exercise his voting power as a shareholder in a general meeting to ratify such contract; his doing so could not be deemed oppressive by reason of his individually possessing a majority of votes, acquired in a manner authorized by the constitution of the company. See *North-West Transportation Co. v. Beatty*, 12 App. Cas. 589. (This reverses judgment of Boyd, C., in S. C., *sub nom. Beatty v. North-West Transportation Co. (Limited)*, 6 O. R. 300; affirms judgment of Court of Appeal, 11 A. R. 205, and reverses judgment of Supreme Court, 12 S. C. R. 598.)

#### 8. Other Cases.

An objection was raised to the president of an insurance company acting as such, because he acted as the inspector of the company for which he was paid a salary:—Held, that no weight could be given to it, because three directors formed a quorum of which the president need not be one, and a quorum may have acted without him; and, moreover, for all that appeared, it might be that he only received an additional allowance as president while discharging the duties of inspector. *Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476.—Cameron.

In the absence of agreement, there is clearly no duty or obligation on the part of directors to pledge their own credit for the benefit of the company. *Christopher v. Noxon*, 4 O. R. 672.—Proudfoot.

Where certain shares were allotted to one of the directors of a company at par, in consideration of which he offered to supply funds to meet a pressing demand upon the company, and he voted on these shares at a general meeting of the shareholders, and no opposition was at the time made to his so doing:—Held, that the shareholders, must be considered to have ratified the transfer, and could not afterwards object to it as improper. *Ib.*

It was alleged that he thus acquired such stock in order to obtain control of the company:—Semble, that this would not be improper, if no improper means were used by him; but that had he made a profit thereby, the company might perhaps have claimed it. *Ib.*

An allotment of shares to a director, if a questionable act, may be ratified by the company, and for this purpose, as for all other acts within the power of the corporation, the approval of a majority of shareholders is sufficient. *Ib.*

A director of a joint stock company, having a judgment and execution of his own against the property of the company acting in good faith, purchased the same at a sale by mortgagees, under a power of sale for \$8,400, and sold it in the following year for \$23,000:—Held, in winding-up proceedings, that he could not purchase for his own benefit, but held the land as trustee for the company and was accountable for any profit received on a resale, and by reason of his refusing to pay over or account for such profits, and in fact by his appearing as a bidder at the sale and so damping the bidding, was guilty of a breach of trust within R. S. C. c. 129, s. 83. *Re Clay Brick Manufacturing Co.—Turner's Case*, 19 O. R. 113.—Robertson.

See *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175, p. 261.

#### VIII. CONDUCT OF BUSINESS.

Semble, that the amendment at page 362 of the report of this case, being to strike out a certain canon and substitute another for it, though moved as an amendment to a proposed amendment of such canon, was rather a substantive motion and should have been brought before the Synod through the standing committee. *Wright v. Incorporated Synod of the Diocese of Huron*, 29 Chy. 348.—Proudfoot. See S. C., 9 A. R. 411; 11 S. C. R. 95.

See *Christopher v. Noxon*, 4 O. R. 672.

#### IX. POWERS OF COMPANIES.

##### 1. Regarding By-laws.

E. & L., brokers in partnership, were both members of the Toronto Stock Exchange, being each the owner of one seat at the board. They assigned to the plaintiff for the general benefit of creditors in December, 1884. The Toronto Stock Exchange by their by-laws provided that in case of a member becoming insolvent and not

procuring named person to realize such case of fines as in payment change of the Exchange, to be representative under the Exchange, certain money change claim to their insolvency Exchange by-laws plaintiff, or titled to the from their the benefit in the sale of the rights plaintiff, as of F. & L., for payment the sale of the petent for the by-laws the claims members of of Stock Exchange plaintiff was solvent and the balance of the said due to the members of Exchange, the of the by-laws means for as to what deduction the proceeds proper to the Master. *Chy. 13 O. R. 212.*

As to the justice of payment such by-law of the Diocese of Huron, 411; 11 S. C. R. 95.

See *Long v. Victoria*, 32 C. P. 476.—Cameron. *Wright v. Incorporated Synod of the Diocese of Huron*, 29 Chy. 348.—Proudfoot. See S. C., 9 A. R. 411; 11 S. C. R. 95.

Where a member of the council, the constitution of proper case jurisdiction matters which law; although court of law. *Marsh v. H.*

procuring a release from his creditors within a named period, the Exchange should have power to realize the seats by sale, and the proceeds in such case were to be applied, first, in payment of fines and dues to the Exchange; secondly, in payment of claims arising out of Stock Exchange transactions of creditors, being members of the Exchange; and thirdly, the balance, if any, to be paid to the insolvent, or his legal representative. The seats of F. & L. were sold under the by-laws of the Exchange and the proceeds remained in the hands of the Exchange. Certain members of the Toronto Stock Exchange claiming to be creditors of F. & L. prior to their insolvency, for debts arising out of Stock Exchange transactions, filed claims under the by-laws prior to the sale of the seats. The plaintiff, on the other hand, claimed to be entitled to the seats and to the moneys arising from their sale under the assignment to him for the benefit of creditors. All parties concurred in the sale of the seats, subject to their respective rights. This action was brought by the plaintiff, as assignee for the benefit of creditors of F. & L., against the Toronto Stock Exchange for payment to him of the money realized from the sale of the seats:—Held, 1, that it was competent for the Toronto Stock Exchange to pass the by-laws in question giving the preference to the claims of the Exchange, and to claims of members of the Exchange for debts arising out of Stock Exchange transactions. 2. That the plaintiff was the legal representative of the insolvents and entitled to the payment to him of the balance of the moneys arising from the sale of the said seats after payment of fines and fees due to the Exchange and claims of creditors, members of the Exchange, arising out of Stock Exchange transactions. 3. Reversing the judgment of Galt, J., dismissing the action, that as the by-laws of the Exchange did not provide any means for ascertaining or deciding a contest as to what deductions might properly be made from the proceeds of sale of the said seats that it was proper to refer this matter for enquiry to the Master. *Clarkson v. Toronto Stock Exchange*, 13 O. R. 213.—Q. B. D.

As to the right to repeal by-laws to the prejudice of parties who have obtained rights under such by-laws. See *Wright v. Incorporated Synod of the Diocese of Huron*, 29 Chy. 348; 9 A. R. 411; 11 S. C. R. 95.

See *Long v. Guelph Lumber Co.*, 31 C. P. 129, p. 273; *Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476, p. 264; *Falkiner v. Grand Junction R. W. Co.*, 4 O. R. 350; *Merchants' Bank v. Hancock*, 6 O. R. 235, p. 265; *Temple v. Toronto Stock Exchange*, 8 O. R. 705, p. 272.

## 2. Expulsion of Members.

Where a member of a college council complains that he has been improperly expelled from the council, the Court of Chancery, under the Administration of Justice Act, has jurisdiction in a proper case to decree relief, that Act giving jurisdiction to the Court of Chancery "in all matters which would be cognizable in a court of law;" although the remedy in such a case in a court of law would be sought by mandamus. *Marsh v. Huron College*, 27 Chy. 605.—Sprague.

One of the by-laws of an incorporated college provided, amongst other things, that special meetings of the council might be convened as the president should deem necessary, or upon the requisition of any three members of the council, the notices of which special meetings should specify the business to be brought forward, and that no business should be introduced at any special meeting in addition to that specified in the notice. The plaintiff, as one of the members of the council, having acted in such a manner as in the opinion of the president merited his dismissal or expulsion from the body, a meeting for that purpose was ordered to be convened by the president, and notices were accordingly sent to all the members of the council stating that a meeting would be held "for special business," but omitting to say what such special business was. At the meeting so called, at which the plaintiff was present, a resolution was unanimously adopted, by the other members of the council present, expelling the plaintiff from the council:—Held, that the notice calling such meeting was invalid, because it did not specify the business intended to be brought before the council; and a decree was pronounced declaring that such resolution of expulsion had been illegally and improperly passed, and that the plaintiff continued to be and was a member of the council. But the court being of opinion that the plaintiff had wittingly and designedly left the members of the council under a false impression, as to his conduct in regard to the matters which had been the subject of enquiry before the council—if he did not designedly produce such impression—refused the plaintiff the costs of the proceedings. *Ib.*

The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the council, did not prevent his afterwards filing a bill impeaching the proceedings as irregular and invalid. *Ib.*

The wrong (if any) complained of being a personal wrong on the part of the members of the council who voted for the resolution:—Quære, if costs were adjudged to the plaintiff, whether they should not be paid by those members. *Ib.*

The reasons for which alone members of a municipal body may be disfranchised, do not apply to the members of the governing body of an educational institution whether incorporated or not. *Ib.*

Quære, what would form a sufficient ground for the expulsion of a member of such a body as the council of Huron college. *Ib.*

Members of charitable and provident societies should not be allowed to litigate their grievances in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies. Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, this court refused to interfere. *Essey v. Court Pride of the Dominion*, 2 O. R. 596.—Chy. D.

By one of the by-laws of the defendants' association they were empowered to expel any mem-

ber for refusing to submit a question arising between members to arbitration, but it was provided that such expulsion should take place only after the case should have been submitted to a meeting of the association, due notice having first been given to the parties that such a meeting would be held. W. & Co., members of the association, had a claim against the plaintiff, who was also a member, consisting of three items \$1.06 for balance of purchase money of grain; \$397.41 for freight on same grain which they had paid under protest, and a sum for costs incurred in an action brought by them to recover back the freight so paid. The plaintiff paid the first item, but disputed the balance of the account, whereupon W. & Co. applied for and obtained a resolution by defendants that there should be an arbitration, to which the plaintiff submitted, and he afterwards admitted his liability for the amount claimed for freight, and offered his note at twelve months for it, which W. & Co. declined. Upon a submission, however, being tendered him covering the three items, he refused to sign it as the first two items were no longer in dispute. In consequence of his refusal, the defendants expelled him at a meeting called "to receive a report from the committee, regarding the conduct of a member."—Held, affirming the decree of Proudfoot, V. C. (27 Chy. 23), that the plaintiff was improperly expelled, and was entitled to be reinstated in his rights of membership. Per Burton and Patterson, J.J.A., that there had been no refusal to arbitrate within the meaning of the by-law, but only a refusal to arbitrate upon a matter not in dispute. *Cannon v. Toronto Corn Exchange*, 5 A. R. 268.

Per Galt, J., that the notice of the meeting at which the expulsion took place was not a sufficient compliance with the provision which required that the object of the meeting should be specially stated. *Id.*

The defendants' act of incorporation provided for the appointment of a committee of management to manage the affairs, etc., of the corporation, and, under a by-law, the committee were to consider and report on all offences under the by-laws, if submitted to them, and to call a special meeting of the corporation to pass judgment thereon. Power was also given by the Act of incorporation to expel members as by the by-laws should be determined. By by-law 13 all complaints to the committee or corporation were to be in writing. By by-law 21 any member complained against, might have a hearing before the corporation, and if the complaint be proved, a vote should be taken by ballot—by a two-thirds majority of those present and voting being required—first, for the forfeiture of the seat, and then if lost for suspension. By by-law 24 a member becoming bankrupt or insolvent, should not be entitled to take his seat as a member of the corporation, or be present at any meeting thereof; and such seat should revert to the corporation to be sold by them, if the member be not readmitted within six months from the date of insolvency, and the proceeds applied as directed therein. In November, 1883, without any complaint in writing or notice to the plaintiff or hearing before the corporation, but on the chairman and secretary, whom the committee had instructed to make enquiries, reporting that plaintiff was offering to compro-

mise with his creditors, the secretary, by order of the committee, wrote to plaintiff, calling his attention to by-law 24; and on the same day the list of members was altered by striking out the plaintiff's name. Nothing further was done until March following, when in consequence of a correspondence between the plaintiff's solicitors and the defendants, those members who had previously reported on plaintiff's condition, made a written complaint to the president complaining of the plaintiff having been insolvent in October and November, and of his disqualification thereby under by-law 24, and asking for an investigation by the corporation, which was had, and by an open vote of 15 to 6, the complaint was held to be proved, the two complainants voting with the majority. No steps were taken to declare the seat forfeited or for suspension.—Held, that insolvency under by-law 24, did not refer to a condition of insolvency, but to a definite act of insolvency under a bankrupt or insolvent Act, e. g., by an assignment or the issue of a writ of attachment; and therefore plaintiff did not come within its terms; but apart from this the defendants' proceedings were clearly illegal and void, for in November there was no complaint that gave the committee jurisdiction to interfere; and as the defendants' affairs were to be managed by the committee, they were responsible for the committee's acts; while the complaint made in March was not a bona fide one, but merely an attempt to support the previous illegal act; and also the vote should have been by ballot.—Held, also, that though defendants' proceedings were abortive to deprive plaintiff of his seat, the erasure of his name was an act most detrimental to the plaintiff, as it prevented him from carrying on his business as a broker; and he was therefore entitled to recover damages for the loss he had sustained thereby. Remarks as to the impropriety of the two complainants acting as judges on their own complaint; and if deemed present there would not be the requisite two-thirds majority, but otherwise if deemed neither present nor voting. Per Rose, J.—In the absence of a by-law providing for ascertaining the fact of insolvency, the finding of the jury herein that plaintiff was not insolvent was conclusive. *Temple v. Toronto Stock Exchange*, 8 O. R. 705.—C. P. D.

See *Essery v. Court Pride of the Dominion*, 2 O. R. 596, p. 150; *L'Union St. Joseph de Montreal v. Lapierre*, 4 S. C. R. 154, p. 150; *Hands v. Law Society of Upper Canada*, 17 A. R. 41; *Beland v. L'Union St. Thomas*, 19 O. R. 747, p. 153.

### 3. To Issue Preferential Stock.

The defendants, a company incorporated under the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. (1877), c. 150, as amended by 41 Vict. c. 8, s. 16, with a capital stock of \$300,000, in shares of \$1,000 each, acting under section 17a of the Act, which authorized the issue of any part of the capital stock as preference shares, passed a by-law in 1877, for the issue of \$75,000 as such preference shares, which were to have preference and priority as respects dividends and otherwise as therein declared, namely: 1. "The company guarantee eight per cent. yearly to the extent of the preference stock, up to the year 1880, and over that

amount (to be divided rata." 2. bonds so take the share, with interest on receiving. The plaintiff shares, and but content by reason of of shares to recover back that the first ultra vires, that the interest and so possible were profits that the share that the Act authorized to cancel the share. Held, however, cover, for no conditions were valid, reference should be for preference he became a v. *Guelph L.*

The plaintiff terms of their real estate within five years, them, otherwise owner, or his equity of redemption mortgagor by provision against equitable estate the five years on whose default property. In against a sub- the title on the plaintiffs had from its acquisition form of conveyance acquired the rights of redemption but:—Held, the sale was sufficient of the purchase necessary to the purchaser who thereof should recited in the defendant. *London Co. v. Graham*

A conveyance empowered by only and not main, and the crown only.

370.—Q. B. I. Where, a co- to hold lands provision as to

amount (eight per cent.) the net dividends will be divided among all the shareholders pro rata." 2. "Should the holders of preference bonds so desire, the company binds itself to take the stock back during the year 1880, at par, with interest at eight per cent. per annum, on receiving six months' notice in writing, etc." The plaintiff subscribed for and was allotted five shares, amounting to \$5,000, which he paid up, but contending that the by-law was ultra vires by reason of the above conditions, and the issue of shares therefore void, brought an action to recover back the money paid therefor:—Held, that the first condition of the by-law was not ultra vires, as its proper construction was, not that the interest was to be paid at all events, and so possibly out of capital, but only if there were profits out of which it could be paid; but that the second condition was ultra vires, for that the Act neither expressly nor impliedly authorized the company to accept a surrender or cancel the shares, repaying the amount thereof:—Held, however, that the plaintiff could not recover, for notwithstanding one or both of the conditions were invalid, the shares themselves were valid, there being authority to issue preference shares, and the plaintiff having subscribed for preference shares, and having got them, he became a shareholder of the company. *Long v. Guelph Lumber Co.*, 31 C. P. 129.—C. P. D.

#### 4. To Hold Land.

The plaintiffs, a loan company, who, by the terms of their charter, were bound "to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them, otherwise it shall revert to the previous owner, or his heirs or assigns," acquired the equity of redemption in certain land from a mortgagor by deed, in which was contained a provision against the merger of the legal and equitable estates. By agreement made within the five years the plaintiffs sold to a purchaser, on whose default they resumed possession of the property. In an action for specific performance against a subsequent purchaser who objected to the title on the ground, among others, that the plaintiffs had not sold the land within five years from its acquisition: It was:—Held, that the form of conveyancing by which the plaintiffs acquired the land did not give them greater rights of retention than if they had foreclosed, but:—Held, that any bona fide agreement to sell was sufficient to prevent a forfeiture where the sale was not carried out through the default of the purchaser:—Held, also, that it was unnecessary to procure a release from the former purchaser whose contract and the determination thereof should, as a matter of conveyancing, be recited in the deed from the plaintiffs to defendant. *London and Canadian Loan and Agency Co. v. Graham*, 16 O. R. 329.—Boyd.

A conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void under the statutes of mortmain, and the lands can be forfeited by the crown only. *McDiarmid v. Hughes*, 16 O. R. 570.—Q. B. D.

Where a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond the

period, only the crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute. *Id.*

Semble, the Dominion parliament has power to enact that a license from the crown shall not be necessary to enable corporations to hold lands within the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license. *Id.*

#### 5. To Borrow Money.

Effect of mortgage not ratified by two-thirds of the shareholders of the company under R. S. C. c. 119, s. 37. See *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247.

#### 6. Changing Head Office.

The Act incorporating a company provided that the head office might be changed from Ottawa to such other place as might be determined by the shareholders at any one of the general meetings. At the general annual meeting a resolution was passed authorizing the directors to consummate arrangements for the removal of the head office from Ottawa to Toronto. The directors made the change, and the subsequent annual meetings were held at Toronto, at the first of which so held, the by-law referring to the place of holding the annual meetings was amended by substituting Toronto for Ottawa:—Held, that the change was effectually made. *Union Fire Ins. Co. v. O'Garra*; *Same Plaintiffs v. Shoolbred*, 4 O. R. 359.—Osler.

#### 7. Other Cases.

An incorporated company, by its charter, was authorized to carry on business in the management of real and personal property; guarantee rents thereof; to collect rents, etc.; procure loans, and to negotiate the sale and purchase of houses, mortgages, stocks, and other securities, "and generally to transact every description of commission and agency business, except the business of banking, and the issue of paper money or insurance."—Held, that this did not confer any power upon the company to discount notes guaranteed by their endorsement; neither had they the right to speculate in the purchase of mortgages or other securities, although they might have been justified in investing any surplus capital or accumulation of profits until the same was required. *Walmley v. Rent Guarantee Co.*, 29 Chy. 484.—Proudfoot.

Held, that 37 Vict. c. 103 (Dom.), which created a corporation with power to carry on definite kinds of business within the Dominion, was within the legislative competence of the Dominion parliament. The fact that the corporation chose to confine the exercise of its powers to one province and to local and provincial objects did not effect its status as a corporation or operate to render its original incorporation illegal as ultra vires the said parliament. *Colonial Building and Investment Ass'n. v. Attorney-General of Quebec*, 9 App. Cas. 157.

Held, that the corporation could not be prohibited generally from acting as such within the province, nor could it be restrained from doing specified acts in violation of provincial law upon a petition not directed and adapted to that purpose. *Id.*

See *Falkiner v. Grand Junction R. W. Co.*, 4 O. R. 350.

## X. CONTRACTS BY AND WITH.

### 1. Necessity for Seal.

To a declaration alleging that the plaintiffs entered into an agreement with the defendants to perform certain stone work, which they partly performed, and averring as a breach that the defendants had prevented them from carrying out and completing the work, whereby, etc., the defendants pleaded the plaintiffs were an association incorporated under R. S. O. (1877) c. 158, and that the agreement was not under the plaintiffs' seal:—Held, on demurrer that the plaintiffs being a trading corporation, enough was not shewn to make the absence of a seal fatal to the validity of the agreement. *Ontario Co-operative Stone Cutters' Association v. Clarke*, 31 C. P. 280.—Osler.

The plaintiffs were a company incorporated under C. S. C. c. 63, and 24 Vict. c. 19, for the manufacture and sale of cheese, etc. On the 10th of August, 1878, a written agreement was entered into between one C., the plaintiffs' secretary and salesman, and one M., on behalf, as was stated, of the plaintiffs and defendants respectively, and which was signed by C. and M., for the sale of the whole of the plaintiffs' July cheese, as also of their August, September, and October cheese, at prices named:—Held, that the plaintiffs being a trading corporation, and the contract one specially relating to the objects and purposes of the company, it was binding upon them, though not under seal. *Albert Cheese Co. v. Leeming*, 31 C. P. 272.—C. P. D.

Semble, that a contract made verbally with the president of defendant's company with the plaintiff engaging him for "the season," that is early in May, until sometime in November, as master to manage a steamer, might be binding, and that a nonsuit for the want of a corporate seal was properly set aside. *Ellis v. Midland R. W. Co.*, 7 A. R. 464.

Held, affirming the judgment of the court of appeal that the setting up of "the want of a seal" as a defence to an action on an assurance policy which had been treated by all parties as a valid policy was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and, therefore, the respondent was entitled to the relief prayed, as founded on the facts alleged in her equitable replication. *London Life Assurance Co. v. Wright*, 5 S. C. R. 466; 5 A. R. 218; 29 C. P. 221.

D., on the suggestion of R. and the Bank of O., that he should purchase certain lumber held by the bank as security for advances made to R., required a guarantee from the bank that the lumber should be satisfactorily culled and any deficiency paid for by the bank. The directors

of the bank thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. Their local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank," that the lumber should be satisfactorily culled previously to shipment:—Held, that no seal was required, and if the bank wished to repudiate it they should repay the money paid to them by D., for the lumber. *Dobell v. Ontario Bank*, 3 O. R. 299.—Proudfoot; 9 A. R. 484.

Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure:—Held, that their appointment of a solicitor need not be under the corporate seal. *Clarke v. Union Fire Ins. Co.—Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

Contracts with municipal corporations. *Silby v. Village of Dunnville*, 8 A. R. 524; *Lawrence v. Village of Lucknow*, 13 O. R. 421.

See *Cleaver v. North of Scotland Canadian Mortgage Co.*, 27 Chy. 508; *Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476, p. 264; *Canada Central R. W. Co. v. Murray*, 8 S. C. R. 313, p. 277; *Bank of Commerce v. Jenkins*, 16 O. R. 215, p. 115.

### 2. Other Cases.

To an action on the common counts brought by T. and W. M. against the C. C. R. Co. to recover money claimed to be due for fencing the line of C. C. railway, the C. C. R. Co. pleaded never indebted, and payment. The agreement under which the fencing was made is as follows:—"Memo. of fencing between Muskrat river, east, to Renfrew. T. and W. M. to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for \$1.25 per rod, company to furnish cars for lumber.

"(Signed) T. & W. M.  
A. B. F."

F. controlled nine-tenths of the stock, and publicly appeared to be and was understood to be, and acted as managing director or manager of the company, although he was at one time contractor for the building of the whole road. T. and W. M. built the fence and the C. C. R. Co. have had the benefit thereof ever since. The case was tried before Patterson, J., and a jury, and on the evidence, in answer to certain questions submitted by the judge, the jury found that T. and W. M., when they contracted, considered they were contracting with the company through F., and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments were made as money which the company owed, not money which they were paying to be charged to F. and a general verdict was found for T. and W. M. for \$12,218.51. On appeal to the Supreme Court of Canada:—Held, (affirming the judgment of the court below, 7 A. R. 640), that it was properly left to the jury to decide whether the work performed, of which the C. C. R. Co. received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract,

and that the ground defence; Rito senting, on dence that company, T tors, nor ev though the company w maintainabl Murray, 8 eal to Her Cas. 574.

The plain boats, docks up their busi in their chan thereafter in Navigation C by the defen stock of the money was t of the latter standing the fendants on of \$3,500 out of the m for shares i completion boats service an unexpected proceedings company we judgment of the defendan the purchase there had nev chase. The visional one tion of a new had taken pla tract of sale, upon the ver gation Co. (L

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In these car stock, an obje power to sue under 42 Vict but it was she receiver, and the Chancery id' arrears for these actions, deliver:—Held, able. Union Same Plainti Rgarty.—C.



and that the verdict could not be set aside on the ground of being against the weight of evidence; Ritchie, C. J., and Taschereau, J., dissenting, on the ground that there was no evidence that F. had any authority to bind the company, T. and W. M. being only sub-contractors, nor evidence of ratification. 2. That although the contract entered into by F. for the company was not under seal, the action was maintainable. *Canada Central R. W. Co. v. Murray*, 8 S. C. R. 313. Special leave to appeal to Her Majesty in Council refused, 8 App. Cas. 574.

The plaintiffs were the owners of certain boats, docks, etc., and being desirous of giving up their business proposed to sell all their rights in their charter, boats, etc., to a company to be thereafter incorporated as the "Thames River Navigation Co." The proposal was assented to by the defendants and others subscribing to the stock of the new company, and the purchase money was to have been paid out of the funds of the latter when formed. Upon this understanding the vessels were delivered to the defendants on behalf of all parties, and the sum of \$3,500 on account of such purchase was paid out of the money paid in by persons subscribing for shares in the new company. Before the completion of repairs necessary to render the boats serviceable, one of them was destroyed by an unexpected flood, in consequence of which, proceedings for the incorporation of the new company were abandoned:—Held, reversing the judgment of the court below, 9 O. R. 754, that the defendants were not liable for the balance of the purchase money, as the circumstances shewed there had never been a completed sale and purchase. The only contract proved, was a provisional one to take effect upon the incorporation of a new company, and the delivery which had taken place, was not in pursuance of a contract of sale, but simply to enable the repairs upon the vessels to be effected. *Thames Navigation Co. (Limited) v. Reid*, 13 A. R. 303.

**Liability of Mutual Insurance Company** composed of different branches for costs of solicitor for services rendered to one branch. See *Duff v. Canada Mutual Fire Ins. Co.*, 9 P. R. 292; 2 O. R. 560.

**Contracts with foreign corporations.** See *Canadian Pacific R. W. Co. v. Western Union Telegraph Co.*, 17 S. C. R. 151.

See *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. R. 476, p. 264.

## XL. ACTIONS BY.

In these cases which were actions for calls on stock, an objection was taken that there was no power to sue, because the company's license under 42 Vict. c. 25 (Ont.), had been revoked, but it was shewn that one B. had been appointed receiver, and was specially required by order of the Chancery Division to prosecute all members in arrears for calls; and that he had adopted these actions, and was prosecuting them as receiver:—Held, that the objection was not tenable. *Union Fire Ins. Co. v. Fitzsimmons*; *Same Plaintiffs v. Shields*, 32 C. P. 602.—*Ragarty*.—C. P. D.

Where certain shareholders in a company joined with the company as plaintiffs, as a precautionary measure merely in case it should transpire that their coplaintiffs, the company were not entitled or unwilling to sue, the court (Blake, V.C.) refused to allow a demurrer for want of equity, as the objection was purely of a formal nature. *City Light and Heating Co. of London v. Macfie*, 28 Chy. 363.

A demurrer to a bill filed by shareholders of an incorporated company, on behalf of themselves and all other shareholders except the defendants, in which the company were joined as coplaintiffs, attacking a transaction whereby all the shareholders including some of those whom the plaintiffs assumed to represent, received shares in the transaction sought to be impeached, was allowed. *Ib.*

The court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed. Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175.—Proudfoot.

A corporation has the same right as an individual to withdraw its name from litigation to which it has been made a party plaintiff, but of which it does not approve. *International Wrecking Co. v. Murphy*, 12 P. R. 423.—Street.

The company itself is the proper plaintiff in actions for injury to the corporate property, and such an action by shareholders alone, shewing no reason why the company has not instituted the proceedings, cannot be sustained. *Ib.*

But where the complaint was that a majority of the shareholders had obtained possession of the company's name and the control of its affairs, and were using it improperly for their own benefit, and causing injury to the company's property:—Held, that an action could be sustained in the name of one or more shareholders, on behalf of themselves and all others, except the defendants, against the company and the majority of the shareholders. *Ib.*

In an action by an incorporated educational institute for the removal of one of the trustees, who also acted as secretary, for alleged improper dealing with the corporate funds, judgment was given, but without any finding of wilful misconduct, directing such trustee's removal, on the ground that so much doubt was cast upon his dealings with the trust funds that it would not be proper to allow him to remain a member of the board. Such an action is maintainable without making the Attorney-General a party. *Wilberforce Educational Institute v. Holden*, 17 O. R. 439.—Rose.

Action by plaintiffs to recover the price of an implement manufactured by them. A winding-up order had previously been obtained against plaintiffs, and a liquidator appointed. An objection was taken at the trial after the evidence had been given, that the action should have been brought in the name of the liquidator and with





ing of four of the directors, constituting the majority, held after proceedings taken by the minority to disallow the illegal payments made to the president and secretary, and without proper notice to the minority of such meeting or its object, a resolution was passed ratifying the payments made to the secretary, and at an adjourned meeting, of which also the minority received no notice, by-laws were passed ratifying the payments made to the president and secretary:—Held, that the resolution and by-laws were invalid, and could not be confirmed by the shareholders, and an injunction was granted restraining the company from acting thereunder, or from holding a meeting of shareholders to ratify and confirm same. *Waddell v. Ontario Canning Co.*, 18 O. R. 41.—Robertson.

A justice of the peace cannot compel a corporation to appear before him nor can he bind them over to appear and answer to an indictment, and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them. *Re Chapman v. City of London*, 19 O. R. 33.—Robertson.

See *McSherry v. Commissioners of the Cobourg Town Trust*, 45 Q. B. 250, p. 238; *Walsley v. Rent Guarantee Co.*, 29 Chy. 484, p. 266; *Wilson v. Elina Life Ins. Co.*, 8 P. R. 131, *infra*; *Christopher v. Noxon*, 4 O. R. 672.

### XIII. AMALGAMATION OF COMPANIES.

#### 1. Generally.

See *Re Standard Fire Ins. Co.—Kelly's Case*, 12 A. R. 486, p. 246; *Nelles v. Ontario Investment Association*, 17 O. R. 129, p. 280.

### XIV. FOREIGN COMPANIES.

Liability of foreign corporations to municipal assessment. See *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552; *Phoenix Ins. Co. of London v. the City of Kingston*, 7 O. R. 343.

Service on a foreign insurance company doing business in Ontario. See *Wilson v. Elina Life Ins. Co.*, 8 P. R. 131.

Held, that Ontario Bank shares, though subscribed for at Montreal and at one time registered there, but transferred to Bowmanville during the testator's lifetime, and appearing in the stock register there only, were Ontario assets. *Bloomfield v. Brooke*, 8 P. R. 266.—Taylor, Master.

The locality of the forum of litigation determines whether a corporation is foreign or not. A contract executed in Ontario and delivered by the agent of the contractor to the contractee in New York is governed by the laws of Ontario. *Clarke v. Union Fire Ins. Co.*, 10 P. R. 313.—Hodgins, Master in Ordinary.

Leave was given to sign final judgment under Rule 80 O. J. Act (Con. Rule 739) against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and

liabilities in Ontario. *Plummer v. Lake Superior Native Copper Co.*, 10 P. R. 527.—Rose.

Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario. *Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527.—C. P. D.

Held, the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation. *Id.*

In 1869 the E. & N. A. Ry. Co. owning the road from St. John, N. B., westward to the United States boundary, made an agreement with the W. U. Tel. Co. giving the latter the exclusive right for ninety-nine years to construct and operate a line of telegraph over its road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree of the Equity Court of New Brunswick to the St. J. & M. Ry. Co., which company, in 1883, leased it to the N. B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Tel. Co. under the said agreement, and has been continued ever since without any new agreement being made with the St. J. & M. Ry. Co. or the N. B. Ry. Co. The W. U. Tel. Co. is an American company, incorporated by the State of New York, for the purpose of constructing and operating telegraph lines in the State. Its charter neither allows it to engage, or prohibits it from engaging, in business outside of the State. In 1888 the C. P. Ry. Co. completed a road from Montreal to St. John, a portion of it having running powers over the line of the N. B. Ry. Co., on which the W. U. Tel. Co. had constructed its telegraph line. The N. B. Ry. Co. having given permission to the C. P. R. to construct another telegraph line over the same road, the W. U. Tel. Co. applied for and obtained an injunction to prevent its being built. On appeal to the supreme Court of Canada from the decree of the Equity Court granting the injunction:—Held, 1. That the agreement made in 1869 between the E. & N. A. Ry. Co. and the W. U. Tel. Co. is binding on the present owners of the road. 2. That the contract made with the W. U. Tel. Co. was consistent with the purposes of its incorporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations. 3. The exclusive right granted to the W. U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade:—Held, per Gwynne, J., dissenting, that the comity of nations does not require the courts of this country to enforce, in favour of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land. *Canadian Pacific R. W. Co. v. Western Union Telegraph Co.*, 17 S. C. R. 151.

See *Merchants' Bank of Halifax v. Gillespie*, 10 S. C. R. 312, p. 283; *Prichard v. Standard Life Assurance Co.*, 7 O. R. 188; *In re Lake Superior Native Copper Co. (Limited)*, *Re Plummer*, 9 O. R. 277, pp. 291, 294; *Re Briton Medical and General Life Association*, 12 A. R. 441, p. 293.

## XV. WINDING-UP ACTS.

## 1. Application of.

An order for compulsory winding-up may be made under 41 Vict. c. 5, s. 5 (Ont.), notwithstanding a resolution had been passed by the shareholders of the company, providing for the voluntary winding-up of the affairs thereof under the supervision of the directors of the company, and a committee of shareholders appointed by them for that purpose. This not being an extraordinary resolution under section 4, sub-section 3, under the circumstances appearing in the judgment:—Held, that the discretion of the judge appealed from had not been improperly exercised. *Re Union Fire Ins. Co.*, 7 A. R. 783.

The Act applies to an Insurance Company incorporated by the Province of Ontario, notwithstanding that R. S. O. (1877) c. 160, provides a separate mode of distributing the deposit made by the company with the Provincial Treasurer. *Ib.*

Held, that 45 Vict. c. 23 (Dom.), is retroactive in the sense of applying to companies which have become insolvent before the date of that Act. *Wylt v. Hamilton Mutual Insurance Co.*, 6 O. R. 118.—Boyd.

The Steel Company of Canada (limited), incorporated in England under Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business in Nova Scotia, and having its principal place of business at Londonderry, Nova Scotia, was, by order of a judge, on the application of the respondents and with the consent of the company, ordered to be wound up under 45 Vict. c. 23 (Dom.). The appellants, creditors of the Steel Company, intervened, and objected to the granting of the winding-up order on the ground that 45 Vict. c. 23, was not applicable to the company:—Held, reversing the judgment of the Supreme Court of Nova Scotia (Fournier, J., dissenting), that 45 Vict. c. 23, was not applicable to such company. *Merchants' Bank of Halifax v. Gillespie*, 10 S. C. R. 312.

J. I., the appellant, gave to one Q. his note for \$6,000, which was endorsed to the Bank of P. E. I., the Union Bank of P. E. I. at the time held a cheque or draft, made by the Bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than \$200 less than its face value; being sued on the note he set off the amount of such cheque or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set-off and another party could succeed in a similar transaction, the Union Bank would get their claim against the Bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set-off, he could not do so, because he was a contributory within the meaning of the 76th section of the Canada Winding-up Act, and that the Act, which came into force on the 12th May, 1882, was retrospective as regards the endorsements made before it was passed, but within thirty

days before the commencement of the proceedings to wind up the affairs of the bank. The jury, under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest which the Supreme Court refused to disturb. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the court below, that appellant having purchased the draft in question for value and in good faith prior to 26th May, 1882, the Canada Winding-up Act, 45 Vict. c. 23, was not applicable, and therefore the appellant was entitled to the benefit of his set-off, and that the Winding-up Act was not retrospective as to this endorsement. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265.

Held, affirming the judgment of the Court below, 10 O. R. 489, that 47 Vict. c. 39, s. 2, is not limited in its application to companies being wound up at the date of 45 Vict. c. 23, it applies also to companies in liquidation, i.e., insolvent, though not technically being wound up, and against which proceedings are being taken to realize their assets and pay their debts. *Re Union Fire Ins. Co.*, 13 A. R. 288.

Sections 2 and 3 of the Winding-up Act 47 Vict. c. 39, providing for the winding-up of insolvent companies do not apply to banks, but an insolvent bank whether in process of liquidation or not at the time it is sought to bring it under the Winding-up Act, must be wound up with the preliminary proceedings provided for by sections 99-102 of 45 Vict. c. 23, as amended by 47 Vict. c. 39. Strong and Gwynne, JJ., dissenting. *Mott v. Bank of Nova Scotia*; *In re Bank of Liverpool*, 14 S. C. R. 650.

Held, that the Winding-up Act, 45 Vict. c. 23 (Dom.), is intra vires the Dominion Parliament, and is in the nature of an insolvency law, and applies to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in this case though incorporated under a Provincial charter, was subject to its provisions. *Re Eldorado Union Store Co.*, 6 Russ. & Geld. 514 followed; *Merchants' Bank of Halifax v. Gillespie*, 10 S. C. R. 312, distinguished. *Re Clarke and the Union Fire Ins. Co.* (2), 14 O. R. 618.—Boyd; 16 A. R. 161; *sub nom. Shoolbred v. Clarke*, 17 S. C. R. 265.

On a petition by certain shareholders of the company praying for a winding-up order under R. S. C. c. 129:—Held, that R. S. C. c. 129, like the Insolvent Act of 1875, which provided for the winding up of incorporated companies, is intended to be put into operation at the instance of creditors only. *In re Union Ranch Co. of Canada (Limited)*, 15 O. R. 307.—Boyd.

Semble, notwithstanding the Act, 52 Vict. c. 32 (Dom.), amending the Dominion Winding-up Act, the Ontario Winding-up Act, R. S. O. 1887, c. 183, does not apply to a company incorporated in Ontario where application to wind up is made on the ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy or insolvency. *Re Iron Clay-Brick Manufacturing Co.—Turner's Case*, 19 O. R. 113.—Robertson.

See *Macklin v. Dowling*, 19 O. R. 441.

It is a suit order appointing insolvent co-creditors, or members of the co-creditors, and the petitioner judge to be dissenting, technical and allowed to court. *Shoolbred v. Clarke*, 17 S. C. R. 265, 266.

Upon a co-dator in a winding-up to follow the English rule. The court also rule as that creditors should consider the what parties administration other things commendation. 298.—Boyd.

Where upon a winding-up Act, interests were bulk of the sheriff of London sided in the creditors' claims and assets were under voluntary liquidation of the Ontario Act, and the liquidator. *Re Northern Bank*, 644, followed.

Under section 129, R. S. C. and creditors at which the pointment of the creditors to the court for the satisfaction of the claim. 120, s. 70:—Held, they having realized the Central Bank.

Preference neither a creditor rule being that should be disallowed.

The intention of the Act is that it

## 2. Liquidators.

## (a) Appointment of.

It is a substantial objection to a Winding-up order appointing a liquidator to the estate of an insolvent company under 45 Vict. c. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by section 24 of the Act, and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew. Per Gwynne, J. dissenting, that such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this court. *Shoolbred v. Union Fire Ins. Co.*, 14 S. C. R. 624, reversing S. C., sub nom. *Re Union Fire Ins. Co.*, 13 A. R. 268, and S. C., sub nom. *Re Clarke v. Union Fire Ins. Co.*, *Shoolbred's Case*, 10 O. R. 489.

Upon a contest for the appointment of liquidator in a winding-up proceeding it is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Acts. The court abstains from laying down any such rule as that the nominee of the petitioning creditors should have a preference. The court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal will act upon their recommendation. *Re Alpha Oil Co.*, 12 P. R. 298.—Boyd.

Where upon an application under the Dominion Act, the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the sheriff of Lambton, and opposed the nominee of the petitioning creditors, and the sheriff resided in the county where the company's operations were carried on, and where all its books and assets were, was already de facto liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was otherwise well qualified for the position, the court appointed him liquidator. The rule as to costs suggested in *Re Northern Assam Tea Co.*, L. R. 5 Ch. App. 644, followed. *Id.*

Under sections 98 and 99 of the Winding-up Act, R. S. C. c. 120, meetings of shareholders and creditors, respectively, of a bank, were held, at which the shareholders recommended the appointment of C. G. and S. as liquidators, and the creditors C. G. and H. On the application to the court for the appointment of three liquidators it appeared that resort to the double liability of shareholders would be necessary to satisfy the claims of creditors under R. S. C. c. 120, s. 70:—Held, that the choice of the creditors, they having the chief and immediate concern in realizing the assets, should be adopted. *Re the Central Bank of Canada*, 5 O. R. 309.—Boyd.

Preference should be given to one who is neither a creditor nor a shareholder, the general rule being that it is desirable that liquidators should be disinterested persons. *Id.*

## (b) Remuneration.

The intention of section 28 of the Winding-up Act is that the remuneration is not necessarily

to be increased because three are to be paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and, if more than one, is distributed amongst them. *Re The Central Bank of Canada*, 15 O. R. 309.—Boyd.

## (c) Other Cases.

By 41 Vict. c. 58 (Dom.), the three plaintiffs were appointed "joint assignees" of the Canada Agricultural Insurance Company for the purpose of winding-up under 41 Vict. c. 21 (Dom.). Two of the plaintiffs, the third being unable to attend through illness, met on the 2nd of January, 1879, and made the 4th and 5th calls of ten per cent. each on the stock of the company:—Held, that the assignees must all join in making calls, and that these calls were therefore invalid:—Held, also, that a meeting of the three joint assignees on the 27th of January, after notice of the 4th and 5th calls had been mailed on the 13th of January, purporting to confirm the action of the two assignees of the 2nd of January, had not that effect. *Ross v. Machar*, 8 O. R. 417.—Q. B. D.

An undertaking by a provisional liquidator in possession to pay a landlord's claim to be paid preferentially for over due rent after service of notice under section 12 of 45 Vict. c. 23 (Dom.), is by sections 20 and 21 of that Act void, unless the permission of the court is first obtained. *Fuchs v. Hamilton Tribune Co.*, 10 P. R. 469.—Boyd.

Query, whether the liquidator of a company can object to the want of registration or other formal defects in a chattel mortgage as an execution creditor or subsequent mortgagee could do. *In re Raing Lake Lumber Co., Stewart, liquidator v. Union Bank of Lower Canada*, 15 A. R. 749.

In assigning to provincial courts or judges certain functions under the Winding-up Act, Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master. *Shoolbred v. Clarke—Re Union Fire Ins. Co.*, 17 S. C. R. 265; S. C., sub nom. *Re Clarke and The Union Fire Ins. Co.*, 16 A. R. 161.

## 3. Contributories.

Sections 70 and 77 of R. S. C. c. 120, must be read together, and make liable as contributories all those who hold shares at the time of the suspension of the bank, or who have held shares at any time within one month before the suspension. *In re Central Bank of Canada—Baines' Case*, 16 A. R. 237; 16 O. R. 293.

A shareholder who has fully paid up his shares in a company is a "contributory" within the meaning of section 5 of R. S. O. (1887), c. 183, so as to entitle him to initiate winding-up proceedings. *Re Macdonald and The Noxon Brothers' Manufacturing Co. (Limited), and R. S. O. (1887), c. 183*, 16 O. R. 368.—Ferguson.

H., having been placed on the list of contributories in the winding-up proceedings of the Central Bank, appealed on the ground that the transfer of his shares was a fraudulent transaction, in view of R. S. C. c. 120, s. 45, since the bank was trafficking in its own shares for the purpose of keeping up the appearance of bona fide sales, and so enhancing the market price of its shares, and took the appellant's notes in payment for his shares, undertaking not to enforce them, but to deliver them up upon a resale being effected, which transactions were ultra vires of the bank:—Held, that this was no defence as against the liquidators, who represented the creditors as well as the bank. *Re Central Bank—J. D. Henderson's Case*, 17 O. R. 110.—Robertson.

H. also appealed as to certain of the shares upon the ground that he had acquired them within one month before the suspension of the bank, and also on the ground that those who had transferred these shares to him should also have been placed on the list of contributories, though they themselves had only acquired the shares within the said month:—Held, that H. was rightly on the list as to these shares, but that his transfers should also be placed upon it, and the report was referred back to the master for this purpose, although the liquidators had not excepted to the report. Liquidators are officers of the court, and the matter being brought to the notice of the court on the appeal, it was the duty of the court to protect the interest of the creditors and all parties concerned, and to see that all were charged who were legally chargeable. *Ib.*

A contributory of an insolvent company, who is also a creditor, cannot set off the debt due to him by the company against calls made in the course of winding-up proceedings in respect of the double liability imposed by the Banking Act, R. S. C., c. 120. *Liquidators of the Maritime Bank v. Troop*, 16 S. C. R. 456.

See *In re Central Bank of Canada—Baines' Case*, 16 A. R. 237, p. 256.

See Subhead IV. 1, p. 241.

#### 4. Debts of Company Transferred to Contributories.

By sections 75 and 76 of 45 Vict. c. 23, it is provided that if a debt due or owing by the company has been transferred within thirty days next before the commencement of the winding-up under that Act, or at any time afterwards, to a contributory who knows, or has probable cause for believing, the company to be unable to meet its engagements or to be in contemplation of insolvency under the Act, for the purpose of enabling such contributory to set up by way of compensation or set-off the claim so transferred, such debt cannot be set up by way of compensation or set-off against the claim upon such contributory:—Held, that the sections in question only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265.

Y. in making a deposit on a Government contract, gave a marked cheque on the Central Bank, in which he was a shareholder, and which cheque was subsequently cancelled and a deposit

receipt issued by the bank, substituted therefor. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation on 3rd December, 1887, and on 20th January, 1888, Y. having been required by the government to take up the deposit receipt and replace it with other security, took an assignment of the receipt and notified the bank. On being threatened with a suit on the note, he filed a petition asking for leave to set up the deposit receipt against the note as a set-off:—Held, following the last case, that Y. as maker of the note to the bank was a mere debtor and not a contributory and that although also a shareholder, and so liable as a contributory, he was not a contributory, quoad the debt which arose out of an independent transaction and for that reason section 73 of R. S. C. c. 129 did not apply. *In re The Central Bank of Canada—York's Case*, 15 O. R. 625.—Boyle.

Held, that the prohibition in the Act against acquiring debts for the purpose of set-off is limited to the case of contributories: as to debtors the law of set-off as administered by the courts is applicable as if the company was a going concern and following *Re The Moseley, etc., Coke Co., Barrett's Case*, 4 D. G. J. & S. 756, that the right of set-off virtually arose not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, because the engagement was to give security to the satisfaction of the Government and in taking up the deposit receipt and supplying better security Y. was only fulfilling that which he was obliged to do by a prior bona fide engagement. *Ib.*

#### 5. Payments by Companies when Insolvent.

The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 22nd, and an order made December 5th. R. & G. H. purchased a stock of hardware held by the bank on which they owed \$14,000 at the time of the suspension. The bank wishing to close the account sold the balance of the stock to A. H. & Co., for \$5,700, and agreed to accept in payment cheques of the defendant drawn on his deposit account, and which were drawn on and accepted by the bank on October 31st. For these cheques A. H. & Co. gave their acceptances which were duly paid. Before the stock was delivered R. & G. H. settled the balance of their debt to the bank. In an action by the liquidators of the bank against the defendant to recover back the amount thus paid on the defendant's cheques, under 45 Vict. c. 23, s. 75 (Dom.), it was:—Held, that the plaintiff could not recover, for the defendant had received no valuable consideration from the bank which he should be ordered to repay. *Exchange Bank of Canada v. Stinson*, 8 O. R. 867.—Boyle.

The defendant owed A. H. & Co. a debt, and gave his cheque on the bank for \$92 in part payment thereof, which the bank accepted from A. H. & Co. on October 23rd, in retiring an overdue bill:—Held, that the amount could not be recovered back. *Ib.*

On November 19th, defendant sold his cheque for \$320 to his uncle, C., who was the local head of the bank, which cheque was negotiated and

accepted by winding-up. Held, that, transacted money was the defendant's and meaning.

The bank 1883. Winding-up November 22nd. 5th. The debt the bank drew 1st, on their note to D., a debt, the following mortgage secured on October 3rd about October 3rd not given up presented to when it was ing notes. In bank against a party, to receive cheque as had the winding and being an upon the fact bank to the therefore was 23, s. 75 (Dom. Council, 8 O.

C. who was defendants' therefor on notes in suit the defendant the amount of payment und

On November suspension of sufficient fund upon it payable in the Dominion upon it, and it in the winding presented it for however, the ment. On November Bank marked count and on the amount of liquidators of subsequently the cheque, the claim upon it allowed it. dividend had filed a claim C. 1887. The M for filing claim as to al only subject there was no that the allow justice, and re Central Bank credited the a charged the a that at that ti creditor of D. meaning of any



accepted by the bank on November 23rd, (after winding-up proceedings had commenced):—Held, that, although it probably was an invalid transaction as far as the person who received the money was concerned, there was no payment to the defendant of anything within the scope and meaning of section 75 of the Act. *Ib.*

The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 23rd, and an order made December 5th. The defendants C. & S. being depositors in the bank drew a cheque for \$4,000 on November 1st, on their deposit account, which was given to D., a debtor of the bank on notes maturing the following December and January. D. gave mortgage security to defendants for the cheque on October 31st. The arrangement was all made about October 5th, although the security was not given until the 31st, and the cheque was not presented to the bank until November 23rd, when it was accepted as payment of the maturing notes. In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid on the cheque as having been paid to defendants after the winding-up proceedings were commenced, and being an unjust preference, etc.:—Held, that upon the facts there was no payment by the bank to the defendants, and that the transaction therefore was not within the statute 45 Vict. c. 23, s. 75 (Dom.) *Exchange Bank of Canada v. Counsell*, 8 O. R. 673.—Boyd.

C. who was being sued by the bank, obtained defendants' cheque for \$2,118, giving security therefor on November 21st, and retired the notes in suit on November 23rd:—Held, that the defendants could not be ordered to repay the amount of the cheque, as being a wrongful payment under the Act. *Ib.*

On November 15th, 1887, the day before the suspension of the Central Bank, one D., having sufficient funds to his credit, drew a cheque upon it payable to C., who deposited the same in the Dominion Bank, and obtained an advance upon it, and the Dominion Bank claimed upon it in the winding up proceedings, having presented it for payment on November 17th, when, however, the Central Bank had suspended payment. On November 23rd, 1887, the Central Bank marked the cheque good, debiting D.'s account and crediting the Dominion Bank with the amount thereof. Afterwards, however, the liquidators claiming the right to set off certain subsequently accruing liabilities of D. against the cheque, the Dominion Bank withdrew their claim upon it, and the Master in Ordinary disallowed it. Subsequently, and after the first dividend had been paid, C. heard of this, and filed a claim on the cheque, on September 13th, 1887. The Master, however, held that the time for filing claims having elapsed, he had a discretion as to allowing the claim, and allowed it only subject to the said set off:—Held, that there was no right to set off as claimed, and that the allowance of the claim was ex debito justitiae, and not discretionary. The fact of the Central Bank having accepted the cheque, and credited the amount to the Dominion Bank, and charged the amount to D., shewed conclusively that at that time the Central Bank was not a creditor of D.: nor did the case come within the meaning of any of the clauses in the Winding-up

Act relating to fraudulent preferences. *Re Central Bank.—Cayley's Case*, 17 O. R. 122.—Robertson.

#### 6. Priority of Claims of the Crown.

Priority of the Crown over other creditors for payment of moneys deposited in a bank that has become insolvent. See *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1; *Liquidators of the Maritime Bank v. Regina*, 17 S. C. R. 657.

#### 7. Practice.

##### (a) Powers of Judges and Masters.

In proceeding under a judgment for the winding-up of a company, the master has the same jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding. *Clarke v. Union Fire Ins. Co.—Coston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

The Dominion Insolvent Companies' Act, 45 Vict. c. 23, as amended by 47 Vict. c. 39, authorizes the Master in Chambers, the Master in Ordinary, or any local master or referee to exercise the powers conferred upon the court in Ontario for the purpose of winding-up insolvent companies. The Master in Chambers, made an order for the winding-up of an insolvent company, and referred it to the Master in Ordinary to settle the list of contributories, take all necessary accounts, make all necessary inquiries and reports, and generally to do all necessary acts, matters, and things for the winding-up of the business of the said company:—Held, (1) that the powers vested in the judicial officers named in the Act were conferred upon each of them as persons designata, which they were not authorized to delegate to others or to each other; (2) that the reference was not authorized by the Judicature Act or Rules, or the prior Acts and Rules conferring jurisdiction upon the former judicial officers in Chambers; (3) that the jurisdiction of the Master in Ordinary under the order of reference would be a delegated jurisdiction as the substitute or deputy of the Master in Chambers, and not the co-ordinate jurisdiction conferred upon his office by the Act; (4) that the order of reference was not therefore warranted by the Dominion or Provincial Acts, and could not be proceeded on. *In re Queen City Refining Co.*, 10 P. R. 415.—Hodgins, *Master in Ordinary*.

It is not competent for the Master in Chambers to make an order under section 77 of 45 Vict. c. 23 (Dom.), as amended by 47 Vict. c. 39, s. 5 (Dom.), referring the winding-up to the Master in Ordinary. That may be done by a judge, as in conformity with the usual course of proceedings in other causes and matters, but it is not the practice, save in one or two exceptional cases, to have references ordered by the Master in Chambers to the Master in Ordinary. The intention of the Act is that the Master in Chambers, or Local Master, or Master in Ordinary may grant a winding-up order, and conduct all the proceedings necessary therefor in his own office and before himself as a judicial officer. *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485.—Boyd.



When proceeding under 45 Vict. c. 23, s. 24 (Dom.), as amended by 47 Vict. c. 39, s. 4 (Dom.), the court has power to refer the appointment of a liquidator to the master. *Re Clarke v. Union Fire Ins. Co.*, 10 O. R. 489.—Proudfoot.

See *Clarke v. Union Fire Ins. Co.*—*Caston's Case*, 10 P. R. 339, p. 292; *Re Bolt and Iron Co.*—*Livingston's Case*, 14 O. R. 211, 16 A. R. 397, p. 267; *Re Central Bank*—*Cayley's Case*, 17 O. R. 122, p. 290.

#### (b) Appeals.

An appeal under the Act respecting the winding up of Joint Stock Companies, 41 Vict. c. 5, s. 27 (Ont.), cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from. *Re Union Fire Ins. Co.*, 7 A. R. 783.

Where a bond good in form with proper sureties was filed with the clerk of the County Court, on the last of the eight days, though not allowed by the judge:—Held, to be within the words, "given security before a judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance risks being deprived of his right of appeal in the event of the bond proving defective. *Ib.*

A winding-up order under 45 Vict. c. 23 (Dom.), winding up a foreign company doing business in Ontario, made by one judge, will not be set aside by another. An application for that purpose must be made to the Divisional Court. *In re Lake Superior Native Copper Co. (Limited)*—*Re Plummer*, 9 O. R. 277.—Proudfoot.

An order was made by Proudfoot, J., in the Chancery Division of the High Court directing the winding up under 45 Vict. c. 23 (Dom.), 1882, of a fire insurance company incorporated by the legislature of Ontario, and against which proceedings had previously been taken under R. S. O. c. 160, and the "Joint Stock Companies Winding-up Act, (Ont.)." This order appointed the receiver in the former proceedings interim liquidator, etc., and further referred it to the master to appoint a liquidator, etc., and to settle the list of contributories; and further provided that certain accounts and inquiries which had been made under the previous proceedings, should be incorporated with and used in the winding-up proceedings under the Dominion statute, in so far as they could properly be made applicable:—Held, that this was an order from which an appeal would lie under section 78 of the Act of 1882. *Re Union Fire Ins. Co.*, 13 A. R. 268.

The trial of a petition before a judge at the assizes, praying that a liquidator might be ordered to deliver up certain lumber claimed by a bank is not the trial of an action, and therefore no appeal lies to the Divisional Court. *Re Rainy Lake Lumber Co.*, 12 P. R. 27.—Chy. D.

#### (c) Costs.

Under an order for winding-up an insolvent company under 45 Vict. c. 23, (Dom.), the proceedings to enforce the liability of shareholders must be taken by the liquidators, and not by the petitioner for the winding-up order. When

proceedings are so taken by the liquidator, and are unsuccessful, costs may be awarded against him personally, leaving him to apply to be allowed such costs out of the assets of the company. *Re Bolt and Iron Co.*—*Hovenden's Case*, 10 P. R. 434.—Hodgins, Master in Ordinary.

One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, where it appeared that S., although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything would be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified him as to costs. *Re Rainy Lake Lumber Co.*, 11 P. R. 314.—Hodgins, Master in Ordinary.

In proceeding in a judgment for winding-up a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him which the master referred to one of the taxing officers to tax:—Held, that the master had authority to direct such reference. *Clarke v. Union Fire Ins. Co.*—*Caston's Case*, 10 P. R. 339.—Hodgins, Master in Ordinary.

On such a reference the taxing officer gives his opinion as to whether the fees and charges claimed should be allowed or disallowed, and on that opinion the master makes his adjudication. *Ib.*

The taxing officer has a discretion as to the attendance of parties claiming a right to attend at such taxation, and his discretion will not be lightly interfered with. His allocatur is sufficient proof that the business charged for was done by the solicitor. *Ib.*

The rule requiring special circumstances to warrant the reopening or taxation of a bill of costs after twelve months does not apply where the bill has been delivered after the company has been ordered to be wound up. *Ib.*

#### (d) Other Cases.

The Chancery practice in sale cases applies to the sales under the Dominion Insolvent Companies' Act; and under such practice it is usual before offering property for sale to have an inquiry whether a sale by auction, or under private contract, would be the most advantageous to the estate. When a sale by private contract is directed, an affidavit of the actual value of the property should be produced, so that such value may be compared with the price offered. *Re Bolt and Iron Co.*, 10 P. R. 437.—Hodgins, Master in Ordinary.

It is preferable to have the proceedings under an order for winding up a company under 45 Vict. c. 23 (Dom.), conducted by solicitors who are totally unconnected with the company to be wound up. *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485.—Boyd.

Under the facts stated in the report an order having been obtained in chambers by one creditor for winding up a company, the conduct of the proceedings was given to three creditors who had also applied for such order. *Ib.*

The court assets to be affecting their bringing their office, which ings at law. *Caston's Case in Ordinary.*

Direction also liquidat v. Donnelly,

Canadian bation of the foreign corpo under 31 Vi (Dom.), the that they we withstanding company wer *Re Briton M. (Limited)* (2),

Held, Burt ing-up order c. 129) having pointed by the might proper. *Clarke and TH*

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The court will not allow its administration of assets to be interfered with by other proceedings, affecting the estate; and creditors of such estate bring their rights with them into the master's office, which the court substitutes for proceedings at law. *Clarke v. Union Fire Ins. Co.—Coston's Case*, 10 P. R. 339.—Hodgins, Master in Ordinary.

Direction of writ of replevin to sheriff who is also liquidator of plaintiffs. See *Alpha Oil Co. v. Donnelly*, 12 P. R. 515.

Canadian policy holders petitioned for distribution of the deposit made by this company, a foreign corporation, with the minister of finance under 31 Vict. c. 48 (Dom.), and 34 Vict. c. 9 (Dom.), the company being insolvent:—Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English courts. *Re Briton Medical and General Life Association (Limited)* (2), 12 O. R. 441.—Proudfoot.

Held, Burton, J.A., dissenting, that a winding-up order under 45 Vict. c. 3 (Dom.), (R. S. C. c. 129) having been made, and the liquidator appointed by the judge, the subsequent proceedings might properly be referred to the master. *In re Clarke and The Union Fire Ins. Co.*, 16 A. R. 161.

See *Shoolbred v. Clarke*, 17 S. C. R. 265, p. 286.

### 8. Other Cases.

The winding up of a company under 45 Vict. c. 23 (Dom.), commences from the time of the service of the notice under section 12, and therefore, under section 69, a landlord's claim to be paid preferentially for overdue rent after such service is invalid. An undertaking by a provisional liquidator in possession to pay such a claim is by sections 20 and 21 void unless the permission of the court is first obtained. *Fuchs v. Hamilton Tribune Co.*, 10 P. R. 409.—Boyd.

The liquidator of an insolvent company brought in for approval an agreement with certain parties for the sale to them of its assets at a price equal to twenty-five cents on the dollar of the claims of the creditors of the company "as may be admitted or adjudicated," in addition to the cost of the liquidation proceedings to be taxed by the taxing officer, and the remuneration of the liquidator to be settled by the master. There was no mode of admitting or adjudicating on such claims provided in the agreement. The agreement was opposed by certain creditors, and thereupon the proposed purchasers withdrew from it:—Held, 1. That if the creditors' claims were to be admitted by and between the parties the agreement was conditional, and the purchasers by withdrawing before ascertainment left the agreement imperfect. 2. That by not providing a mode of admitting or adjudicating upon the creditors' claims, the agreement was ambiguous, and parol evidence would have to be adduced to explain it. 3. That for these reasons the agreement was incapable of being enforced, and could not be approved:—Quære, whether an agreement to purchase the assets of a company at a certain rate in the dollar of the ascertained claims of the creditors of such company would be valid. *Re Bolt and Iron Co.*, 10 P. R. 437.—Hodgins, Master in Ordinary.

After a winding-up order had been made P., a resident of Ontario, brought an action against the company in the state of Michigan, with a view to attaching a steamer wintering there, which was the property of the company. It was shewn that representations that the company was perfectly solvent had been made by both the secretary and managing director to P., and P. swore that but for these representations he would have taken proceedings before he did, which might have enabled him to obtain a judgment before the winding-up order was made. In an action for an injunction to restrain P. from proceeding with his action in Michigan, in which it was shewn that other creditors of the company, who were residents of the United States and so not within the jurisdiction of the court, were also proceeding against the steamer, it was:—Held, that this case could not be distinguished in principle from *Ex parte Railway Steel and Plant Co.*—In *re Taylor*, 8 Chy. D. 183, and the continuance of the injunction, which had been granted *ex parte*, was refused. *In re Lake Superior Native Copper Co. (Limited)*—*Re Plummer*, 9 O. R. 277.—Proudfoot.

C. F. S. applied for an order for the winding up of the B. company under 45 Vict. c. 23 (Dom.), and amending Acts, and as evidence of the insolvency of the company shewed that, being entitled to the beneficial interest in a certain policy on the life of her deceased husband, she had demanded payment thereof from the company, but it had been refused; that the suspension of the company had been announced in the papers, and that the manager of the head office in Canada had stated that he was instructed from the head office in England not to make any payments on behalf of the company. It appeared, however, that the policy provided for payment in three months after proof of the death of the insured had been received by the company, while the above demand for payment was made a fortnight after the death, and no other demand had ever been made:—Held, that the debt was not due when the demand was made, and therefore nonpayment was not evidence of insolvency within the meaning of 45 Vict. c. 23, ss. 9, 10, 11 (Dom.), nor would the fact that the company had not paid claims amount to an acknowledgment of insolvency within section 9 (d) of that Act, nor otherwise was there sufficient evidence here of the insolvency of the company, and the petition must be dismissed:—Held, also, that as a matter of pleading, if it had been intended to rely upon the acknowledgment of insolvency, it should have been stated in the petition. *In re Briton Medical and General Life Association (Limited)*, 11 O. R. 478.—Proudfoot.

Semble, that even if a general manager of a company positively agreed that any winding-up proceeding that should be necessary should be taken in Ontario rather than elsewhere, this would not bind the company, for the business of the manager is to manage a going concern. It is no part of his duty nor within his power to arrange about putting an end to it. 16.

Order by Scotch court granted in proceedings for winding-up the plaintiff company, ordering defendant, the officer of the court, to deliver up certain books, etc., and in case of default authorizing the liquidator to take proceedings

against him in the courts of Ontario. See *British Canadian Lumbering and Timber Co. v. Grant*, 12 P. R. 301.

Preference of debts due the Crown over debts due to the subject. See *Clarkson v. Attorney-General of Ontario*, 15 O. R. 632.

Where the shares which had been transferred to one placed on the list of contributories had been previously held by the cashier of the bank in trust, as alleged, for the bank, which it was objected was thus trafficking in its own shares:—Held, that even if the cashier did hold the shares in trust for the directors of the bank, this would not be necessarily illegal, as he might have such shares, under section 45 of the Banking Act, as security for overdue debts; and, besides, this was a matter which, though it might give the appellant a right to rescind during the currency of the banking institution, became of no moment after the rights of creditors represented by the liquidators arose. The matter was not an absolute nullity, but, at most, one which the shareholders could waive as voidable, and it became, by the suspension, of unimpeachable validity as between the appellant and the liquidators. *In re Central Bank of Canada—Baines' Case—Nasmith's Case*, 16 O. R. 293.—Boyd.

See *Briton Medical and General Life Association, (Limited)* (2), 12 O. R. 441.

### COMPENSATION.

- I. DAMAGES GENERALLY—See DAMAGES.
- II. FOR LANDS TAKEN OR INJURED.
  1. *By Government*—See CROWN.
  2. *By Municipalities*—See MUNICIPAL CORPORATIONS.
  3. *By Railways*—See RAILWAYS AND RAILWAY COMPANIES.
- III. FOR IMPROVEMENTS—See IMPROVEMENTS ON LAND.
- IV. FOR INJURIES—See NEGLIGENCE.
- V. IN ACTIONS FOR SPECIFIC PERFORMANCE—See SPECIFIC PERFORMANCE.
- VI. ON SALES OF LAND—See SALE OF LAND—SPECIFIC PERFORMANCE.
- VII. FOR USE OF WORKS AND IMPROVEMENTS IN STREAMS—See WATER AND WATER COURSES.
- VIII. TO AGENTS—See PRINCIPAL AND AGENT.
- IX. TO EXECUTORS—See EXECUTORS AND ADMINISTRATORS.
- X. TO TRUSTEES—See TRUSTS AND TRUSTEES.

### COMPOSITION.

See BANKRUPTCY AND INSOLVENCY.

### COMPOUNDING.

See COMPROMISING.

### COMPROMISING.

- I. CRIMINAL OFFENCES, 296.
- II. ACTIONS—See ACTION—SOLICITOR.

#### I. CRIMINAL OFFENCES.

The defendant R. having been charged with misapplying fines paid into his hands as a justice of the peace, and proceedings instituted against him in respect thereof, the plaintiff, pending an investigation of the charge, volunteered his aid to assist R. in affecting a settlement of the amount claimed by the municipality, which he undertook to discharge upon the defendant R. giving his promissory note for the amount, indorsed by his wife. The plaintiff thereupon settled the amount claimed by giving his note therefor, which he alleged he had subsequently paid, and the defendants joined in a promissory note in the manner proposed by the plaintiff.—Held, affirming the judgment of the court below, 2 O. R. 25, that the transaction in effect amounted to a compromise of a criminal charge, and therefore that plaintiff was not entitled to recover on the note given by the defendant. *Bell v. Riddell*, 10 A. R. 544.

Reference of indictment and all matters in difference to arbitration. See *Township of Hungerford v. Lattimer*, 13 A. R. 315.

S., a trader in Yarmouth, N. S., had a number of creditors in Montreal. J., one of such creditors, preferred a criminal charge against S., sent a detective to Yarmouth with a warrant, caused such warrant to be indorsed by a local magistrate and had S. brought to Montreal, when the other creditors there issued writs of *capias* for their respective claims. The father of S. came to Montreal and in consideration of the release of S. on both the civil and criminal charges, transferred all his property for the benefit of the Montreal creditors, and S. was released from gaol having given his own recognizance to appear on the criminal charge. In the settlement to the claims of the creditors was added the costs of both the civil and criminal suits. In a suit to set aside the transfer as being obtained by duress and to stifle the criminal prosecution, the evidence showed that the creditors, in taking the proceedings they did, expected to obtain the security of the friends of S.:—Held, affirming the judgment of the court below, that the nature of the proceedings and the evidence clearly showed that the criminal process was only used for the purpose of getting S. to Montreal to enable the creditors to put pressure on him, in order to get their claims paid or secured, and the transfer made by the father under such circumstances was void. *Shorey v. Jones*, 15 S. C. R. 398.

### COMPULSORY REFERENCE.

See ARBITRATION AND AWARD.

### COMPUTATION OF AMOUNT DUE.

See INTEREST ON MONEY.

**COMPUTATION OF TIME.***See TIME.***CONDITIONAL CONTRACT.***See SALE OF GOODS—SPECIFIC PERFORMANCE.***CONDITIONS.**

- I. IN CONTRACTS—*See CONTRACT.*
- II. IN DEEDS—*See DEED.*
- III. IN POLICIES—*See INSURANCE.*
- IV. IN SALE OF LANDS.
  1. *By Railway Companies—See RAILWAYS AND RAILWAY COMPANIES.*
  2. *By the Court—See SALE OF LAND BY ORDER OF THE COURT.*
- V. IN WILLS—*See WILL.*

**CONFESSION OF JUDGMENT.***See FRAUDULENT JUDGMENT.***CONFLICT OF CASES.***See COURTS.***CONFUSION OF PROPERTY.**

*See Oliver v. Newhouse, 32 C. P. 90; Smith v. Merchants' Bank, 28 Chy. 629; 8 A. R. 15; McDonald v. Lane, 7 S. C. R. 462.*

**CONSIDERATION.**

- I. IN BILLS OR NOTES—*See BILLS OF EXCHANGE AND PROMISSORY NOTES.*
- II. IN BILLS OF SALE OR CHATTEL MORTGAGES—*See BILLS OF SALE AND CHATTEL MORTGAGES.*
- III. IN CONTRACTS—*See CONTRACT—GUARANTEE AND INDEMNITY.*
- IV. IN DEEDS—*See DEED.*
- V. INADEQUACY OF—*See FRAUD AND MISREPRESENTATION.*

**CONSOLIDATING ACTIONS.***See PRACTICE.***CONSOLIDATION OF MORTGAGES.***See MORTGAGE.***CONSPIRACY.***See CRIMINAL LAW.*

By deputy returning officer and agent of candidate to interfere with the franchise of voters. *See Soulanges Election—Cholette v. Bain, 10 S. C. R. 652.*

**CONSTABLE.**

In an action for malicious arrest the jury found a general verdict for the plaintiff, with \$200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute R. S. O. (1877), c. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and the court were of opinion under the facts, set out in the case, that there was no evidence on which the special finding of the jury could be supported:—Held, that the nonsuit must be set aside, and judgment entered for the plaintiff, with \$200 damages as assessed. If the statute has not been pleaded honest belief is no defence, if there existed no reasonable ground for such belief. *McKay v. Cummings, 6 O. R. 400.—C. F. D.*

Liability in replevin for improperly impounding sheep. Notice of action. *See Ibbotson v. Henry, 8 O. R. 625.*

The plaintiffs appointed the defendant chief of police of the town of Stratford, at a named salary, but stipulated that he should act as county constable within the town only, and account for and pay over to the plaintiffs all fees received by him from the county as a reward for services performed by him as a county constable:—Held, that under 5 and 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, the agreement to account for such fees was invalid. *Town of Stratford v. Wilson, 8 O. R. 104.—Rose.*

Quere, whether the plaintiffs, or the Board of Police Commissioners, had the power to appoint the defendant; and whether, apart from the statutes above mentioned, it was not ultra vires the plaintiffs to bargain with the defendant for the accounting to them for the fees of another office not under their control. *Ib.*

L., the constable to whom the coroner delivered a summons for the jury was at the inquest sworn in as one of the jury, and was sworn and gave evidence as a witness:—Held, that the fact of L. being such constable did not preclude him from being on the jury, nor did either of such positions preclude him from giving evidence. *Regina v. Winegarner, 17 O. R. 208.—C. P. D.*

Liability in trespass for unjustifiable handcuffing. *See Hamilton v. Massie, 18 O. R. 585.*

Arrest by constable under defective warrant. *See Regina v. King, 18 O. R. 566.*





have the insurance money expended in rebuilding the burned buildings is not merely of local application, but extends to this province and was applicable to the present case. *Carr v. Fire Assurance Association*, 14 O. R. 487.—C. P. D.

Held, that section 11 of 26 Geo. II. c. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license, without the consent of parent or guardian, was absolutely void, is not in force in this province. *Lavelle v. Chamberlain*, 18 O. R. 296.—Boyd.

This action was begun in March, 1887, to recover \$220,000 from the defendants. The defendants having become subject to proceedings in bankruptcy, the plaintiffs presented their claim and lodged it with the assignee in bankruptcy in England in September, 1887. The judge in bankruptcy in England made an order enjoining the plaintiffs from proceeding with this action in the High Court of Justice for Ontario; and subsequently an order was made in this action by the Master in Chambers staying the proceedings for ever. Quere, whether there was power under the English Bankruptcy Act, 1883, to grant the injunction referred to? But Held, that there was power in this court to make the order, either under section 10 of the English Act, or by reason of the equity of the case and the power of the court to administer that equity, and the order of the Master in Chambers staying proceedings was affirmed. *Howell v. Dominion of Canada Oils Refinery Co.*, 37 Q. B. 484; *Regina v. College of Physicians and Surgeons of Ontario*, 44 Q. B. 564; *Ellis v. McHenry*, L. R. 6 C. P. 228, specially referred to. *Maritime Bank v. Stewart*, 13 P. R. 86.—Rose. *Id.*, 262.—Q. B. D. *S. C.*, *Id.* 491.—C. of A.

#### IV. BRITISH NORTH AMERICA ACT, 1867.

##### 1. Generally.

The plaintiff, being the holder of a debenture issued by the B. & O. Railway Co. under 23 Vict. c. 109, sued thereon. By the 27 Vict. c. 57, the railway company were authorized to issue preferential bonds, and to execute a mortgage to a trustee to secure payment thereof. The railway, being at the time of confederation a local work, the 31 Vict. c. 44 (Ont.) was passed, which recited that the trustee was in possession and about to foreclose the mortgage, and amongst other things, directed that the debentures (therein called ordinary bonds) should be converted into stock at a certain rate on the dollar; and that the holders thereof should have no other claim on the company than for conversion of their debentures into stock. By the 41 Vict. c. 36 (Dom.), the B. & O. Railway Co. and the defendant company were amalgamated. The defendants set up that their liability on the debentures in question was extinguished by the 31 Vict. c. 44 (Ont.), and that they were ready and willing to take the debentures in exchange for reduced stock thereunder. Third replication that the Act was not binding because it was a private Act, and the plaintiff was not named therein, nor a petitioner therefor, nor were his rights specially taken away thereby. Fourth replication, that the Act was ultra vires, because the debenture was payable in London, England, and was there domiciliated, and the holder resided there at the

time of the passing of the Act, beyond the jurisdiction of the Ontario legislature:—Held, on demurrer, third replication bad; for, though the Ontario Act was in the nature of a private Act, it sufficiently referred to the plaintiff by referring to the class of bondholders to which he belonged, and that he was therefore bound thereby:—Held, also, fourth replication bad, for the local legislatures were not restricted by the decree "property and civil rights in the province" to legislation respecting bonds held therein, and that where debts or other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of the local legislature, such debts may be dealt with by subsequent Acts of the same legislature, notwithstanding that by a fiction of law they may be domiciled out of the province. *Jones v. Canada Central R. W. Co.*, 46 Q. B. 250.—Osler.

The term "provincial objects" in the B. N. A. Act refers to local objects within a province, in contradistinction to objects which are common to all provinces in their collective or Dominion quality. *Clarke v. Union Fire Ins. Co.*, 10 P. R. 313.—Hodgins, *Master in Ordinary*.

Per Patterson, J.A.—The legislation of the Dominion Parliament forbidding the defendants contracting against liability for their own negligence is not ultra vires. *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162.

Held, that in No. 13 of section 92 the words "property and civil rights in the province" include rights arising from contract (which are not in express terms included under section 91), and are not limited to such rights only as flow from the law, e. g., the status of persons. *Citizens Ins. Co. of Canada v. Parsons*; *Queen Ins. Co. v. Parsons*, 7 App. Cas. 96; 4 S. C. R. 215.

Sections 91 and 92 of the B. N. A. Act of 1867 must in regard to the classes of subjects generally described in section 91 be read together, and the language of one interpreted and, where necessary, modified by that of the other so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can without entering more largely than is necessary upon an interpretation of the statute. *Id.*

##### 2. Assessment and Taxation.

Held, that section 3 of 43 Vict. c. 27 (Ont.), amending the Assessment Act was not ultra vires the Ontario Legislature. *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552.—C. P. D.

The plaintiffs sued the defendant for the proportion of fees received by the defendant as registrar, to which they were entitled under R. S. O. (1877) c. 111, ss. 98 to 103. The defendant demurred to the declaration on the ground that these sections were ultra vires the local legislature, as they imposed an indirect tax and not a tax for raising a revenue for provincial purposes:—Held, affirming the judgment of Armour, J., that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein provided:—Held, also, that if a tax at all, it was clearly a direct tax, and intra vires. *County of Hastings v. Ponton*, 5 A. R. 543.



Held, that Quebec Act, 43 and 44 Vict. c. 9, which imposed a duty of ten cents upon every exhibit filed in court in any action depending therein is ultra vires the provincial legislature. *Attorney-General for Quebec v. Reed*, 10 App. Cas. 141.

Held, that the Quebec Act 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the province, is intra vires the provincial legislature. A tax imposed upon banks which carry on business within the province varying in amount with the paid-up capital and with the number of its officers, whether or not their principal place of business is within the province is direct taxation within clause 2 of section 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3 or 15 of section 91. Similarly with regard to insurance companies taxed in a sum specified by the Act. *Bank of Toronto v. Lambe*, 12 App. Cas. 575.

See *Longueuil Navigation Co. v. City of Montreal*, 15 S. C. R. 566, p. 317; *Pigeon v. Recorder of Court and City of Montreal*, 17 S. C. R. 495, p. 314.

### 3. Banking.

Per Fournier, Henry, and Taschereau, J.J., sections 46, 47 and 48 of 34 Vict. c. 5 (Dom.), (the Banking Act, 1871,) are intra vires the Dominion Parliament. *Merchants' Bank of Canada v. Smith*, 8 S. C. R. 512.

### 4. Bankruptcy and Winding-up Acts.

Per Spragge, C. J. O., and Morrison, J. A.—Section 136, of the Insolvent Act, 1875, dealing with matter of procedure incident to the law of bankruptcy and insolvency, was within the jurisdiction of the Parliament of Canada to enact. *Peck v. Shields*, 6 A. R. 639; See *S. C. sub nom. Shields v. Peck*, 8 S. C. R. 579.

Per Burton, J. A.—Section 136, which gives certain creditors an additional remedy in the provincial courts for the recovery of their debts in full, is ultra vires of the Parliament of Canada; but section 8, sub-section 7 of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it. *Ib.*

Per Patterson, J. A., it is immaterial whether section 136 is ultra vires or not; for if the Parliament of Canada had the power to deal with the subject of that section, it would be binding, but if not, then the same enactment in section 8, sub-section 7 of the Act of 1864, is unrepealed and in force. *Ib.*

Held, that section 24 of 35 Vict. c. 26 (Dom.), the Patent Act, is not ultra vires the Dominion Parliament. *Aitcheson v. Mann*, 9 P. R. 473—Q. B. D.

Held, following Broddy v. Stuart, 7 C. L. T. 6, that 48 Vict. c. 26 (Ont.), is intra vires the provincial legislature. *Clarkson v. Ontario Bank*, 13 O. R. 666.—*Ferguson*; 15 A. R. 166.

Held, that the Winding-up Act, 45 Vict. c. 23 (Dom.), is intra vires the Dominion Parlia-

ment, and is in the nature of an insolvency law, and applies to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in this case, though incorporated under a provincial charter, was subject to its provisions. *Re Eldorado Union Store Co.*, 6 Russ. v. Geld, 514, followed; *Merchants' Bank of Halifax v. Gillespie*, 10 S. C. R. 312, distinguished. *Re Clarke and The Union Fire Ins. Co.*, 10 O. R. 489.—*Proudfoot*; 14 O. R. 618.—*Boyd*; 16 A. R. 161. Affirmed by Supreme Court, *Sub nom. Shoolbred v. Clarke*, 17 S. C. R. 265.

Certain lands, after the grant from the Crown, became by certain mesne conveyances the property of the Bank of Upper Canada, and upon the failure of that bank were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown by 33 Vict. c. 40 (Dom.). The Crown then sold them and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provision for payment of taxes, but the taxes were not paid and the lands were sold, this action being brought to set aside the tax sale:—Held, per Hagarty, C.J.O., and Osler, J.A., that the Act, 32 Vict. c. 40 (Dom.), was intra vires, as dealing with "Bankruptcy and Insolvency" or "Banking and Incorporation of Banks." That the lands were therefore properly vested in the Crown as trustee, and that the interest of the Crown as mortgagee and trustee could not be sold for arrears of taxes, but was exempt under R. S. O. (1887) c. 193, s. 7, sub-s. 1:—Per Burton, J.A. That the Act was ultra vires as an interference with "property and civil rights in the province" and that the lands remained in the trustees subject to taxation. That even if the Act was intra vires still the lands, being vested in the Crown in the place and stead of the trustees voluntarily selected by the shareholders of the bank, were not exempt from taxation:—Per MacLennan, J.A., That the Act was ultra vires and the lands subject to taxation, but that, upon the evidence, the sale was fraudulent and void as far as the interest of the Crown was concerned. The judgment of the Queen's Bench Division, 17 O. R. 615, was therefore affirmed, Burton, J.A., dissenting. *Regina v. County of Wellington*, 17 A. R. 421.

Semble. Notwithstanding the Act, 52 Vict. c. 32 (Dom.), amending the Dominion Winding-up Act, the Ontario Winding-up Act, R. S. O. (1887) c. 183, does not apply to a company incorporated in Ontario where application to wind up is made on the ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy or insolvency. *Re Iron Clay Brick Manufacturing Co.—Turner's Case*, 19 O. R. 113.—*Robertson*.

See *Merchants' Bank of Halifax v. Gillespie*, 10 S. C. R. 312 p. 283; *Clarkson v. Severs*, 17 O. R. 592, p. 100.

### 5. Bills of Lading and Warehouse Receipts.

The provisions of 34 Vict. c. 5 (Dom.), as to warehouse receipts do not invade the functions of the provincial legislature by an interference with "property and civil rights" in the province. *Smith v. Merchants' Bank*, 28 Chy. 629. In the Court of Appeal *Armour, J.*, was of a

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As to validity of R. S. O. (1877), c. 116, s. 5, respecting Bills of Lading. See *Hately v. Merchants' Despatch Co.*, 2 O. R. 385.

#### 6. Courts and Judges.

*Quere*, Where the land having been taken under an Act of the Dominion Parliament whether the finding of the arbitrators could be reviewed under 38 Vict. c. 15 (Ont.) *Norral v. Canada Southern R. W. Co.*, 5 A. R. 13.

Held, that 40 Vict. c. 21, establishing a court of maritime jurisdiction for the province of Ontario is ultra vires of the Dominion Parliament. *The Picton—Smith v. Keith*, 4 S. C. R. 648.

The 32 Vict. c. 22, s. 2 (Ont.); 32 Vict. c. 26, (Ont.); 33 Vict. c. 12, s. 1 (Ont.), and R. S. O. (1877), c. 42, s. 2, assuming to repeal C. S. U. C. c. 14 and C. S. U. C. c. 15, s. 3, and to abolish the court of impeachment for the trial of county court judges, and regulate their tenure of office are ultra vires the provincial legislature. *Re Squier*, 46 Q. B. 474.—Wilson.

Pursuant to the Local Courts Act, R. S. O. (1877) c. 42, s. 16, et seq., the counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a county court district. By section 17, in such a district the several county courts, division courts, etc., shall be held by the judges in the district in rotation. By the Division Courts Act, R. S. O. (1877) c. 47, s. 19, the division courts shall be presided over by the county court judges in their respective counties. An order for the committal of the defendant was made by the judge of the county court of the county of Lambton, sitting in a division court in the county of Middlesex under the provisions of the Local Courts Act. A motion for a prohibition was made on the ground that that enactment was ultra vires:—Held, Armour, J., dissenting, that the provincial legislature has complete jurisdiction over the division courts, including the appointment of officers to preside over them: that the learned judge acted in the Middlesex division court as one of the persons designated by the legislature to preside over it, and having regard to the enactment in question, solely in its bearing on division courts, it was not ultra vires. *In re Wilson v. McGuire*, 2 O. R. 118.—Q. B. D.

Per Armour, J.—Section 13 of the Local Courts Act is ultra vires. The provisional legislature having no power to appoint county court judges, neither can it authorize the Governor-General to appoint one by order as enacted (the appointment being properly made by letters patent under the great seal), nor can it depute a county court judge to nominate another judge to take his place as enacted. The clear and sole effect of section 17 is to appoint the judge of each county court in any district judge of all the other counties which is ultra vires. The provincial legislature has no power to appoint the judges of the division courts; but it has not yet assumed to do so, and in this case the judge acted solely by virtue of being judge of the county court of the county of Lambton, and as

such assigned to perform the duties of the judge of the county court of Middlesex, and was therefore acting without authority. *Id.*

Held, per Armour and O'Connor, JJ., that the county judge of the county of Lanark had no power to preside at the sessions in the county of Renfrew, the provincial statute authorizing him to do so being ultra vires. Wilson, C. J., upon this point gave no positive opinion, but inclined to the opposite view. *Gibson v. McDonald*, 7 O. R. 401.—Q. B. D.

Held, that the constitution of a court or judicial tribunal for the determination of disputes under the Patent Act 1872, s. 28, was not ultra vires the Dominion Parliament. *In re the Bell Telephone Company and the Telephone Manufacturing Company and the Minister of Agriculture*, 7 O. R. 605.—Osler.

The Dominion Controverted Elections Act of 1874, 37 Vict. c. 10 (Dom.), does not contravene section 92, sub-section 14 of the British North America Act, 1867. The said sub-section does not relate to election petitions, while section 41 of the same Act reserved to the Parliament of Canada the power of creating a jurisdiction to determine them. The Parliament of Canada has power to commit such jurisdiction to existing provincial courts. Special leave refused to appeal from two concurrent judgments of the courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing that there was no substantial question requiring to be determined, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched. *Valin v. Langlois*, 5 App. Cas. 115; 3 S. C. R. 1.

So much of section 156 of the Inland Revenue Act, 1867, (31 Vict. c. 8) as gives the court of Vice-Admiralty jurisdiction in prosecutions for penalties and forfeitures incurred thereunder, is ultra vires, notwithstanding such court is established in Canada by Imperial authority. *Valin v. Langlois*, (3 Can. S. C. R. 1; 5 App. Cas. 115) discussed and followed. *Attorney-General of Canada v. Flint*, 16 S. C. R. 707.

Section 43, O. J. Act, (1881) which provides that in cases where the amount in controversy is under \$1,000, no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada except by leave of a judge of the former court is ultra vires of the Ontario legislature, and not binding on the Supreme Court. Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal. *Clarkson v. Ryan*, 17 S. C. R. 251.

See *In re Sproule*, 12 S. C. R. 140; *Re Simmons and Dalton*, 12 O. R. 505.

#### 7. Criminal Law and Penalties.

The legislative assembly of Ontario has no criminal jurisdiction, and therefore has no jurisdiction in case of a conspiracy to bribe members to vote against the government considered as a criminal offence. *Regina v. Bunting*, 7 O. R. 524.—Q. B. D.

The jurisdiction of the provincial legislatures over "property and civil rights" does not pre-

clude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Elections Act 1874, by section 109, provides that all penalties and forfeitures (other than fines in cases of misdemeanor) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's courts in the province in which the cause of action arose, having competent jurisdiction:—Held, affirming 32 C. P. 632, that this enactment was valid. *Doyle v. Bell*, 11 A. R. 326.

Held, reversing the judgment of the Q. B. D. (17 O. R. 58), that the "Act to Provide Against Frauds in the Supplying of Milk to Cheese or Butter Manufactories," 51 Vict. c. 32 (Ont.), though penal in its nature, does not deal with criminal law within the meaning of section 91, sub-section 27, of the B. N. A. Act, but merely protects private rights and is *intra vires*. *Regina v. Wason*, 17 A. R. 221.

So also the "Act respecting Appeals on Prosecutions to enforce Penalties and Punish Offences under Provincial Acts," 52 Vict. c. 15 (Ont.), is not legislation dealing with criminal procedure within the meaning of that sub-section and is *intra vires*. *Ib.*

See *Hodge v. Regina*, 9 App. Cas. 117; *Regina v. Frazer*, 7 A. R. 246; *Regina v. Allbright*, 9 P. R. 25; *Regina v. Pipe*, 1 O. R. 43.

#### 8. Escheats.

Held that lands in Canada escheated to the Crown for defect of heirs belong to the province in which they are situate and not to the Dominion. *Attorney-General of Ontario v. Mercer*, 8 App. Cas. 767; 8 S. C. R. 538.

At the date of passing the B. N. A. Act, 1867, the revenue arising from all escheats to the Crown within the then Province of Canada, was subject to the disposal and appropriation of the Canadian legislature and not of the Crown. Although section 102 of the Act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces, yet by section 109 the casual revenue arising from lands escheated to the Crown after the union was reserved to the provinces, the words "lands, mines, minerals, and royalties" therein including, according to their true construction, royalties in respect of lands such as escheats. *Ib.*

#### 9. Fisheries.

On 1st January, 1874, the minister of marine and fisheries of Canada, purporting to act under the powers conferred upon him by section 2, c. 60, 31 Vict., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the South West Miramichi River in New Brunswick for the purpose of fly-fishing for salmon therein. The locus in quo being thus described in the special case agreed to by the parties:—"Price's Bend is about forty or forty-five miles above the ebb and flow of the tide. The

stream for the greater part from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow." Certain persons who had received conveyances of a portion of the river, and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavouring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The Supreme Court of New Brunswick having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing privileges and for the expenses he had incurred. By special case certain questions (which are given in the report) were submitted for the decision of the court, and the Exchequer Court held *inter alia* that an exclusive right of fishing existed in the parties who had received the conveyances, and that the minister of marine and fisheries consequently had no power to grant a lease or license under section 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the minister of marine and fisheries lawfully issue a lease of that portion of the river?" Held, that the minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river. The appellant thereupon appealed to the Supreme Court of Canada on the main question; whether or not an exclusive right of fishing did so exist:—Held, (affirming the judgment of the Exchequer Court) 1st, the general power of regulating and protecting the fisheries under the British North America Act, 1867, s. 91, is in the Parliament of Canada, but that the license granted by the minister of marine and fisheries of the locus in quo was void because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi river flows. *Regina v. Robertson*, 6 S. C. R. 52.

Although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down and a right of passage up and down in Canada, etc., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands *ad medium flum aquæ*. *Ib.*

The rights of fishing in a river, such as is that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority. *Ib.*

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Per Ritchie, C. J., and Strong, Fournier and Henry, J.J., (reversing the judgment of the Exchequer Court on the 8th question submitted) ungranted lands in the province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the minister of marine and fisheries to fish in streams running through provincial property would be illegal. *Ib.*

#### 10. Incorporating Companies.

Held, that 22 Vict. c. 86 of the Parliament of Canada which created a corporation having its corporate existence and rights in the provinces of Ontario and Quebec could not be repealed or modified by the legislature of either province or by the conjoint operation of both, but only by the Dominion Parliament. *Dobie v. Temperalities Board*, 7 App. Cas. 136.

Held, that the Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend 22 Vict. c. 86, and (1) To destroy a corporation created by the Canadian Parliament and substitute a new one; (2) To alter materially the class of persons interested in the corporate funds and not merely to impose conditions upon the transaction of business by the corporation within the province, was invalid. *Ib.*

Held, that the Act 37 Vict. c. 103 (Dom.), which created a corporation with power to carry on certain definite kinds of business within the Dominion was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one province, and to local and provincial objects did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires the said Parliament.—Held, further, that the corporation could not be prohibited generally from acting as such within the province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose. *Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 App. Cas. 157.

See *Queddy River Driving Boom Co. v. Davidson*, 10 S. C. R. 222, p. 316; *Clarke v. Union Fire Ins. Co.*, 10 P. R. 313, p. 299.

#### 11. Insurance.

In No. 2 of section 91 the words "regulation of trade and commerce," include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore do not conflict with the power of property and civil rights conferred by section 92, No. 13. *Citizens' Ins. Co. of Canada v. Parsons*; *Queen's Ins. Co. v. Parsons*, 7 App. Cas. 96; 4 S. C. R. 215.

39 Vict. c. 24 (Ont.), which deals with policies of insurance entered into or in force in the province of Ontario for insuring property situate therein against fire and prescribes certain conditions which are to form part of such contracts, is a valid Act applicable to the contracts of all such insurers in Ontario, including corporations and companies, whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority. *Ib.*

The defendant, a mutual insurance company, was incorporated by an Act of the Dominion Parliament, 41 Vict. c. 40, by section 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto shall render the policy void :—Held on demurrer, that the matters provided for by the above section were subject matters of the "Fire Insurance Policy Act" of Ontario, over which the province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act per se, but only by being used as required or modified by said Ontario Act, namely in the manner provided for variations to the conditions therein contained. *Citizens' Ins. Co. v. Parsons* and *The Queen Ins. Co. v. Parsons*, 7 App. Cas. 96, commented upon. *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82.—O'Connor.

The Acts 31 Vict. c. 48, (Dom.), and 34 Vict. c. 9 (Dom.), relating to insurance companies are not ultra vires the Dominion Parliament. *Re Briton Medical and General Life Association (Limited)* (2) 12 O. R. 441.—Proudfoot.

#### 12. Intoxicating Liquors.

Held :—That the Act of the Parliament of Canada, 41 Vict. c. 16, "An Act respecting the Traffic in Intoxicating Liquors" cited as the "Canada Temperance Act, 1878," is within the legislative capacity of that body. *Mayor, etc., of Fredericton v. Regina*, 3 S. C. R. 505.

By the British North America Act, 1867, plenary powers of legislation are given to the Parliament of Canada over all matters within the scope of its jurisdiction, and they may be exercised either absolutely or conditionally : in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other. *Ib.*

Under sub-section 2 of section 91, B. N. A. Act, 1867, "regulation of trade and commerce," the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the court has no right whatever to enquire what motive induced Parliament to exercise its powers. *Henry, J., dissenting. Ib.*

Quære, per Cameron, J., as to the power of the local legislature to limit or authorize municipalities to limit the number of licenses and as

to the effect of the decision of the Supreme Court in *city of Fredericton v. The Queen*, 3 S. C. R. 505. *Regina v. Howard*, 45 Q. B. 340.

Held, that the Canada Temperance Act, 1878, which, in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament. *Russell v. Regina*, 7 App. Cas. 829.

The objects and scope of the Act are general, viz: to promote temperance by means of a uniform law throughout the Dominion. They relate to the peace, order, and good government of Canada, and not to the class of subjects, "property and civil rights." Provision for the special application of the Act to particular places does not alter its character as general legislation. *Ib.*

Subjects which in one aspect and for one purpose fall within section 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within section 91. *Russell v. The Queen*, 7 App. Cas. 829, explained and approved:—Held, that the Liquor License Act, R. S. O. (1877), c. 181 which in respect of sections 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15, and 16, of section 92 of the Act of 1867, and is within the powers of the Provincial Legislature. *Hodge v. Regina*, 9 App. Cas. 117.

Held further, that the local legislature had power by the said Act of 1867, to entrust to a board of commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Ib.*

"Imprisonment" in No. 15 of section 92 of the Act of 1867, means imprisonment with or without hard labour. *Ib.* S. C. sub nom.; *Regina v. Hodge*, *Regina v. Fravelley*, 7 A. R. 246; (reversing S. C., 46 Q. B. 141, 153); *Regina v. Albright*, 9 P. R. 25; *Regina v. Pipe*, 1 O. R. 43.

Held, per Ritchie, C.J. and Strong and Fournier, J.J., that the provisions of the provincial statute, 42 & 43 Vict. c. 4 (Que.), ordering houses in which spirituous liquors, etc., are sold to be closed on Sundays and every day between eleven o'clock of the night and until five o'clock in the morning, are police regulations within the power of the legislature of Quebec. *Poulin v. Corporation of Quebec*, 9 S. C. R. 185.

The Quebec License Act, 41 Vict. c. 3, is intra vires of the legislature of the Province of Quebec. *Hodge v. The Queen*, 9 App. Cas. 117, followed. *Sulte v. City of Three Rivers*, 11 S. C. R. 25.

The inspector of licenses for the revenue district of Montreal charged R., a drayman in the employ of J. H. R. M. & Bros., duly licensed brewers under the Dominion statutes 43 Vict.

c. 19, before the court of special sessions of the peace at Montreal, with having sold beer outside the business premises of J. H. R. M. & Bros., but within the said revenue district in contravention of the Quebec License Act, 1878 and its amendments, and asked a condemnation of \$95 and costs against R. for said offence. Thereupon J. H. R. M. & Bros. and R., claiming inter alia that being licensed brewers under the Dominion statute, they had a right of selling beer by and through their employees and draymen without a provincial license, and that 41 Vict. c. 3 (Que.) and its amendments were ultra vires, and if constitutional did not authorize his complaint against R., caused a writ of prohibition to be issued out of the Superior Court enjoining the court of special sessions of the peace from further proceeding with the complaint against R.:—Held, per Ritchie, C.J., and Strong, Fournier and Henry, J.J., that the Quebec License Act and its amendments were intra vires, and that the court of special sessions of the peace of Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the question of facts and of law involved, a writ of prohibition did not lie. Per Taschereau and Gwynne, J.J., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition. Per Gwynne, J., the Quebec License Act of 1878, imposes no obligation upon brewers to take out a provincial license to enable them to sell their beer, and therefore the court of special sessions of the peace had no jurisdiction and prohibition should issue absolutely. *Molson v. Lambe*, 15 S. C. R. 253.

Held, that the Ontario Legislation, R. S. O. (1877) c. 181, ss. 92, 93, 105, 106; 41 Vict. c. 14, ss. 6, 8; 44 Vict. c. 27, ss. 11, 12, 13, 14, 16; 47 Vict. c. 34, s. 34; 50 Vict. c. 33, which represent a body of legislation relating to municipalities brought under the Canada Temperance Act, by which ways and means are provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county, are not ultra vires the local legislature; and that the plaintiffs were entitled to recover from the defendants the expenses of carrying out the provisions of the Temperance Act in the license district of F. formed out of a part of the county of F. *Licenses Commissioners for Frontenac v. County of Frontenac*, 14 O. R. 741.—Boyd.

The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the province, within the meaning of B. N. A. Act, section 92, item 16, and it may be enforced through the medium of provincial officers, to be appointed and paid for according to provincial legislation under B. N. A. Act, 92, item 4. *Ib.*

The legislation in question might also fall within the scope of B. N. A. Act, section 92, item 8, as pertaining to municipal institutions in the province. *Licenses Commissioners of Prince Edward v. County of Prince Edward*, 26 Chy. 452; *Licenses Commissioners of the North Riding of the County of Norfolk v. Corporation of Norfolk*, *Armour, J.*, Nov. 1st, 1887, (14 O. R. 749), concurred in. *Ib.*

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By the New Brunswick Liquor License Act, 1887, applications for licenses must be endorsed by the certificate of one-third of the ratepayers of the district for which the license is asked. No holder of a license can be a member of the municipal council, a justice of the peace, or a teacher in the public schools:—Held, that the legislature could properly impose these conditions to the obtaining of a license, and the provision is not ultra vires the local legislature as being a prohibitory measure by reason of the ratepayers being able to prevent any licenses being issued; nor is it a measure in restraint of trade by affixing a stigma to the business of selling liquor. *Danaher v. Peters; O'Regan v. Peters*, 17 S. C. R. 44.

### 13. Jurors.

By the Dominion Act 32 & 33 Vict. c. 29, s. 44, the selection of jurors in criminal cases is authorised to be in accordance with the provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act. By the provincial Acts 42 Vict. c. 14, and 44 Vict. c. 6, the mode of selection of jurors in criminal cases, as provided by C. S. U. C. c. 31, as amended by 26 Vict. c. 44, was changed by excluding the clerk of the peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these Provincial Acts:—Sembles, that the 32 & 33 Vict. c. 29 (Dom.), was not ultra vires the Dominion Parliament as being a delegation of their powers, and that the selection made in accordance with the Provincial Acts, was valid. *Regina v. O'Rourke*, 32 C. P. 388.—C. P. D. See *S. C.*, 1 O. R. 464.

Quere, whether the selection and summoning of jurors is a matter of procedure, or relates to the constitution and organization of criminal courts. *Ib.*

### 14. Lands.

Escheats. See *Attorney-General of Ontario v. Mercer*, 8 App. Cas. 767; 5 S. C. R. 538, *supra*.

Right of Province of Ontario in Indian lands. See *Regina v. St. Catharines Milling and Lumber Co.*, 10 O. R. 196; 13 A. R. 148; 13 S. C. R. 577; 14 App. Cas. 46.

Sembles, the Dominion Parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license. *McDiarmid v. Hughes*, 16 O. R. 570.—Q. B. D.

Held, reversing S. C. in Supreme Court, which affirmed the judgment of the Exchequer Court, (14 S. C. R. 246), that a conveyance by the province of British Columbia to the Dominion of "public lands" being in substance an assignment of its right to appropriate the territorial reve-

nues arising therefrom does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown, and, under section 109 of the British North America Act of 1867, beneficially to the province, and an intention to transfer them must be expressed or necessarily implied. *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 App. Cas. 295.

Rights of railways to enter Crown lands. See *Booth v. McIntyre*, 31 C. P. 183.

See *Foran v. McIntyre*, 45 Q. B. 288; *Regina v. Robertson*, 6 S. C. R. 52, p. 308; *Kennedy v. City of Toronto*, 12 O. R. 211.

### 15. Legal Procedure.

Quere, can the Dominion Parliament give an appeal in a case in which the legislature of a province has expressly denied it. *Danjon v. Marquis*, 3 S. C. R. 251.

Held, that the Act 31 Vict. c. 76 (Dom.), providing for the taking of evidence to be used in other countries is not ultra vires the Dominion Parliament, for the taking of evidence in one of the provinces for the use of foreign tribunals is not a subject which is assigned to the exclusive legislative authority of the province, by section 92 of the British North America Act, inasmuch as such proceedings are of extra provincial pertinence, and do not relate to civil rights in the province. *Re Wetherell and Jones*, 4 O. L. 713.—Chy. D.

Quere. Is section 51 of the Supreme and Exchequer Courts Act, which confers power on judges of the Supreme Court to issue writs of habeas corpus ultra vires. See *In re Sproule*, 12 S. C. R. 140.

See *Doyle v. Bell*, 11 A. R. 326, p. 307.

### 16. Licenses.

The council of the city of Montreal is authorized by sub-sections 27 and 31 of section 123 of 37 Vict. c. 51 (Que.), to regulate and license the sale in any private stall or shop in the city outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold in markets:—Held, affirming the judgments of the courts below, that the sub-sections in question are intra vires the provincial legislature. Also that a by-law passed by the city council under the authority of the above-named sub-sections fixing the license to sell in a private stall at \$200 in addition to the 7½ per cent. business tax, levied upon all traders under another by-law and which the appellant had paid, is not invalid. *Per Strong, J.*—That the words "other licenses" in sub-section 9 of section 92 of the B. N. A. Act include such a license as the provincial legislature have empowered the city of Montreal to impose by the terms of the statute now under consideration. *Lamb v. Bank of Toronto*, 12 App. Cas. 575 and *Severn v. Regina*, 12 S. C. R. 70, distinguished. *Pigeon v. Recorder's Court and the City of Montreal*, 17 S. C. R. 495.



See *Citizens Ins. Co. of Canada v. Parsons*, 7 App. Cas. 96; 4 S. C. R. 215, p. 310; *Regina Hodge*, 7 A. R. 246; *infra*.

See Subhead IV. 12, p. 310.

#### 17. Magistrates.

Held, that the appointment of police magistrates is not ultra vires the Legislature of Ontario. *Regina v. Bennett*, 1 O. R. 445, followed. *Regina v. Lee*, 15 O. R. 353.—C. P. D. See also *Regina v. Richardson*, 8 O. R. 651.

The Crown has the prerogative right to appoint justices of the peace within the Dominion of Canada and each of its provinces, but it derogated from that right by assenting to the B. N. A. Act, which conferred upon either the Parliament of Canada or the legislatures of the provinces the power to pass laws providing for the appointment of justices of the peace. Such laws are in relation to the administration of justice, and upon the proper construction of sections 91 and 92 of the B. N. A. Act are exclusively within the power of the provincial legislatures under section 92, paragraph 14. Additional weight is given to the construction placed upon these sections, by the Parliament of Canada having from time to time since the B. N. A. Act passed laws recognizing the right assumed by the provincial legislatures to pass such laws and the appointments made under them. An order nisi to quash a conviction made by a police magistrate appointed by the Lieutenant-Governor of Ontario under 48 Vict. c. 17 (Ont.), on the ground that such statute is ultra vires, was, therefore, discharged, with costs. *Regina v. Bush*, 15 O. R. 398.—Q. B. D. See also *Regina v. Bennett*, 1 O. R. 445.

#### 18. Municipal.

By clause 8 of the 92nd section of the B. N. A. Act, exclusive power is given to the provincial legislatures to make laws in relation to "municipal institutions in the province," and clause 9 gives similar power in relation to "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes." Per Spragge, C. J., that clause 9 is cumulative to clause 8, and was intended to authorize provincial legislation in relation to licenses, for the purpose of raising a revenue as well as for the regulation of matters of police. *Regina v. Hodge*; *Regina v. Frawley*, 7 A. R. 246.

See *License Commissioners for Frontenac v. County of Frontenac*, 14 O. R. 741; *Central Vermont R. W. Co. v. Town of St. Johns*, 14 S. C. R. 288; 14 App. Cas. 590, p. 316; *Longueuil Navigation Co. v. City of Montreal*, 15 S. C. R. 566, p. 317.

#### 19. Navigable Waters.

Held, following the case of *The Commissioners of the Cobourg Town Trust*, 22 Chy. 377, that the commissioners of the Toronto harbour were entitled to compensation for their services, and this, whether the harbour belonged to the Dominion or Provincial Government, as in the event of it being found to belong to the Dominion, it

must be assumed that the Dominion Government intended the commissioners to be subject to the law of the province in which the trust was to be administered. *Re Toronto Harbour Commissioners*, 28 Chy. 195.—Spragge.

G. (defendant) was in possession of a part of the foreshore of the harbour of Summerside, and had erected thereon a wharf or block at which vessels might unload. H. et al. (the plaintiffs) brought an action of ejectment to recover possession of the said foreshore. H. et al.'s title consisted of letters patent under the great seal of Prince Edward Island, dated 30th August, 1877, by which the Crown in right of the island, and assuming to act in exercise of authority conferred by a provincial statute, 25 Vict. c. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action:—Held, that under B. N. A. Act, s. 108, the soil and bed of the foreshore in the harbour of Summerside belonged to the Crown, as representing the Dominion of Canada, and therefore the grant under the great seal of Prince Edward Island to H. et al. was void and inoperative. *Holman v. Green*, 6 S. C. R. 707.

Professing to act under the powers contained in their Act of incorporation, 45 Vict. c. 100 N. B., the Q. R. B. Co. erected booms and piers in the Quddy river which impeded navigation—the locus being in that part of the river which is tidal and navigable:—Held, affirming the judgment of the court below, that the Provincial Legislature might incorporate a boom company, but could not give it power to obstruct a tidal navigable river, and therefore the Act 45 Vict. c. 100 N. B., so far as it authorizes the acts done by the company in erecting booms and other works in the Quddy river obstructing its navigation, was ultra vires the New Brunswick Legislature. *Quddy River Driving Boom Co. v. Davidson*, 10 S. C. R. 222.

An Act incorporating the town of St. Johns, Que., extended the limits of the town to the middle of the Richelieu River, a navigable river:—Held, intra vires the legislature of the province of Quebec. *Central Vermont R. W. Co. v. Town of St. Johns*, 14 S. C. R. 288; 14 App. Cas. 590.

By 39 Vict. c. 52, s. 1, sub-s. 3, (Que.) the city of Montreal is authorized to impose an annual tax on "ferry-men or steamboat ferries;" under the authority of the said statute the corporation of the city of Montreal passed a by-law imposing an annual tax of \$200 on the proprietor or proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distance from the same, and obtained from the Recorder's court for the city of Montreal a warrant of distress to levy upon the appellant company the said tax of \$200 for each steamboat employed by them during the year as ferry-boats between Longueuil and Montreal. In an action brought by the appellant company, claiming that the provincial statute was ultra vires the Provincial Legislature and that the by-law was ultra vires the corporation, and asking for an injunction, it was:—Held, affirming the judgment of the court of Queen's Bench, Montreal, that the provincial legislation was intra vires. 2. Reversing the judgment of the court below, that the

by-law was statute only of each ferry boats or vessels should be of the court harbour contain limits to tax and *Longueuil* 15 S. C. R.

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by-law was ultra vires, as the words used in the statute only authorize a single tax on the owner of each ferry, irrespective of the number of boats or vessels by means of which the ferry should be worked. 3. Affirming the judgment of the court below, that the jurisdiction of the harbour commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferries within such limits. *Longueuil Navigation Co. v. City of Montreal*, 15 S. C. R. 566.

See also WATER AND WATER COURSES.

## 20. Queen's Counsel.

Appointment of Queen's Counsel — Letters appointing of precedence at the bar. See *Lenoir v. Ritchie*, 3 S. C. R. 575.

## 22. Statutes before Confederation.

The powers conferred by the British North America Act 1867, section 129, upon the provincial legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely coextensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867:—Held, that 22 Vict. c. 66, (of the Parliament of Canada) which created a corporation, having its corporate existence and rights in the provinces of Ontario and Quebec, could not be repealed or modified by the legislature of either province or by the conjoint operation of both, but only by the Parliament of the Dominion:—Held, further, that the Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66 and (1) to destroy a corporation created by the Canadian parliament and substitute a new one; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the province, was invalid. *Citizens' Insurance Company of Canada v. Parsons*, 7 App. Cas. 96, approved and distinguished. *Dobie v. Temporalities Board*, 7 App. Cas. 136.

## V. OTHER STATUTES.

The Act 29 & 30 Vict. c. 16, being an Act to provide for the sale of the rectory lands of this province, is intra vires and valid, the Imperial Act 17 & 18 Vict. c. 118, having removed the restrictions upon legislation upon such subject matter formerly existing by force of 31 Geo. III. c. 31, and Imp. Act 3 & 4 Vict. c. 35. *Langtry v. Dumoulin*, 7 O. R. 499.—Ferguson.—Chy. D.

Held, that the debentures in suit which had been issued under the authority of the Canadian Act (16 Vict. c. 235), by the trustees of the Quebec turnpike roads, appointed under Ordinance, 4 Vict. c. 17, and empowered thereby to borrow moneys "on the credit and security of the tolls thereby authorized to be imposed, and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the Ordinance, and not to be paid out of or chargeable against

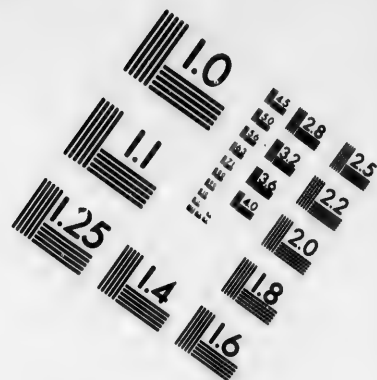
the general revenue of this province," did not create a liability on the part of the province, in respect of either the principal or interest thereof. *Regina v. Belleau*, 7 App. Cas. 473; 7 S. C. R. 53.

Held, further, that the province of Canada had not by its conduct and legislation recognised its liability to pay the same. The 7th section of the Act, 16 Vict., expressly took away the power which had been conferred by the 27th section of the Ordinance to make advances out of provincial funds for the payment of interest, and by its proviso distinguished these debentures from those which had a provincial guarantee. *Ib.*

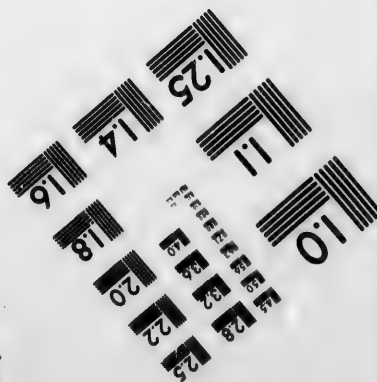
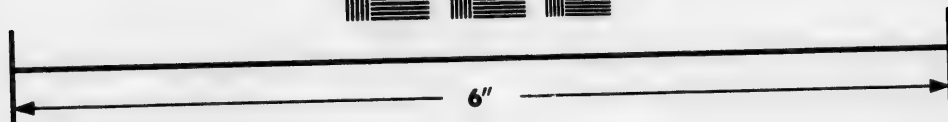
Held, that the Ontario Act 39 Vict. c. 24 is not inconsistent with Dominion Act 38 Vict. c. 20, which requires all insurance companies, whether incorporated by foreign, dominion or provincial authority, to obtain a license to be granted only upon compliance with the conditions prescribed by the Act. *Citizens' Insurance Company of Canada v. Parsons*; *Queen's Insurance Co. v. Parsons*, 7 App. Cas. 96; 4 S. C. R. 215.

Held, that R. S. C. c. 161, s. 4, which enacts that every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere is guilty of felony, provided that the person who contracts such second marriage is a subject to Her Majesty, resident in Canada, and leaving the same with intent to commit the offence, is not ultra vires the Dominion legislature either as being repugnant to Imperial legislation or on any other grounds. Per Boyd, C.—This statutory law is nearly half a century old; it has been confirmed by the court, past upon more than once by competent colonial legislatures and ratified by the express sanction of the Imperial Parliament and Her Majesty in person. *Regina v. Brierley*, 14 O. R. 525.

By section 11 of the Order in Council, admitting the province of British Columbia into confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government, in trust, might deem advisable, in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the legislature of British Columbia passed the statute 47 Vict. c. 14, by which it was enacted inter alia as follows:—"From and after the passing of this Act there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the main land of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of said line, as provided in the Order in Council section 11 admitting the province of British Columbia into confederation." On the 20th



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 4.0.



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November, 1883, by public notice the Government of British Columbia reserved a belt of land of twenty miles in width along a line by way of Bow River Pass. In November, 1884, the respondent in order to comply with the provisions of the provincial statutes, filed a survey of a certain parcel of land, situate within the said belt of twenty miles, and the survey having been finally accepted on 13th January, 1885, letters patent under the great seal of the province were issued to F. for the land in question. The Attorney-General of Canada by information of intrusion sought to recover possession of said land, and the Exchequer Court having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was:—Held, reversing the judgment of the Exchequer Court, Henry, J. dissenting, that at the date of the grant the province of British Columbia had ceased to have any interest in the land covered by said grant and that the title to the same was in the Crown for the use and benefit of Canada. *Regina v. Farwell*, 11 O. R. 392.

#### VI. NOTICE TO A. TORNEYS-GENERAL.

The questions arising in this case as to the conditions of a mutual fire insurance policy were:—Held, not to be of such a constitutional character as to require notice to the attorney-general of the province, or the minister of justice of the Dominion. See *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82.

See *Hately v. Merchants' Despatch*, 2 O. R. 385.

### CONTEMPT OF COURT.

I. GIVING OR WITHHOLDING EVIDENCE—  
See EVIDENCE — EXAMINATION OF  
JUDGMENT DEBTOR.

II. OF INJUNCTION—See INJUNCTION.

The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendants, who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a police magistrate, and fined, under 32-33 Vict. c. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt was discharged, but without costs. *Haywood v. Hay*, 46 Q. B. 562.—Q. B. D.

Attachment against sheriff for disobedience of interpleader order. See *Maclean v. Anthony*; *Slater v. Anthony*, 6 O. R. 330.

A deputy sheriff was arrested under a writ of attachment for default in obeying an order upon his sheriff to deliver up to the claimant, who had succeeded on an interpleader issue, the goods, etc., seized. Upon a motion by the deputy to be discharged from custody, it was shown that his noncompliance with the order arose from a difficulty in which he found himself by reason of the claim of another person who had succeeded in an issue about the same goods,

and not from any deliberate intention to disregard the order; and his discharge was ordered. Semble, that the motion should have been for leave to administer interrogatories to or for the examination of the person committed, and for a habeas corpus. *In re Maitland, Gunther v. Cooke*, 9 P. R. 400.—Osler.

On an application on behalf of the respondent H. to an election petition, for an order nisi calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of court for publishing articles in his newspaper, reflecting on and prejudging the conduct of the respondent and the returning officer during the currency of an election petition:—Held, on the materials before the court, a prima facie case of contempt was made out; but as it appeared on the same materials that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer, and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and the motion was refused. *In re Bothwell Election Case*, 4 O. R., 224.—C. P. D.

By an order of the county judge, upon the application of the plaintiff, after hearing numerous parties, including the defendants, a certain street on a registered plan was closed up. Thereafter the defendant municipality passed a by-law declaring the street in question open. On a motion to quash the by-law—Held, that the by-law should be quashed, as having been passed in disregard and contempt of the order:—Held, also, that as the order shewed jurisdiction on its face, the evidence upon which it had been made should not be looked at on this application. *Waldie v. Burlington*, 7 O. R. 192.—Rose; 13 A. R. 104.

The plaintiffs' factum containing reflections on the judge in equity and the full court of New Brunswick, was ordered to be taken off the files of court as scandalous and impertinent. *Vernon v. Oliver*, 11 S. C. R. 156.

The adjudication that the appellant, a solicitor and officer of the court, and moved against in that quality, has been guilty of a contempt, is by itself an appealable judgment, although no sentence for the contempt has been pronounced by the court, when the party in contempt has been ordered to pay the costs of the application to commit the court in effect inflicts a fine for the contempt. *In re Henry O'Brien*; *Regina ex rel Felitz v. Howland*, 16 S. C. R. 197.

The alleged contempt consisted in publishing in a newspaper comments on a judgment rendered by a master in chambers in a cause in which the writer was solicitor for the defendant. The motion to commit was made by the relator in such cause. Notice of appeal from said judgment had been given, but before the motion was made the notice was countermanded and the appeal abandoned. Held, reversing the judgment of Proudfoot J., 11 O. R. 633, and the Court of Appeal, 14 A. R. 184, that the proceedings in the cause before the master being at an end the relator in the cause could not be prejudiced, as a suitor, by the publication complained of; and as such prejudice was the only ground on which he could institute the proceedings for con-

tempt he should not be committed.

A rule nisi in Brunswick for an attachment in contempt in a newspaper v. attachment was cases in the attachment was the party in to answer in he could, put so the court peeled from lute:—Held, was not a fine would lie in Courts Act, Baird, 16 S.

Attachment for company for disobedience refused because by himself and of directors, writ and the Demoreux v. Wilson.

Attachment for remedy for d

A judge of authority of an assignee for assignee. To deliver over of the insolvent judge made a attachment a contempt:—Held, the statute, v. County Court jurisdiction at fore no power attachment; Paquette, 11

An inferior unless by exp for any contempt committed in the

Where a person has apologized committal, etc. a motion for him in prison for unless the costs are sooner paid 500.—Ferguson

Upon the Controverted was examined produce the order to have been voters the day stated that he tion with other while the instructions received from the general manager service he was others, should

tempt he had no locus standi and his application should not have been entertained. *Ib.*

A rule nisi of the Supreme Court of New Brunswick calling upon E. to shew cause why an attachment should not issue against him for contempt in publishing certain articles in a newspaper was made absolute and a writ of attachment was issued. By the practice in such cases in the said court it appeared that the attachment was issued merely in order to bring the party into court where he might be ordered to answer interrogations, and by his answers, if he could, purge his contempt. If unable to do so the court would pronounce sentence. E. appealed from the judgment making the rule absolute:—Held, that the judgment appealed from was not a final judgment from which an appeal would lie under the Supreme and Exchequer Courts Act, R. S. C. c. 135, s. 24 (a). *Ellis v. Baird*, 16 S. C. R. 147.

Attachment against the president of a company for disobedience of a writ of mandamus was refused because it appeared that he could not, by himself and without a majority of the board of directors, perform the act required by the writ and the other directors had not been served. *Demorest v. Midland R. W. Co.*, 10 P. R. 82.—Wilson.

Attachment not sequestration is the proper remedy for disobeying a mandamus. *Ib.*

A judge of a County Court, acting under the authority of 48 Vict. c. 26, s. 6 (Ont.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the judge made an order for the issue of a writ of attachment against the first assignee for contempt:—Held, that the judge, in acting under the statute, was not exercising the powers of the County Court, but an independent statutory jurisdiction as persona designata, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Paquette*, 11 P. R. 463.—Wilson.

An inferior court cannot at common law, nor unless by express legislative enactment, commit for any contempt except for a contempt committed in the face of the court. *Ib.*

Where a party is in prison for contempt, and has apologized, but has not paid the costs of his committal, etc., the proper order to make upon a motion for his discharge is, that he be continued in prison for his contempt for a time certain, unless the costs of the proceedings against him are sooner paid. *Campbell v. Martin*, 11 P. R. 509.—Ferguson.

Upon the trial of a petition under the Ontario Controverted Elections Act, a telegraph operator was examined as a witness, and was asked to produce the originals of certain telegrams alleged to have been sent by the respondent to certain voters the day before the election. The witness stated that he had burnt the telegrams in question with others after being subpoenaed, and while the trial was actually going on, upon instructions received by telegraph from the general manager of the telegraph company in whose service he was; that these telegrams, with others, should have been destroyed before, in

accordance with a standing rule of the company, but that he had neglected to do so at the proper time. Upon the return of an order nisi to commit the general manager and the operator for contempt of court, it was objected that no original subpoena had been exhibited to the operator when he was served with what purported to be a copy, and that none was produced in court; and it was contended that the making away with the messages was not a contempt unless the witness was duly subpoenaed to produce them:—Held, that the question was not whether there had been a proper service of a subpoena, but whether there had been an interference with evidence, which but for such interference would have been before the court. The documents were in existence at the beginning of the court; during the trial they were destroyed by the deliberate action of the general manager, whereby the court was hindered in the prosecution of an investigation of a public nature; and the manager and operator were guilty of a contempt of court. *Re Dwight and Macklam*, 15 O. R. 148.—Boyd.—Osler.

A solicitor in an action had obtained an order for the payment out to him of certain moneys in court, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal:—Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the court; and that Con. Rule 867 had no application. *Pritchard v. Pritchard*, 18 O. R. 173.—McMahon. *Ib.*, 178.—C. P. D.

## CONTRACT.

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## XIII. PARTICULAR CONTRACTS AND CONTRACTS BY AND WITH PARTICULAR PERSONS—See THE SEVERAL TITLES.

## I. MAKING THE CONTRACT.

## 1. Parties.

The defendant D. after some correspondence with plaintiffs as to an advertising contract for the Union Medicine Co., had an interview with plaintiffs as to entering into the same. A contract had been drawn up by plaintiffs in expectation that it would be made by the company, but on ascertaining that the company was not incorporated it was at plaintiffs' request signed by D., and the entry in plaintiffs' books was "G. A. Davlin, Toronto, Union Medicine Advertising Contract." The first and second payments were made by D., but on the third payment coming due, he stated his desire not to make it as it might prejudice a claim he had against G., his

partner, with whom he had a dispute about the partnership affairs, whereupon plaintiffs saw G., and on his stating that it was D.'s business to pay this account, the plaintiffs sued D., and moved for judgment under Rule 80, (Con. Rule 739) stating in their affidavit, in support of the motion that "the claim was under an agreement made between the parties," etc., and that "the defendant" D. "was and still is, justly and truly indebted to the plaintiffs in respect of the matters above set forth." D. put in an affidavit in answer, in consequence of which G. was made a party defendant, and the case proceeded to trial:—Held that, on the evidence, the credit under the contract was given to D. alone; but, even treating D. as an agent for an undisclosed principal, namely for G. as one of the firm, and therefore that G. might be jointly liable with D., the plaintiffs were bound to elect whether they looked to D. or the firm, and that there was a binding election not to treat the firm as liable, but to rely on the individual liability of D. *Mail Printing Co. v. Devlin*, 17 O. R. 15.—C. P. D.

T., being in Newfoundland, discovered a mine of pyrites, and on returning to Nova Scotia he proposed to A. that they should buy it on speculation. A. agreed, and advanced money towards paying T.'s expenses in going to Newfoundland to secure the title. T. made the second journey and obtained an agreement of purchase from the owner of the mine for a limited time, but failing to effect a sale within that time the agreement lapsed. It was renewed, however, some two or three times, A. continuing to advance money for expenses. Finally, T. effected a sale of the mine at a profit and had the necessary transfers made for the purpose, keeping the matter of the sale secret from A. On an action by A. for his share of the profit under the original agreement:—Held, affirming the judgment of the court below, that the sale related back, as between T. and A., to the date of the first agreement, and A. could recover. *Tupper v. Anand*, 16 S. C. R. 718.

See *Canada Central R. W. Co. v. Murray*, 8 S. C. R. 313, p. 277; *Bank of Montreal v. Thomas*, 16 O. R. 503, p. 326; *Re McMillan*, 17 O. R. 344, p. 340.

## 2. By Letters or Telegrams.

In order to convert a proposal into a promise, the acceptance must be absolute and unqualified, and should be prompt and immediately given. *Fulton Bros. v. Upper Canada Furniture Co.*, 9 A. R. 211.

The plaintiffs having agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that this was to be "American inspection," and the plaintiffs answered "we do not know anything about American inspection, but will submit to any reasonable inspection." No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiffs to submit to such inspection:—Held (reversing the judgment of the court below, 32 C. P. 422), that there had not been shown "a clear accession on both sides to one and the same set of terms," and that a concluded agreement had not been made out between the parties. *Id.*

M. offered to give land containing a tract that he would take \$1,500 for thirty years receiving any "Coming Monday immediate reply." at once." M. now constituted a contract to him for \$1,500:—Held, constitute any such offer to which plaintiff referred, and most accept" did not sit were merely an offer something in the nature of a contract. 6 O. R. 161.

R. wrote to O. "of our conversation property." O. replying offering \$800 for the land. R. had concluded to purchase the land. R. referred to in R.'s letter the property in question years' credit:—Held, O. was as of a cash offer to make any such offer specifically enforceable. Their understanding. *Co. v. Richardson*, 17 O. R. 15.—C. P. D.

A letter containing "prejudice" means "do not accept it to me," but "witness is removed."

Per Burton, J. A. writing by one party the other, either by the contract is a contract. A. R. 226.

On the 26th January as follows: "A. for property known one-third cash, balance per annum. noon." On the same day the following letter was offered made this morning by known as Mr. M. on M. street, for \$330 on completion of the contract at eight per cent. and abstract submitted. F. H., Esq., 22, D. that I may get copy. On a bill for specific Queen's Bench (M. J., dissenting) that formed:—Held, (R. J., dissenting) that additional acceptance fore no completed contract parties. *McIntyre*

Where property particulars and conditions the vendor's name, signed by the purchaser and the auctioneer.

M. offered to give J. \$1,500 for a certain lot of land containing a fifty feet frontage. J. replied that he would take \$1,750 for the fifty feet, or \$1,500 for thirty-five feet of the fifty feet. Before receiving any answer, J. telegraphed to M.: "Coming Monday to accept \$1,500. Waiting immediate reply." M. telegraphed back: "Come at once." M. now alleged that these telegrams constituted a contract for the sale of the fifty feet to him for \$1,500, and claimed specific performance:—Held, that the telegrams did not constitute any such contract, for it was ambiguous as to which proposal of \$1,500 J.'s telegram referred, and moreover the words "coming to accept" did not shew an actual acceptance, but were merely an expression of intention to do something in the future. *McFarren v. Johnston*, 6 O. R. 161.—Proudfoot.

R. wrote to O. "I have considered the matter of our conversation, and offer you \$800 for the property." O. replied: "I have your favour offering \$800 for the property (describing it). I have concluded to accept your offer." The evidence showed that at the prior conversation referred to in R.'s letter, R. was seeking to buy the property in question on terms of five or seven years' credit:—Held, that as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it. *Omnium Securities Co. v. Richardson*, 7 O. R. 182.—Boyd. Affirmed by Court of Appeal. *Ib.* 185.

A letter containing an offer written "without prejudices" means "I make you an offer; if you do not accept it this letter is not to be used against me," but when the offer is accepted the privilege is removed. *S. C.*, 7 O. R. 182.—Boyd.

Per Burton, J. A., when a proposal is made in writing by one party and accepted ad idem by the other, either verbally or by acting upon it, the contract is a written one. *Ellis v. Abell*, 10 A. R. 226.

On the 26th January, 1892, McI. wrote to H. as follows: "A. McI. agrees to take \$35,000 for property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday 28th, noon." On the same day H. accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., Esq., 22, D. block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance, the Court of Queen's Bench (Man.) decreed that H. was entitled to have the agreement specifically performed:—Held, (Ritchie, C. J., and Fournier, J., dissenting) that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties. *McIntyre v. Hord*, 9 S. C. R. 556.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of

sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued: "Re S.'s purchase, we would like to close this." And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. \* \* Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and on a subsequent occasion: "Re S.'s purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract."—Held, affirming 8 A. R. 161, that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds. *O'Donohoe v. Stammers*, 11 S. C. R. 358.

On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it telegraphed him if unable to pay it to draw on them for the amount. The acceptor took the telegram to the manager of the plaintiff's bank, who on the faith of it discounted a sight bill drawn by the acceptor on the drawers with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so redrawn:—Held, that the telegram having been sent for the purpose of inducing the drawers to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, drawers of the telegram, entitling the former to maintain an action against the latter for the money so advanced:—Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal v. Thomas*, 16 O. R. 503.—C. P. D.

See *Ockley v. Masson*, 6 A. R. 108; *Ryan v. Sing*, 7 O. R. 266; *Christie v. Burnett*, 10 O. R. 609; *Nevitt v. McMurray*, 14 A. R. 126.

### 3. Parol Contracts.

An agreement to insure may be made by parol. *Wright v. Sun Mutual Life Insurance Co.*, 5 A. R. 218.

See *Halloran v. Moon*, 28 Chy. 319, p. 330; *Ellis v. Midland R. W. Co.*, 7 A. R. 464, p. 275; *Thompson v. Molson's Bank*, 16 S. C. R. 684, p. 145.

### 4. Tenders.

The defendants acting as a committee to superintend the reception of a large number of persons, and being desirous, in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for \$1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally



allege failure of consideration; but that he was not bound by the settlement to pay for ties that were not delivered, and therefore that the determination of the action depended upon the result of the enquiry directed as to the number of ties delivered by defendant; and an appeal from the judgment directing such inquiry was accordingly dismissed. The objection, that the judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone v. VanAllen*, 12 A. R. 133.

The defendants, who had had a contract with the Government of British Columbia for the performance of a public work, but had forfeited it, after a part of the work had been done, agreed with the plaintiffs that the latter should do the remainder of the work under the contract, and should receive ninety per cent. of the amount of every estimate issued till the completion of the work. The written instrument embodying the agreement referred to the contract as an existing one, but the fact was, as was fully known by all the parties, that at the time of making the agreement the contract had been forfeited, and the Government had taken possession of the works. No advantage was taken by the defendants; the plaintiffs had examined the contract with the Government, and understood as well as the defendants the exact position of affairs; but all trusted to the possession of certain influence by which they hoped to get back the contract, and resume work upon it:—Held, affirming the judgment of the Q. B. D., that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking. *Cunningham v. Dunn*, 8 C. P. D. 443, applied, and followed. *McKenna v. McNamee*, 14 A. R. 339.

See *Wicher v. Darling*, 9 O. R. 311, p. 330.

### III. OPERATION OF THE STATUTE OF FRAUDS.

#### 1. Agreements to be Performed within a Year.

In an action on a verbal agreement made in November, for the hiring of plaintiff by defendant for a year from the 1st of December then next:—Held, that there could be no recovery for wrongful dismissal, the agreement being one not to be performed within a year; and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied. *Harper v. Davies*, 45 Q. B. 442.—Q. B. D.

Held, reversing the judgment of the County Court of York, that a contract for hiring for a year or more, defeasible within the year, is within the fourth section of the Statute of Frauds. The agreement, as alleged by the plaintiff, was made in February, 1880, whereby the defendant was to pay him for his services while he should remain in defendant's employment, at the rate of \$500 a year, for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties, and his salary to commence on the 3rd of March, then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year, and for such longer period as might be agreed

upon:—Held, clearly within the statute. *Booth v. Prittie*, 6 A. R. 680.

The court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement, where the consideration therefor has been executed. *Halleran v. Moon*, 28 Chy. 319.—Spragge.

To an action for a breach of promise of marriage, the plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August":—Held, that this was not an agreement not to be performed within a year and was, therefore, not void under the statute, although not in writing. *Smith v. Jamieson*, 17 O. R. 626.—Q. B. D.

See *Brown v. Nelson*, 7 O. R. 90, p. 338.

#### 2. Part Performance.

##### (a) Generally.

Held, (affirming the judgment of Proudfoot, J.), that the staying of the action was a sufficient part performance to take the case out of the Statute of Frauds. *Coates v. Coates*, 14 O. R. 195.—C. P. D.

### IV. VALIDITY AS REGARDS PUBLIC POLICY.

#### 1. Restraint of Trade.

D., on entering the employment of W. as agent in the vending of teas and coffees, covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person for at least two years after leaving W.'s employ. W. moved for an injunction to restrain D., who had left her employ, from violating the above covenant:—Held, that the covenant was binding upon D., notwithstanding that the consideration for it might have been inadequate:—Held, also, that the above covenant was not invalid on grounds of public policy. A covenant in restraint of trade is not invalid unless the restraint is larger and wider than the protection of the covenantee can possibly require. *Wicher v. Darling*, 9 O. R. 311.—Rose.

See *Schrader v. Lillis*, 10 O. R. 358, p. 328.

#### 2. Other Cases.

A. being about to sell a certain property, and in order to induce his wife, B., to bar her dower, entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B. "as she may require it for the maintenance of A. & B. and their family":—Held, a valid agreement, and not opposed to public policy. *Lavin v. Lavin*, 2 O. R. 187.—Proudfoot.

Lowering rates by railways. See *Owen Sound Steamship Co. v. Canadian Pacific R. W. Co.*, 17 O. R. 691; *Langdon v. Robertson*, 13 O. R. 407.

The plaintiff purchased from an alleged company fifteen bushels of hulless oats paying

therefor \$10 a bushel and receiving the company's bond to sell for him thirty bushels of oats at the same price. The company found in the defendant a purchaser of thirty bushels of oats and the plaintiff's oats were sold to him and the defendant's notes for \$300 were transferred to the plaintiff, the defendant getting the company's bond to sell sixty bushels for him at the same price. This was but one of a very large number of similar transactions and both the plaintiff and the defendant were aware of this, and that these transactions could not be carried out without some one else being induced to enter into a similar transaction by which their own would be completed and a loss probably suffered by their successors. The oats were not worth more than ordinary oats and the transactions were in fact speculative and fraudulent.—Held, (Burton, J. A., dissenting), that the transaction could not be dealt with as an isolated one, but that the whole scheme must be looked at; that the tendency of that scheme was clearly contrary to the general well-being of the public and therefore that the transaction in question forming part of that scheme was against public policy and illegal, and that the plaintiff could not recover the amount of the notes given by the defendant. Judgment of the County Court of Hastings affirmed on other grounds. *Bonisteel v. Saylor*, 17 A. R. 505.

See *Roberts v. Hall*, 1 O. R. 388; *Meredith v. Williams*, 27 Chy. 154; *Canadian Pacific R. W. Co. v. Western Union Telegraph Co.*, 17 S. C. R. 151, p. 282.

## VI. CONSTRUCTION OF CONTRACTS.

### 1. Conditions Precedent.

O. D. & Co. contracted with the government to complete certain telegraph works, and M. afterwards contracted with O. D. & Co. to construct part of the said works, in which latter contract O. D. & Co. covenanted to pay M. at the rate mentioned therein per mile, but the contract was expressed to be subject to the condition that the said payments should be made to M. within twenty days after the estimate of the engineer in charge, to be by him put in from time to time to the minister of public works, and service of a copy of such estimate on O. D. & Co.:—Held, that this alone, apart from other portions of the contract, was sufficient to make such estimate and service of a copy thereof a condition precedent to M.'s right to recover for work done under his contract. *McDonald v. Oliver*, 3 O. R. 310.—Ferguson.

By a third contract T. M. and G. M. contracted with both M. and O. D. & Co. to make advances to M., and to become security for M.'s due completion of the work, it being agreed therein that "upon the completion of the contract O. D. & Co. should pay T. M. and G. M. the amount due them by M. for supplies, before paying M. anything."—Held, that there must be an amount owing by O. D. & Co. to M., for which M. could recover against them, before O. D. & Co. were liable under the above contract to pay T. M. and G. M. anything, and that the intention was only to enable T. M. & G. M. to intercept payment by O. D. & Co. to M. of money due from them to M. *Ib.*

Performance of conditions by railway company before receiving the debentures voted them by a municipality as a bonus. See *Bickford v. Town of Chatham*, 10 O. R. 257; 14 A. R. 32; 16 S. C. R. 235.

See *Montreal City and District Savings Bank v. County of Perth*, 32 C. P. 18; *Blake v. Kirkpatrick*, 6 A. R. 212; *O'Brien v. Regina*, 4 S. C. R. 529; *Isbester v. Regina*, 7 S. C. R. 686; *Jones v. Regina*, 7 S. C. R. 570; *Provincial Insurance Co. v. Cameron*, 31 C. P. 523; 9 A. R. 56; *Regina v. Starrs*, 17 S. C. R. 118.

### 2. Implied Conditions.

Held, that an express or implied contract for safe transport is not created with the Crown because an individual pays tolls, imposed by statute for the use of a public work, such as slide dues, for passing his logs through government slides. *Regina v. McFarlane*, 7 S. C. R. 216.

The defendant company, who were empowered by statute to run a traction engine over certain highways in the county of York, and who by their charter were allowed to construct a tramway in the county to be worked by horse or steam power, upon such terms as might be agreed on with the municipalities through which the road might pass, entered into an agreement with the county, whereby it was agreed that the company should be at liberty to lay down a tramway along a certain road; that the tolls to be collected should not exceed certain specified rates on one and two horse vehicles; that the company, if required, should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh; that in case horses, carriages, teams, or other vehicles or animals met the horses, waggons, carriages, or other vehicles of the company, the latter should have the right of way, and that "so soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use of the said traction engine, and of any other traction engine, upon or along such public highways." The company insisted that they were at liberty, under the agreement, to run a steam motor upon the said tramway. Thereupon an action was instituted by the corporation to restrain the use of steam power on the tramway, which relief the court below, 3 O. R. 584, (Proudford, J.), on the hearing of the cause granted. Upon appeal, this court being equally divided, the appeal was dismissed, with costs. Per Hagarty, C. J., and Patterson, J. A. (agreeing with Proudford, J.), on the true construction of the agreement there was, if not an express, at least an implied qualification excluding the use of steam as a motive power. Per Burton, J. A., and Rose, J., what the company had agreed to abandon was only the right theretofore exercised by them,—under the general law, 31 Vict. c. 34 (R. S. O. c. 186)—of using traction engines on the public highway, and that they were not restrained by the agreement from using steam motors on the tramway. *County of York v. Toronto Gravel Road and Concrete Co.*, 11 A. R. 765. Appeal to Supreme Court dismissed, 12 S. C. R. 517.

In a chattel mortgage containing no redemption clause, there may be an implied contract that

the mortgagor abscond with the property in default of equal to that effect; a necessary arises ment unless it be terms. Porter distinguished. *Dead* 227.

When one con the preparation of expense, a correction of any expense on the part of the tracts to furnish cation will be known to, and parties at the date work it was, and power of the par agreement. *Hen* v. *McNamee*, 15 S.

The rule now is contract in question which is illegal, whether the illegality is in law. *Kitchin* Oiler.

Appellant, part an action against ship brokers in Eritia that while he as ship's husband refused to obey and to said vessel, an agreement by which charter nor sent cept as ordered by sent. On the tri brother of respondent appellant a fourth ship being effected by O was also shewn the parties was as all the arrival of the dents went to a la contrary to directi to New Orleans, of Appellant wrote to their conduct and incurred. They have no cause of management of the would not have p the vessel, if they were to have the vessel when on th A correspondence vember, 1869, appe to the fact that re "eternal bickering" fault. He then read vessel, stated in de against them, and the matter, if his quarter, I will cash." This an. for the share as years before. Res and the transfer was



the mortgagor shall remain in possession until default of equal efficacy with an express clause to that effect; and such an implied contract necessarily arises from the nature of the instrument unless it be very expressly excluded by its terms. *Porter v. Flintoff*, 6 C. P. 335, distinguished. *Dedrick v. Ashdown*, 15 S. C. R. 227.

When one contracts to do work for another the preparation for which involves outlay and expense, a corresponding agreement, in the absence of any express provision, will be implied on the part of the person with whom he contracts to furnish the work; but no such implication will be made where from circumstances known to, and in the contemplation of both parties at the date of the agreement to do the work it was, and continued to be, beyond the power of the party to carry out such implied agreement. *Henry, J., dissenting. McKenna v. McNamee*, 15 S. C. R. 311.

### 3. Other Cases.

The rule now is, that if the legal part of the contract in question can be severed from that which is illegal, the former shall stand good whether the illegality exist by statute or common law. *Kitching v. Hicks*, 6 O. R. 739.—Oler.

Appellant, part owner of a vessel, brought an action against respondents, merchants and ship brokers in England, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents, refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent. On the trial it appeared that E. V., a brother of respondents, had obtained from appellant a fourth share in the vessel, the purchase being effected by one of the respondents; and it was also shewn that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at Liverpool, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to New Orleans, of which appellant disapproved. Appellant wrote to respondents, complaining of their conduct and protesting against the expense incurred. They replied that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the Atlantic. A correspondence ensued, and on the 17th November, 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it was not their fault. He then reasserted his right to control the vessel, stated in detail, his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for \$4,200 in cash." This amount was about the same price for the share as appellant had sold it for some years before. Respondents accepted the offer, and the transfer was made to appellant:—Held,

on appeal, reversing the judgment of the Supreme Court of New Brunswick, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction, the contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name. *Weldon v. Vaughan*, 5 S. C. R. 35.

Under 32 and 33 Vict., c. 7. which provides that the printing, binding, and other like work required for the several departments of the government shall be done and furnished under contracts to be entered into under authority of the Governor in Council after advertisement for tenders, the Under-Secretary of State advertised for tenders for the printing "required by the several departments of the government." The suppliants tendered for such printing, the specifications annexed to the tender, which were supplied by the government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the Governor in Council, and an indenture was executed between the suppliants and Her Majesty, by which the suppliants agreed to perform and execute, etc., "all jobs or lots of printing for the several departments of the Government of Canada, of reports, etc., of every description and kind soever coming within the denomination of departmental printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specification hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the departmental printing having been given to others, the suppliants, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing:—Held (affirming the judgment of Henry, J., in the Exchequer Court), that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance, and the contract, there was a clear intention shewn that the contractors should have all the printing that should be required by the several departments of the government, and that the contract was not an unilateral contract, but a binding mutual agreement. (*Taschereau and Gwynne, J.J., dissenting.*) *Regina v. MacLean*, 8 S. C. R. 210.

S. and H., trading partners, sold out their business to E. under a written agreement, as follows:—"S. and H. do hereby bind themselves to E. under a penalty of \$2,000, that they will not do business in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M.:—Held, that this did not amount to a breach of the above agreement, though the matter was not free from doubt. *Elliott v. Stanley*, 7 O. R. 360.—Boyd.

One of the conditions of sale was, that the timber was to be removed by T. within two years:—Held, that the effect of the condition was that T. was only to have the right to cut

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and remove the timber within two years from the date of the agreement. *Strinchoff v. McKee*, 13 O. R. 546.—C. P. D.

The plaintiff conveyed his farm to his son, subject to the payment of an annuity of \$60 a year; and the plaintiff's "maintenance in board, washing and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of same date whereby defendant covenanted to furnish such maintenance, or pay such sum. The defendant sold the farm, and went to reside elsewhere. The plaintiff went and lived with him on the new farm for some years, receiving his maintenance, etc., but becoming dissatisfied left:—Held, that the plaintiff was not bound to reside with defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year. At the trial, the defendant's counsel raised the objection that the amount if any, was only payable at the end of the year: The trial judge overruled the objection, and decreed that plaintiff was entitled to receive \$2 a week, payable weekly. The defendant's counsel then asked to have the amount payable monthly, to which the judge acceded, and gave judgment accordingly:—Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it. *Sweeney v. Sweeney*, 16 O. R. 92.—C. P. D.

The defendants were a company carrying on a general telephone business with a central office to connect subscribers' telephones, and in addition carried on a messenger business for the purpose of delivering letters, messages, etc. By an agreement the defendants assigned their messenger business to the plaintiffs and covenanted that they would not transmit or give directly or indirectly any messenger order to any person, except the plaintiffs, and that they would cease to do such business. The G. N. W. Telegraph Co., (one of the defendants' telephone subscribers,) subsequently opened an office for a messenger business, and applied for a telephone in the usual way which the defendants supplied them with and by means of it the G. N. W. Telegraph Co. received orders for messengers, etc.:—Held, that the defendants did not transmit or give messenger orders when they placed a subscriber in communication (through the central office) with the G. N. W. Telegraph Co., that they only afforded him a medium by which to transmit or give his own order, which was a case not provided for by the agreement, and the action for an injunction to restrain defendants was dismissed with costs. *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, 17 O. R. 495.—Falconbridge. Affirmed *Id.* 501.—Chy. D.

On appeal, per Hagarty, C. J. O., and Burton, J. A. The covenant in question was broken, subscribers being enabled by the active intervention of the defendants to give orders of the kind referred to persons other than the plaintiffs. Per Osler, and MacLennan, J.J.A. The covenant was not broken, the defendants taking no active part in the transmission of the messages, but merely allowing subscribers to communicate with one another in the usual manner. *S. C.*, 17 A. R. 292.

See *Omnium Securities Co. v. Richardson*, 7 O. R. 182, 185, p. 325; *Brown v. Nelson*, 7 O. R. 90, p. 338; *Ryan v. Sing*, 7 O. R. 266; *Mennie v. Leitch*, 8 O. R. 397; *Hughes v. Moore*, 11 A. R. 569.

## VII. PERFORMANCE.

### 1. Excuse for Non-performance.

Where the plaintiff was engaged by the defendants for "the season," i.e., from early in May till some time in November, as master to manage the steamer *Idyl-Wyld* for \$1,000, and he continued so employed until September, when the steamer was burnt:—Held, that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendant. *Semble*, that such a contract made verbally with the president of the defendant company might be binding; and that a nonsuit for want of the corporate seal was properly set aside. *Ellis v. Midland R. W. Co.*, 7 A. R. 464.

The plaintiff lent P. a sum of money, for securing the repayment of which P. gave a chattel mortgage on goods; which P. was to retain possession of, and the defendant executed a bond, conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and an action having been commenced against the defendant on this bond, he pleaded the fact of such destruction without any default on his part:—Held, bad on demurrer, for not negating any default on the part of P. (*Cameron, J.*, dissenting). *Bonwell v. Sutherland*, 8 A. R. 233; 32 C. P. 131.

S. & Co., contractors for the erection of a building for the respondent in the city of St. John, N.B., brought an action claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed (under authority of an Act of the general assembly of New Brunswick, 41 Vict. c. 7) two days after the contract was signed. On the trial of the action the plaintiffs were nonsuited, and an application to the Supreme Court of New Brunswick to set such nonsuit aside was refused:—Held (Henry, J., dissenting) that the by-law of the city of St. John made the contract illegal, and, therefore, the plaintiffs could not recover. *Walker v. McMillan*, 6 S. C. R. 241, followed. Per Henry, J.—That the erection of the building would not, so far as the evidence shewed, be a violation of the by-law, and therefore, the nonsuit should be set aside and a new trial ordered. *Spears v. Walker*, 11 S. C. R. 113.

Where an executory contract is entered into respecting property or goods, if the subject-matter be destroyed by the act of God or vis major, over which neither party has any control, and without either party's default, the parties are relieved. *McKenna v. McNamee*, 14 A. R. 339.

The defendant to a firm of the firm was dissolved to carry out brought in the partners, for that the dissolution in law for out their contract R. 470.—Q. B. Appeal, 18 A. R. 2.

See *Stephens v. Coates*

### 2. When T

The plaintiff the lease having was on or about behalf of the defendant, to surrender, which he consented to, agreeing to \$250, agreeing to of February. between the parties not actually given February, he agreed as reserved in accepted by the defendant refused to upon, alleging a refusal of the nonsuit named:—Held, judgment made of the the delay formed the sum agreed to be R. 47.

On a sale of the Gould, 9 A. R.

Time may be without any expense such was the intent O. R. 188.

The plaintiff a defendant seventy-Printing Company his note, payable the shares, which the defendant's seventy-six shares the defendant for to pledge to a bill for the defendant it was a condition defendant, who had Printing Company the position of the director of the fixed salary. The note retired himself of the 12 been afterwards managing director turn of the forty- the purpose for (viz: the raising Hon. George Bro

The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract. In an action brought in the individual names of the three partners, for damages for non-delivery:—Held, that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract. *McCraney v. McCool*, 19 O. R. 470.—Q. B. D. Affirmed by Court of Appeal, 18 A. R. 217.

See *Stephenson v. Bain*, 8 P. R. 166, 258; *Coates v. Coates*, 14 O. R. 195.

## 2. When Time the Essence of Contract.

### (a) Generally.

The plaintiff was lessee of certain premises, the lease having nearly a year to run, when he was on or about the 13th January applied to on behalf of the defendant, the executor of the lessor, to surrender the remainder of his term, which he consented to do in consideration of \$250, agreeing to give up possession on the 1st of February. In consequence of negotiations between the parties interested, the plaintiff did not actually give up possession until the end of February, he agreeing to deduct a month's rent as reserved in the lease. Possession was accepted by the defendant's agent, but the defendant refused to pay the consideration agreed upon, alleging as a principal ground for such refusal the nondelivery of possession on the day named:—Held, that time was not by the agreement made of the essence of the contract, and the delay formed no defence to an action for the sum agreed to be paid. *Dainty v. Vidal*, 13 A. R. 47.

On a sale of timber limits. See *Crossfield v. Gould*, 9 A. R. 218.

Time may be of the essence of a contract even without any express stipulation if it appears that such was the intention. *Oldfield v. Dickson*, 18 O. R. 188.

### 3. Other Cases.

The plaintiff agreed to purchase from the defendant seventy-six shares of stock in the Globe Printing Company, and gave to the defendant his note, payable in two years, for the price of the shares, which were transferred to him. At the defendant's request he then pledged these seventy-six shares, and, as the jury found, lent the defendant forty-four other shares of his own, to pledge to a bank, which discounted the note for the defendant. The jury also found that it was a condition of the purchase that the defendant, who had a large interest in the Globe Printing Company, should keep the plaintiff in the position which he occupied as managing director of the Globe Printing Company, at a fixed salary. The defendant at the maturity of the note retired it, and took an assignment to himself of the 120 shares. The plaintiff having been afterwards dismissed from his position as managing director, brought this action for a return of the forty-four shares, on the ground that the purpose for which they had been pledged, (viz: the raising of money by the defendant for Hon. George Brown's estate,) had been fulfilled;

and for a return of the note, and to be relieved from the purchase of the seventy-six shares, on the ground that the condition of the purchase, (viz: his being retained in office,) had not been fulfilled, but had been broken by the defendant's procuring his dismissal:—Held, that as there had been a partial performance of the defendant's agreement, by retaining the plaintiff in office for the period within which the seventy-six shares were to have been paid for, there could be no rescission of the whole contract; but that the plaintiff—the finding of the jury as to the forty-four shares not having been moved against—was entitled to a return of these shares, and the defendant to judgment for the price of the seventy-six shares; and that the plaintiff's remedy, if any, for wrongful dismissal was by an independent action:—Held also, that the defendant having performed his portion of the agreement, the Statute of Frauds, as regards agreements not to be performed within a year, was not applicable to the undertaking to keep the plaintiff in office. *Brown v. Nelson*, 7 O. R. 90.—C. P. D.

In order to recover in an action for non-performance of a contract to do work, the plaintiff must shew a willingness and readiness on his part to perform, and on the defendant's part a distinct and unequivocal absolute refusal, and that such refusal was treated and acted upon by the plaintiff; for, if after refusal, he continue to urge or demand compliance with the contract, he must be deemed as considering it as not at an end. *McLellan v. Winston*, 12 O. R. 431.—C. P. D.

In this case the plaintiff set up a contract made with defendants, to cut and lay down on the defendants' limits a quantity of ties; that he was to ship his outfit to Port Arthur, where he was to receive instructions from defendants as to the means and way of forwarding same to the place where the work was to be performed. The plaintiff sent his outfit to Port Arthur, and claimed that defendants neglected and refused to give such instructions and refused to carry out the contract whereby the plaintiff was damaged:—Held, that the evidence disclosed that the plaintiff himself was not ready and willing to perform the contract; and further, if a refusal to perform by defendants was proved, that it was not treated and acted upon by plaintiff as such, but thereafter he continued to treat the contract as still subsisting:—Held, therefore, the action failed. *Id.*

R., who held a license from the government of New Brunswick to cut timber on certain lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and he issued a writ of replevin for some 800 logs alleged to be so cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under the said license (of R.) shall be surveyed and established by (naming the surveyors) and the stumps counted, etc.:—Held, reversing the judgment of the Supreme Court of New Brunswick (26 N. B. Rep. 258) that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line. *Snowball v. Ritchie*, 14 S. C. R. 741.

Action for not transferring to plaintiff a claim of a half-breed in Manitoba, or returning the price paid therefor. See *Burns v. Young*, 10 A. R. 215.

In March, 1883, B. contracted with C. et al. for the delivery of an engine in accordance with the Herreshoff system to be placed in the yacht "Ninie" then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st August C. et al. took out a *saisie conservatoire* of the yacht "Ninie" and claimed \$2,199.37 for the work and materials furnished. B. petitioned to annul the attachment and pleaded that the amount was not yet due, as C. et al. had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the *saisie conservatoire* was abandoned and the Court of Queen's Bench, on an appeal from a judgment of the Superior Court in favour of B., both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract and report on the defects. A report was made by which it was declared that C. et al.'s contract was not carried out and that work and materials of the value of \$225 was still necessary to complete the contract. On motion to homologate the experts' report, the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that court held that as C. et al. had not built an engine as covenanted by them, B.'s plea should be maintained, but as to the incidental demand held the evidence insufficient to warrant a judgment in favour of B. On appeal to the Court of Queen's Bench that court, taking into consideration the fact, that the yacht "Ninie" had, since the institution of the action, been sold in another suit at the instance of one of B.'s creditors, and purchased by C. et al., the proceeds being deposited in court to be distributed amongst B.'s creditors, credited B. with \$225 necessary to complete the engine, allowed \$750 damages on B.'s incidental demand, and gave judgment in favour of C. et al. for the balance, viz., \$1,225 with costs. The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings. On appeal to the Supreme Court of Canada and cross-appeal as to amount allowed on incidental demand by the Court of Queen's Bench it was:—Held, reversing the judgment of the Queen's Bench, Sir W. J. Ritchie, C. J. and Taschereau, J., dissenting, that as it was shewn that at the time of the institution of C. et al.'s action, it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C. et al. covenanted to build it, their action was premature:—Held also, that the evidence in the case fully warranted the sum of \$750 allowed by the Court of Queen's Bench on B.'s incidental demand, and therefore he was entitled to a judgment for that amount on said incidental demand with costs.—Taschereau J. was of opinion on cross-appeal, that B.'s incidental demand should have been dismissed with costs. *Bender v. Carrier*, 15 S. C. R. 19.

See *Village of Brussels v. Ronald*, 4 O. R. 1; 11 A. R. 605; *Spears v. Walker*, 11 S. C. R. 113;

*Thames Navigation Co. (Limited) v. Reid* 13 A. R. 303; *Bickford v. Chatham*, 14 A. R. 32.

#### 4. Enforcing.

(a) By Whom.

In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would, during her life, provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon, until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it:—Held, that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the agreement, and if the children did their part they could hold their brother to his promise, though the agreement was not in terms made with them as parties. *Re McMillan*, 17 O. R. 344:—Boyd.

See *Mitchell v. City of London Ass. Co.*, 15 A. R. 262.

#### X. ASSIGNMENT OF CONTRACTS.

On the 2nd August, 1878, H. C. & F. entered into a contract with Her Majesty to do the excavation, etc., of the Georgian Bay branch of the Canadian Pacific Railway. Shortly after the date of the contract and after the commencement of the work, H. C. & F. associated with themselves several partners in the work, amongst others S. & R. (respondents), and on 30th June, 1879, the whole contract was assigned to S. & R. Subsequently, on the 25th July, 1879 the contract with H. C. & F. was cancelled by Order in Council on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th August, 1879, S. & R. notified the Minister of Railways of the transfer made to them of the contract. On the 9th August the Order in Council of 25th July was sent to H. C. & F. On the 14th August, 1879, an Order in Council was passed stating that as the government had never assented to the transfer and assignment of the contract to S. & R., the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification, S. & R., who were carrying on the works, ceased work, and with the consent of the Minister of Public Works, realized their plant and presented a claim for damages, and finally H. C. & F. and S. & R. filed a petition of right claiming \$250,000 damages for breach of contract. The statement in defence set up inter alia, the 17th clause of the contract which provided against the contractors assigning the contract, and in case of assignment without Her Majesty's consent, enabled Her Majesty to take the works out of the contractors' hands, and to employ such means as she might see fit to complete the same; and in such case the contractors should have no claim for any further payment in respect of the works performed, but remain liable for loss by reason of non-completion by the contractor. At the trial there was evidence that the Minister of Public Works knew that S. & R. were partners, and that he was satisfied that they were connected with the concern. There was also evidence that the depart-

ment knew S. & R. and that S. & R. Deputy Minister of was necessary to be tractors, was to see from H. C. & F. Henry, J. awarded damages. On appeal was—Held, reversing (Fournier and Henry) was no evidence of of the Crown to as to S. & R. who the recover. 2. That tractors, by assigning power of the govern absolutely, which w all of the 14th Augu under the 17th cla for the value of wo prospective damag the plant. *Regina*

Assignment of r of agreement mad which the latter ag cows to no other ch N.D.—Right of act 18 S. C. R. 366.

#### XI. RESCUE.

1.

Form of decree after money advanced *Savings Co. v. Lucas* S. C., 44 Q. B. 106.

See *Brown v. Nelson* v. Smith, 10 S. C. R. *Lumber Co.*, 11 S. C. *Mulligan*, 13 O. R. 14 O. R. 608; 15 A. *vestment Association*

#### CONTRACTS.

See Works.

Liability of contractors within the knowledge. See *Robertson*.

Liability of contractor to injury to workman which the corporation by their engineer a v. *City of Ottawa*, 13

See *Walker v. McLean*.

#### CONTRACTS.

I. WINDING-UP COMPANY.

II. BY SURETY.

Held, that a third the benefit of one j

ment knew S. & R. were carrying on the works, and that S. & R. had been informed by the Deputy Minister of the department that all that was necessary to be officially recognized as contractors, was to send a letter to the government from H. C. & F. In the Exchequer Court, Henry, J. awarded the applicants \$171,040.77 damages. On appeal to the Supreme Court it was—Held, reversing the judgment of Henry, J., (Fournier and Henry, JJ., dissenting,) That there was no evidence of a binding assent on the part of the Crown to an assignment of the contract to S. & R. who therefore were not entitled to recover. 2. That H. C. & F., the original contractors, by assigning their contract put it in the power of the government to rescind the contract absolutely, which was done by the Order in Council of the 14th August, 1871, and the contractors under the 17th clause could not recover either for the value of work actually done, the loss of prospective damages, or the reduced value of the plant. *Regina v. Smith*, 10 S. C. R. 1.

Assignment of rights but without warranty of agreement made with certain farmers by which the latter agreed to give the milk of their cows to no other cheese factory than to that of N.D.—Right of action. See *Demers v. Duhaime*, 16 S. C. R. 366.

#### XI. RESCINDING CONTRACTS.

##### 1. Generally.

Form of decree where mortgage rescinded after money advanced. See *Superior Loan and Savings Co. v. Lucas*, 15 A. R. 748. Reversing S. C., 44 Q. B. 106.

See *Brown v. Nelson*, 7 O. R. 90, p. 338; *Regina v. Smith*, 10 S. C. R. 1, *supra*; *Petrie v. Guelph Lumber Co.*, 11 S. C. R. 450, p. 240; *Proctor v. Muligan*, 13 O. R. 683; *Clayton v. McConnell*, 14 O. R. 608; 15 A. R. 560; *Nelles v. Ontario Investment Association*, 17 O. R. 129, p. 280.

#### CONTRACTOR.

See WORK AND LABOUR.

Liability of contractor subject to insane delusions within the knowledge of one of the plaintiffs. See *Robertson v. Kelly*, 2 O. R. 163.

Liability of contractor and corporation for injury to workman in constructing works over which the corporation exercised superintendence by their engineer and inspector. See *Murphy v. City of Ottawa*, 13 O. R. 334.

See *Walker v. McMillan*, 6 S. C. R. 241, p. 207.

#### CONTRIBUTION.

I. WINDING-UP COMPANIES — See COMPANY.

II. BY SURETY—See PRINCIPAL AND SURETY.

Held, that a third person holding a note for the benefit of one joint endorser, cannot main-

tain a joint action against the co-endorsers under R. S. O. (1877), c. 110, ss. 2, 3, as endorsers for the full amount of the note, but must sue each separately in a special action for his share of the contribution. *Small v. Riddell*, 31 C. P. 373.—C. P. D.

Judgment against partners—Right of partner to enforce contribution. See *Honsinger v. Love*, 16 O. R. 170.

See *Kempt v. McCauley*, 9 P. R. 582, p. 16.

#### CONTRIBUTORIES.

See COMPANY.

#### CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

#### CONTROVERTED ELECTIONS.

I. MUNICIPAL—See MUNICIPAL CORPORATIONS.

II. PARLIAMENTARY AND LEGISLATIVE—See PARLIAMENTARY ELECTIONS.

#### CONVERSION.

##### I. OF CHATTELS.

1. Generally, 342.

2. Damages, 345.

II. OF REALTY INTO PERSONALTY, 346.

III. TROVER—See TROVER.

##### I. OF CHATTELS.

###### 1. Generally.

The plaintiff was executor of H. D., widow of T. D., whose executor the defendant was. The plaintiff claimed a piano in the house lately occupied by the widow, of which the defendant had the key. At an interview between the plaintiff and defendant the latter claimed the piano, but said he was willing to leave the question of the ownership to a person to be named. The plaintiff left him, promising to write, and afterwards did write, saying he had decided to bring the matter before the proper court. Subsequently the plaintiff's solicitor wrote the defendant offering to release all demands upon the defendant giving up all claim to the piano, to which the defendant's solicitor answered that he could not comply with the demand. The defendant commenced an action in which the title to the piano would come in question. The plaintiff's solicitor having again written to ask whether possession of the piano would be given, the defendant's solicitor wrote that it was perfectly safe where it was, and that the action commenced would decide the question. He also wrote that the plaintiff would not have put the law in motion:—Held, in an action of replevin, assuming the piano to be the plaintiff's, that

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there was no evidence of trespass or conversion to support the affirmative of the issue, that the defendant did not take or detain the piano. *Schaffer v. Dumble*, 5 O. R. 716.—Q. B. D.

The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent has he sustained damage. *Stimson v. Block*, 11 O. R. 96.—Boyd.

A bank placed an execution against M., the plaintiff's son, and one C., in the hands of B., a Division Court bailiff, under which B. seized a stallion as belonging to M., which plaintiff claimed as her property, and which pending interpleader proceedings instituted by her, was placed with an innkeeper. Subsequently an execution by P. against the same parties was placed in the sheriff's hands, P.'s solicitor informed the sheriff of all the circumstances, and he on the 2nd October, obtained from the innkeeper a written undertaking to keep the horse—stated to be under seizure by the sheriff—until further orders from the sheriff. On 14th October the sheriff on notice of plaintiff's claim interpleaded. On 31st October, the Division Court interpleader was decided in the plaintiff's favour. Whereupon the sheriff at once notified the innkeeper that he did not claim any further right to hold the horse. Before being so notified, the plaintiff demanded the horse, but the innkeeper refused to deliver it up until his charges for keeping it were paid, but did not assert any right to hold for the sheriff. On 18th November, part of the charges were paid, but it did not appear whether by the bank or P.; and the balance was subsequently paid by B. On the 3rd November an order was made barring P.'s claim and directing the sheriff to forthwith deliver the horse to plaintiff. On 14th November this action was commenced against the bank, P., the sheriff and bailiff, for conversion, and disobedience of the order of the court directing redelivery, claiming the value of the horse, loss of earnings, etc. About 3rd December, after the commencement of the action, the horse was tendered to plaintiff who refused to accept it unless damages and costs were paid. No notice of action was given:—Held, that there could be no recovery against any of the parties for the reason (1) that the bailiff should have had notice of action; (2) that there was nothing to connect the bank or P. with the seizure; (3) that though there was what constituted a seizure by the sheriff, so as to entitle him to interplead and make the innkeeper liable if he had not kept the horse for him, the sheriff in no way interfered with the bailiff's possession or control over it, or in any way converted it to his own use, it being at the time in the custody of the law. *Pardee v. Glass*, 11 O. R. 275.—C. P. D.

An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E. under a written order to ship same to his address as per sum agreed on, viz., \$875; \$225 to be allowed for E.'s portable engine and boiler, and \$635 to be paid on shipment; but, if not settled for in cash or notes within twenty days, then the whole

amount to become due. The order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs, E. agreeing not to sell or remove the same without the plaintiffs' consent in writing. On default in payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased, with right to purchase, by defendant D. to E.'s wife for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. all the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, etc., and on the same day D. leased the said premises, mill and machinery, to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery to the defendants the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at three months, which was renewed from time to time, but ultimately E. having failed to pay same, the plaintiffs demanded the machinery when D. notified plaintiffs not to remove same, as also did the society:—Held, that the effect of the transaction was, that the property was in the plaintiffs, and that they were entitled thereto; and that there was an illegal detention by the defendants D. and E. amounting to a conversion: and that the F. Co. by having notified plaintiff not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover \$650 with interest, being the price of machinery, and that upon removal of the engine and boiler the sum of \$60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E. *Polson v. Degee*, 12 O. R. 275.—C. P. D.

Held, (reversing the judgment of the C. P. D.) that the defendant could not be held liable for a conversion of the goods in question, by reason of his having joined in a bill of sale of them, and having accepted and assigned a mortgage for the balance of purchase money thereof; no other act of interference with the property on his part being shewn, they never having been in his possession or control, and he never having had the power to deliver up or retain them so as to make a demand upon and refusal by him evidence of a conversion; he having acted in such sale of the goods as the agent, and by the authority of another only. The plaintiff J. I. D. could not maintain an action for the conversion of the property in question; for assuming that it was the property of those under whom he claimed, which was one of the matters in controversy, it did not become vested in him until after the alleged conversion; neither could J. D. maintain the action, he never having had the actual possession of the property but a mere right as receiver

appointed by the it belonged to those would not support form the ground of court for a mand appropriate relief. 166.

One of the defendant piano, which she conditional sale by was to retain the before paying the the other defendant's agent in the and take possession payment she had between the defendant from the vendor the money of the instrument under seal of action against the of the piano, in view upon the defendant's ment, it was objection nor trover would plaintiff was entitled him for the conversion not necessary to in particular period denial after action piano could be treated as evidence of a conversion said defendant of and as against the wrong doer the beneficiaries should be added as a party in to succeed. *Black* Q. B. D.

See *McNeill v. E.*

B. having possession demanded them of refused to allow them moved until after December, S. commenced, on the ground detention of the goods B. notified S. that der of the goods, but finding some of process of attachment removed the rest, the Division Court seized:—Held, affirmed Master in Ordinary damages for the detention, but that was nominal, and not sustained. S. acted on and there did not a disposal of the goods action or removal advice, but the plaintiff from getting the defendant's misconduct attaching creditors 11 O. R. 96.—Boyd



appointed by the court to obtain the custody if it belonged to those whom he represented, which would not support the action, though it might form the ground of a special application to the court for a mandamus or attachment or other appropriate relief. *Dickey v. McCaul*, 14 A. R. 166.

One of the defendants was the purchaser of a piano, which she had partly paid for, under a conditional sale by which until fully paid for it was to remain the property of the vendor, but, before paying the balance due on it, she allowed the other defendant, who had acted as the vendor's agent in the sale to her, secretly to remove and take possession of it, he paying her the cash payment she had made. After this transaction between the defendants the plaintiff purchased from the vendor the notes given for the purchase money of the instrument, and took an assignment under seal of the property in it. In an action against the defendants for the recovery of the piano, in which no demand was proved upon the defendant in possession of the instrument, it was objected by him that neither detention nor trover would lie:—Held, that the plaintiff was entitled to recover damages against him for the conversion of the piano; for it was not necessary to impute the conversion to any particular period of time, and the defendant's denial after action of the plaintiff's right to the piano could be treated under the circumstances as evidence of a conversion before action by the said defendant of the plaintiff's interest in it; and as against technical objections raised by a wrong doer the benefit of all possible presumptions should be allowed:—Held, also, that it was not necessary that the vendor should be added as a party in order to entitle the plaintiff to succeed. *Blackley v. Dooley*, 18 O. R. 381.—Q. B. D.

See *McNeill v. Haines*, 17 O. R. 479.

## 2. Damages.

B. having possession of certain goods of S., S. demanded them of him on 23rd December. B. refused to allow the more bulky goods to be removed until after Christmas, on the ground that it would interfere with his own trade. On 24th December, S. commenced this action for damages, on the ground of wrongful conversion and detention of the goods by B. On 26th December, B. notified S. that he could remove the remainder of the goods. S. thereupon sent for them, but finding some of them had been seized under process of attachment out of the Division Court, removed the rest, and afterwards contested in the Division Court the ownership of those seized:—Held, affirming the judgment of the Master in Ordinary, that S. was entitled to damages for the detention of the goods on 23rd December, but the measure of that damage was nominal, and not the value of the goods detained. S. acted on the letter of 26th December, and there did not appear to have been any disposal of the goods in the sense of their destruction or removal adverse to the plaintiff's property, but the plaintiff was ultimately prevented from getting the goods, not because of the defendant's misconduct, but because the claim of attaching creditors intervened. *Stimson v. Block*, 11 O. R. 96.—Boyd.

Trees cut by locattee under the Free Grant and Homesteads' Act in the actual process of cultivation were sold to the plaintiff a millowner, and were seized by the defendants the timber licensees who also had a mill, and were taken by them thereto and cut up into lumber. It was proved that the plaintiff could not get other logs at that season of the year:—Held, Cameron, C. J., dissenting, that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the logs into lumber at his mill. *Cockburn v. Muskoka Mill and Lumber Co.*, 13 O. R. 343.—C. P. D.

In an action for the conversion by the defendant of certain logs of the plaintiff which had been cut without permission on the plaintiff's land, and purchased by the defendant and hauled to his mill, and there cut into lumber, the measure of damages was held to be the value of the logs as they were in the defendant's yard at the time they were demanded by the plaintiff, without any deduction for cutting and hauling, it appearing that the defendant knew that he was buying logs taken from the plaintiff's land, or at least that he suspected that such was the fact, and wilfully abstained from inquiry:—Semble, had the defendant been an innocent purchaser, a different measure of damages might have been applied. *Smith v. Baechler*, 18 O. R. 293.—Street.

Damages against railway company, on a contract to carry certain goods on their railway and connecting lines, for failure to deliver and for conversion. See *Worden v. Canadian Pacific R. W. Co.*, 13 O. R. 652.

## II. OF REALTY INTO PERSONALTY.

P. being the owner of certain lands was served by a railway company with notice of expropriation and tendered a sum of money for right of way and damage, which he refused. Subsequently on the application of the company and with the consent of P.'s solicitor the county judge made an order fixing the amount of security to be given for damages, and the price of the land, and giving the company possession upon their paying the amount of such security into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid for the value of the land taken and the damage to the remainder was fixed by the award in separate sums. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will, by which he devised all his real estate to a trustee, and appointed the plaintiff executor. The defendants were appointed trustees in place of the trustee named in the will. Upon a special case for the opinion of the court as to whether the plaintiff as executor of the personal estate or the defendants as trustees of the testator's land, was or were entitled to the sums awarded or any part thereof. It was:—Held, that notice to treat having been given, and a claim made by the landowner, and refused by the company, and the money having been paid into court and possession taken by the company, these circumstances under the authority of *Nash v. The Wor-*



cester Improvement Commissioners, 1 Jur. N. S. 973, would entitle the landowner to have specific performance against the company, and that therefore the land was converted into money and the plaintiff as executor was entitled to the sums awarded. *Hoskin v. Toronto General Trusts Co.*, 12 O. R. 490.—Proudfoot.

See *Wood v. Armour*, 12 O. R. 146; *Kearney v. Kean*, 3 S. C. R. 332.

## CONVICTION.

### I. BY MAGISTRATES.

1. *Generally*—See JUSTICES OF THE PEACE—SESSIONS.
2. *Under Canada Temperance Act and Liquor License Act*—See INTOXICATING LIQUORS.
3. *Appeal from*—See SESSIONS.

### II. REMOVAL OF—See CERTIORARI—INTOXICATING LIQUORS.

A conviction must be under seal. *In re Ryer and Plows*, 46 Q. B. 206.—Osler.

## CO-OPERATIVE ASSOCIATION.

Held, that R. S. O. (1877), c. 158, s. 15, an Act respecting co-operative associations which requires the business there referred to to be a cash business, does not prevent an association formed to carry on a "labour" or "trade," from entering into contracts on credit necessary for and incidental to such labour or trade—other than contracts of buying or selling—such as contracts for work or services. *Ontario Co-operative Stone Cutters' Association v. Clarke*, 31 C. P. 280.—Osler.

## COPYRIGHT.

See TRADE MARKS.

To create a perfect right under 38 Vict. c. 88 (Dom.), there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but without any writing, there may be such conduct on the part of the owner, in assenting to and encouraging the infringement complained of, as to disentitle him to relief in equity by way of injunction. *Allen v. Lyon*, 5 O. R. 615.—Boyd.

G., the writer of a book, printed the book which he intended to copyright, with notice therein of copyright having been secured, although he had not at the time actually taken the steps to obtain copyright. He, however, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. Furthermore, it appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete:—Held,

that this did not invalidate the patent, and quere whether it was an infringement of section 17 of the Act respecting copyrights, 38 Vict. c. 88 (Dom.), so as to subject G. to any penalty. *Gemmell v. Garland*, 12 O. R. 139.—Boyd; 14 S. C. R. 321.

On the title page of the book as published the plaintiff caused these words to be printed: "Entered according to Act of Parliament, in the year 1883, by J. A. Gemmell, in the office of the Minister of Agriculture, at Ottawa."—Held, that this was sufficient compliance with section 9 of the said Act, although the form of words used was not exactly the same as there prescribed, inasmuch as the word "of Canada," omitted after the word "Parliament," were immaterial. General remarks on forms prescribed in various cases by Acts of Parliament. *S. C.*, *sub nom. Garland v. Gemmell*, 14 S. C. R. 321.

The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted works therefor. In works of this nature where so much may be taken by different publishers from common sources and the information given must be in the same words, the courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence. *Id.*

Section 5 of the Con. Stat. C. c. 81, is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for an infringement of it. *Griffin v. Kingston and Pembroke R. W. Co.*, 17 O. R. 660.—Falconbridge.

A railway ticket is not a subject of copyright under the Act. *Id.*

The plaintiffs, a company incorporated in England for the purpose of securing Canadian copyright, and of acquiring the protection of the Canadian Copyright Act, 1875, moved to restrain the defendants from offering for sale in Canada a collection of songs imported from New York, which contained songs covered by the plaintiffs' Canadian copyright:—Held, that neither the facts that the domicile of the plaintiffs was in London, England, nor that the defendants were ignorant of the plaintiffs' right, were defences to the plaintiffs' action. The affidavit of the plaintiffs' manager, setting out their incorporation, and the acquisition of the copyright of the songs in question, and which was in no way controverted, was held, for the purposes of the motion, sufficient evidence of copyright. The defendants were ordered to pay the costs of the action although they had acted innocently, and at once expressed regret, inasmuch as they had contested the plaintiffs' right in court. *Anglo-Canadian Music Publishers' Association (Limited) v. Winniffrith B. others*, 15 O. R. 164.—Street.

There is a very clear distinction to be observed in the Copyright Act, R. S. C. c. 62, between works which are of prior British copyright, and those which are of prior Canadian

copyright. If then and thereafter Canada by the production of 6, that local copyright by the importation. But if the Canadian part of the author section 4, the no outside importation. *Publishers' Association*, O. R. 239.—Boyd.

The Imperial Parliament reiterated colonial session of a prior Canada completely against torial extent of the English reproductions subsequent British

See *Canada Publishing*, R. 306; *Robinson v.*

A coroner for the to have jurisdiction city of Ottawa, situated *v. Berry*, 9 P. R. 1.

The inquisition identifying the body person with whose charged; but the p the evidence shewed mitted. *Id.*

At a coroner's in receivable under R witness at such inquisition a statement inconsistent money; and independent improper reception a certiorari to bring Regina *v. Ingham*, referred to. *Regina*, 106.—MacMahon.

It is not improper for the prosecution the consent of the reached a conclusion county attorney is the proper language to be their verdict after i

The caption to an coners guilty of murder was held at H., etc. of January, in the 5 Majesty Queen Victoria be "an inquisition Sovereign lady the the body of an infant prisoners) then and oath of" (giving the and lawful men of then and there duly quire for our said law how and by what r came to her death, etc.:—Held, that the holding the inquest ciently appeared th

copyright. If there is a prior British copyright, and thereafter Canadian copyright is obtained by the production of the work, then, by section 6, that local copyright is subject to be invaded by the importation of lawful British reprints. But if the Canadian copyright is first on the part of the author or his assigns, then, under section 4, the monopoly is secured from all outside importation. *Anglo-Canadian Music Publishers' Association (Limited) v. Suckling*, 17 O. R. 239.—Boyd.

The Imperial Parliament has sanctioned and reiterated colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright. *Ib.*

See *Canada Publishing Co. v. Gage*, 11 S. C. R. 306; *Robinson v. Boyle*, 18 O. R. 387.

### CORONER.

A coroner for the county of Carleton was held to have jurisdiction to hold an inquest in the city of Ottawa, situate in that county. *Regina v. Berry*, 9 P. R. 123.—Osler.

The inquisition was held to be defective in not identifying the body of the deceased as being the person with whose death the prisoner was charged; but the prisoner was recommitted, as the evidence shewed that a felony had been committed. *Ib.*

At a coroner's inquest evidence is properly receivable under R. S. C. c. 174, s. 234, that a witness at such inquest has made at other times a statement inconsistent with his present testimony; and independently of that enactment the improper reception of evidence is no ground for a certiorari to bring up the coroner's inquisition. *Regina v. Ingham*, 5 B. & S. at p. 260, specially referred to. *Regina v. Sanderson*, 15 O. R. 106.—MacMahon.

It is not improper for the county attorney acting for the prosecution to enter the jury-room, with the consent of the coroner, after the jury have reached a conclusion, where the object of the county attorney is to advise the jury as to the proper language to be employed in order to draw their verdict after it has been arrived at. *Ib.*

The caption to an inquisition finding the prisoners guilty of murder, stated that the inquest was held at H., etc., on the 11th and 15th days of January, in the 51st year of the reign of Her Majesty Queen Victoria, and the inquisition to be "an inquisition indented, taken for our Sovereign lady the Queen," etc., "in view of the body of an infant child of A. W. (one of the prisoners) then and there lying, and upon the oath of" (giving the names of the jurors) "good and lawful men of the county, and who being then and there duly sworn and charged to enquire for our said lady the Queen, when, where, how and by what means the said female child came to her death, do upon their oaths say," etc.:—Held, that the statement of the time of holding the inquest was sufficient; that it sufficiently appeared that the presentment was un-

der oath: and that it need not be under seal: that there was a sufficient finding of the place where the alleged murder was committed: and of identification of the child murdered with that of the body of which the view was had. *Regina v. Winegarner*, 17 O. R. 208.—C. P. D.

L., the constable to whom the coroner delivered the summons for the jury, was at the inquest sworn in as one of the jury, and was sworn and gave evidence as a witness; and Y., a jurymen, was also sworn and gave evidence as a witness:—Held, that the fact of L. being such constable did not preclude him from being on the jury, nor did either of such positions preclude him giving evidence; and so also Y. was not precluded. *Ib.*

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XXI. STAYING PROCEEDINGS UNTIL COSTS OF FORMER PROCEEDINGS ARE PAID—*See PRACTICE.*

XXII. COMMISSION EXECUTIVE PARTITION  
XXIII. COSTS AND JURISDICTION

The wrong (if any) personal wrong on the council who voted if costs were adjudged they should not be *Marsh v. Huron Co.*

Held, that the common mistake of counsel to decide the case bear his own costs. *386.—Proudfoot.*

Where it was held a receipt, not being a release, no costs were allowed on action undefended release. *See Kaiser v. Boyd.*

In selecting the fee had not only to the also to those of the inexpensive mode of more expensive a adopted, it must be *dewaters v. Horton.*

Sureties sued on a to stay proceedings principal, "upon payment the words "upon payment of agreement, not more that execution for to under the order. *566.—Dalton, Master.*

In expropriation taxed liberally in fact where the statutes not "full costs," cost client are not intended *Atlantic R. W. Co.,*

Where a railway land under the Dominion pay to the land-owners the arbitration" had to be paid. Held, that to costs as between costs preliminary to

The two judges were court at the hearing motion to set aside judge in favour of with costs. *Cousins Ins. Co., 15 O. R. 35*

III. SECURITY

1. *Wills*

(a) *Residents Abroad*  
Where a plaintiff dictation wilfully state

XXII. COMMISSION IN LIEU OF COSTS — See EXECUTORS AND ADMINISTRATORS — PARTITION.

XXIII. COSTS AND EXPENSES OF CRIMINAL JURISDICTION — See CRIMINAL LAW.

I. GENERALLY.

The wrong (if any) complained of, being a personal wrong on the part of the members of the council who voted for the resolution:—Quære, if costs were adjudged to the plaintiff, whether they should not be paid by those members. *Marsh v. Huron College*, 27 Chy. 605.

Held, that the costs in this case having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should bear his own costs. *Dalby v. Bell*, 29 Chy. 336.—Proudfoot.

Where it was held that a legatee having signed a receipt, not being by law bound to execute a release, no costs were given against him in an action undefended to compel him to execute a release. See *Kaiser v. Boynton*, 7 O. R. 143.—Boyd.

In selecting the form of action regard must be had not only to the interests of the plaintiff, but also to those of the defendant, and when a simple inexpensive mode of procedure is open, and a more expensive and burdensome course is adopted, it must be at the peril of costs. *Vandewater v. Horton*, 9 O. R. 548.—Rose.

Sureties sued on a bail-bond, obtained an order to stay proceedings on the render of their principal, "upon payment of costs":—Held, that the words "upon payment of costs" are words of agreement, not mere words of condition, and that execution for costs was properly issued under the order. *Stuart v. Branton*, 9 P. R. 566.—Dalton, Master.

In expropriation cases the costs should be taxed liberally in favour of the proprietor; but where the statutes mention "costs" only, and not "full costs," costs as between solicitor and client are not intended. *Re Bronson and Canada Atlantic R. W. Co.*, 13 P. R. 440.—Boyd.

Where a railway company in expropriating land under the Dominion Railway Act agreed to pay to the land-owners "all costs incidental to the arbitration" had to fix the compensation to be paid:—Held, that the words did not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration. *Ib.*

The two judges who composed the divisional court at the hearing of this case disagreeing, a motion to set aside the judgment of the trial judge in favour of the plaintiff was dismissed with costs. *Cousineau v. City of London Fire Ins. Co.*, 15 O. R. 329.—Q. B. D.

III. SECURITY FOR COSTS.

1. When Ordered.

(a) Residents Abroad and Foreigners in Ontario.

Where a plaintiff resident without the jurisdiction wilfully stated in his bill that he resided

within it, security for costs was ordered. *Sutherland v. McDonald*, 9 P. R. 178.—Boyd.

A subsequent application to rescind the order on the ground that the plaintiff had returned within the jurisdiction and intended to remain there at the time of the former application, but had not then shewn the facts fully, was granted, but on appeal this order was reversed, and the order for security directed to stand. *Ib.*

Semble, that security will not be ordered, even where the plaintiff is a foreigner who has come within the jurisdiction temporarily, and only for the purpose of maintaining the suit. *Ib.*

Where a plaintiff who resided out of the jurisdiction did not endorse his place of residence on the writ, the costs of an application for security were made costs to the defendant in the cause. *McCready v. Hennessey*, 9 P. R. 489.—Dalton, Master.

The right to security for costs under Rule 431, O. J. Act, (Con. Rule 1242) is absolute, where the plaintiff resides out of Ontario, and it is immaterial that the defendant has no defence upon the merits. Quære, as to the proper time for making application for such security. *Bank of Nova Scotia v. La Roche*, 9 P. R. 503.—Cameron.

A defendant is not necessarily entitled to security for costs because the plaintiff's residence is out of the jurisdiction. *Doer v. Rand*, 10 P. R. 165.—Dalton, Master.—Galt.

If it be made apparent by evidence, which the court should look at, that the defendant has no defence, security will not be ordered. *Ib.*

The defendant admitted on his examination in this cause, that he owed the debt sued for, but he afterwards alleged a counterclaim for illegal arrest by the plaintiff in the course of his action:—Held, that under these circumstances, the defendant was not entitled to security for costs, and a præcipe order for security was set aside with costs. *Ib.*

Security for costs will not be ordered when the defendant has admitted the cause of action; and it is not essential that the admission should be in the action, on the pleadings, or in any technical form. *Anglo-American Casings Co., (Limited) v. Rowlin*, 10 P. R. 391.—Boyd.

The plaintiff swore that there was no defence on the merits, and produced a letter received from the defendant before action, promising to pay the claim sued on:—Held, that this contradicted and unexplained warranted the conclusion that there was no defence. *Bank of Nova Scotia v. La Roche*, 9 P. R. 503, not followed. *Ib.*

Since the passing of Con. Rule 1251, the practice sanctioned by *Doer v. Rand*, 10 P. R. 165, and *Anglo-American Casings Co. v. Rowlin*, *Ib.* 391 is no longer applicable, and where a plaintiff, against whom a præcipe order for security for costs had been obtained, moved to set it aside and for judgment under Con. Rule 739 without paying \$50 into court, under Con. Rule 1251 his motion was dismissed. *Payne v. Newberry*, 13 P. R. 354.—Falconbridge.

An affidavit filed by the defendant set out that "the said plaintiff has been for some time past,





tion, and who had indemnified him as to the costs. *Re Rainey Lake Lumber Co.*, 11 P. R. 314.—Dalton, *Master*.

The rule that security for costs should not be ordered where it could be only against one of several plaintiffs does not now universally govern, since the law as to joinder of plaintiffs has been changed by Rule 89, O. J. A. 1881. (See Con. Rules 300, 1171). Quare, whether the rule was ever applicable to the ordering of security for costs against an insolvent plaintiff suing for the benefit of another person. *Irving v. Clark*, 12 P. R. 29.—Dalton, *Master*.

Where one plaintiff was suing to enforce a mechanic's lien against certain land, and the other, an insolvent, suing on another's behalf to set aside a sale of the same land, security for costs was ordered against the latter plaintiff alone. *Id.*

Where an insolvent plaintiff in an action is not an actor therein, but is a mere passive instrument in the hands of the real plaintiff, by whom the action is brought, security for costs will be ordered; but where the plaintiff, financially worthless, unable to pay costs, although he partly bring the action for the benefit of another, is also himself largely interested in the result, he has to be considered as the real acting plaintiff, and cannot be compelled to give security for costs. *Delaney v. MacLellan*, 13 P. R. 63, distinguished. *Wallbridge v. Trust and Loan Co.*, 13 P. R. 67.—Dalton, *Master*.

See *Robertson v. McMaster*, 8 P. R. 14, p. 360; *McKay v. Baker*, 12 P. R. 341, p. 358; *Delaney v. MacLellan*, 13 P. R. 63.

#### (c) Costs of Former Suit unpaid.

The plaintiff filed a bill against B. and his daughter, alleging that he had been induced by the false representations of defendants to marry the daughter, upon the supposition that her husband was dead, whereas he was alive: that the plaintiff was induced by B. to expend money on property, which B. was to convey to the plaintiff, and his supposed wife, who afterwards left the plaintiff, and the plaintiff claimed a lien upon and sale of the property to repay his said expenditure thereon. This bill having been dismissed for want of prosecution, the plaintiff sued the executor of B. who had died, setting out his expenditure under the false representations, and alleging that after his supposed wife had left him B. agreed, that upon receiving three years' rent of the property which was under lease, he would convey it to the plaintiff, and praying for specific performance.—Held, that the second suit was not for substantially the same cause as the first, and that defendant therein was not entitled to security for costs. *Caswell v. Murray*, 9 P. R. 192.—Dalton, *Master*.—Boyd.

The plaintiff, as administrator of his late wife, brought this action under R. S. O. (1887) c. 135, to recover compensation for her death, alleged to have been caused by reason of the negligence of the defendants. Previous to his obtaining letters of administration to his wife's estate he had brought an action in his own name against the same defendants for the same purpose, but discontinued it. The costs of the first action

being unpaid, the defendants applied for security for costs under Con. Rule 1243:—Held, that the cause of action in the two cases was not the same, and an order staying proceedings till the plaintiff should give security for costs was set aside. *Lucas v. Cruickshank*, 13 P. R. 31.—Street.

#### (f) Other Cases.

The order for security for costs under Rule 431, O. J. Act, (Con. Rule 1242), is a stay of proceedings, and a judge has no power to set it aside when once properly issued and sign final judgment under Rule 80, O. J. Act. (Con. Rule 739). *Bank of Nova Scotia v. LaRoche*, 9 P. R. 503.—Cameron.

When the defendant has no defence. See *Doer v. Rand*, 10 P. R. 165; *Anglo-American Casings Co. (Limited) v. Rowlin*, 10 P. R. 391.

As to the rule that security for costs should not be ordered when it could be only against one of several plaintiffs. See *Irving v. Clarke*, 12 P. R. 29.

Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife:—Held, (Proudfoot, J., dissenting), that though suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. This case did not come within the class of cases where a nominal insolvent plaintiff is put forward, while the substantial litigant keeps in the background in order to avoid liability for costs. *McKay v. Baker*, 12 P. R. 341.—Chy. D.

An application for an order for security for costs was made on the ground that the plaintiffs had no corporate existence, and that their name was being used by one C., who was insolvent:—Held, upon the evidence, that there was nothing to warrant the conclusion that this action was really brought for the benefit of any other than the plaintiffs. *Port Rowan and Lake Shore R. W. Co. v. South Norfolk R. W. Co.*, 13 P. R. 327.—Q. B. D.

Held, that the question whether the plaintiffs had or had not ceased to be an existing corporation, having been raised upon the pleadings, could not be raised and determined on an application for security for costs. *Id.*

The plaintiff sued as lessee from her brother of certain goods, for damages for illegal distress. An action had been previously brought by her brother in respect of the same distress against the same defendant, and had been dismissed. Semble, that under these circumstances security for costs might be ordered. *Denham v. Gooch*, 13 P. R. 344.—Dalton, *Master*.

On the 5th November, 1885, an order was made requiring the plaintiff to give security for costs within four weeks and in default that the action should be dismissed with costs, unless the





a motion for judgment made simultaneously with the motion to set aside the præcipe order for security for costs was refused. *Doer v. Rand*, 10 P. R. 162.—*Dalton, Master*.—*Galt*.

The statement of defence set up that the assult complained of was in self-defence, and, as an alternative defence, that, while the defendant did not admit his liability for damages, he brought into court \$150, and said that the same was sufficient, etc.:—Held, that the money paid into court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs. *Rogers v. Loos*, 11 P. R. 118.—*Kingsmill, Local Judge*.—*Boyd*. See *Bell v. Fraser*, 12 A. R. 1.

See *Walmesley v. Griffith*, 11 P. R. 139, p. 355.

#### 6. Cancellation of Bond.

The plaintiff, who lived out of the jurisdiction, obtained a judgment at the trial, which was affirmed by the Divisional Court, except as to one defendant against whom the action was dismissed, without costs:—Held (reversing the order of the Q. B. D., 11 P. R. 9), pending an appeal to the Court of Appeal by the other defendants, that the plaintiff was not entitled to have delivered out to him for cancellation a bond for security for costs of the action after judgment in his favour by the Q. B. D. before the time for appealing to this court had actually elapsed, and while an appeal was actually pending. *Hately v. Merchants' Despatch Co.*, 12 A. R. 640.

#### 7. Payment out of Court Pending Appeal.

Plaintiffs, who resided in England, obtained a verdict for the price of goods in defendants' possession. The defendants appealed to the Court of Appeal. Plaintiffs applied for payment out of \$300 paid in by them as security for costs on commencing the action:—Held, that as the plaintiffs were shewn to have goods in the country, and in the defendants' possession, the \$300 should be paid out. But for this the plaintiffs would not have been entitled to the money, the appeal being a step in the original cause, not a new action. *Napier v. Hughes*, 9 P. R. 164.—*Wilson*.

Money paid into court in lieu of giving the usual bond for security for costs will not be paid out to the party paying it in, in whose favour a decree has been made, pending an appeal to the Court of Appeal. *National Ins. Co. v. Egleson*, 9 P. R. 202.—*Boyd*.

The defendants being entitled by the judgment of the Court of Appeal to the costs of the action, obtained out of court for suit the bond given by the plaintiff for security for such costs. Before action on the bond, and pending an appeal by the plaintiff from the judgment of the Court of Appeal to the Supreme Court of Canada, one of the sureties on the bond obtained leave and paid into court to the credit of this action \$400, the amount due on the bond, to abide further order. Upon the application of the defendants, the company, *Boyd, C.*, directed \$200 of the \$400 to be paid out to their solicitors, upon the solicitors undertaking to refund

the amount if the Supreme Court should vary the disposition of costs made by the Court of Appeal. *Kelly v. Imperial Loan Co.*, 10 P. R. 499.

See *Citizens' Ins. Co. v. Parsons*, 32 C. P. 492; *McLaren v. Caldwell*, 9 P. R. 118.

#### IV. WHEN PARTY HAS SUCCEEDED ONLY IN PART.

The court refused in this case to reform an instrument on parol evidence, although satisfied that the plaintiffs ought to have succeeded had the case been one depending on the weight due to such evidence, and had the bill only asked for that relief would have dismissed it with costs; but as the bill contained a prayer for foreclosure, that relief was afforded the plaintiffs, subject to the payment of such costs as the defendant, an assignee in insolvency, had incurred in resisting a rectification of the mortgage. *Dominion Loan & Savings Society v. Darling*, 27 Chy. 68.—*Spragge*.

In a suit seeking to restrain the use by defendant of an oven, which had been the subject of a patent in favour of the plaintiff, the plaintiff having succeeded as to part only of his claim, no costs were given to either party up to the hearing. A reference as to damages having been directed, subsequent costs were ordered to abide the result. *Hunter v. Carrick*, 28 Chy. 489.—*Proudfoot*.

Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the execution creditors that some of the goods seized, amounting to one-sixth of total value, were not covered by the mortgage:—Sembles, although the mortgagee was entitled to the general costs of the issue a deduction of one-sixth should be made in respect of the goods as to which he failed. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R. 413.—*Boyd*.

Held, in this case, that the demurrer being partially successful and partially unsuccessful, neither party should get costs. *Attorney General v. The Midland Railway Co.*, 3 O. R. 511.—*Boyd*.

Plaintiff sued C. & G., G. being a married woman, and obtained a verdict against both. In term both defendants obtained a rule to enter a nonsuit for them, or a verdict for G. The latter part of the rule was made absolute. The taxing officer disallowed the plaintiff any costs in term, because he had not given notice that he abandoned his verdict against G., and taxed to her one-half of the costs of the term motion, both defendants having appeared by the same attorney:—Held, on appeal, that a proper proportion of the costs in term should be allowed to the plaintiff, against defendant C., and the taxing officer was directed to enquire whether any binding contract of retainer had been entered into by G., and if not to allow her only disbursements. *Clark v. Creighton*, 9 P. R. 125.—*Oslar*.

Held, that inasmuch as the plaintiff succeeded in the only branch of the case argued before the Divisional Court, she should get her costs of that appeal; but as to the rest of the suit, to

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save the expense and trouble of the apportionment, no costs should be given or received. *Gough v. Birch*, 6 O. R. 699.—Chy. D.

In this case the defendant was refused his costs, as the ground on which he had succeeded did not go to the merits. *Regina v. Sparham*, 8 O. R. 570.—Rose.

The appeal of one of the defendants, a bank, was allowed and the bill against them dismissed, but as they set up a claim in their original answer, which was urged on appeal and could not be maintained, they were held not entitled to their costs of defence or of the appeal. *Railey v. Jellett*, 9 A. R. 187.

See *Porritt v. Fraser*, 8 P. R. 430, p. 99; *Bertram & Co. v. Massey Manufacturing Co.*, 13 P. R. 184, p. 380.

See also next Subhead.

#### V. UPON COUNTERCLAIM OR SET-OFF.

An action on an unsettled account, to which there was a counterclaim, also on an unsettled account, was referred. The referee found that there was a sum of \$148.81 due the plaintiff on his claim, and \$164.50 due the defendant on his counterclaim, leaving a balance due defendant of \$15.69, and he certified to entitle the defendant to full costs. The Statute of Limitations was pleaded respectively to the claim and counterclaim, and the items barred by the statute were in consequence disallowed; but apart from the statute the balance would have been in the plaintiff's favour:—Held, that the plaintiff and defendant were entitled to recover the costs of and relating to the claim and counterclaim, and proof thereof respectively, including the reference and subsequent proceedings; the defendant being also entitled to recover the sum of \$15.69. The taxing officer to divide items in common; and judgment entered for the party in whose favour the balance should be found. *Coughlin v. Hollingsworth*, 5 O. R. 207.—Rose.

Although for some purposes a claim and counterclaim form but one action, yet the costs of the counterclaim are to be taxed separately from the costs of the action, a counterclaim being, for the purposes of taxation, to be treated as a cross-action. *McGowan v. Middleton*, 11 Q. B. D. 461, and *Beddall v. Maitland*, 17 Ch. D. 174, followed. *Emerson v. Gearin*, 12 P. R. 399.—Street.

Where the order of a divisional court varied the judgment at the trial by directing that the counterclaim should be struck out and not dismissed, and should be disposed of in a separate action, and also directed that the defendants should pay into court the amount of the costs of the action, but was silent as to the costs of the counterclaim:—Held, that the rights of the parties must be governed by this order, and not by anything that preceded it, and that under it the plaintiffs were not entitled to tax the costs of the counterclaim. *Id.*

To an action on a building contract, the defendant set up the defence that the work was incompletely and unskillfully done, and counterclaimed for damages by reason thereof. The master to whom the action was referred found

that \$177 should be deducted for unskillful and incomplete work from the amount claimed by the plaintiff, and that the defendant had suffered damage to the extent of \$177.—Held, that the questions raised by the defendant might have been raised in a similar action before the Judicature Act, and that he was not entitled to have the costs dealt with as if what he had set up was properly a counterclaim. *Cutler v. Morse*, 12 P. R. 594.—Armour.

The plaintiff claimed \$1,205, the balance of the contract price for work done, and the defendant claimed that by reason of imperfect work the balance should be reduced by \$900. The defendant was allowed \$266.54 in respect of his claim for reduction, and the plaintiff, therefore, recovered \$938.46:—Held, that what the defendant claimed was neither a set-off nor a counterclaim; and, as the plaintiff had substantially succeeded, he should get the general costs of the action and reference, less the costs incurred by the defendant in establishing the items of improper work on which he succeeded. *Cutler v. Morse*, 12 P. R. 594, followed. *Sanderson v. Ashfield*, 13 P. R. 230.—Boyd.

See *Brown v. Nelson*, 11 P. R. 121, p. 367; *Weaver v. Sawyer*, 16 A. R. 422, p. 378; *Foster v. Viegel*, 13 P. R. 133, p. 378; *Bertram & Co. v. Massey Manufacturing Co.*, 13 P. R. 184, p. 380.

#### VI. THIRD PARTY COSTS.

Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H., claiming indemnity; and, thereupon, by order in chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands:—Held, that the plaintiffs must pay H.'s costs. *Beard v. Credit Valley R. W. Co.*, 9 O. R. 616.—Ferguson.

The defendants, being sued as carriers for the loss of goods in transit under a contract between the plaintiffs and defendants, gave notice under Rules 107 and 108 (Con. Rules 328 and 329) to the third parties that they claimed indemnity from them, under a contract to which the plaintiffs were strangers; the third parties appeared, and an order was made that they should be at liberty to assist in defending the action and should be bound by the result as regards the liability of the defendants to the plaintiffs. The plaintiffs were consulted at the trial:—Held, that the plaintiffs were not liable for the costs of the third parties, or for the costs occasioned by joining them; nor were the defendants liable for such costs. *Tomlinson v. Northern R. W. Co. of Canada*, 11 P. R. 419.—Armour.

Held, that the order of Armour, J., (11 P. R. 419), refusing the third parties their costs, was made in the exercise of a discretion which, by section 52 O. J. Act, was not subject to review without leave, and as no such leave had been given, an appeal from the order was dismissed, with costs. The court directed that such part of the costs incurred by the third parties in establishing the defence as might properly have been incurred by the defendants, should be al-

lowed by the tax C. P. D.

In an action received by the defendant upon a third party claim. The third was made that he the action as regards plaintiff and the at the trial, called witnesses called and be bound by delivered a statement directly against the except a portion was not a proper tribution existed was struck out at cation. The pla tion:—Held, tha the position of o own interest to o should not reco brought him in *Wallbridge v. G*

#### VII. COSTS M

In an appeal ag security for costs the costs made c *Bell v. Landon*, 1

The plaintiffs of a foreign commiss order contained th be costs in the ca but was not put in that the direction preclude the taxin costs to the plain evidence had not v. *Stinson*, 9 P. R

The venue in an ment of a patent v Brockville. As t applying, the cost in appeal were m *son v. Mann*, 9 P.

Costs of moving of the absence of d in the cause where diligent efforts, e *Brown v. Porter* 250.—Rose.

#### VIII. AR

An order was n bers changing th Simcoe, for which chancery sittings siding at those si the case, as it be sion:—Held, with master's order wa tiff was justified i occasioned by th allowed to him. S 475.—Cameron.

The costs of a case the jury di

lowed by the taxing officer. *S. C., Ib.*, 528.—C. P. D.

In an action for rent or royalties upon iron received by the defendants, they served a notice upon a third party claiming contribution from him. The third party appeared; and an order was made that he should be at liberty to defend the action as regarded the questions between the plaintiff and the defendants only, and to appear at the trial, call witnesses, cross-examine the witnesses called by the plaintiff and defendants, and be bound by the findings. The third party delivered a statement of defence, which was directly against the plaintiff's statement of claim, except a portion thereof which stated that he was not a proper party, and that no right of contribution existed against him, but this portion was struck out at the trial upon his own application. The plaintiff was successful in the action:—Held, that the third party had adopted the position of one who was called upon by his own interest to defend the action, and that he should not recover from the defendants who brought him in his costs of so defending it. *Wallbridge v. Gaujot*, 13 P. R. 463.—Ferguson.

#### VII. COSTS MADE COSTS IN THE CAUSE.

In an appeal against an order refusing further security for costs, the appeal was dismissed, and the costs made costs in the cause to the plaintiff. *Bell v. Landon*, 9 P. R. 100.—Boyd.

The plaintiffs obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs be costs in the cause. The evidence was taken, but was not put in at the trial. *Boyd, C.*: Held, that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiffs, on the ground that the evidence had not been used. *Dominion etc., Co. v. Stinson*, 9 P. R. 177.

The venue in an action to restrain the infringement of a patent was changed, without terms, to Brockville. As the defendant had been slow in applying, the costs of the application below and in appeal were made costs in the cause. *Aitchison v. Mann*, 9 P. R. 253.—Boyd.

Costs of moving to postpone a trial on account of the absence of a material witness will be costs in the cause where the party moving has made diligent efforts, etc., to secure the attendance. *Brown v. Porter—Knox v. Porter*, 11 P. R. 250.—Rose.

#### VIII. ABORTIVE PROCEEDINGS.

An order was made by the master in chambers changing the venue from the assizes at Simcoe, for which notice had been given, to the chancery sittings in London. The judge presiding at those sittings having refused to take the case, as it belonged to a common law division:—Held, without determining whether the master's order was a proper one, that the plaintiff was justified in acting on it, and his costs occasioned by the abortive proceedings, were allowed to him. *Schwob v. McGloughlin*, 9 P. R. 475.—Cameron.

The costs of a trial which was abortive because the jury disagreed, no order to the con-

trary having been made by the judge at the trial, were held taxable against the defendants by the plaintiff who ultimately succeeded. *Cope-land v. Township of Blenheim*, 11 P. R. 54.—Rose.

See *Bissett v. Strachan*, 8 P. R. 211, p. 386; *Christopher v. Noxon*, 10 P. R. 149, p. 385.

#### IX. COSTS OF THE DAY.

The practice of giving costs of the day is superseded by the O. J. Act. No officer of the court has now power to issue a rule for such costs. Where the plaintiff fails to enter the cause, defendant should apply to a judge under Rule 264 (Con. Rule 665). The master in chambers has no jurisdiction to entertain an application for costs under that rule. *Hopkins v. Smith*, 9 P. R. 285.—Dalton, Master.

See *Hogg v. Crabbe*, 12 P. R. 14, p. 394.

#### X. ABANDONMENT OR DISCLAIMER.

J., one of the defendants, had bid for and had become purchaser of a lot of land sold under the provisions of R. S. O. (1877), c. 216, by certain parties claiming to be trustees of the Coloured Wesleyan Methodist Church, whose proceedings in respect of such attempted sale were impeached in the action to which J. was made a party defendant, although he avowed his willingness to withdraw from the purchase, and by his answer disclaimed all interest in the result of the suit, and alleged that no effort had been made by him to have the sale carried out, as he was aware that the same would have to be first confirmed by the members of the said church. At the trial judgment was pronounced setting aside the sale, and ordering the defendants generally to pay costs:—Held, varying the judgment of the court below, that under the circumstances, a formal disclaimer was not required, and J. was ordered to be paid his costs of the appeal, but the action in the court below was dismissed as against him, without costs. *Wansley v. Smallwood*, 11 A. R. 439.

See *Beard v. Credit Valley R. W. Co.*, 9 O. R. 616, p. 364.

#### XII. SET-OFF OF COSTS.

The costs of a motion in term are interlocutory costs, and the party to whom they are awarded is entitled to have them set-off against the judgment of the opposite party obtained in the same cause. *Young v. Hobson*, 8 P. R. 253.—Osler.

Held, that the costs of a motion made after judgment might be treated as interlocutory, for the purposes of a set-off under Reg. Gen. 52 (Con. Rule 1205). *Ib.*

In an action in a County Court, tried by a judge without a jury, judgment was given for \$36, no order being made as to costs:—Held, that no costs could be awarded, and a mandamus was granted to the county court clerk to enter up judgment for the plaintiff with costs, and without allowing defendant to set-off against the judgment the difference between County and Division Court costs. *Re Great Western Advertising Co. v. Rainer*, 9 P. R. 494.—Armour.

Where judgments were recovered in the same action, by the plaintiff on his claim with general costs of action, and the defendant on his counterclaim with costs thereof, such claim and counterclaim arising out of the same subject matter, the judgment for counterclaim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counterclaim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant, notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff. *Brown v. Nelson*, 11 P. R. 121.—*Dalton, Master*.—*Oslar*.

Quere, when a judgment, as in this case, has been framed without directing a set-off, whether a judge in chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the court. *Ib*.

It is not a fair construction to incorporate with Rule 511 (Con. Rule 1174) the provisions of R. S. O. (1877), c. 50, s. 346, that section being restricted to a case where there is a trial. *White v. Belfry*, 10 P. R. 64, commented upon. *Andrews v. City of London*, 12 P. R. 44.—*Chy. D*.

Under Rule 436 (Con. Rule 1204), a discretion is allowed as to whether or not there shall be a set-off of costs in the same action, where costs are awarded to and against the parties; equitable considerations are allowed to enter into the disposal of the contention, and there is no strict right in the matter. *McCarthy v. Cooper*, 12 P. R. 125.—*Boyd*.

A direction to set-off costs was properly refused under the following circumstances:—The plaintiff succeeded at the trial of an action for specific performance of a contract for the sale of land, and was given costs up to the trial; on reference to a master he failed to shew title, and was ordered to pay defendant his costs subsequent to the trial, and to repay \$500 of the purchase money which had been paid by the defendant; the defendant's solicitor asserted a lien upon the sum due by the plaintiff for costs, which could be recovered upon the bond given by him as security for costs, whereas the \$500 could not be recovered against the plaintiff, who was worthless. *Ib*.

The plaintiff recovered judgment against the defendant, with costs, upon a claim for the value of goods sold under a distress for rent, of which the defendant, the landlord himself, became the purchaser; and the defendant recovered judgment against the plaintiff, with costs, upon a counterclaim for rent and damages to the demised premises. The judgment did not direct any set-off, and the plaintiff's solicitors having asserted a lien upon the judgment for costs against the defendant, the taxing officer refused to allow a set-off of the costs, awarded to plaintiff and defendant respectively:—Held, that the claim and counterclaim were separate and distinct, and the judgments must be treated as judgments in separate actions; and Con. Rule 1204 did not apply to enable the taxing officer to deduct or set off costs. Under the circumstances of this case, the Court (Rose, J., dissenting), deprived the plaintiff, who was finally successful upon the appeals as to costs, of the costs of the

appeals. *Link v. Bush*, 13 P. R. 425.—*MacMahon*.—*C. P. D*.

See *White Sewing Machine Co. v. Belfry*, 10 P. R. 64, p. 369; *Richardson v. Jenkin*, 10 P. R. 292, p. 369; *Ireland v. Pitcher*, 11 P. R. 403, p. 370; *Liverpool v. Bailey*, 12 P. R. 535, p. 381; *Truax v. Dixon*, 13 P. R. 279, p. 374; *Johnston v. Kenyon*, 13 P. R. 24, p. 372.

### XIII. SCALE OF COSTS.

#### 1. Generally.

The plaintiff sued the defendant on a foreign judgment for \$240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. (1877), c. 50, s. 153, and that the plaintiff was entitled to superior court costs. *Davidson v. Cameron*, 8 P. R. 61.—*Dalton, Q. C*.

Where a cause was properly within the equity jurisdiction of a County Court, but the defendants resided in a different county from that in which the land in question was situated, the costs were ordered to be taxed on the higher scale. *Doubledee v. Credit Valley R. W. Co.*, 8 P. R. 416.—*Taylor, Master*.

The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged. The damages were assessed at \$40, but judgment was given for the restoration of the plaintiff's land:—Held, that the plaintiff was entitled to full costs. *Snarr v. Granite Curling and Skating Co.*, 1 O. R. 102.—*Ferguson*.

The plaintiff and defendant entered into partnership to furnish G. & W. with certain staves, for the price of \$2,000. The contract was not fulfilled, and the plaintiff subsequently brought an action, and obtained a reference to take an account of the partnership dealings. The report found that the plaintiff had contributed to the partnership capital \$87.39, and the defendant \$233.89, and that there was due from the defendant to the plaintiff \$43.74. The taxing officer taxed the plaintiff's costs under the lower scale, on the ground that the case came within C. S. U. C. c. 15, s. 34, sub-s. 1. On appeal, *Cameron, J.*, reversed the taxing officer's ruling. *Blaney v. McGrath*, 9 P. R. 417.

An action for the price of two distinct parcels of goods sold and delivered. The defendants accepted a bill of exchange for each parcel, one bill being for \$103.80, and the other for \$106.40. At the time the action was brought the second bill had not matured, as was alleged by the defendants, and afterwards admitted by the plaintiffs. Upon the application of the plaintiffs, the master made an order, under Rule 322 O. J. Act, (Con. Rule 756) for final judgment against the defendants for the first parcel of goods sold and delivered, that is, for \$103.80, with interest and costs of suit, including the costs of the application, "to be taxed according to the course and practice of the court." Under this order the taxing officer allowed the plaintiffs county court costs on that part of their claim upon which they obtained the order for judgment, and he allowed

to the defendant court of justice claim upon which is the claim for \$106.40 parcel of goods. defendants to recover it was the duty at the pleadings, debts so as to as that Division Court taxed to the plaintiff they obtained judgment signature of the within the comp the defendant costs down to an defence, which w but for the plain price of the recor not due, and also with a set-off pr judgment and coa v. Belfry, 10 P. R.

After a mortgagee the surplus proceeds. The third mortgagee to him of the \$102 gage was void for. A reference was d that the second m much larger amou The claimants of t counties. An orde gave the second m tion and reference test was the whol second mortgage, involved exceeded able jurisdiction o fore, and also been resided in differen question was in c taxing officer was higher scale. *Re*

In an action in for trespass to land plaintiff recovered officer taxed Divisi and full costs to th admitted an entry placing fixtures, a priation, but put moval:—Held, th the title to corpore question is:—Held, dant had failed t entitled to set of *Jenkin*, 10 P. R. 25

Action in the \$288.20, the balance \$310 lbs. of butter been paid on accou tiff obtained a ver ficate for costs was on a motion to a ju defendant to pay to out deduction or s liquidated by the meaning of R. S. O and the plaintiff, v was entitled to Cou nia v. McLean, 10



to the defendants the full costs of the high court of justice on that part of the plaintiffs' claim upon which the defendants succeeded, that is the claim for \$108.40, the price of the second parcel of goods. Upon an application by the defendants to revise the taxation:—Held, that it was the duty of the taxing officer to look at the pleadings, and if necessary receive affidavits so as to ascertain the facts of the case; that Division Court costs only should have been taxed to the plaintiffs, as the amount for which they obtained judgment was ascertained by the signature of the defendants, and was therefore within the competence of the Division Court; that the defendants should have Superior Court costs down to and including the statement of defence, which would not have been required but for the plaintiffs claiming improperly the price of the second parcel of goods, which was not due, and also their costs of this application, with a set-off pro tanto against the plaintiffs' judgment and costs. *White Sewing Machine Co. v. Belfry*, 10 P. R. 64.—Wilson.

After a mortgage sale, the first mortgagee paid the surplus proceeds of sale (\$162) into court. The third mortgagee petitioned for payment out to him of the \$162, alleging that the second mortgage was void for want of consideration, etc. A reference was directed, and the master found that the second mortgage was valid, and that a much larger amount than \$162 was due upon it. The claimants of the fund lived in three different counties. An order made upon further directions gave the second mortgagee the costs of the petition and reference:—Held, that what was in contest was the whole amount represented by the second mortgage, and the subject matter thus involved exceeded the limits of the former equitable jurisdiction of the county court, and therefore, and also because the different respondents resided in different counties, and the money in question was in court in a third county, the taxing officer was right in taxing costs upon the higher scale. *Re Lyons*, 10 P. R. 150.—Boyd.

In an action in the Common Pleas Division, for trespass to lands and removal of fixtures, the plaintiff recovered a verdict for \$50. The taxing officer taxed Division Court costs to the plaintiff, and full costs to the defendant. The pleadings admitted an entry under an agreement as to placing fixtures, and their removal and appropriation, but put in issue their wrongful removal:—Held, that the taxing officer was right, the title to corporeal hereditaments not being in question:—Held, also, that though the defendant had failed to prove his defence, he was entitled to set off his costs. *Richardson v. Jenkins*, 10 P. R. 292.—C. P. D.

Action in the Common Pleas Division for \$228.20, the balance of a claim of \$1,828.20, for 3,810 lbs. of butter at 22c. per lb. \$1,600 had been paid on account of the claim. The plaintiff obtained a verdict for \$228.20. No certificate for costs was asked for at the trial:—Held, on a motion to a judge, for an order directing the defendant to pay to the plaintiff full costs, without deduction or set-off, that the amount was liquidated by the act of the parties, within the meaning of R. S. O. (1877), c. 43, s. 19, sub-s. 2, and the plaintiff, without a judge's certificate, was entitled to County Court costs only. *Durkin v. McLean*, 10 P. R. 295.—Rose.

Mortgagees, after the exercise of the power of sale in their mortgage, claimed that \$182.61 was still due to them, but on an account being taken, \$20.07 was found due to the mortgagee:—Held, that laying aside the question of the whole amount of the mortgage money (\$6,705), the amount involved was \$202.68 and therefore the case was not within Rule 515 O. J. Act (C. S. U. C. c. 15, s. 34, sub-s. 8):—See Con. Rule 1219—and the costs were properly taxed on the higher scale. *Morton v. Hamilton Provident and Loan Society*, 10 P. R. 636.—Proudfoot. Affirmed, 11 P. R. 82.—Chy. D.

An order in chambers, referred an action in the High Court of Justice to a master to assess the damages, and directed that the costs should be taxed to whichever party was successful in a certain appeal. There was no trial, and no judgment was entered. The master assessed the damages at \$60, and the taxing officer taxed to the plaintiff, who succeeded in the appeal, his costs upon the High Court scale:—Held, that the officer had no power under the order to determine the scale of costs, and he was therefore right in taxing upon the scale of the court in which the action was brought. *McGarvey v. Town of Strathroy*, 11 P. R. 57.—Rose.

At the trial the learned judge only allowed County Court costs. On shewing cause to the defendants' motion, the plaintiff, who had not moved, asked to have the direction as to costs varied, and full costs allowed; but the court, in the absence of a substantive motion therefor, refused to interfere. *Dymont v. Northern and North-Western R. W. Co.*, 11 O. R. 343.—C. P. D.

In an action against justices of the peace for false imprisonment, etc., the Divisional Court (10 O. R. 631) ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation:—Held, that the action being within the proper competence of the Division Court (unless the defendant objected thereto), the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off:—Held, also (Cameron, C. J., dubitante), that the effect of R. S. O. (1877), c. 73, s. 19, read in connection with section 12 of that Act and with R. S. O. (1877), c. 43, s. 18, sub-s. 5, R. S. O. (1877), c. 47, s. 53, sub-s. 7, and R. S. O. (1877), c. 50, s. 347, is not to provide that the plaintiff should have costs on the superior court scale when his recovery is within the jurisdiction of an inferior court. Per Cameron, C. J.—The case came under section 18 rather than section 19 of R. S. O. (1877) c. 73. *Ireland v. Pitcher*, 11 P. R. 403.—C. P. D.

The defendants under a mortgage for \$2,300, made by plaintiff's father, and containing a distress clause, distrained the plaintiff's goods for interest amounting to \$112.55. The plaintiff claimed that the distress was illegal and should be set aside, that the defendants should be enjoined from selling the goods distrained, and that the plaintiff should be paid \$200 damages, or if the distress should be held legal, that the plaintiff should be subrogated to the right of the de-



lenders under their mortgage, as against the mortgagor. The judge at the trial found in favour of the plaintiff, assessing the damages at \$25, and granting the injunction prayed for; but this judgment was reversed by the divisional court and judgment for defendants was ordered to be entered, with costs:—Held, that the action was not one that could properly have been brought under the equity jurisdiction of the County Court before the passing of the O. J. Act and Law Reform Act, 1868, though the arrears of interest and the damages found by the learned judge were less than \$200; and therefore the case did not come under Rule 515 O. J. Act, (See Con. Rule 1219) and the costs should be taxed on the scale of the High Court. *McDonnell v. Building and Loan Association*, 11 P. R. 413.—Cameron.

Where in an action of libel a verdict for \$1 damages was found, and the judge at the trial gave no certificate for costs:—Held, that the plaintiff was entitled to tax full costs. *Garnett v. Bradley*, 3 App. Cas. 944, considered and followed. *Wilson v. Roberts*, 11 P. R. 412.—Q. B. D.

Where the plaintiff's claim in an action to enforce a mechanic's lien was only \$142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over \$200:—Held, that the action was properly brought in the High Court of Justice, and the costs should be on the scale of that court, and it made no difference that the other lien holder failed to substantiate his claim. *Hall v. Pilz*, 11 P. R. 449.—Wilson.

The plaintiffs had judgment and execution against one of the defendants for less than \$200, and sought in this action, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other, as fraudulent. At the trial this action was dismissed. At the time it was brought the sheriff had other executions in his hands against the same defendant, amounting to more than \$200:—Held, that if the plaintiffs had been successful all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors' Relief Act would have applied to the case, and therefore the amount of the subject matter involved exceeded \$200, and the costs were taxable on the High Court scale. *Dominion Bank v. Heffernan*, 11 P. R. 604.—Ferguson.

It is proper practice to obtain a direction of a judge as to the scale of costs before they are taxed. *Id.*

The parties, by consent, allowed a verdict for the plaintiff for \$1 to be taken before the judge at the assizes, to be altered according to the result of a reference agreed upon, and also agreed that the costs should abide the event. The action was for damages for negligence, and the award was in favour of the plaintiff for \$85. A question having arisen as to the scale of costs:—Held, following *Watson v. Garrett*, 3 P. R. 74, and *Hyde v. Beardsley*, 18 Q. B. D. 244, that "costs to abide the event" does not mean that the plaintiff, if successful, shall necessarily have full costs, but that he shall have such costs as, under the statutes and rules of court, a plaintiff

recovering the amount that he recovers by the event is entitled to. *Andrews v. City of London*, 12 P. R. 44.—Chy. D.

Held, also, following *Cumberland v. Ridout*, 3 P. R. 14, that the final judgment by means of the reference was to be regarded as obtained without a trial, and the costs therefore depended upon Rule 511, (See Con. Rule 1174) under which the taxing officer was directed to proceed. *Id.*

The plaintiff in an action in the High Court of Justice claimed \$296.14, the balance of an account of \$896 for rent and goods sold and delivered. The defendants in their statement of defence admitted a liability of \$170.30, but claimed a credit of \$81.14, leaving a balance of \$89.16, which they brought into court with their defence. The plaintiff served notice under Rule 218 O. J. Act, 1881, accepting the amount paid in full of the claim and proceeded to tax his costs. Upon taxation a question arose as to the scale of costs:—Held, that the provision in said Rule 218, that the plaintiff may tax his costs, does not give him costs according to any higher scale than if he had entered judgment for the sum which he received out of court; the costs should, therefore, be on the County Court scale, as the whole amount of the account was over \$800, and the amount admitted by the defendant was \$170.30. *Chick v. Toronto Electric Light Co.*, 12 P. R. 58.—Rose; *Tobin v. McGillis*, *Id.* 60.—Armour.

The plaintiff held defendant's note for \$300, and gave it back to the defendant to hold until the latter should be free from a certain liability as surety. After he became freed he refused to give up the note, and destroyed it, and this action was brought for breach of his contract to return the note. The action was referred to a referee who found the plaintiff entitled to \$314 damages, being the amount of the note and interest:—Held, that so soon as the facts relating to the note had been arrived at, the quantum of damages was a fixed amount ascertained by calculating the amount of the defendant's liability upon the note; and therefore the claim was within the jurisdiction of the County Court under R. S. O. (1887), c. 47, s. 19, sub-s. 2; and the plaintiff was entitled to costs upon the County Court scale only. The defendant was entitled to set off the difference between County Court and High Court costs of his defence. *Johnson v. Kenyon*, 13 P. R. 24.—Street.

Before a motion for costs was made, the defendant offered to pay the plaintiff's costs upon the County Court scale:—Held, that this was not an offer which the plaintiff was bound to accept, and the plaintiff was entitled to the costs of the motion on the County Court scale. *Id.*

In an action by a judgment creditor, seeking payment out of land alleged to have been conveyed away by the debtor in fraud of the plaintiff, the proceedings were not alleged to be taken on behalf of other creditors, and the plaintiff's judgment was less than \$200. It appeared that there were three other claims, amounting in all to \$36, owing by the judgment debtor. Before the trial of the action a settlement of the plaintiff's claim was effected for \$75 and costs, and upon the taxation of these costs a question arose as to the scale:—Held, that the case was taken

out of the Act by the defendant; need not be being less than lower scale. 622 followed. P. R. 604 did P. R. 106.

The plaintiff the defendant after having plaintiff's assent court that the land:—Held, in question in the plaintiff would have been on the scale. *Haines*, 13 P. R.

This action plaintiff recovered together with his costs according to the County Court scale, and the plaintiff's costs were sought to be prescribed by the Court would have been on the scale. *White*, 13 P. R.

The case, not not fall under the discretion of the Court such discretion were applied to allowed costs of defendant the High Court, as the amount within County Court,

The plaintiff brought in the mechanic's lien, \$245.29, and a lien on the land upon the investment of upwards of \$1000, the landowner, only \$63.79, and to this amount taxation of costs have sued the to recover the proceeded in the tiffs, suing upon entitled to the plaintiff's claim the Division Court the meaning of Act, R. S. O. could not have Division Court, their costs upon v. *Dixon*, 13 P. R.

Held, that, hoped to establish them to landowner should of his costs

out of the provisions of the Creditors' Relief Act by the compromise between the plaintiff and defendant; and the claims of other creditors need not be considered; and the plaintiff's claim being less than \$200, the costs should be on the lower scale. *Forrest v. Laycock*, 18 Chy. at p. 622 followed. *Dominion Bank v. Heffernan*, 11 P. R. 504 distinguished. *McKay v. Magee*, 13 P. R. 106.—*Boyd*. Affirmed. *Ib.* 146.—Chy. D.

The plaintiff sued for damages sustained by the defendant cutting timber on his own land, after having sold such timber standing to the plaintiff's assignor. It was determined by the court that the timber sold was an interest in land:—Held, that the title to land was brought in question in the action, and therefore, although the plaintiff recovered only \$135, a County Court would have no jurisdiction, and the costs should be on the scale of the High Court. *McNeill v. Haines*, 13 P. R. 115.—*Ferguson*.

This action was tried without a jury, and the plaintiff recovered judgment for \$120.75, "together with his costs of action, to be taxed according to the proper scale applicable."—Held, that a County Court has jurisdiction to entertain and investigate accounts and claims of suitors however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act; and in this case a County Court would have had jurisdiction. *Bennett v. White*, 13 P. R. 149.—*Ferguson*.

The case, not having been tried by a jury, did not fall under Con. Rule 1172; and the determination of the scale of costs was a matter in the discretion of the court. In the exercise of such discretion the principles of Con. Rule 1172 were applied to the case, and the plaintiff was allowed costs on the County Court scale, and the defendant the excess of his costs incurred in the High Court, as between solicitor and client, over the amount which he would have incurred in the County Court, to be set off. *Ib.*

The plaintiffs, sub-contractors, in an action brought in the High Court to enforce a mechanic's lien, claimed against the contractor \$245.29, and recovered \$281.54. They claimed a lien on the land for the amount due them, but upon the investigation of accounts to the extent of upwards of \$1,700 between the contractor and the landowner, it was found that the latter owed only \$63.79, and the plaintiffs' lien was limited to this amount:—Held, upon an appeal from taxation of costs, that the contractor could not have sued the landowner in the Division Court to recover the balance of \$63.79, but must have proceeded in the County Court, and the plaintiffs, suing upon the same claim, were therefore entitled to County Court costs; and as the plaintiffs' claim was beyond the jurisdiction of the Division Court, upon any construction of the meaning of section 28 of the Mechanics' Lien Act, R. S. O. (1887) chapter 126, the plaintiffs could not have brought their action in the Division Court, and were therefore entitled to tax their costs upon the County Court scale. *Truax v. Dixon*, 18 P. R. 279.—*Galt*.—Q. B. D.

Held, that, as the plaintiffs could not have hoped to establish a case which would have entitled them to High Court costs, the defendant landowner should be allowed a set-off of the excess of his costs incurred in the High Court over

what he would have incurred in the County Court; but as the action was tried without a jury, and Con. Rule 1172 did not apply, the taxing officer had no power to allow this set-off without the direction of the court; and the judgment of the court was amended so as to meet the case. *Ib.*

The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the defendant was the tenant of the plaintiff:—Held, that the title was put in issue by such denial, and as a County Court would therefore have had no jurisdiction, the costs should be on the scale of the High Court, although the plaintiff recovered only \$75:—Held, also, that the question whether the title was in issue must be determined according to the pleadings, and not according to what took place on the trial or reference. *Worman v. Brady*, 12 P. R. 618.—*Armour*.

In interpleader issues. See *Masuret v. Lansdell*, 8 P. R. 57; *Phipps v. Beamer*, 8 P. R. 181; *Beaty v. Bryce*, 9 P. R. 320; *Arkell v. Geiger*, 9 P. R. 523; *Christie v. Conway*, 9 P. R. 529.

See *Livernois v. Bailey*, 12 P. R. 535; 13 P. R. 62, p. 381; *Moses v. Moses*, 13 P. R. 12; *Foster v. Viegel*, 13 P. R. 133, p. 378.

#### XIV. IN THE DISCRETION OF THE JUDGE.

##### 1. Conduct of Parties.

When the defendant had by his answer denied the agreement to convey, which however was clearly established by his own evidence, *Blake, V.C.*, on dismissing the bill, refused to give the defendant his costs. *Ferguson v. Ferguson*, 28 Chy. 380.

In a suit instituted to compel payment of the amount of a policy of insurance against fire the company raised the defence of ultra vires, which the court (*Spragge, C.*) sustained and dismissed the bill, but refused the company their costs of suit, as in opposing the plaintiff's claim they were resisting upon inequitable grounds the payment of a just debt. *Lawson v. Canada Farmers' Ins. Co.*, 28 Chy. 525.

An order was made dismissing an action for penalties under the Dominion Election Act, 37 Vict. c. 9, for wilful delay in prosecution, without costs, for the reason that a prima facie case of bribery was established against the defendant, which he had not attempted to contradict. *Miles v. Roe*, 10 P. R. 218.—*Boyd*.

Remarks as to the unnecessary introduction of personal charges and assertions of motives in resisting an application for mandamus in this case and costs refused in dismissing it. *In re Stanton and the Board of Audit of the County of Elgin*, 3 O. R. 86.—*Hagarty*.

In this case the motion to quash the by-law was refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation. *In re Workman and the Town of Lindsay*, 7 O. R. 425.—*Rose*.

A conviction was quashed, without costs, where it appeared that the defendant had at-

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tempted to tamper with the informant. *Regina v. Ryan*, 10 O. R. 254.—Rose.

The defendants were ordered to pay the costs of the action for infringement of a copyright although they had acted innocently, and at once expressed regret, inasmuch as they had contested the plaintiffs' right in court. *Anglo-Canadian Music Publishers Ass'n. (Limited) v. Winnifith Brothers*, 15 O. R. 164.—Street.

No costs were given to defendant in an action to restrain him from using a certain designation of his college as he had sought by the use of the name to advantage himself in an unmeritorious way. *Robinson v. Bogle*, 18 O. R. 387.—Boyd.

On application for an injunction against a corporation, though refused, the corporation were not allowed their costs, as their conduct in the matter in question was highly discreditable. See *Darby v. City of Toronto*, 17 O. R. 554.

An infant cannot during infancy avoid a lease by him, reserving rent for his benefit, and possession of the demised premises will be ordered to be given in an action by the lessee for that purpose. *Hartshorn v. Early*, 19 C. P. 139, and *Slator v. Brady*, 14 Ir. C. L. R. 61, 342, followed. The discretion given by Con. Rule 1170 as to costs authorizes the imposition against the infant of the costs of an action to enforce such lease, including the costs of the official guardian, paid by the plaintiffs. *Lipsett v. Perdue*, 18 O. R. 575.—C. P. D.

See *Livingston v. Wood*, 27 Chy. 515.

## 2. Unnecessary or Vexatious Proceedings.

Where one of several persons beneficially interested under the will of a testator, without making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby much unnecessary costs and trouble, the court (Spragge, C.), being satisfied with the conduct of the executors, refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit. *Rosebatch v. Parry*, 27 Chy. 193.

A count having been drawn so as to invite a demurrer, the demurrer was overruled without costs. *Smith v. Ancaster Township*, 45 Q. B. 86.—Osler.

A summons for a writ of prohibition to a Division Court was made absolute without costs, there being no meritorious defence. *Kinsey v. Roche*, 8 P. R. 515.—Osler.

It not appearing that there was any good reason for filing a bill instead of proceeding to enforce an award in the usual way, the court (Spragge, C.) refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the award under the statute. *Moore v. Buckner*, 28 Chy. 606.

Where the defendant, who had covenanted that only \$664 was due on a mortgage held by

a building society on property purchased by plaintiff, and his answer admitted an error in the computation of the amount due to the society, and offered to pay the difference between the \$664 and what he alleged was the cash value of the mortgage and costs up to that time:—Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer. *Stark v. Shepherd*, 29 Chy. 316.—Proudfoot.

When it appeared that administration proceedings had been instituted without any shew of reason, or proper foundation, for the benefit of the estate, and that they had not, in their results, conduced to that benefit, the decision of Proudfoot, J., ordering the plaintiff to pay the costs of all parties, was affirmed on appeal. *Re Woodhall—Garbutt v. Hewson*, 2 O. R. 456.—Chy. D.

Costs of cross actions refused where such actions unnecessary. *Norvell v. Canada Southern R. W. Co.*, 9 A. R. 325.

Costs not allowed where several motions depend really upon the same considerations, and there should have been only one motion. See *Monteith v. Walsh*, 10 P. R. 162.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court, by making a claim for possession of the land, is one that must be carefully guarded; and except in cases clearly indicating the necessity for proceeding in the High Court, no costs will be given to the plaintiff. In this case where the amount claimed under a mortgage was within the proper competence of the Division Court, but the suit was brought in the High Court, and there were no circumstances shewing the necessity for bringing it therein, no costs were allowed the plaintiff. *Vandewater v. Horton*, 9 O. R. 548.—Rose.

Although in this case the plaintiff was entitled to judgment of seizin, yet as there was no demand made and the defendants were always ready and willing to assign the dower the plaintiff was not entitled to costs. *Malone v. Malone*, 17 O. R. 101.—Robertson.

Where a question might have been raised by demurrer, without the expense of a trial, no other costs or greater were taxed to the defendants than would have been taxed to them had they simply demurred to the statement of claim, and the demurrer had been decided in their favour. *Hepburn v. Township of Orford*, 19 O. R. 585.—Q. B. D.

See *Campbell v. McDougall*, 5 A. R. 503; *Stevenson v. Stevenson*, 28 Chy. 232. *In re Dean v. Chamberlin*, 8 P. R. 303; *In re Flint and Jellett*, 8 P. R. 361; *McCardle v. Moore*, 2 O. R. 229; *Merchants' Bank v. Sparkes*, 28 Chy. 108; *Simpson v. Horne*, 28 Chy. 1; *Purdy v. Park*, 9 P. R. 424; *Wansley v. Smallwood*, 11 A. R. 439, p. 366; *Beatty v. O'Connor*, 5 O. R. 731, 747; *Vandewater v. Horton*, 9 O. R. 548, p. 353; *Snider v. Snider—Snider v. Orr*, 11 P. R. 140; *Latour v. Smith*, 13 P. R. 214, p. 386; *Fulton v. Vipond*, 13 P. R. 485, p. 380; *Re Allenby and Weir, Solicitors*, 13 P. R. 403.

In an action wrong complete the culpable of the jury gave declared that costs, where entered for his cause was shewn to the defence 1170), which tried by a jury unless, upon good cause shewn otherwise order. C. P. D.

Where, in a tainted a verdict Held, that no was necessary deprived of a Wilson v. Roy Bradley, 3 Apr v. Conger, (2)

The court could find of the recover a verdict alleged for delay that he was shewn by the the same issue be regarded.

An action by against the bar recover the proceeds the latter, such seizure and sale plaintiff upon execution debt a County Court the plaintiff was the circumstances costs, and ordered the action, and should be decided judgment. On creation, this court learned judge, reserved his opinion right in any judgment of a plaintiff right to recover substantially proved costs of the defendant Rule 428 (Con over the appointment cases to deprive does not extend plaintiff or defendant in his action on defendant's costs. In question is of of chancery, it was exercised usual character R. 517.

In an action defendant was plaintiff had a judge dismissed

## 3. Good Cause.

In an action for seduction it appeared that the wrong complained of was partly attributable to the culpable conduct of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get the costs, whereupon judgment was directed to be entered for him without costs:—Held, that good cause was shown why costs should not be given to the defendant within Rule 428 (Con. Rule 1170), which declares that where an action is tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the judge or court shall otherwise order. *Walsley v. Mitchell*, 5 O. R. 427.—C. P. D.

Where, in an action for libel, the plaintiff obtained a verdict for twenty cents damages:—Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only. *Wilson v. Roberts*, 11 P. R. 412; *Garnett v. Bradley*, 3 App. Cas. 544, followed. *Wellbanks v. Conger*, (2) 12 P. R. 447.—C. P. D.

The court cannot look behind or beyond the finding of the jury as to the right of a party to recover a verdict, and therefore the cause here alleged for depriving the plaintiff of costs, viz., that he was really not entitled to recover, as shewn by the result of a trial of substantially the same issues before another forum, could not be regarded. *Id.*

An action by the bailiff of one Division Court against the bailiff of another Division Court to recover the proceeds of goods seized and sold by the latter, such goods being at the time of such seizure and sale already under seizure by the plaintiff upon executions in his hands against the execution debtor, was tried before the judge of a County Court, without a jury, who held that the plaintiff was entitled to recover, but, under the circumstances, deprived the plaintiff of his costs, and ordered that the defendant's costs of the action, and the costs of the seizure and sale, should be deducted from the amount of the judgment. On appeal from such exercise of discretion, this court reversed the decision of the learned judge, and ordered judgment to be entered for the plaintiff with costs. *Hagarty, C. J. O.*, reserved his opinion as to the existence of any right in any judge to make a defendant pay the costs of a plaintiff who has failed to establish a right to recover, or to make a plaintiff who substantially proved his right to recover, pay the costs of the defendant. Per *Patterson, J. A.*—Rule 428 (Con. Rule 1170) gives full discretion over the apportionment of costs, and in proper cases to deprive the successful party of costs, but does not extend to make any party, whether plaintiff or defendant, who is wholly successful in his action or defence, pay his defeated opponent's costs. Per *Osler, J. A.*—The jurisdiction in question is one which existed in the old court of chancery, though the circumstances in which it was exercised, were of a very special and unusual character. *Mitchell v. Vandusen*, 14 A. R. 517.

In an action for libel, the jury found that the defendant was guilty of libelling, but that the plaintiff had sustained no damage. The trial judge dismissed the action, but ordered the de-

fendant to pay the plaintiff's costs, and gave the latter judgment therefor. The defendant thereupon moved in the Divisional Court against the judgment for costs, which that court varied by ordering the action to be dismissed with costs, and the plaintiff having appealed to this court from the judgment at the trial, dismissing the action, as also from the judgment of the divisional court:—Held, that although Rule 428 (Con. Rule 1170), gives to the judge or court the power of depriving any of the parties to an action, plaintiff or defendant, of their costs; it does not confer the power of compelling a successful party to pay the costs of an unsuccessful party: *Mitchell v. Vandusen*, 14 A. R. 517, considered, approved and followed:—Held, also, allowing the appeal of the plaintiff from the judgment at the trial, that a venire de novo should be awarded: (*Patterson, J. A.*, dissenting from such direction). *Wills v. Carman*, 14 A. R. 656; *Bush v. McCormack*, 20 O. R. 497.

By R. S. O. (1877), c. 52, s. 2, a successful party on an application for a writ of prohibition is entitled to and should be awarded costs, unless the court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof. Under the circumstances of this case, reported 12 P. R. 450, the defendant was allowed costs of a successful motion for prohibition to a Division Court. *Re McLeod v. Emigh*, (2) 12 P. R. 503.—C. P. D.

The jury found a verdict for the plaintiff on his claim for \$200, and for the defendants on their counterclaim for \$100, and stated that they wished the plaintiff to have full costs and the defendants to have no costs, and the judge gave effect to the expression of their wishes as to costs:—Held, that the recommendation of the jury did not constitute good cause for depriving the defendants of the costs of the counterclaim. *Weaver v. Sawyer*, 16 A. R. 422.

In an action tried by a jury, where the defendant recovers on a counterclaim, the costs should be on the scale of the court in which the action is brought by the plaintiff, unless the judge for good cause makes a different order. The fact that the recovery is for a sum within the jurisdiction of an inferior court is not good cause for such an order. *Foster v. Viegel*, 13 P. R. 133.—C. of A.

When the special jury before which an action of libel was tried returned to the court-room after considering their verdict, the foreman announced a verdict for the defendant. He then asked if the jury had anything to do with the question of costs. The trial judge replied that he thought not, but if any recommendation was made it would be considered. The foreman then announced that in the opinion of the jury each party ought to pay his own costs. Upon a motion by the plaintiff to the trial judge for an order disposing of the costs in the way recommended by the jury: Held, that the recommendation of the jury as to costs was not a part of their verdict, but if so it was an announcement of a result at which they had no right in law to arrive; the verdict was complete before anything was said as to costs. If the verdict for

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the defendant would not have been given except with the recommendation as to costs, that would be matter for consideration upon a motion for a new trial, and not upon the present motion. Upon the motion the plaintiffs filed affidavits of some of the jurors, stating that they would not have agreed in a verdict for the defendant if they had thought the result would be to throw upon the plaintiffs the whole costs of the action. Held, that these affidavits were not receivable in evidence. *Regina v. Fellowes*, 19 Q. B. 48, followed. *Jamieson v. Harker*, 18 Q. B. 590, distinguished. It was also contended by the plaintiffs that the trial judge should make an order depriving the successful defendant of costs, upon the recommendation of the jury and the facts appearing in evidence: Held, that the question of costs was within the power of the trial judge, and he could only interfere with the event for "good cause." (Con. Rule 1170). By acting on the recommendation of the jury he would, in effect, be abdication his functions and allowing the jury to determine what was "good cause." "Good cause" means some misconduct leading to the litigation, or in the course of the litigation, which requires the court in justice to interfere, and there is a marked distinction between interfering with costs going to the plaintiff and costs going to the defendant; and upon the facts of this case there was no "good cause" for interfering. *Farquhar v. Robertson*, 13 P. R. 166.—*Rose*. See also *United States Express Co. v. Donahue*, *Id.* 158.

The plaintiffs claimed more than \$13,000 upon a special contract for iron sold to the defendants, and damages for refusal to accept a portion of the goods sold. The defendants denied their liability to pay for any part of the iron, setting up that it was not what they had contracted for, and counterclaiming for damages for breach of contract. The case was tried by a jury, who in answer to questions left to them found that the iron delivered was not up to contract, but that the defendants had accepted and used a portion of it; and judgment was entered for the plaintiffs by the trial judge for over \$5,000 for the portion of the iron used by the defendants, at the contract price less fifteen per cent. for inferiority, as found by the jury. The trial judge gave the plaintiffs the costs of the action and the defendants the costs of the counterclaim, and the Divisional Court (15 O. R. 516) affirmed the judgment and disposition of costs. The defendants appealed upon the question of costs only, contending that they had succeeded upon the issue as to the quality of the iron, and were entitled to the costs of that issue. The defendants had not asked at the trial to have judgment entered for them upon such issue, nor was it so entered:—Held, by the majority of the court, that there was, upon the evidence, "good cause," within the meaning of Con. Rule 1170 for depriving the defendants of the costs of the issue found by the jury in their favour, and the order of the trial judge and the Divisional Court should not be interfered with. Per Hagarty C. J. O.—If the trial judge did not intend by his order to deprive the defendants of such costs, then the costs were properly left to follow the event, which was in favour of the plaintiffs to the extent of over \$5,000. Per Burton, J. A.—The defendants, not having applied for judgment thereon, were not entitled to costs of the issue

found by the jury in their favour. Per Osler and Maclellan, J. J. A.—Although there was no formal order specifically depriving the defendants of costs, the trial judge and the court below intended to deprive them of costs for good cause. *Huxley v. West London Extension R. W. Co.*, 14 App. Cas. 26, specially referred to. *Bertram & Co. v. Massey Manufacturing Co.* 13 P. R. 184.—C. of A.

The court can interfere with the trial judge's discretion in depriving a successful party of costs in an action tried by a jury, where he has given effect to considerations which do not constitute "good cause" within the meaning of Con. Rule 1170. *Fulton v. Vipond*, 13 P. R. 493.—C. P. D.

The plaintiff's principal claim, upon which he succeeded, was for wood cut and removed by the defendants. The trial judge ruled that the conduct of the plaintiff in refusing a remeasurement caused unnecessary litigation, and he deprived him of the costs of that claim. The plaintiff and defendant had each had a measurement made, and differed as to the result. The plaintiff refused to have a remeasurement and brought the action, the result of which shewed that his measurement was correct:—Held, that the plaintiff's refusal was not misconduct inducing the litigation, and there was no "good cause" for depriving him of costs. *Huxley v. West London Extension R. W. Co.*, 14 App. Cas. at pp. 33-4, specially referred to. *Id.*

Con. Rule 1170 provides that where an action is tried by a jury the costs shall follow the event, unless, upon application made at the trial for good cause shewn, the judge before whom the action or issue is tried or the court otherwise orders:—Semble, that there must be substantially an application at the trial, and if the trial judge, anticipating the application of counsel, makes the order in presence of opposing counsel, he makes it on application. *Id.*

#### 4. Other Cases.

Boyd, C., overruled a demurrer, without costs, as it was the first occasion the point decided under it had arisen since the Judicature Act. *Rumohr v. Marx*, 29 Chy. 179.

In this case the action was dismissed without costs as the point decided was a new one, and the statute was not plainly expressed. *Wallace v. Board of Public School Trustees for Union School Section 9 of Township of Lobo*, 11 O. R. 648.—Boyd.

The question as to jurisdiction being important, and open to reasonable doubt, no costs were allowed. *Re North York Election (Dom.)*.—*Paterson v. Mulock*, 32 C. P. 458.—Cameron.

Costs not asked for in rule, though they were at the bar:—Held, no objection, as they are in the discretion of the court under the Judicature Act. *In re Peck and the Town of Galt*, 46 Q. B. 211.—Osler.

The plaintiff, by his bill, did not submit to do what he was bound to do as the price of the relief asked; and the defendant asked relief which the court could not grant. The court (Spragge,

C.), on pronouncing either party.

Where affidavits written, scarcely, the court (Spragge) costs connected with the costs of the *v. Garvey*, 27 C.

Where the party from subscribing for plaintiff, and the invite discussion petition did so *v. 27 Chy. 576.*

Costs refused claim by down 205.

The defendant fence, a sum which answer the plaintiff the trial finding judgment to be costs:—Held, the discretion to do and having executed no alternative but full costs incurred payment into court 223.—Cameron.

On a motion to strain an action as the learned judge allowed County Court the plaintiff was Court at the risk of Court, and lose should get no successful recovery brought to recover *Young v. Mordaunt*.

The trial judge wards delivered the plaintiff's favour, but any order as to costs within Rule 338 judge had power Divisional Court, was disturbed, to make *Robson*, 14 Ch. *Pickard*, 12 P.

In an action for contract, the jury at the trial judge entered and certified to the Divisional Court defendant from set appeal, a Divisional costs so as to give as he would have (1877) c. 50, s. 3 the trial did not 12 P. R. 535.—C.

On appeal from appeal, judgment appeal without costs being divided in and Burton, J. trial judge had that power have



C.), on pronouncing a decree, refused costs to either party. *Clemow v. Booth*, 27 Chy. 15.

Where affidavits used on a motion were badly written, scarcely legible and difficult to decipher, the court (Spragge, C.), refused the plaintiff all costs connected with their preparation, although the costs of the suit were given him. *Burnham v. Garvey*, 27 Chy. 80.

Where the petitioner had carefully abstained from ascribing fraud or fraudulent conduct to the plaintiff, and the circumstances were such as to invite discussion, the court in dismissing the petition did so without costs. *Ricker v. Ricker*, 27 Chy. 576.

Costs refused on ground of delay in proof of claim by dowress. *Hyde v. Barton*, 8 P. R. 205.

The defendant brought into court, with his defence, a sum which he pleaded was sufficient to answer the plaintiff's claim, and the judge at the trial finding that it was sufficient, directed judgment to be entered for the defendant, with costs:—Held, that the judge at the trial had a discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into court. *Small v. Lyon*, 10 P. R. 223.—Cameron.

On a motion for a writ of prohibition to restrain an action in a Division Court:—Held, that as the learned judge who tried the case does not allow County Court costs in similar cases, and as the plaintiff was obliged to sue in the Division Court at the risk of prohibition, or in the County Court, and lose his costs, that the defendant should get no costs of this motion, unless he successfully resist the suit to be subsequently brought to recover the amount of the note. *Re Young v. Morden*, 10 P. R. 276.—Rose.

The trial judge reserved judgment and afterwards delivered a written judgment in the plaintiff's favour, but inadvertently omitted to make any order as to costs:—Held, that the case came within Rule 338 (Con. Rule 780), and that the judge had power, even after an appeal to a Divisional Court, which left his judgment undisturbed, to make an order as to costs. *Fritz v. Hobson*, 14 Ch. D. 542 followed. *Hardy v. Pickard*, 12 P. R. 428.—Rose.

In an action for damages for breach of a contract, the jury awarded the plaintiff \$68.50, and the trial judge entered judgment for that amount, and certified to entitle the plaintiff to costs on the Division Court scale, and to prevent the defendant from setting off high court costs. On appeal, a Divisional Court varied the order as to costs so as to give the plaintiff such costs only as he would have recovered under R. S. O. (1877) c. 50, s. 347, sub-s. 3, where the judge at the trial did not certify. *Livernois v. Bailey*, 12 P. R. 535.—C. P. D.

On appeal from this decision to the court of appeal, judgment was given dismissing the appeal without costs, the judges in this court being divided in opinion, Hagarty, C. J. O., and Burton, J. A., being of opinion that the trial judge had power to deal with the costs, and that power having been exercised was not re-

viewable; and that the appeal should be allowed. *S. C.*, 13 P. R. 62.

See *Lipsett v. Perdue*, 18 O. R. 575, p. 375.

## XV. APPEALS AS TO COSTS.

Per Osler, J. A., the rule as to an appeal on the question of costs appears to be this, that if, in making the order complained of, there has been any violation of principle, or the court has proceeded on a wrong general rule, or if the discretion of the court has been exercised upon any misapprehension of fact, a court of appeal will interfere, but not otherwise. *Wansley v. Smallwood*, 11 A. R. 439.

On an application by an insurance company to stay proceedings, in an action on a policy, pending an arbitration as to the amount of loss under the statutory conditions, the court granted a stay, on the company admitting its liability on the policy; and further ordered, but without defendant's consent, that either party might, after the award, apply to the court in respect of the costs of the arbitration. On a subsequent application an order was made by a judge in chambers for defendants to pay a part of such costs:—Held, that the court had jurisdiction to deal with the costs; and moreover, that defendants having submitted to the order of the court, and taken the benefit of it, could not object to the order of the judge made under it. *Hughes v. British America Insurance Co., and Hughes v. London Assurance Co.*, 7 O. R. 465—Q. B. D.

See *Re Olmstead v. Errington*, 11 P. R. 366; *Levernois v. Bailey*, 12 P. R. 535; 13 P. R. 62, p. 381.

See, also, Subhead XVI. 7, p. 390.

## XV. TAXATION.

### 1. Notice and Appointment.

The plaintiff's costs were being taxed by one of the taxing officers at Toronto, when he applied to stop the taxation in order that he might have the order for taxation varied. The taxation was stopped, the officer gave up to the plaintiff the bill of costs which he had brought in for taxation, and nothing further was done:—Held, that the effect of this was that the appointment to tax and the taxation lapsed, and no further proceedings could have been had without a fresh appointment; and, therefore, the taxing officer was not thereafter seized of the taxation, and the local registrar in whose office the action had been begun and was pending could properly issue his appointment, and tax the plaintiff's costs. *Cousineau v. City of London Fire Ins. Co.*, 13 P. R. 36.—Q. B. D.

Held, that the taxation was properly had during the long vacation. *Id.*

The defendants objected that they had not a reasonable notice of the taxation by the local registrar, but did not ask for an enlargement of it, relying instead on objections they took to its proceeding at all, and the taxation proceeded in their absence:—Held, that having taken the risk they must also take the result. *Id.*



## 2. Attendance at.

The taxing officer has a discretion as to the attendance of parties claiming a right to attend on taxation, and his discretion will not be lightly interfered with. *Clarke v. Union Fire Ins. Co.—Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

G., a judgment creditor of W. A. C., garnished a fund recovered by J. W. C., suing as the assignee of W. A. C. G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C., as to the portion of the fund which would remain after satisfying the claim of the solicitor of J. W. C., who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue:—Held, that G. had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C., and the other as against G. if he succeeded in the issue. *Gall & Co. v. Collins*, 12 P. R. 413.—Chy. D.

## 3. Production of Evidence.

The taxing officers have the power to call for evidence on taxations pending before them. *Williamson v. Town of Aylmer*, 12 P. R. 129.—Wilson.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendant until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then if unable to decide the question of retainer, should report to a judge in Chambers. *Id.*

## 4. Costs allowed.

## (a) Tariff.

Held, that the local masters, who are paid by fees instead of salary, are entitled to charge one dollar per hour in money under Chancery Tariff of 23rd March, 1875, when taxing costs. *McGinnis v. Clarke*, 9 P. R. 555.—Boyd.

The tariff of costs now in force does not pretend to exhaust all possible items of services for which remuneration is to be made. The object of a tariff is to provide a fixed or movable scale for usual and ordinary services and as to all items embraced therein it is generally conclusive, but for other matters one has to go outside of the tariff to the practice and course of the court. It is therefore for the taxing officer to determine, according to a proper discretion, what allowance to make for procuring the attendance of witnesses who live out of the jurisdiction. Rules 154 and 168 of T. T., 1856, are still in force as to matters not embraced in the tariff of 1881. *Bail v. Crompton Corset Co.*, 11 P. R. 256.—Boyd.

See *Re McKeen and the Township of South Gower*, 12 P. R. 553, p. 385; *Carty v. City of London*, 13 P. R. 286, p. 385

## (b) Counsel Fee.

Where evidence taken before the master, sitting for a judge, was entered in the decree as having been taken in court, the same fees were taxed to counsel before the master as before a judge. *Rae v. Trim*, 8 P. R. 405.—Taylor, *Master*.

On an application for further security for costs, a counsel fee of \$10 was allowed. *Bell v. Landon* 9 P. R. 100.—Boyd.

When the actions were in the Court of Appeal, Burton, J.A., made an order that only one appeal book should be printed for the three cases, and the three cases were argued together, but the defence was different:—Held, that the taxing officer was right in allowing separate counsel fees in each case. *Petrie v. Guelph Lumber Co., Stewart v. Guelph Lumber Co., Inglis v. Guelph Lumber Co.*, 10 P. R. 600.—Ferguson.

Where the defendant's solicitor was served with a short notice of motion, which was admitted to be defective:—Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to show that the notice was irregular. *Waller v. Claris*, 11 P. R. 130.—Wilson.

The Administration of Justice Act, 1885, has not conferred upon local registrars of the High Court the power of taxing counsel fees of any greater amount than is allowed by the tariff of costs in force. *Bank of British North America v. Western Assurance Co.*, 11 P. R. 30.—Boyd.

Upon an appeal from the taxation of the plaintiff's party and party costs:—Held, a counsel fee for settling plaintiff's reply to the defendant's counterclaim should have been taxed in addition to fee allowed on settling statement of claim. *Alexander v. School Trustees of Gloucester*, 11 P. R. 157.—Wilson.

The discretion of the taxing officer as to counsel fee at the trial should not be interfered with. *Id.*

A counsel fee of \$5 for each necessary and proper enlargement of a court motion should be taxed. *McCallum v. McCallum*, 11 P. R. 179.—Boyd.

Under an order made at the Assizes postponing the trial upon payment of "the costs of the day," only one counsel fee of \$10 is taxable. *Hogg v. Crabbe*, 12 P. R. 14.—Proudfoot.

An action came on for trial, and a postponement was applied for by the defendant, and was ordered upon payment of the costs of the day:—Held, that counsel fees were chargeable and taxable according to the discretion of the taxing officer, and not according to any arbitrary limit. *Hogg v. Crabbe*, 12 P. R. 14, dissented from. *Outwater v. Mullett*, 13 P. R. 509.—Armour.

In taxing the costs of an arbitration upon the County Court scale, no larger fee for attendance of counsel before the arbitrators than \$25 can be allowed, even though the attendance is for several days. *Re Montague and the Township of Aldborough*, 12 P. R. 141.—Wilson.

Held, that the amount to be allowed per diem to arbitrators and counsel was a matter peculiarly within the province of the taxing

officer, and held with. *Re H* P. R. 285.—

Item 153 read as part at Toronto b tion of incre arbitration w a reference to made under *McKeen and* 553.—Boyd.

No counsel from pending under Con. R. P. R. 30.—F

See *Regina*

## (c) W

A taxing of the expenses subpoenaed to prove aborti cause the defe produce. Th the costs of t nugatory by t witnesses wer abortive trial journe trial could not be Held, that in subpoenaing t officer did not tion given him 1214). *Christ Proudfoot*.

The plaintiff admissions of tion for disc attendance of admitted sho v. *School Tru Wilson*.

Where the cases at the a the witnesses the fees for t *Id.*

The plaintiff during an ex called as a w what his char would amou nothing to sh statement the amination, th eluded in the the plaintiff *Carty v. City B. D.*

Held, *Armo* to Con. Rules 17 of tariff A. to tax anyth tor of writs o

officer, and his decision should not be interfered with. *Re Hillyard and Royal Insurance Co.*, 12 P. R. 285.—Galt.

Item 153 of Tariff A, Con. Rules, should be read as part of item 164; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration where there is no cause in court and a reference to a local officer to tax costs has been made under R. S. O. (1887), c. 53, s. 24. *Re McKen and Township of South Gower*, 12 P. R. 553.—Boyd.

No counsel fee was allowed upon an appeal from pending taxation of costs to the master under Con. Rule 854. *Re Nelson, a solicitor*, 13 P. R. 30.—Falconbridge.

See *Regina v. Doutre*, 6 S. C. R. 342.

#### (c) Witness Fees and Subpœnas.

A taxing officer refused to allow the plaintiffs the expenses of seventeen witnesses who were subpoenaed to attend a trial at Hamilton, which proved abortive, the trial being postponed because the defendants had not obeyed an order to produce. The defendants were ordered to pay the costs of the hearing at Hamilton rendered nugatory by the postponement. The seventeen witnesses were subpoenaed to be examined at the abortive trial, and were examined at the adjourned trial upon matters which the judge held could not be interfered with by the court:—Held, that in refusing the plaintiffs the costs of subpoenaing these seventeen witnesses, the taxing officer did not erroneously exercise the discretion given him by Rule 442 O. J. Act (Con. Rule 1214). *Christopher v. Noxon*, 10 P. R. 149.—Proudfoot.

The plaintiff, not being bound to rely on the admissions of the defendants on their examination for discovery, the costs of procuring the attendance of a witness to prove what was then admitted should have been taxed. *Alexander v. School Trustees of Gloucester*, 11 P. R. 157.—Wilson.

Where there is no daily peremptory list of cases at the assizes, and it is necessary to keep the witnesses in attendance from the first day, the fees for such attendance should be taxed. *Id.*

The plaintiff's own physician attended on him during an examination de bene esse, and was called as a witness at the trial, when he stated what his charges for attendance on the plaintiff would amount to:—Held, that there being nothing to shew that he did not include in his statement the charges for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the action. *Carty v. City of London*, 13 F. R. 285.—Q. B. D.

Held, *Armour, C. J.*, dubitante, having regard to Con. Rules 254, 1212, 1217, and items 16 and 17 of tariff A., that the plaintiff was not entitled to tax anything for costs of service by his solicitor of writs of subpoena. *Id.*

By the judgment on further directions the plaintiffs were awarded the costs of the action and reference. Upon appeal from the taxation of such costs the defendant contended that the plaintiffs should not be allowed the costs of attendances and witnesses in the master's office relating to items in the account in question as to which the plaintiffs failed:—Held, that the plaintiffs were entitled to all the costs properly, fairly, and reasonably incurred upon the reference, but not to costs of unnecessary proceedings or witnesses, and costs of witnesses called to establish something on which the party calling them failed were in the discretion of the taxing officer. Con. Rules 1195 and 1215 considered. *Latour v. Smith*, 13 P. R. 214.—Boyd.

Where costs were awarded to the plaintiffs upon a postponement of the trial, and the case was not tried till after the taxation of such costs was closed, but it appeared upon appeal from the taxation that some of the witnesses allowed for were not called when the case was actually tried, the taxation was reopened upon payment of costs, and the taxing officer was directed to reconsider the allowance of witness fees. *Conmee v. North American Railway Contracting Co.*, 13 P. R. 433.—MacMahon.—Q. B. D.

See *Ball v. Crompton Corset Co.*, 11 P. R. 256, p. 383.

#### (d) Other Cases.

A bill had been filed but not served, and was subsequently dismissed with costs by the plaintiff. It appeared that, though no answer had been drawn, the defendant's solicitor had received instructions to defend, some two months before the dismissal of the bill:—Held, that defendant was entitled to tax instructions, and the costs of the taxation. *Bissett v. Strachan*, 8 P. R. 211.—Taylor, Master.

On a taxation between party and party, instructions for reply will not be allowed, as well as instructions for statement of claim. But expenses incurred in procuring a deed, and certain other documents, which caused a saving of expense, were allowed. *Torrance v. Torrance*, 9 P. R. 271.—Proudfoot.

A person of the same name as the defendant served by mistake with the writ in the action, was held entitled to his costs of opposing a motion for judgment under Rule 324, O. J. Act. (Con. Rule 744), *Lucas v. Fraser*, 9 P. R. 319.—Dalton, Master.

Necessary letters between a solicitor and his agent on the business of the cause are taxable as between party and party, whether the agent resides in the county town of the county in which the solicitor resides, or in another county, or in Toronto. *Agnew v. Plunkett*, 9 P. R. 456.—Osler.

The costs of serving an infant personally who is out of the jurisdiction will not be allowed. *Reo v. Anthony*, 9 P. R. 545.—Boyd.

Expense incurred for surveys and other special work of that nature, made in order to qualify witnesses (surveyors) to give evidence, are not taxable between party and party, the English

Chancery Order 120 (1845) not being in force here. *McGannon v. Clarke*, 9 P. R. 555.—Boyd.

The taxing officer refused to allow charges for maps prepared to identify the details of the line mentioned in the judgment as that which the judge considered the true line, and also for a certificate of the state of the cause, for a letter advising of judgment, and for instructions on motion for judgment:—Held, that there being no error in principle, but only an exercise of discretion by the taxing officer, the court would not interfere with his ruling. *Ib.*

The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrongdoers. They were sued for an alleged conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McLean defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which was the foundation of the actions, was true:—Held, that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants. *Petrie v. Guelph Lumber Co., Stewart v. Guelph Lumber Co., Inglis v. Guelph Lumber Co.*, 10 P. R. 600.—Ferguson.

Upon an appeal from the taxation of the plaintiff's party and party costs:—Held, the costs of a smiliter, with jury notice, were properly disallowed. *Alexander v. School Trustees of Gloucester*, 11 P. R. 157.—Wilson.

Instructions for the examination of the plaintiff, and of the defendants, each \$2, should have been taxed. *Ib.*

Attendances to bespeak copies of depositions of parties, on their examination for discovery in the action, should have been taxed. *Ib.*

A fee for attending to hear judgment on a day fixed, when the judge deferred it till a subsequent day at Toronto, should have been taxed. *Ib.*

A fee for attending to hear judgment at Toronto should have been taxed, although a fee on a previous attendance, when judgment was deferred, had been allowed, and a charge for sending a telegram advising defendants of result of judgment, by direction of judge, should have been allowed. *Ib.*

Where the judge directed reasons for judgment in plaintiff's favour to be put in, the plaintiff's charges for drawing, settling, engrossing, etc., such reasons should have been taxed. *Ib.*

Instructions for common affidavit of disbursements were properly disallowed. *Ib.*

Instructions for brief should be allowed where the brief itself is allowed. *McCallum v. McCallum*, 11 P. R. 179.—Boyd.

Charges for procuring copies of opinions of judges in another action, for the instruction of counsel, should not be taxed as between party and party. *Platt v. Grand Trunk R. W. Co.*, 12 P. R. 273.—Boyd.

The court refused to interfere with the discretion of the taxing officer in allowing certain costs to the solicitor, of proceedings which had been set aside in the action as irregular, and as to which the judgment creditor alleged negligence and want of skill. *Gall & Co. v. Collins*, 12 P. R. 413.—Chy. D.

Held, that only one attendance should be allowed on obtaining a praecipe order. *Latour v. Smith*, 13 P. R. 214.—Boyd.

An order was obtained by the plaintiff, who sued for damages for bodily injuries sustained, for his own examination de bene esse before the trial. The order provided that after the conclusion of the plaintiff's examination, he should submit to a personal examination by medical men on behalf of the defendants, and that the defendants might afterwards continue their cross-examination of the plaintiff; and that the examination might be given in evidence at the trial, "provided the defendants had been able to continue and complete their cross-examination of the plaintiff after the said medical examination." The plaintiff was examined, and partly cross-examined, under this order, and was examined by the medical men, but his cross-examination, owing to his ill-health, was never completed. The plaintiff was not examined as a witness at the trial; the depositions taken were offered in evidence, but were rejected as inadmissible under the terms of the order. The plaintiff succeeded in the action:—Held, under the circumstances of the case, that the examination of the plaintiff de bene esse was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it should have been taxed to the plaintiff as part of the costs of the action. *Beaufort v. Ashburnham*, 13 C. B. N. S. 598; 32 L. J. N. S. C. P. 97; 7 L. T. N. S. 710; 11 W. R. 267; 9 Jur. 822, followed. *Carty v. City of London*, 13 P. R. 285.—Galt.—Q. B. D.

In an action against a municipal corporation for injury to a drain, the corporation caused the two contractors who had constructed the drain, and the assignee of one of them, to be made defendants. The two contractors were partners at the time of the construction of the drain, but had dissolved partnership before the action was begun. One partner appeared, and defended by one solicitor, and the other partner and his assignee by another solicitor. Judgment was given dismissing the claim of the corporation against the added defendants with costs, but they were not by the judgment limited to one set of costs:—Held, that there was no "law of the court" which, under the circumstances of this case, justified the taxing officer in refusing to allow more than one set of costs to the added defendants. *Con. Rule 1202 considered. Melbourne v. City of Toronto*, 13 P. R. 346.—Armour.

Where the arbitrators having authority so to do awarded costs, and their award not having been moved against, it was the duty of the taxing officer to tax costs. *Re Smith v. City of Toronto*, 13 P. R. 479.—Q. B. D. See *Re Beatty v. City of Toronto*. *Ib.* 316.

See *Ulark v. Creighton*, 9 P. R. 125, p. 362.

Upon the taxing officer when the should further 10 P. R. 444.

An appeal not lie until

Under Rule 1194, 1231), of his ruling taxation, and his right to it has issued his

An informant at the end was taxed as officer, and that this was cate of taxation satisfy the rule, 10 P. R. 179, d. R. 413.—Chy.

There is no costs for the and issuing local officers of an execution of what they signify tion of the their function up results, as note the bill with the date signature, w allocatur to s They have allowed or clerical error Cuerrier v. Chy. D.

Any objection on in writing is affixed.

Remarks on equity as to tion. *Ib.*

See *McCall* 390.

Held that bers to review costs taxed properly made as Rule 447 of Toronto tax 438 O. J. Act 10 P. R. 40.

It is a cor made on ap items, or on to refer the officers at Quay, 11 P.

### 5. Certificate of Taxation.

Upon the issuing of a certificate of taxation a taxing officer is functus officio, and it is only when the court requires information that he should further certify. *Langtry v. Dumoulin*, 10 P. R. 444.—Boyd.

An appeal from a certificate of taxation will not lie until the certificate has been filed. *Ib.*

Under Rules 437 and 443, O. J. Act (Con. Rules 1194, 1231), a taxing officer may issue a certificate of his ruling on any points in dispute pending the taxation, and upon it an appeal may be had, but his right to issue such certificate ceases when he has issued his final certificate. *Ib.*

An informal certificate of taxation was written at the end of a bill of costs, shewing that it was taxed at so much, initialed by the taxing officer, and marked "filed" in his office:—Held, that this was not a sufficient filing of a certificate of taxation for the purposes of appeal, to satisfy the rule laid down in *Langtry v. Dumoulin*, 10 P. R. 444. *McCallum v. McCallum*, 11 P. R. 179, distinguished. *Gall v. Collins*, 12 P. R. 413.—Chy. D.

There is no need for local officers, when taxing costs for the purpose of completing a judgment and issuing execution thereon (which they as local officers may also do), to preface the issuing of an execution by a formal certificate to themselves of what they have done upon the taxation. They signify clearly and sufficiently the completion of the taxation, and the full discharge of their functions as taxing officers, when they add up results, ascertain the correct amount payable, note the bill of costs as taxed at such a sum, with the date, and verify the whole with their signature, which is a sufficient certificate or allocatur to shew that the taxation is at an end. They have no power to alter what they have allowed or disallowed after this, except as to clerical errors, and they are then functi officii. *Cuerrier v. White*, 12 P. R. 571.—Robertson.—Chy. D.

Any objections to the taxation must be carried on in writing, before the signature of the officer is affixed. *Ib.*

Remarks upon the former practice at law and equity as to allocators and certificates of taxation. *Ib.*

See *McCallum v. McCallum*, 11 P. R. 179, p. 390.

### 6. Revision.

Held that an application to a judge in chambers to review a taxation of a sheriff's bill of costs taxed under R. S. O. (1877) c. 66, s. 43, was properly made under R. S. O. (1877) c. 66, s. 52, as Rule 447 (Con. Rule 1230) applied only to the Toronto taxing officers appointed under Rule 438 O. J. Act (Con. Rule 194). *Grant v. Grant*, 10 P. R. 40.—Wilson.

It is a convenient practice, when any case is made on appeal from taxation as to several items, or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto, as upon a revision. *Quay v. Quay*, 11 P. R. 258.—Boyd.

A certain sum of money had been paid into court as security for the defendants' appeal to the court of appeal, which was afterwards abandoned; and by an order made on the consent of both parties it was provided that the plaintiff's costs should be paid out of this money after taxation:—Held (*Armour, C. J.*, dissenting), that this money was a fund in court within the meaning of Con. Rule 1207, and there should be a revision by one of the taxing officers at Toronto of the taxation of costs by the local registrar. Per *Armour, C. J.*—The object of Con. Rule 1207 was for the protection of a fund in court, where the parties to the taxation of costs payable thereout were none of them sufficiently interested in the fund in court to protect it. *Cousineau v. City of London Fire Ins. Co.*, 13 P. R. 36.—Q. B. D.

See *Platt v. Grand Trunk R. W. Co.*, 12 P. R. 273, p. 391.

### 7. Appeals from.

#### (a) Time for Appealing.

Appeals from taxation by local officers must be brought on within eight days from the date of the taxing officer's certificate. *Stark v. Fisher*, 11 P. R. 235.—Boyd.

Appeals from the taxation of costs by local registrars are subject to the eight days' limit prescribed as to appeals from orders of masters and local judges, as was held in *Stark v. Fisher*, 11 P. R. 235, but the time for appealing may be enlarged by the master in chambers or a judge. *Quay v. Quay*, 11 P. R. 258.—Boyd.

Appeals from taxation should be brought on within a reasonable time, and within eight days, the time limited for appeals under Rule 427, O. J. Act (Con. Rule 846), is a reasonable time. *Stark v. Fisher*, 11 P. R. 235, and *Quay v. Quay*, 11 P. R. 258, approved. *Ireland v. Pitcher*, 11 P. R. 403.—C. P. D.

The time for appealing from a taxation of costs begins to run from the date of the certificate of taxation, not from the date of each ruling in the course of taxation. *Re O'Donohoe, a Solicitor*, 12 P. R. 612.—Armour.

See *McCallum v. McCallum*, 10 P. R. 179, *infra*.

#### (b) Other Cases.

Quere, as to whether an appeal from taxation of the costs of an action in the Court of Appeal should not have been to a judge of the Court of Appeal, instead of to one of the chancery division. *Petrie v. Guelph Lumber Co.*, 10 P. R. 600.—Ferguson.

Where no formal certificate of the result of a taxation by a local registrar of the party and party costs was filed, but the bill itself, with a memorandum at the end signed by the registrar showing the result, was filed in the local office and forwarded to Toronto for the purposes of an appeal, and it was admitted that execution had issued upon such memorandum:—Held, that the appeal should not be barred because no more formal certificate was filed. Two clear days' notice of such an appeal is sufficient: *Exchange Bank v. Newell*, 19 C. L. J. 253, distinguished. *McCallum v. McCallum*, 11 P. R. 179.—Boyd.

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Rule 447 (Con. Rule 1230), applies to a taxation of costs conducted by a local taxing officer under the powers given him by 48 Vict. c. 13, s. 22 (O.), and an appeal from such taxation does not lie unless objections are carried in before the officer, as required by that rule. *Quay v. Quay*, 11 P. R. 258, followed. *Snowden v. Huntington*, 12 P. R. 248.—Proudfoot.

Upon an appeal to a judge in chambers from the taxation of costs by a local taxing officer, where the bill was referred to one of the taxing officers at Toronto as upon a revision:—Held, that there should be no costs of the appeal and revision, unless substantially entire success was with one party or the other. *Platt v. Grand Trunk R. W. Co.*, 12 P. R. 273.—Boyd.

An appeal should not be allowed as to any item not included in the objections put in to the taxation. *Id.*

An appeal from the taxation of costs where the amount in question is less than \$40, should not be brought before a divisional court. *Re McRae and The Ontario and Quebec R. W. Co.*, 12 P. R. 327.—Chy. D.

The practice upon appeals from pending taxations of costs to the master in chambers, or the master in ordinary, under Con. Rule 854, should be simple and inexpensive; there is no necessity for a formal order, or a counsel fee, upon such an appeal. *Re Nelson, a Solicitor*, 13 P. R. 30.—Falconbridge.

It is not desirable that any taxation should come more than once by way of appeal before a judge; and where there was an appeal pending the taxation to the master in ordinary, and an appeal from his order to a judge in chambers, the latter was ordered to stand over till after the close of the taxation. *Id.*

As there was no need to appeal in this case, and the application might have been made in chambers, no costs of it were given. *Fouchier v. St. Louis*, 13 P. R. 318.

An appeal from taxation of costs was entertained in chambers where the amount involved was only \$5.32, for the reason that a question of principle was involved. *Monk v. Benjamin*, 13 P. R. 256.—Robertson.

Upon appeals from taxation of costs the court will not interfere with the discretion of the taxing officer as to the quantum or quotas of fees; and this rule covers any question of distribution or allotment of charges among different cases or branches of a case. *Connec v. North American Railway Contracting Co.* 13 P. R. 433.—MacMahon.—Q. B. D.

See *Langtry v. Dumoulin*, 10 P. R. 444, p. 389; *Gall v. Collins*, 12 P. R. 413, p. 389.

#### XVII. RECOVERING COSTS.

Right to recover costs from opposite party where attorney is paid by a fixed salary. See *Stevenson v. Corporation of Kingston*, 31 C. P. 333, p. 43. See R. S. O. (1887), c. 184, s. 278 (3).

The defendant in this action was represented by a firm purporting to be a firm of solicitors, one of the members, however, not being a duly

admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him:—Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if proof had been given. *Reeder v. Bloom*, 3 Bing. 9; ——— v. Sexton, 1 Dowl. 180 followed. *Scott v. Daly*, 12 P. R. 610.—Armour.

See *Kempt v. Macauley*, 9 P. R. 582, p. 16.

#### XVIII. INTEREST ON COSTS.

Costs of all parties to an action for the construction of a will were ordered to be paid out of the estate of the testator, and were taxed in 1883, but there were no funds available for their payment until 1888:—Held, that interest upon these costs could not be allowed out of the estate. *Archer v. Severn*, 12 P. R. 648.—Ferguson.

#### XIX. LIEN FOR COSTS.

##### 1. By Execution Creditor.

Held, (Burton, J. A., dissenting,) affirming the judgment of Armour, C. J., that under R. S. O., (1887), c. 124, s. 9, the costs for which the execution creditor has a lien, are the costs not of the execution only, but all the usual costs which could be recovered from the debtor under an execution. *Ryan v. Clarkson*, 16 A. R. 311, affirmed by Supreme Court, 17 S. C. R. 251. Gwynne and Patterson, JJ., dissenting.

#### COUNCIL.

See MUNICIPAL CORPORATIONS.

#### COUNSEL.

See BARRISTER AT LAW.

#### COUNTERCLAIM.

##### I. PLEADING.

1. Generally—See PLEADING.
2. Actions for Recovery of Land—See EJECTMENT.

##### II. COSTS OF—See COSTS.

#### COUNTY COURTS.

##### I. JUDGE.

1. Appointment of, 393.
2. Removal of, 393.
3. As Local Judge of High Court—See PRACTICE.
4. Of Division Courts—See DIVISION COURTS.
5. Mandamus to—See MANDAMUS.
6. Prohibition to—See PROHIBITION.

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Held, that the absence of the deputy under R. S. O. essential to enable the county judge to try the proceedings. *Dancey*, 12 A.

An objection under R. S. O. entertained, but the proceedings tried before the county judge. *Dancey*, 12 A.

Certain charges under the Great facts and the (Imp.), and directed into the summons witness evidence on or report thereupon a motion was made that enquiries be made before the author enquiry upon or Held, also, that supported at co



7. *Appeals from Assessments and Voters' List*—See ASSESSMENT AND TAXES—PARLIAMENTARY ELECTIONS.

8. *Investigation of Municipal Matters*—See MUNICIPAL CORPORATIONS.

9. *Municipal Controverted Elections*—See MUNICIPAL CORPORATIONS.

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1. *Liquidated and Ascertained Claims*, 394.

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## III. PLEADING, 400.

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1. *When Appeal Lies*, 402.

2. *Bond and Security*—See COURT OF APPEAL.

3. *Reference back to Assess Damages*, 404.

4. *Costs*, 404.

## I. JUDGE.

### 1. Appointment of.

Held, that the commission in this case appointing a deputy judge during pleasure and the absence of the county judge, was validly issued under R. S. O. (1877) c. 42, and that it was not essential to enable the deputy judge to act that the county judge should be absent from the county. *Regina v. Fee*, 3 O. R. 107.—C. P. D.

An objection to the jurisdiction exercised under R. S. O. (1877), c. 42, ss. 16, 22, was not entertained, because there was nothing upon the proceedings to shew that the case was not tried before the proper judge. *McKenzie v. Dancy*, 12 A. R. 317.

### 2. Removal of.

Certain charges having been preferred against a County Court judge, a commission was issued under the Great Seal of Canada, reciting these facts and the provisions of 22 Geo. III. c. 75, (Imp.), and directing the commissioners to examine into the charges, and for that purpose to summon witnesses, and require them to give evidence on oath and produce papers; and to report thereupon. The enquiry proceeded, and a motion was made for a prohibition:—Held, that enquiries under the Imperial Act should be made before the Governor General in Council, and the authority could not be delegated, nor enquiry upon oath authorized by commission:—Held, also, that the commission could not be supported at common law, for it created a court

for hearing and enquiring into offences without determining. *Re Squier*, 46 Q. B. 474.—Wilson.

The C. S. C. c. 13, and 31 Vict. c. 38 (Dom.) give power to issue commissions for enquiring into the administration of justice when the enquiry is not regulated by any special law, and an enquiry into the conduct of any one connected with the administration of justice is within the meaning thereof. But:—Held, that this enquiry into the conduct of a County Court judge falls within the exception in the Act, being regulated by C. S. U. C. c. 14, ss. 1 and 4, which are a special law for such cases. *Id.*

The 32 Vict. c. 22, s. 2 (Ont.); 32 Vict. c. 26 (Ont.); 33 Vict. c. 12, s. 1 (Ont.), and R. S. O. (1877), c. 42, s. 2, assuming to repeal C. S. U. C. c. 14, and C. S. U. C. c. 15, s. 3, and to abolish the court of impeachment for the trial of County Court judges, and regulate their tenure of office, are ultra vires of the provincial legislature. *Id.*

The tenure of office of the County Court judges is still regulated by C. S. U. C. c. 15, s. 3. *Id.*

The different modes of proceeding against County Court judges, for misconduct, pointed out. *Id.*

## II. JURISDICTION.

### 1. Liquidated and Ascertained Claims.

A County Court has jurisdiction to try a claim up to \$400, which is made up of an unliquidated amount of less than \$200, and the balance of a liquidated amount. *Vogt v. Boyle*, 8 P. R. 249.—Hagarty.

The plaintiff sued in the County Court, on the indebtedness count, for \$375, claiming by his particulars, balance due from defendant to 1st November, 1877, \$120; wages from 1st November, 1877, to 1st November, 1878, \$360, less amount paid \$160, \$200. Balance, \$320. On objection being taken at the trial to the jurisdiction of the County Court, the plaintiff was allowed to amend by striking out all the items except the first:—Held, affirming the judgment of the County Court, that the particulars were no part of the record, which shewed an amount within the jurisdiction of the County Court; but:—Held, also, that judgment for that sum would be a bar to any future action for work done at any time before the commencement of this suit. *Davidson v. Belleville and North Hastings R. W. Co.*, 5 A. R. 315.

Action for the price of thirty hogheads of goods. It appeared that K. sold to S., the defendants' testator, a quantity of goods, which K., in his evidence, said was a definite quantity, which he could not recollect, but not less than thirty hogheads, and not more than forty, at the price of \$10 per hoghead:—Held, that the demand was liquidated by the act of the parties at the time of sale, and the action was therefore within the jurisdiction of the County Court. *Watson v. Severn*, 6 A. R. 559.

Per Patterson, J. A.—That it was not improper to leave to the jury the question whether the amount was ascertained by the act of the parties. *Id.*



The plaintiff purchased, by sample, from the defendant two lots of barley, consisting of ten and five car loads respectively. On receipt of the first lot, the plaintiff, alleging that the bulk did not correspond with the sample, claimed \$200 for inferiority in quality. The defendant disputed any liability, and the plaintiff threatened to dishonour the draft which had been drawn on him for the price. In order to sustain his credit with the bank, the defendant telegraphed the plaintiff to accept, and that he would accept plaintiff's draft for the \$200. The defendant's draft for the price, though the defendant was not aware of it, had then been paid by the plaintiff. A deduction of \$100 from the price of the second lot of five car loads was subsequently demanded on the same ground, and the plaintiff refused to pay the defendant's draft for that lot unless he sent a cheque for that amount, and instructed the bank to pay the plaintiff's dishonoured draft for \$200 claimed in respect of the first lot. The defendant telegraphed the plaintiff, "Accept my draft. Will be down Wednesday and pay you." The plaintiff having paid the second draft, sued the defendant in the County Court for \$300:—Held, reversing the judgment of the court below, per Burton and Patterson, J.J.A., that the sums of \$200 and \$100 were both liquidated by the act of the parties; that the whole demand was therefore within the jurisdiction of the County Court, and that plaintiff was entitled to recover. Per Hagarty, C. J. O.—Without deciding that either demand was liquidated, the court in this case had jurisdiction. It cannot entertain any unliquidated cause of action over \$200; but it has jurisdiction to try any number of unliquidated causes of action in debt, covenant or contract, so long as each does not exceed \$200, and the aggregate does not exceed \$400. *McLaughlin v. Scharfer*. 13 A. R. 253.

The plaintiff agreed to sell the defendant a piano for \$400, to be paid by notes at one and two years, with interest, with a rebate for cash. The piano was delivered at the defendant's residence, who after using it for some time objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in the County Court, claiming the \$400 and interest. At the trial leave was given to strike out the words "with interest"—Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay, either by notes or cash, the plaintiff was entitled to recover in an action for goods sold and delivered. *Greenizen v. Burns*, 13 A. R. 481.

Pending negotiations for the sale by the plaintiff to the defendant of a certain business as a going concern the defendant entered into possession, made sales, and received moneys, entering the receipts in a cash book. The negotiations fell through and the plaintiff brought this action in the County Court to recover "\$271.03, the return of moneys received by the defendant belonging to the plaintiff, being proceeds from sales of goods in plaintiff's shop, as follows:" setting forth the sums received on each day by the defendant.—Held, that this sum was not ascertained by its receipt by the defendant and the bringing of the action by the plaintiff for the sum so received. *Robb v. Murray*, 16 A. R. 503.

The increased jurisdiction applies only in the comparatively plain and simple cases where, by the act of the parties or the signature of the defendant, the amount is liquidated or ascertained as being due from one party to the other on account of some debt, covenant, or contract between them; such ascertainment of the amount by the act of the parties being something equivalent to the stating of an account between them, *Id.*

See also **COSTS XIII.**, p. 368.

## 2. Title to Land in Question.

The County Court, on its equity side, had power to grant an injunction in any case coming within its jurisdiction. The fact of the title to land coming in question did not oust the jurisdiction of the County Court on its equity side. *Rae v. Trim*, 8 P. R. 405.—Taylor, Master.

S., being indebted to the plaintiffs, entered into an agreement to mortgage to them, amongst other lands, certain lands known as the Dominion Hotel property. A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owned by S. adjacent thereto inserted. The defendant had been the tenant of S., and after the mortgage, attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. In an action for arrears of rent:—Held, that after such attornment and payment of rent, the defendant could not be heard to deny the plaintiff's title, and they being the equitable owners of the land, were entitled to recover:—Held, also, that the title not being open to question by the defendant, the County Court had jurisdiction. *Bank of Montreal v. Gilchrist*, 6 A. R. 659.

The defendants, by an agreement under seal with one S., acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others, to enter upon the land in question. The question, whether S. gave the defendants such an interest in the land as entitled them to impound cattle, was held not to be a question of title in the sense that it would oust the jurisdiction of the county court. *Graham v. Speltigue*, 12 A. R. 261.

Where, in an action of trespass for pulling down fences and for mesne profits, the plaintiff alleged his title at the time from which he claimed to recover mesne profits; and the defendant, in his statement of defence, denied that he committed any of the wrongs in the plaintiff's statement of claim mentioned, and denied that he was liable in damages or otherwise on the alleged causes of action:—Held, that on these pleadings the title to land was expressly brought in question, and the jurisdiction of the County Court ousted. Held also, that the defendant was not estopped from raising the question of jurisdiction at the trial, because of his omission to file an affidavit under the R. S. O. (1877) c. 43, s. 28, that his pleading was not vexatious, or for the mere purpose of excluding jurisdiction: such an omission being a

mere irregularity  
been set aside,  
diction where  
question of title  
R. 222, follows

The statement of action within the case could not have been pleading whether it was established, and therefore the court (384) did not approach the question of jurisdiction. *Young, 14 A*

It was contended from dispossessions, and by covered a judgment defendant's tenant damages for profits for a period the date of ejectment did not go further. Held, that the evidence against the writ of ejectment in question, on the aspect of the person claiming prior

The expression holding Tenant in such semblance that the right confers no authority the question and as soon as it is really in dispute right which the is bound to discontinue. 24 C. P. 60, and B. 597, not for before the court sent up, the high proceedings upon the Act. *Price v.*

**The plaintiff** that he was, a years, the owner occupied, and by the defendant's statement by his statement of the claim, and confession and brought in the recovered \$120,000 the pleadings to his title to the Court would have costs should be *Danaher v. Little*

See *Richards v. Worman v. Brown v. Haines*, 13 F.

**See also**

In an action of the court of Haldimand defendants from the removed to the

more irregularly, for which the plea might have been set aside, but not operating to confer jurisdiction where the defence in fact raised the question of title. *Campbell v. Davidson*, 19 Q. B. 222, followed.

The statement of claim presented a cause of action within the jurisdiction, and the defendant could not have demurred; it depended upon his pleading whether the jurisdiction would be ousted, and therefore Rule 189 O. J. Act (Con. Rule 384) did not apply to prevent the raising of the question of jurisdiction at the trial. *Seabrook v. Young*, 14 A. R. 97.

It was contended that the defendant was estopped from disputing the plaintiff's title by his admissions, and by reason of the plaintiff having recovered a judgment in ejectment against the defendant's tenants; but the plaintiff's claim was for damages for pulling down fences, and for mesne profits for a period of five or six months prior to the date of ejectment, and the admissions of title did not go further back than the ejectment:—Held, that the judgment against his tenants was evidence against the defendant, at the date of the writ of ejectment, but that title was really in question, and necessary to be proved in respect of the period for which mesne profits were claimed prior to the ejectment. *16.*

The expression "colour of right" in the Overholding Tenants' Act, R. S. O. (1887) c. 144, means such semblance or appearance of right as shews that the right is really in dispute. The Act confers no authority upon the county judge to try the question of the tenant's right or title; and as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the judge is bound to dismiss the case. *Gilbert v. Doyle*, 24 C. P. 60, and *Woodbury v. Marshall*, 19 Q. B. 597, not followed. Upon the proceedings before the county judge being commanded to be sent up, the high court has power to stay proceedings upon the writ of possession under the Act. *Price v. Guinane*, 16 O. R. 264.—Armour.

The plaintiff by his statement of claim alleged that he was, and had been for more than six years, the owner of certain land, which was unoccupied, and claimed damages for timber cut by the defendant on such land. The defendant, by his statement of defence, disputed the plaintiff's claim, and set up certain facts by way of confession and avoidance. The action was brought in the High Court, but the plaintiff only recovered \$120 damages:—Held, that under the pleadings the plaintiff was obliged to prove his title to the land, and therefore the County Court would have had no jurisdiction, and the costs should be on the scale of the High Court. *Danaher v. Little*, 13 P. R. 361.—Q. B. D.

See *Richardson v. Jenkin*, 10 P. R. 292, p. 369; *Norman v. Brady*, 12 P. R. 618, p. 374; *McNeill v. Haines*, 13 P. R. 115, p. 373.

See also, DIVISION COURTS, I., 2.

### 3. Replevin.

In an action of replevin, brought in the county court of Haldimand, for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there de-

tained until replevied:—Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing the mare; and although the original taking was justified under a search warrant issued in Haldimand, to search the plaintiff's premises in Haldimand for the mare, and to bring it before a justice of that county, yet the subsequent removal to the county of Brant, and detention there, were not, and constituted the defendant a trespasser ab initio, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant. *Hoover v. Craig*, 12 A. R. 72.

### 4. Other Cases.

An issue had been directed from a County Court to one of the superior courts under R. S. O. (1877) c. 49, s. 12, to try whether a conveyance of certain lands by a judgment debtor was fraudulent, and the County Court had defined the issue to be tried, and the time and place of trial. The plaintiff, in pursuance of the direction, prepared and delivered the issue to defendant, the grantee in the conveyance, who did not return it; and the plaintiff, after the time for trial had elapsed, applied in the superior court for an order absolute for sale of the land:—Held, such order could be made only in the County Court, whence the issue had been directed, and that the superior court could only try the issue, and could make no final disposition of the matter:—Held, also, that the application was not in any event well founded, as the plaintiff should have proceeded with the trial of the issue. *Quære*, as to the granting of a new trial, or reviewing the verdict upon such an issue. *Merchants' Bank v. Brooker*, 8 P. R. 133.—Osler.

A County Court judge has power to give a fiat in term time for the issue of a writ of quo warranto to try a contested municipal election:—Held, that Rule 1 M. T. 14 Vict. has become inoperative by the effect of subsequent statutory enactments to which it is repugnant. *Regina ex rel. McDonald v. Anderson*, 8 P. R. 241.—Osler.

Power of County Court judge to set aside writ of quo warranto when issued on his fiat. See *Regina ex rel. Grant v. Coleman*, 8 P. R. 497; *S. C.* 46 Q. B. 175; 7 A. R. 619; *Regina ex rel. O'Dwyer v. Lewis*, 32 C. P. 104; *S. C.*, sub nom. *Regina ex rel. Dwyer v. Lewis*, 8 P. R. 497.

A verdict was entered for the plaintiff on the trial of an issue directed by the Court of Chancery, to be tried at the sittings of the County Court of the county of Dufferin. The County Court judge set aside the verdict, and entered a nonsuit, on grounds embracing matters of law as well as of fact and evidence:—Held, that he had no power to do so, and that the application should have been made to the court that directed the issue. *Barker v. Leeson*, 9 P. R. 107.—Proudfoot.

In an action in a County Court, on a promissory note made by the defendant, in which the defendant claimed indemnity against the third party, the third party having appeared, the learned judge of the County Court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party, amounting to

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Held, that the venue in any action of replevin in a County Court, except for goods distrained, may be changed to any other county, under R. S. O. (1877) c. 50, s. 155. *O'Donnell v. Duchenaull*, 14 O. R. 1.—O'Connor.

Under the system of pleading in the High Court of Justice, and in County Courts, under the Judicature Act, Rules 123, 146, 147, 148, 240, where a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue. *Waterloo Mutual Fire Ins. Co. v. Robinson*, 4 O. R. 295, approved of. *Seabrook v. Young*, 14 A. R. 97.

#### IV. PRACTICE.

Where a rule nisi in a County Court was ordered by the judge to stand over until the next term:—Held, that it was not necessary to take out a rule to enlarge the rule nisi to prevent it from lapsing. *In re Dean v. Chamberlin*, 8 P. R. 303.—Osler.

At the trial, the jury answered all the questions left to them in favour of the plaintiff, and judgment was entered for him, which the County Court judge subsequently set aside and entered judgment for the defendants:—Held, that under Rule 490 O. J. Act (Con. Rule 1257), the same power is extended to the County Courts as is possessed by the high court under Rule 321, (Con. Rule 755) and that the judge of the County Court was right in giving judgment in favour of the defendants instead of submitting the question to another jury. See also, on the same point, *Stewart v. Rounds*, 7 A. R. 575, and *Williams v. Crow*, 10 A. R. 301. *McConnell v. Wilkins*, 13 A. R. 438.

Reading section 41 with section 29 of the County Courts Act, R. S. O. (1887) c. 47, and having regard to the provisions of Rule 488 O. J. Act (Con. Rule 1255):—Held, that a party may move before the judge in court against the verdict or judgment at the trial, either before, or during the first two days of the next quarterly sittings after the trial. The motion is not necessarily to be made at the usual fixed sittings; the judge may entertain it at any previous time. Scope of section 42, sub-s. 5, R. S. O. (1887) c. 47, as to moving before the County Court to set aside the judgment at the trial, observed on. *Smith v. Rooney*, 12 Q. B. 661, is not applicable to the existing law and practice. *Norton v. McCabe*, 12 P. R. 506.—C. of A.

See *Ferguson v. McMartin* 11 A. R. 731, p. 403; *Merchants' Bank v. Brooker*, 1 P. R. 133, p. 398; *Barker v. Leeson*, 9 P. R. 107, p. 398; *Coyne v. Lee*, 14 A. R. 503, p. 404.

#### V. COSTS.

In an action in a County Court, tried by a judge without a jury, judgment was given for \$30, no order being made as to costs:—Held, that no costs could be awarded, and a mandamus was granted to the County Court clerk to enter up judgment for the plaintiff without costs, and without allowing defendant to set off against the judgment the difference between the County and Division Court costs. *Re Great Western Advertising Co. v. Rainer*, 9 P. R. 494.—Armour.

#### VI. APPEAL FROM.

##### 1. When Appeal Lies.

Although the jurisdiction of the Court of Appeal is not limited in appeals from the County Court as it is in appeals from the superior courts, under section 18, sub-section 3, of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused by the County Court upon a matter of discretion only. *Campbell v. Prince*, 5 A. R. 330.

In an action for assault against a public officer, in which the jury had found a verdict of \$100, and a new trial, asked for on the ground that the verdict was against evidence, was refused, the Court of Appeal granted a new trial, as the evidence strongly preponderated in the defendants' favour, and there was reason to believe the jury had been misled by the charge. *Id.*

The verdict in this case was set aside by the judge of the County Court, and a nonsuit entered, upon a ground not taken as a defence at the trial, or in the rule nisi:—Held, reversing the judgment, that the judge erred in giving effect to the objection, which, if taken at the trial, would have been met with an amendment. As the evidence shewed that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule in the court below discharged. *Clarke v. Barron*, 6 A. R. 309.

At the trial the judge left several matters of fact in dispute to the jury, the jury found on one point only and the judge granted a new trial owing to his dissatisfaction with the verdict, the court refused to interfere with his discretion, as it did not appear that he was clearly wrong. *Hunter v. Vanstone*, 6 A. R. 337.

In an action of replevin, the defendant, for a second plea, avowed for board due by plaintiff to him as a boarding-house keeper; and for a third, avowed for a lien on the goods of plaintiff under R. S. O. (1877), c. 147, s. 2. On the trial, before the judge of the County Court (York) without a jury, the evidence as to whether the defendant was the keeper of a boarding-house was contradictory, but the learned judge decided in favour of the plaintiff, holding that the defendant was not a boarding-house keeper. On appeal this finding of the County Court judge was affirmed, although, had the matter come before this court in the first instance, it would have decided otherwise, and under the circumstances, no costs of the appeal were given to the respondent. *Rees v. McKeown*, 7 A. R. 521.

This case had been remitted to the court below, this court being of opinion that the record should be there amended and a verdict entered for the plaintiff against the defendant B. alone (C. A. R. 411). The judge of the County Court instead of entering such a verdict, directed a new trial, the parties to apply to amend their pleadings as they might be advised, so that B. might raise any defence which he was not obliged to raise in the action on the joint liability:—Held, that the direction of the judge as to the way in which he thought it most just to the defendant B. that the application to amend should be made, was an exercise of his discretion with which this court in the exercise of its appellate jurisdiction would not interfere. *Wilson v. Brown*, 7 A. R. 181.

Appeal in garnishee proceedings. See *Van Norman v. Grant*, 27 Chy. 498; *Sato v. Hubbard*, 6 A. R. 546; *McKinsley v. Armstrong*, 11 P. R. 200.

Appeal from order of county judge, setting aside fiat and writ of summons in the nature of a quo warranto. See *Regina ex rel. Grant v. Coleman*, 7 A. R. 619.

The judge, at the trial in the County Court, entered a verdict for the plaintiff, instead of directing judgment to be entered, and afterwards refused a rule nisi to set aside such verdict. Rule 405 of the O. J. Act in effect forbids the granting of any rule to shew cause where the application is against the judgment of a judge who tries a cause without a jury. Quere, as to the application of this rule to County Courts by Rule 490 O. J. Act; but—Held (per Patterson, J. A.), that the entry of the verdict might be treated as a direction to enter judgment, and was a decision from which an appeal would lie under Rule 510 O. J. Act. *Williams v. Crow*, 10 A. R. 301.

An objection to an appeal from a judge refusing such rule might be raised by motion in chambers, but it is not obligatory to raise it in that manner. *Ib.*

An action in the County Court of Carleton was tried without a jury by the junior judge of that county, who, after consideration, entered a verdict for the defendant. A court, composed of the senior and junior judges of Carleton, and the judge of the County Court of Prescott and Russell, subsequently assumed to set aside the verdict, and to enter judgment for the plaintiff, dissenting the junior judge of Carleton:—Held, that the judgment of a court so constituted was invalid, and that the verdict at the trial was not affected thereby. Per Patterson, J. A., the verdict at the trial was a final judgment of the court, and could not be attacked except by an appeal to this court. Rule 510, O. J. Act (Con. Rule 798), gives a party no right to move in the County Court. Per Osler, J. A., the party dissatisfied with the judgment at the trial may, under Rule 510 O. J. Act (Con. Rule 798), move against it before the judge himself; and an appeal to this court may, under 45 Vict. c. 6, s. 4 (Ont.), as properly be brought from the decision on such motion as from the judgment at the trial. *Ferguson v. McMartin*, 11 A. R. 731.

An order for leave to sign judgment under Rule 80 (Con. Rule 739), is in its nature final, and not interlocutory, and such an order made in the County Court, or district court, is appealable. *Bank of Minnesota v. Page*, 14 A. R. 347.

In an action pending in the High Court, an interpleader issue and all subsequent proceedings were transferred, under the 44 Vict. c. 7, s. 1 (Ont.), to the County Court of Middlesex. By a subsequent order made on consent, the trial of such issue was withdrawn from Middlesex, and a special case was agreed on, and the venue changed from Middlesex to York, where the special case was argued.—Held, per Patterson and Osler, J.J.A., that in strictness the appeal should be quashed. The transfer to the Middlesex County Court was final, and there was no jurisdiction under the statute or otherwise to transfer the issue or any part of it, or to change

the venue to any other County Court. The proceedings in the County Court of York could therefore only be regarded as a summary trial by consent from which no appeal lay. *Coyne v. Lee*, 14 A. R. 503.

An interpleader issue, arising out of an action in the chancery division of the High Court of justice, was sent to a County Court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7 (Ont.), rather than under the interpleader jurisdiction of the old court of chancery; and that being so, that a divisional court of the High Court of justice had no jurisdiction to hear an appeal from the judgment of the County Court on such issue, and that such appeal should have been to the Court of Appeal, under R. S. O. (1877) c. 54, s. 23. *Close v. Exchange Bank*, 11 P. R. 186.—Chy. D.

Semble, that an appeal lies from the order of the judge of the County Court under the Registry Act, altering or amending a plan. *In re Waldie v. Village of Burlington*, 13 A. R. 104.

When a case in the County Court has been tried with a jury, the only appeal given by the R. S. O. (1887) c. 47, s. 41, direct to the Court of Appeal from the judgment at trial, is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial, on a motion for a non-suit, or the reception or rejection of evidence, or the charge to the jury, must be brought from the decision of the judge upon a subsequent motion for a new trial. The general language of section 42 does not apply when the case is one coming within section 41. *Weaver v. Sawyer*, 16 A. R. 442.

The right or claim mentioned in section 42 of the County Courts Act, R. S. O. (1887) c. 47, is that which forms the subject of the action, not the right to take any particular step in the course of the action; and an order made in chambers in a County Court action, striking out a jury notice, is not an order finally disposing of a right or claim within the meaning of the section, but is in its nature an interlocutory order, and not appealable. *McPherson v. Wilson*, 13 P. R. 339.—Osler.

See *Mahon v. Nicholls*, 31 C. P. 22, p. 400; *McKenzie v. Davey*, 12 A. R. 317.

### 3. Reference Back to Assess Damages.

The Court of Appeal directed a verdict to be entered for the plaintiff against a tavern-keeper for selling liquor to her husband after being forbidden by the plaintiff, his wife, to do so, but referred it back to the County Court judge to assess the damages, declining to follow the course adopted in *Denny v. The Montreal Telegraph Co.*, 3 A. R. 628. *Austin v. Davis*, 7 A. R. 473.

### 4. Costs.

As the judgment was varied on a matter of discretion, no costs of appeal were given. *Campbell v. Prince*, 5 A. R. 330.

The court, having the County Court the appeal on pay so far as to direct the return of wh necessary amend v. *Brown et al*, 6

## COUNTY

Where the acc York, for the q 1879, for expense tration of crimin county board of the items were treasurer as not p consolidated reve in the schedule, fore, in auditing for a subsequent the amount of sa mus was granted order for such de Board of Audit of 31.—C. P. D.

Held, that th though not clerk ing within R. S. form part of the of criminal justic

Under an order is entitled to \$4 c informations, et charges for the certificate of the should be allowe before the county of larceny, havin was tried at the on three of them two cases were no attorney, obtained for and charged a five cases, which audit, and paid upon the twenty allowed by the p cision communicat the amount from that a mandamus audit, to rescind provincial treasu ducting the am their discretion u In re Stanton and County of Elgin,

A fee of fifty co attorney for atten criminal courts, s tries for each pris summarily. The actual attendance tries in each of against C., which him and his electi cases on which t were only allowed ruling of the prov for the same res



The court, having no power, on an appeal from the County Court to amend the record, allowed the appeal on payment of costs by the appellant, so far as to direct the issue of a rule nisi, upon the return of which, in the court below, the necessary amendment could be made. *Wilson v. Brown et al*, 6 A. R. 411.

### COUNTY CROWN ATTORNEY.

Where the account of the county attorney of York, for the quarter ending 31st December, 1879, for expenses connected with the administration of criminal justice, was audited by the county board of audit, and paid, but certain of the items were disallowed by the provincial treasurer as not payable by the Crown out of the consolidated revenue fund, not being contained in the schedule, and the board of audit, therefore, in auditing the county attorney's account for a subsequent quarter, deducted therefrom the amount of said disallowed items, a mandamus was granted to the board to rescind their order for such deduction. *In re Fenton and the Board of Audit of the County of York*, 31 C. P. 31.—C. P. D.

Held, that the county attorney of York, though not clerk of the peace, is an officer coming within R. S. O. (1877) c. 85, whose expenses form part of the expenses of the administration of criminal justice. *Ib.*

Under an order in council the county attorney is entitled to \$4 on receiving and examining all informations, etc., connected with criminal charges for the court of assize, etc., upon the certificate of the crown counsel that such fee should be allowed. One C. on being brought before the county judge on twenty-five charges of larceny, having elected to be tried by a jury, was tried at the ensuing assizes, and convicted on three of them; but the remaining twenty-two cases were not tried. The plaintiff, a county attorney, obtained the crown counsel's certificate for and charged a fee of \$4 in each of the twenty-five cases, which was passed by the board of audit, and paid by the county treasurer, but upon the twenty-two untried cases being disallowed by the provincial treasurer and his decision communicated to the board they deducted the amount from a subsequent account:—Held, that a mandamus would not lie to the board of audit, to rescind their order, the ruling of the provincial treasurer being a good reason for deducting the amount, which was a matter for their discretion under the R. S. O. (1877), c. 85. *In re Stanton and the Board of Audit of the County of Elgin*, 3 O. R. 86.—*Magarty*.

A fee of fifty cents is allowed to the county attorney for attendance in the county judge's criminal courts, and making the necessary entries for each prisoner not consenting to be tried summarily. The plaintiff charged fifty cents for actual attendances and making the necessary entries in each of the twenty-five charges preferred against C., which were separately read over to him and his election taken thereon. The three cases on which the prisoner was actually tried were only allowed by the board of audit, on the ruling of the provincial treasurer:—Held, that for the same reasons as above, a mandamus

would not lie to the board of audit to allow the fee in the other cases. *Ib.*

The plaintiff claimed \$1 for an affidavit verifying the jurors' book, and \$1 for a certificate drawn up by him for the county judge to sign, of the receipt of such books, etc. The tariff allows \$1 "for each certificate required to be entered in the jurors' book to verify the same."—Held, that these fees could not be allowed, and that a mandamus would not lie. *Ib.*

As to the propriety of a county attorney entering the jury room and advising coroner's jury as to the language of their verdict. See *Regina v. Sanderson*, 15 O. R. 106.

See *Van Norman v. Grant*, 27 Chy. 498, p. 91.

### COURT OF APPEAL.

#### I. APPEALS TO.

1. *From Judge of Court of Appeal*, 406.

2. *From High Court*, 406.

3. *From County Courts*—See COUNTY COURTS.

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III. ENFORCING JUDGMENT, 414.

IV. CASES RELATING TO APPEALS GENERALLY—See APPEAL.

#### I. APPEALS TO.

1. *From Judge of Court of Appeal*.

Held, Spragge, C. J. O., dubitante, that an appeal will not lie from an order of a judge of the Court of Appeal extending the time for appealing to the Supreme Court of Canada. *Neill v. Travellers' Ins. Co.*, 9 A. R. 54.

2. *From High Court*.

Upon an application by the churchwardens of St. James' church, for leave to appeal from the judgment of the Chancery Divisional Court (7 O. R. 644) in their own names, or in the name of the rector, the defendant (who declined to carry the case further), as their trustee:—Held, that the rector was not a trustee for the applicants, but would himself, if the contention should prevail, be beneficially entitled to the fruits of the

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litigation; and that the applicants had not such an interest as entitled them to be made parties to the action; and the application was therefore refused. The event rendered it unnecessary to consider whether or not the application was properly made to this court. *Langtry v. Dumoulin*, 11 A. R. 544.

The plaintiffs by their agent, Patrick R., in April, 1877, procured a judgment to be signed against Peter R., the defendant, who, for purposes of his own, suffered the judgment to go by default. No execution was ever issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick, who paid them \$50 therefor; and, on her application, Armour, J., made an order allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment as having been fraudulently obtained, and to be allowed to defend the action, or for such other order as should seem just; and upon such application, Wilson, C. J., made an order setting aside the judgment and all proceedings in the action, and directing the plaintiffs to repay the \$50. This order was affirmed on appeal by the Common Pleas division:—Held, that an appeal lay from the order of the Common Pleas division, as it was, in effect, a final disposition of the whole matter, and a bar to the plaintiffs' further proceeding; but, although the members of this court were all of opinion for different reasons that the order below was wrong, they did not agree as to the extent to which it should be modified or reversed, and therefore the appeal was dismissed, without costs. *Schröder v. Rooney*, 11 A. R. 673.

Held, reversing the order of the Queen's Bench divisional court, 11 P. R. 9, that the plaintiff was not entitled to have delivered out to him for cancellation a bond for security for costs of the action, after judgment in his favour by the Queen's Bench divisional court, before the time for appealing to this court had elapsed, and while an appeal was actually pending. The order of the court below, even if interlocutory, was appealable under the language of the Court of Appeal Act, and as the penalty of the bond was \$1,000, and the defendants' costs exceeded that amount, the sum in controversy was sufficient to warrant an appeal, and it could not be said that it was a matter so entirely in the discretion of the court below, that this court would not interfere. The right of appeal conferred by the Judicature Act considered:—Quere (per Burton and Patterson, J.J.), whether the order in appeal was interlocutory:—Quere (per Osler, J.A., and Galt, J.), whether ss. 33 and 34 O. J. Act, apply to appeals from interlocutory orders. *Hately v. Merchants' Despatch Co.*, 12 A. R. 640.

The objection that the judge at the trial should himself have decided the issue as to failure of consideration, instead of directing an enquiry before the master, is not one that the court will entertain. *Featherstone v. VanAllan*, 12 A. R. 133.

The decision of a judge of the High Court of justice (which by section 28 of the O. J. Act 44 Vict. c. 5, is the decision of the court) in an interpleader issue to try the title to property taken under execution on a final judgment in the suit on which it is issued, is not an interlocutory

order within the meaning of that expression in section 35 of the O. J. Act, or if it is, it is such an order as was appealable before the passing of that Act, and in either case it is appealable now. *Hovey v. Whiting*, 14 S. C. R. 515; 12 A. R. 119.

Appeal from an order of a judge of the High Court, for the winding up of a company under 45 Vict. c. 23 (Dom.). See *Re Union Fire Insurance Co.*, 13 A. R. 268. S. C., sub nom. *Schoolbred v. Union Fire Ins. Co.* 14 S. C. R. 624.

The defendant, who was convicted by two justices under the Canada Temperance Act, removed the conviction by certiorari, and the same was quashed (10 O. R. 727). On appeal to this court:—Held that there was no jurisdiction in this court to hear the appeal, and the same was therefore quashed, with costs, to be paid by the informant. *Regina v. Eli*, 13 A. R. 528.

The defendants having been convicted on an indictment for a nuisance, which had been removed into the Queen's Bench Division by certiorari, moved for a new trial, which was refused:—Held, that no appeal would lie to this court from the judgment refusing the new trial, and that it could make no difference that the indictment had been removed by certiorari, and tried on the civil side. *Regina v. Eli*, 13 A. R. 526; *Regina v. Laliberté*, 1 S. C. R. 117, referred to. *Regina v. City of London*, 15 A. R. 414.

An order was made by a judge sitting in court, directing the execution by the defendants (mortgagees) of a reconveyance or discharge, directed by a previous judgment, or in default for a sequestration:—Held, that an appeal to the Court of Appeal lay without leave, whether the order was to be regarded as interlocutory or not. *Semle*, per Hagarty, C. J. O., and Patterson, J. A., that such an order is not in its nature interlocutory. *Bull v. North British Canadian Investment Co.*, 12 P. R. 284.—C. of A.

Appeal to Court of Appeal, from order of judge in chambers, affirming order of master to strike out jury notice, refused. *Adamson v. Adamson*, 12 P. R. 469.—Boyd.—C. of A.

Leave to appeal to the Court of Appeal, from an order of the Common Pleas division changing the place of trial, was asked by the plaintiff, because it was of importance to him in other litigation to have the question of venue decided, and was granted upon his undertaking to pay the costs of both parties of the appeal. *Grey v. Siddall*, 12 O. R. 577.—Q. B. D.

See *In re Hall*, 8 A. R. 135; *Connec v. Canadian Pacific R. W. Co.*, and *Canadian Pacific R. W. Co. v. Connec*, 12 A. R. 744.

See also APPEAL I., p. 25.

#### 6. Time for Appealing and Notice.

Where a decree was made at the hearing of a case, but certain questions were reserved for further directions:—Held, that the year within which an appeal could be brought ran from the making of the decree on further directions, and not from that on the hearing. *Freed v. Orr*, 6 A. R. 690.

Two only of seven respondent, by her claimed relief over defendants to the suits against appeal printed appeal book down the appeal for had never been served notice of appeal, nor the costs of appeal, of taking part in the book:—Held, that the court. 1b.

By the oversight solicitor, the notice (1877), c. 38, (s. 38) to the registrar of it was duly served not been prejudicial notice to be filed with costs. *Regina v. 72.—Boyd.*

Held, that s. 38, plaintiffs' right under to appeal within a decree, which had April, 1881, before into force. *Work Dalton, Q. C.*

By the decree "reservations" were reserved the defendant residing shewn that any attempt to communicate with her would have been of no use, and that the defendant had been present sufficient special circumstances to obtain leave of the month within to be given. *Miller v. Proudfoot.*

A plaintiff was admitted on the 30th of July, of the year on the 30th of June, for again until the 2nd of the first time, learned notice of appeal to the court from the rendering 38 O. J. Act):—Held, giving leave to appeal to a party who had obtained the right to have the rules and practice submitted:—Held, also, that it might be prejudicial to another party in an appeal to the Court of justice, by the ground for granting *Wilby v. Standard Insurance Co.*, 24, 40.—Cameron.—

A notice served on an appeal to the Court of justice, given on the 4th of the month, was too late. *Wright v. Tom, Master.*

A notice of appeal was not an initiation of the action, but the execution of the O. J. Act, was not a new appeal pending.

Two only of several defendants appealed. The respondent, by her reasons against the appeal, claimed relief over against two of the other defendants to the suit, and served them with reasons against appeal, and subsequently with the printed appeal book, and with notice of setting down the appeal for argument. These defendants had never been served with the statutory month's notice of appeal, nor furnished with security for the costs of appeal, nor afforded an opportunity of taking part in the settlement of the appeal book.—Held, that they were properly before the court. *Ib.*

By the oversight of a clerk of the appellant's solicitor, the notice of appeal required by R.S.O. (1877), c. 38, (s. 38 O. J. Act 1881), was not given to the registrar of the court appealed from, but it was duly served on the respondent, who had not been prejudiced. *Boyd, C.*, allowed the notice to be filed within four days, upon payment of costs. *Re Lewis, Laws v. Laws*, 9 P. R. 72.—*Boyd.*

Held, that s. 38, O. J. Act, did not affect the plaintiffs' right under R. S. O. (1877), c. 38, s. 46, to appeal within a year from the making of the decree, which had been pronounced on the 2nd April, 1881, before the first mentioned Act came into force. *Workman v. Robb*, 9 P. R. 169.—*Dalton, Q. C.*

By the decree in question "further directions" were reserved, and it also appeared that the defendant resided in England, but it was not shown that any attempt had been made to communicate with her, nor that if there had it would have been of any use, nor that the defendant had been prejudiced by it:—Held, not sufficient special circumstances to entitle the defendant to obtain leave to appeal after the lapse of the month within which notice of appeal is to be given. *Miller v. Brown*, 9 P. R. 542.—*Proudfoot.*

A plaintiff was advised by his solicitor on the 3rd of July, of the judgment of the court given on the 30th of June. He did not see his solicitor again until the 20th of August, when he, for the first time, learned that he should have caused notice of appeal to be served within a month from the rendering of the judgment. (Section 38 O. J. Act):—Held, not a sufficient ground for giving leave to appeal, and thus denying to the party who had obtained the judgment of the court the right to have it enforced as promptly as the rules and practice of the court will permit:—Held, also, that the fact that the plaintiff might be prejudiced in another action against another party in another division of the High Court of justice, by this judgment, was not a ground for granting the indulgence sought. *Wilby v. Standard Fire Insurance Co.*, 10 P. R. 34, 40.—*Cameron, Q. B. D.*

A notice served on Monday, October 6th, of an appeal to the Court of Appeal from a judgment given on the 4th of September, was held too late. *Wright v. Leys*, 10 P. R. 354.—*Dalton, Master.*

A notice of appeal to the Court of Appeal is not an initiation of the appeal. Where notice was served, but the security required by section 38, O. J. Act, was not given:—Held, that there was no appeal pending, and a motion to set aside

the notice of appeal, or to dismiss the appeal, was dismissed. *Smith v. Smith*, 11 P. R. 6.—*Dalton, Master.*—*Rose.*

Semble, R. S. O. (1877), c. 38, s. 46, would have the effect of preventing an appeal from a judgment more than a year old, unless leave were obtained from the Court of Appeal; but if new evidence were admitted, and the case heard anew, the time for appealing would run from the date of the later judgment:—Semble, also, R. S. O. (1877), c. 38, s. 22, was not intended to apply to newly discovered evidence. *Synod v. DeBlaquiere*, 10 P. R. 11, followed. *Bank of British North America v. Western Insurance Co.*, 11 P. R. 434.—*Proudfoot.*

Cross applications in respect of the same subject matter were argued together, and both were dismissed by a judgment pronounced on the 26th April, 1885. The question argued was an important one, viz., the ultra vires of an Act. Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th of June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party, who was not desirous of appealing unless his opponent appealed, was advised too late to serve notice within the time limited, and therefore applied, after the expiration of the time, to have it extended:—Held, that it was a proper case for exercising a discretion in favour of the applicant, and leave to appeal was accordingly granted. *Re Lake Superior Native Copper Co.*, 11 P. R. 36.—*Proudfoot.*

An appeal was not made within the time required by Rule 461 (Con. Rule 484), as it was supposed that Christmas vacation did not count. On the facts stated in the judgment, leave was given to appeal on payment of costs. *Sieve-wright v. Leys*, 9 P. R. 200.—*Dalton, Master.*

Where leave of the court is necessary for an appeal, application therefor should be made within three months from the judgment to be appealed from; but in a case where, although leave to appeal was necessary, none was obtained, and the appellant gave notice and filed his appeal bond, which was allowed without objection by the respondent, and where the appeal presented a fairly arguable question of law, and no sittings had been lost by the delay:—Held, that such an equity was raised in the appellant's favour as entitled him to relief after the three months. The rule laid down in *Sieve-wright v. Leys*, 9 P. R. 200, is the rule that should be acted upon in regard to extension of time. *Langdon v. Robertson*, 12 P. R. 139.—*C. of A.*

Motion to dismiss the defendants' appeal to this court for want of prosecution. The judgment appealed from (12 O. R. 119) was pronounced on the 28th April, 1886, and notice of appeal was given within two weeks thereafter. Security was given at the end of June, but the draft appeal case was not sent to the plaintiff's solicitors till the 24th September following, and did not reach them till the 27th September. The period from that date till the 1st of March, 1887, was occupied by correspondence between the solicitors for the parties, in an attempt to settle the appeal case, and at the end of that period it became apparent that there must be a motion to a judge to settle the case. From the

1st of March, however, till the 28th of April, when a year had run from the pronouncing of judgment, nothing was done, and this motion was made on the 14th May, 1887. The reason given for the delay after the 1st March was, that the appellants' solicitor thought it best to have the case settled by the judge who tried the action, and that that judge did not during the time in question hold chambers, he being away on circuit. It was shewn, however, on the other side, that he was not continuously absent during this period.—Held, by Patterson, J. A., in chambers, that no special circumstances were shewn to justify an extension of the time, and that the appeal should be dismissed for want of prosecution. *Platt v. Grand Trunk R. W. Co.*, 12 P. R. 380.—Patterson, C. of

Held, on appeal, by the court, that the judge in chambers had power to make the order dismissing the appeal, and that nothing was shewn to warrant interference with his discretion. *Ib.*

See *Re Union Fire Ins. Co.*, 7 A. R. 783. *infra*.

### 7. Appeal Books.

The formal judgment or order appealed from should be printed in the appeal book. *Thompson v. Robinson*, 16 A. R. 175.

Where no written judgment has been delivered by the court appealed from, a statement of the grounds assigned therefor should be obtained from the reporter, or from notes of counsel who attend to hear judgment, and should be inserted in the appeal book. *Blackley v. Kenny*, 16 A. R. 522; See *Boswell v. Sutherland*, 8 A. R. 233.

See *Petrie v. Guelph Lumber Co.*, 10 P. R. 600, p. 384.

### 8. Bond and Security.

#### (a) Generally.

The bond for \$400, given under the provisions of R. S. O. (1877) c. 38, s. 26, is a security for the costs of appeal only; in order to stay execution for the costs of the court below, further security must be given. *Powell v. Peck*, 8 P. R. 85.—*Stephens, Referee.*

An order allowing \$400 to be paid into court by the appellant, in lieu of a bond, will be granted *ex parte*. *Connolly v. O'Reilly*, 8 P. R. 159.—*Stephens, Referee.*

An appeal under the Act respecting the winding up of joint stock companies, 41 Vict. c. 5, s. 27 (Ont.), cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from. *Re Union Fire Ins. Co.*, 7 A. R. 783.

Where a bond good in form, with proper sureties, was filed with the clerk of the County Court on the last of the eight days, though not allowed by the judge:—Held to be within the words "given security before a judge," and a sufficient compliance with the Act, though a person thus filing a bond without allowance, risks being deprived of his right of appeal in the event of the bond proving defective. *Ib.*

Where, on a motion in chambers to disallow a bond given on an appeal, it appeared from the

examination of one of the bondsmen that he had lands of sufficient value, but that the conveyances to him were unregistered, it was directed that the conveyances should be registered. *Adamson v. Adamson*, 9 P. R. 96.—*Stephens, Referee.*

See *Smith v. Smith*, 11 P. R. 6, p. 410.

#### (b) Further Security.

An application for further security for costs of appeal, on the ground of the insolvency of one or more of the sureties, should be made to the court appealed from. *Lumsden v. Davis*, 10 P. R. 10.—*Burton.*

Where one of the sureties in a bond given to secure the costs in the court below became worthless:—Held, that the respondent was entitled to a new one. *Gage v. Canada Publishing Co.*, 10 P. R. 169.—*Dalton, Master.*

#### (c) Delivery up of Bond and Payment out of Court.

On appeal to the Court of Appeal, from the judgment of the Court of Queen's Bench in favour of one P. against the Citizens' Insurance Company, the company paid into court a sum of money as security for the amount of the judgment, as well as for interest and costs, and also for the costs of the appeal. The appeal was dismissed with costs, and the company then appealed to the Supreme Court, and paid a further sum into court as security for the costs of such appeal. The Supreme Court dismissed the appeal with costs. A judge's order was then obtained, under which the moneys were paid out of court to G. and M., to whom P. had assigned them. The company afterwards appealed to the Privy Council, when the appeal was allowed and the judgment of the Supreme Court reversed. On an action brought therefor:—Held, by Hagarty, C. J., that the company were entitled to recover back the moneys so paid out of court on the judge's order with interest thereon from that payment at six per cent.; and also all sums paid for costs, but without interest. *Citizens' Ins. Co. v. Parsons*, 32 C. P. 492.

A judgment by the Court of Appeal, in favour of a defendant appellant, puts an end to all liability upon the appeal bond, which may after such judgment be delivered up to the appellant, even where the other party has given notice of appeal to the Supreme Court of Canada. *Burgess v. Conway*, 11 P. R. 514.—*Dalton, Master.*—*Galt.*

Notice should be given to the opposite party of a motion to take the appeal bond off the files. *Ib.*

Where money has been paid into court for a specific purpose, and that purpose has been answered in favour of the party paying it in it will be paid out to that party. *McLaren v. Caldwell*, 9 P. R. 118.—*Proudfoot.*

### 9. Staying Proceedings on Bond.

An action against the sureties upon a bond given by the defendants in the action of *Mc*

*Laren v. Canada* upon the appeal of Appeal in the *Laren v. Canada* of Appeal to Her appeal security including security and execution held, that proceed this action. *Mc Dalton, Master.*

The condition defendant was a would effectually such costs and de case the judgment. The appellant dis to R. S. O. (1877) "thereupon the titled to the costs ceedings in appeal for such costs or ment in the court ther proceedings had been brought master was refer respondent's cost Held, affirming had been affirmed that these costs spondent by virtue the meaning of prosecute." *Hug Rose. See also I ada Southern R.*

See *Cousineau v.* 13 P. R. 36, p. 38

As the court bel as to whether then the appeal was sin nonsuit, but leavir touched. *Walton*

In an action fo county road in re plaintiff. A rule obtained to enter this court made i On appeal the co made no order as in which a new tr disposed of by th nial was complete far as this court enter a nonsuit, w it without asking regarded the new also, *Wilson, C. J.* Appeal have no p Court of Appeal A this court to reop question whether, should be granted 32 C. P. 35.—*C. I.*

Section 43 of th O. 1877, c. 38), w appeal against a ju

*Laren v. Canada Central Railway Company*, upon the appeal of the defendants to the Court of Appeal in that case. The defendants in *McLaren v. Canada Central* appealed from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren v. Stephens*, 10 P. R. 88.—*Dalton, Master.*

#### 10. Discontinuance.

The condition of an appeal bond in which the defendant was a surety was that the appellant would effectually prosecute his appeal, and pay such costs and damages as might be awarded in case the judgment appealed from was affirmed. The appellant discontinued the appeal pursuant to R. S. O. (1877) c. 35, s. 41, which enacts that "thereupon the respondent shall at once be entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the court below, and may take all further proceedings in that court as if no appeal had been brought." The registrar, to whom the matter was referred, assessed the damages at the respondent's costs of opposing the appeal:—Held, affirming his finding, that the judgment had been affirmed by the discontinuance, and that these costs had been awarded to the respondent by virtue of section 41:—*Quære*, as to the meaning of the expression "effectually prosecute." *Hughes v. Boyle*, 5 O. R. 395.—*Rose.* See also *International Bridge Co. v. Canada Southern R. W. Co.*, 9 P. R. 250.

See *Cousineau v. City of London Fire Ins. Co.*, 13 P. R. 36, p. 382.

#### 11. Other Cases.

As the court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit, but leaving the question of new trial untouched. *Walton v. County of York*, 6 A. R. 181.

In an action for negligence in not keeping a county road in repair, the jury found for the plaintiff. A rule nisi having been subsequently obtained to enter a nonsuit, or for a new trial, this court made it absolute to enter a nonsuit. On appeal the court allowed the appeal, but made no order as to that portion of the rule nisi in which a new trial was asked, leaving it to be disposed of by this court:—Held, that the rule nisi was completely and finally disposed of, so far as this court was concerned, by the rule to enter a nonsuit, which the defendants, by taking it without asking for any reservation so far as regarded the new trial, had acquiesced in:—Held, also, *Wilson, C. J.*, dissenting, that the Court of Appeal have no power, under section 23 of the Court of Appeal Act, R. S. O. (1877) c. 38, to direct this court to reopen the rule or reconsider the question whether, in their discretion, a new trial should be granted. *Walton v. County of York*, 32 C. P. 35.—*C. P. D.*

Section 43 of the Court of Appeal Act (R. S. O. 1877, c. 38), which provides "when on an appeal against a judgment in any action personal,

the Court of Appeal gives judgment for the respondent, interest shall be allowed by the court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the court below is in favour of the defendant, and is reversed on appeal. In such case the court on reversing the judgment, gave liberty to the appellant, the plaintiff in the court below, to move to be at liberty to enter judgment as directed by this court, *nunc pro tunc*, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favour. *Quintan v. Union Fire Ins. Co.*, 8 A. R. 376. (See R. S. O. (1887), c. 44, s. 88.)

This court is allowed, and required by law, to give judgment "according to the very right and justice of the case," and, up to the last moment, has the right to make any amendment proper for the attainment of that end. Therefore, where the defendants had by their answers admitted the truth of certain paragraphs of the bill, which charged that they had severally purchased with notice of the claim of the plaintiff; but subsequently they swore that they did not intend to make such admission; that in fact they had not had such notice, and the admission was made in ignorance of its effect; the defendants up to the last stage of the proceedings should be at liberty to set up the facts as a means of defence. *Peterkin v. McFarlane*, 9 A. R. 429.—*Hagarty.*

Costs of an appeal from the surrogate court to the Court of Appeal should be taxed on the scale of the court appealed from, as provided by Rule 23 of the Court of Appeal, and not on the scale of County Court Appeals. *Regan v. Waters*, 10 P. R. 364.—*Oaler.*

The plaintiff served notice of appeal from the judgment of the Common Pleas division (15 O. R. 544) upon both defendants, and furnished both with security for costs of appeal, but disclaimed any relief against the defendant B., and brought him before the court only that the defendant L. might obtain any relief over against B. that he might consider himself entitled to. No notice of setting down or reasons of appeal were served on B. L. claimed no relief against B. in his pleadings or reasons of appeal:—Held, that B. was not a person who would or might be affected by a reversal of the decision complained of, and there was no reason for retaining him before the court. *O'Sullivan v. Lake*, 12 P. R. 550.—*Oaler.*

The defendants, appealing from a divisional court, applied for leave to adduce further evidence in the Court of Appeal, to corroborate that already taken upon a point which was argued before the divisional court, and decided adversely to the applicants. The application was refused. Remarks on the reception of further evidence by appellate courts. *Merchants' Bank v. Lucas*, 12 P. R. 526.—*C. of A.*

See *Austin v. Davis*, 7 A. R. 478, p. 404; *Grand Junction R. W. Co. v. County of Peterborough*, 13 A. R. 420.

#### III. ENFORCING JUDGMENT.

Held, that a certificate of the Court of Appeal may be acted on in the court below, without issuing a rule upon such certificate. *McArthur v. Township of Southwold*, 8 P. R. 27.—*Jackson, Master.*

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tax. *In re Roman Catholic Separate Schools*, 18 O. R. 606.—Boyd.—Robertson.

It is competent for the court of revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll, should be inserted therein, upon the complaint of the person himself, or of any elector, or ratepayer. *Id.*

## COURTS.

### I. SUPERIOR AND INFERIOR, 417.

#### II. POWERS OF.

##### 1. Generally, 417.

##### 2. Summary Jurisdiction—See CONTEMPT OF COURT.

### III. CONFLICTING DECISIONS, 418.

### IV. LEGISLATIVE POWERS AS TO—See CONSTITUTIONAL LAW.

### V. RULES OF COURT—See RULES OF COURT.

### VI. APPEALS FROM—See APPEAL.

### VII. PROHIBITION—See PROHIBITION.

### VIII. PARTICULAR COURTS—See THEIR SEVERAL TITLES.

### IX. FOREIGN COURTS—See FOREIGN COURTS.

#### I. SUPERIOR AND INFERIOR.

Remarks as to what constitutes a superior or inferior Court. See *Regina v. O'Rourke*, 32 C. P. 388.

#### II. POWERS OF.

##### 1. Generally.

Held (O'Connor, J., dissenting), that the jurisdiction given to the legislature by R. S. O. (1877), c. 12, ss. 45 to 48, to punish for a contempt does not oust the jurisdiction of the courts where the offence is of a criminal character, but that the same act may be in one aspect a contempt of the legislature, and in another aspect a misdemeanour. *Regina v. Bunting*, 7 O. R. 524.—Q. B. D.

Per O'Connor, J., that in all matters and offences done in contravention of the law and constitution of parliament, with the exception of treason, felony, and breaches of the peace, parliament alone has jurisdiction, and the ordinary courts, civil and criminal, have no jurisdiction. 2. That the *lex et consuetudo parliamenti* reserves to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members, and its business, with the above three exceptions. *Id.*

It was contended in this case that the revising officer, under the Electoral Franchise Act, 48 & 49 Vict. c. 40 (Dom.), was an appointment of the Dominion government, and that his sittings were sittings of a court of record, and that there was no jurisdiction in a provincial court to issue a

mandamus to him:—Held, that the Dominion parliament, had by the Electoral Franchise Act, interfered with civil rights in this province, and having made no provision for a court to superintend the conduct of the officials appointed under that Act, and following *Valin v. Langlois*, 3 S. C. R. 1, that until such court is created, the provincial courts, by virtue of their inherent jurisdiction, have a right to superintend the discharge of their duties by any inferior officer or tribunal. *Re Simmons and Dalton*, 12 O. R. 505.—Proudfoot.

Held, that an inferior court has no jurisdiction to entertain an action brought upon the judgment of a superior court. *Re Eberts v. Brooke* 10 P. R. 257.—Galt. Reversed, S. C., 11 P. R. 296.—Q. B. D.

The supreme court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, in the province; powers as full and ample as those known to the common law and possessed by the superior courts of England. *In re Robert Evan Sproule*, 12 S. C. R. 140.

As to power to grant judgment of foreclosure or direct a sale of land beyond the territorial jurisdiction of the courts. See *Strange v. Radford*, 15 O. R. 145.

#### III. CONFLICTING DECISIONS.

When a decision of the court of appeal in England is at variance with a decision of the court of appeal of this province, the latter should be followed here, as the former court is not the court of ultimate appeal for the province: *Sutton v. Sutton*, 22 Chy. D. 511, not followed. *Macdonald v. McDonald*, 11 O. R. 187.—Proudfoot. See also *McDonald v. Elliott*, 12 O. R. 98.

Observations upon the effect of a decision where the Court is equally divided. *Clarkson v. Attorney-General of Canada*, 16 A. R. 202.

See *Gould v. Beattie*, 11 P. R. 329.

## COVENANT.

### I. GENERALLY, 419.

### II. JOINT COVENANTORS, 419.

### III. CONTRACTS RELATING TO LAND.

#### 1. Generally, 419.

#### 2. Covenants Running with the Land.

##### (a) Generally, 421.

##### (b) In Leases—See LANDLORD AND TENANT.

#### 3. Covenants for Title—See COVENANTS FOR TITLE.

#### 4. In Leases—See LANDLORD AND TENANT.

#### 5. In Mortgages—See MORTGAGE.

### IV. IN POLICIES—See INSURANCE.

### V. OTHER COVENANTS, 423.



- VI. ASSIGNMENT OR MORTGAGE OF, 424.
- VII. ACTIONS ON, 424.
- VIII. DAMAGES FOR BREACHES OF, 424.
- IX. INJUNCTION AGAINST BREACH OF — See INJUNCTION.
- X. RELIEF AGAINST FORFEITURE, 425.

### I. GENERALLY.

The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void, but where you can sever them, whether the illegality be created by the statute, or by the common law, you may reject the bad part, and retain the good. *Kitching v. Hicks*, 6 O. R. 739.—Osler.

### II. JOINT COVENANTORS.

Semble, the rule stated in Rawle on Covenants, 4th ed., p. 536, that when two persons jointly covenant with another, a joint action lies for the covenantor on a breach of covenant by one of the covenantors only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements, in the absence of language imputing such suretyship in regard to future acts or breaches. *Elliott v. Stanley*, 7 O. R. 350.—Boyd.

### III. IN CONTRACTS RELATING TO LAND.

#### 1. Generally.

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unaltered in its usual place, viz.: after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *McKay v. Howard*, 6 O. R. 135.—Boyd.

H.S. by deed dated 4th November, 1863, granted his farm and some chattels to his son T. S., in consideration of \$300, "subject to be defeated and rendered null and void upon the non-performance by the said party of the second part of the following condition, or any part thereof, viz., the said party of the second part covenants to feed, clothe, support and maintain the said party of the first part \* \* \* during the term of his natural life. \* \* \* " T. S. having fulfilled the condition during his lifetime, died on the 5th October, 1865, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house, and

have him provided for there, or to allow him to go to her brother's house in the same way, both of which offers were declined, and as no maintenance was provided for him by her at the farm, he treated the condition as broken and brought an action of ejectment, and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. H. S. was subsequently supported part of the time on the farm by the defendant, and died in 1880. In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was:—Held, affirming the judgment of Armour, J., (Proudfoot, J., dissenting,) that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited. Per Armour, J., (at the trial), the deed must be construed as being made upon condition and as being defeated and rendered void by the non-performance of the covenant. The effect of the covenant is, that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require him to go, and he was justified in refusing to accept the offers made. Per Boyd, C., the parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the court ought to respect them in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is, that the conditions of the deed were broken and the land forfeited. Per Proudfoot, J., the life interest of H. S. was not reserved out of the land, it rested solely on the condition, with probably an equitable charge on the land. The condition is to maintain without specification of place; it imposes no personal obligation on the grantee, it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representative might reasonably offer. Per Ferguson, J., it was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor, or those claiming from him the reversion in the lands; the grantor was not bound to accept the offer that was made, and there was a breach of the condition, the effect of which was to revert the estate. *Millette v. Sabourin*, 12 O. R. 248.—Chy. D.

The defendant M. had in his possession, as executor of J. D. C., a mortgage of one R., which the agent of M. had deposited with H. as collateral security for moneys advanced to such agent, in all about \$400. Some years after M. executed an assignment of this mortgage to S. C. a legatee under the will, for the alleged purpose of securing payment of her legacy, at the same time giving a personal covenant for the same object. H. assuming to act as owner of such mortgage, wrote to the persons owning the equity of redemption, that he controlled the mortgage; that the lands were encumbered for more than their value, and suggesting that they should convey their right to him. This they did

for \$30, by a subsequently executed from S. C. the R. mortgage covenant of M. for an alleged conveyance afterwards amount of H. C., did not ex-stituted by H. reversed the division (10 O. ing H.'s dealing to enforce pay v. McLean, 13

Covenant of station, in cons a municipal l Chatham, 10 O. R. 235.

See Coleman

2. Coven

Where D. t ing part to B. veyance: "Bel but is always to residence with including porter his part, covenan a certain kind t veyed:—Held, passed to the s of the advantag the land, thoug there, and thoug mally transfers son, 1 O. R. 349 C., 28 Chy. 483

Where it is of gible benefit to the conveyance the consideration the court will g guage, whatever the party who h S. C., 1 O. R. 3

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for \$30, by conveying to a trustee for H. and subsequently H. in consideration of \$500 obtained from S. C. an assignment of her interest in the R. mortgage, and also an assignment of the covenant of M. H. subsequently sold these lands for an alleged consideration of \$5,000; accepting a conveyance of other lands, which he shortly afterwards sold for \$6,500 cash. The whole amount of H.'s claim, including the \$500 paid S. C., did not exceed \$1,500. In a proceeding instituted by H. against M., this court, on appeal, reversed the judgment of the Common Pleas division (10 O. R. 59), holding that notwithstanding H.'s dealings with the lands, he was entitled to enforce payment of M.'s covenant. *Wilkins v. McLean*, 13 A. R. 467.

Covenant of railway company to construct a station, in consideration of the company receiving a municipal bonus. See *Bickford v. Town of Chatham*, 10 O. R. 257; 14 A. R. 32; 16 S. C. R. 235.

See *Coleman v. Hill*, 10 O. R. 172.

## 2. Covenants Running with the Land.

### (a) Generally.

Where D., the owner of certain lands, on selling part to B., inserted this clause in the conveyance: "Bellevue square is private property, but is always to remain unbuilt upon, except one residence with the necessary outbuildings, including porter's lodge," and the purchaser, on his part, covenanted not to allow any business of a certain kind to be carried on on the part conveyed:—Held, that the benefit of the restriction passed to the assignee of the purchaser, as one of the advantages and privileges appurtenant to the land, though the word "assigns" was not there, and though the benefit of it was not formally transferred to him. *VanKoughnet v. Denison*, 1 O. R. 349.—Boyd; 11 A. R. 699. See S. C., 28 Chy. 485.

Where it is clearly intended to give some tangible benefit to a grantee by such a covenant in the conveyance to him, and it formed a part of the consideration which induced his purchase, the court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement. *S. C.*, 1 O. R. 349.

Where the person who was building the house objected to, held under an agreement for a lease, but had made no outlay on the property till after notice was served on her, nor paid any rent:—Held, that she was not in the same position as an innocent person holding for value under a completed instrument, and the erection of the house must be stopped. *Id.*

Where the square had been built upon for years without objection by purchaser or his vendee, the plaintiff, but the building had been erected by purchasers under a mortgage executed by D. before he conveyed to B.:—Held, no proof of acquiescence, as they could not have objected with effect. *Id.*

The land having been sold under a mortgage, a portion came again to the hands of D., who proceeded to convey parts of it for building purposes:—Held, that D.'s liability under

restrictive agreement not to build on Bellevue square, revived on his again acquiring the property. *S. C.*, 11 A. R. 699.

On the 1st December, 1870, A. M., by deed, conveyed certain lands to his grandsons W. M. and D. M., as tenants in common; and on the same day an agreement in writing was made between the parties whereby W. M. and D. M. agreed to pay the following sums of money, and fulfil the agreement, namely, that W. M. and D. M. should thenceforward support their mother, the plaintiff, and furnish her with reasonable, suitable, and comfortable board, lodging, and clothing, and medical attendance during her lifetime, and maintain her in a proper manner; and in the event of any disagreement between W. M., D. M., and the plaintiff, whereby she would be obliged to leave the said premises, they were to pay her \$55 a year in lieu of such board, etc., and, if not paid, to be recoverable by suit at law. The covenants, payments and annuities to be chargeable against the said land. The plaintiff was no party to the agreement. On the 4th October, 1872, the defendant W. M., for a nominal consideration of \$1,000, conveyed his undivided half interest to the plaintiff, but of which she said she was not aware; and on 1st March, 1877, she reconveyed the same to W. M. "free from incumbrances." On 12th January, 1882, D. M. sold his undivided half interest to C., and a conveyance was executed, but the sale was never carried through. On 27th September, 1883, D. M. sold his said interest to G. A. B., and, to save registration charges, the conveyance was made by C. to G. A. B. On 20th March, 1884, G. A. B. conveyed to E. and S., who in May, 1884, ejected the plaintiff from the land. The agreement was not registered until 27th January, 1882:—Held, reversing the judgment of Galt, J., at the trial, that the agreement did not create a rent charge, as no power of distress was conferred; that if either a rent service or rent seek there would be a right of distress and apportionment, but if neither, but covenant charged on land, performance of it would be decreed; that upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished, but an apportionment took place; and that therefore defendant was entitled to enforce performance against D. M.'s undivided half interest, in the hands of E. and S., whom the evidence shewed were purchasers with notice. *McCaskill v. McCaskill*, 12 O. R. 783.—C. P. D.

C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed, by writing under seal, to erect a party-wall on the dividing line and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion thereof whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee, by deed containing the usual statutory covenants, and the plaintiffs entered into possession. Some years later, defendant erected a building on his lot, making use of the rear part of such party-wall, by reason of which he became liable to pay \$98.65, and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in said land, against the defendant to recover the sum so due in respect of such wall:—Held, that the



fused and neglected to issue said debentures. In an action brought by the company against the corporation, solely for damages for their neglect in refusal to issue said debentures:—Held, turning the judgment of the court below, that the corporation, apart from its liability for the amount of the indebtedness and interest thereon, was liable under Articles 1065, 1073, 1840, and 1841 Civil Code (Que.), for damages for breach of covenant. *Ritchie, C. J., and Gwynne, J., dissenting. County of Ottawa v. Montreal, Ottawa and Western R. W. Co., 14 S. C. R. 193.*

See *Mennie v. Leitch*, 8 O. R. 397, p. 476.

#### X. RELIEF AGAINST FORFEITURE.

The defendant gave a mortgage to the plaintiff, in which he covenanted to pay the mortgage money in nine equal annual instalments, and also to clear up and fence ten acres in each year for five years from the date of the mortgage, and to build a log house on the land within one year, and there was a proviso "that the mortgage should immediately become due and payable after fault being made in building the house and clearing the land at the periods of time above mentioned." No default occurred in payment of the mortgage money, but the log house was not built until about a month after the expiry of the first year, nor were ten acres fenced, though more than ten were cleared:—Held, that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenants as to the erection of the house, and to judgment for redemption or foreclosure, but should have no costs. Relief is given against forfeitures for nonpayment of rent, and in certain cases for neglecting to insure, but no case appears in which default like the present has been relieved against:—Sembles, that if the only default had been the not putting up of the fence, the forfeiture would be relieved against, for the clearing of the land was the substantial part of the covenant:—Sembles, also, that in this province equity will not relieve against a proviso in a mortgage that on default of payment of a part of the debt the whole shall become due. *Graham v. Ross*, 6 O. R. 154.—Hagarty.

### COVENANTS FOR TITLE.

#### I. GENERALLY, 425.

#### II. DAMAGES, 428.

#### I. GENERALLY.

Action by the plaintiff against defendant as administratrix of one J. McK. for breach of covenant for title contained in a deed made by him to his son, the plaintiff. The deed purported to be under the Short Forms Act, and the covenant was that the grantor had the right to convey, omitting the words "notwithstanding any act of the said covenantor":—Held, following *Brown v. O'Dwyer*, 35 Q. B. 354, that although not in accordance with the statute, it bound the covenantor as an absolute covenant that he was seized and had a right to convey in

fee simple. *McKay v. McKay*, 31 C. P. 1.—C. P. D.

It appeared that, at the time of the transaction in question, the father was some seventy years old, and reposed great confidence in his son, the plaintiff, and was in the habit of relying upon his advice. Without any apparent reason for parting with the land, on which he lived, and which was worth \$6,000, he was induced by the plaintiff to sell it to him for \$3,000, \$1,000 of which consisted of alleged stale demands by the son against the father, barred by the statute of limitations, and the balance of \$2,000 was secured by a mortgage, with interest at six per cent., neither principal nor interest being payable for ten years, the father being permitted to remain on the land during his life. The mortgage was produced, with the registrar's certificate of discharge endorsed thereon, but there was no evidence as to the execution of the discharge, or as to how the mortgage came into the plaintiff's possession. There was no corroboration of the plaintiff's statement of the existence of the debt of \$1,000, except a receipt of \$15, which the court refused to accept as genuine, while in corroboration of his assertion of the payment of the mortgage, some four receipts were put in by the plaintiff, which, though purporting to have been given at different intervals and different places, within four years from the execution of the mortgage, all appeared by the water mark to have been written on and torn from the same sheet of paper: and being of a very suspicious character, the court also refused to accept them as genuine:—Held, that the evidence having failed to prove that the mortgage had been paid off, and it being therefore outstanding, no action could be brought on the covenant in the deed. *Id.*

On a sale of "timber limits," held under licenses, in pursuance of the Con. Stat. Canada, c. 23, a clause of simple warranty (*garantie de tous troubles généralement quelconques*) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold. *Ducondu v. Dupuy*, 9 App. Cas. 150. Reversing judgment of Supreme Court, 6 S. C. R. 425.

It is a firmly established rule of property in Ontario, that covenants for title are sufficient to work an estoppel, though it is otherwise held in England. *Casselman v. Casselman*, 9 O. R. 442.—Proudfoot.

On 3rd February, 1873, the company granted to A. T. P. (through whom S. P., the original plaintiff in this action, claimed), a mill site on the river Maitland with certain easements, one of which was the right to erect a dam across the river, high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted (without reserving any of the easements granted to A. T. P.), an island in the river called "Island C," and two parcels of land, one on each bank, immediately opposite each other, and adjoining the property of the plaintiff, called respectively "The Great Meadow," and "Block F," all three of which were above the land granted to A. T.

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P., and subsequently became the property of H. Y. A. In an action by S. P. (who died after action brought, M. A. P. being made plaintiff by order of revivor,) against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river, without submerging a great part of, if not the whole of "Island C." and penning back water and ice on "The Great Meadow," and "Block F," and encroaching upon the rights of H. Y. A. as riparian proprietor of the said lands. It was contended, on the part of the defendants, that the mortgagees of the property should be made parties:—Held, that O. J. Act, s. 17, sub-s. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail:—Held, also, that in an action on a covenant for quiet enjoyment a plaintiff must shew an interruption or obstruction of the easement, in order to entitle him to recover, and that S. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and not having been interrupted, he could not succeed on the covenant for quiet enjoyment:—Held, also, as to the covenant for title, that as the Supreme Court of Canada had decided in *Platt v. Attrill*, 10 S. C. R. 425, that the company had no right to grant the easement to A. T. P., that decision was binding here, although the company were not parties to the suit; and that the covenant was broken as soon as it was made, and the plaintiff was entitled to such damages as accrued during the life of S. P.; and, following *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, that the damages would be the difference in money between the value of the estate that had passed, and that which the deed purported to convey, and the company covenanted that they had a right to convey. It appeared that during S. P.'s ownership the government had constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action:—Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set off the money recovered from the government against their liability for damages for their breach of contract:—Held, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant. The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed. *Platt v. Grand Trunk R. W. Co. of Canada*, 12 O. R. 119.—*Proudfoot*. See 54 Vict., c. 42, s. 35 (Ont.).

Action on covenants in a deed of land, whereby the defendant covenanted that he had done no

act \* \* whereby or by means whereof the lands \* \* were, or should, or might be in anywise impeached, charged, or affected, or encumbered in title, estate, or otherwise however, and that the grantees should enjoy them free from all encumbrances. It appeared that a scheme of local improvement which resulted in the imposition of a fixed rate for ten years, as a charge upon the lands conveyed, to defray the expense of the improvement, was undertaken, at the instance and upon the petition of the defendant and other property-holders interested, under R. S. O. (1887), c. 184, s. 612, sub-s. 9. The by-law creating the charge was passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance. The by-law also contained a provision for commutation at the option of the owner:—Held (affirming the decision of Robertson, J.), that the action of the defendant in joining in the petition, was the means by which an incumbrance was created on the property, and was a breach of the covenants for which the plaintiffs were entitled to recover:—Held, also, that the plaintiffs were entitled as damages in this action to a sum sufficient to remove the charge. Per *Boyd, C.*—Different would be the conclusion if the taxes had been imposed by municipal authority, without the intervention of the defendant; *Moore v. Hynes*, 22 Q. B. D. 107, distinguished. *Cumberland v. Kearns*, 18 O. R. 151.—*Chy. D. Affirmed* 17 A. R. 281. See also *Re Graydon and Hammill*, 20 O. R. 199.

## II. DAMAGES.

The deed with absolute covenants for title contained two several parcels of land, and the plaintiff was evicted from one, but was still owner of the most valuable parcel:—Held, that the measure of damages was not the whole purchase money, but only the proportionate value of that part to which the title failed. *McKay v. McKay*, 31 C. P. 1.—C. P. D.

S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order it was now sought to set aside on the ground that the right of action did not survive to her:—Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued since his death, for which:—*Scoble*, the heir, or devisee, might bring an action. *Platt v. Grand Trunk R. W. Co. of Canada*, 11 O. R. 246.—*Proudfoot*.

In the case of such covenants running with the land, where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach took place, but damages accrued in the lifetime of the ancestor, the remedy for these damages passes to the personal representative. *Id.*

See *Platt v. Grand Trunk R. W. Co. of Canada*, 12 O. R. 119, p. 427; *Cumberland v. Kearns*, 18 O. R. 151, *supra*.

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See *Menzies v.*

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**CREDITORS' RELIEF ACT.**

See EXECUTION.

**CREDITORS' SUIT.**

See BANKRUPTCY AND INSOLVENCY—FRAUDULENT CONVEYANCES.

A receiver was appointed under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into court, which were to be paid out on the report of the master to the parties entitled as found by him. S., pursuant to advertisement for creditors, proved his claim. The master had not made his report. By 44 Vict. c. 61 (Ont.), the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of C. and F., who were appointed creditors' trustees, in payment of all money necessary to be paid for the discharge of the receiver in this suit. An order of court was made on the application of the defendants, discharging the receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came under it should take fifty cents on the dollar:—Held, that the position of affairs having altered since the time at which S. had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible. *Lee v. Credit Valley R. W. Co.*, 29 Chy. 480.—Proudfoot.

See *Menzies v. Ogilvie*, 27 Chy. 456, p. 90.**CRIMINAL LAW.****I. ABORTION, 431.****II. ASSAULT.**1. *The Offence*, 431.2. *Evidence*, 432.**III. BIGAMY, 432.****IV. BRIBERY, 433.****V. CONSPIRACY, 434.****VI. EMBEZZLEMENT, 434.****VII. FALSE PRETENCES, 434.****VIII. FORGERY AND UTTERING FORGED INSTRUMENTS.**1. *The Offence*, 435.2. *Evidence*, 438.3. *Other Cases*.—See FORGERY.**IX. FRAUDULENTLY DEPRIVING OF USE OF PROPERTY, 439.****X. FRAUDULENT REMOVAL OF GOODS, 440.****XI. LARCENY, 440.****XII. LIBEL, 441.****XIII. MALICIOUS INJURY TO PROPERTY, 442.****XIV. MALICIOUSLY WOUNDING, 442.****XV. MURDER AND MANSLAUGHTER, 442.****XVI. PERJURY, 443.****XVII. RAPE, 444.****XVIII. RECEIVING STOLEN GOODS, 444.****XIX. REFUSING TO PROVIDE FOR FAMILY, 444.****XX. OTHER OFFENCES, 445.**1. *Extortion*.—See EXTORTION.2. *Frauds in Supplying Milk to Cheese or Butter Manufactories*.—See BUTTER MANUFACTORIES.3. *Gaming*.—See GAMING.4. *Public Morals*.—See PUBLIC MORALS.5. *Illegal Sale of Intoxicating Liquors*.—See INTOXICATING LIQUORS.6. *Sunday*.—See SUNDAY.7. *Vagrancy*.—See PUBLIC MORALS.**XXI. SUMMARY CONVICTIONS**.—See JUSTICE OF THE PEACE.**XXII. LEGISLATIVE JURISDICTION**.—See CONSTITUTIONAL LAW.**XXIII. JURISDICTION OF COURTS**.—See COURT OF ASSIZE—HIGH COURT OF JUSTICE.**XXIV. PROCEDURE, PRACTICE AND TRIAL.**1. *Indictment*, 445.2. *Summary Trial before County Judge*, 446.3. *Case Reserved*, 447.4. *Jury*, 448.5. *Evidence*.(a) *Confessions and Admissions*, 450.(b) *Dying Declarations*, 450.(c) *Depositions*, 450.(d) *Competent and Compellable Witnesses*, 450.(e) *Discrediting Witness*, 452.(f) *Accomplices*, 452.(g) *Corroborative*, 452.(h) *Of Identity*, 452.(i) *Other Cases*, 452.(j) *In Extradition Proceedings*.—See EXTRADITION.6. *Convictions*.—See CERTIORARI—JUSTICE OF THE PEACE.**XXV. NEW TRIAL, 453.****XXVI. ERROR, 454.****XXVII. APPEAL.**1. *To Privy Council*, 454.2. *To Supreme Court*, 454.3. *To High Court*.—See HIGH COURT OF JUSTICE.**XXVIII. APPREHENSION AND ARREST OF OFFENDERS, 454.****XXIX. BAIL, 454.****XXX. HABEAS CORPUS**.—See HABEAS CORPUS.**XXXI. COSTS AND EXPENSES OF CRIMINAL JURISDICTION, 455.**

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## XXXII. PRIVATE PROSECUTORS.

1. *Liability for Costs, 455.*
2. *Proceedings before Magistrates—See JUSTICES OF THE PEACE.*

## XXXIII. ENFORCEMENT OF PENALTIES — See JUSTICES OF THE PEACE.

## XXXIV. COMPROMISING PROSECUTIONS — See COMPROMISING.

## XXXV. ACTION FOR MALICIOUS PROSECUTION — See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

## XXXVI. SUSPENSION OF ACTIONS IN CASES OF FELONY.—See ACTION.

## XXXVII. WHEN CRIMINAL PROCEEDINGS A BAR TO FURTHER ACTION—See RELEASE.

## I. ABORTION.

The prisoner was indicted for unlawfully using an instrument on J. L., with intent to procure a miscarriage. J. L. was called for the prosecution to prove the charge, and in cross-examination denied that she had told H. A., H. R., and M. T. that before the prisoner had operated on her she had been operated on by Dr. B. for the purpose of procuring a miscarriage. H. A., H. R. and M. T. were called for the defence, and swore that J. L. had so told them. Dr. B. was then called by the Crown, and he swore that he had not operated on J. L.:—Held, that the evidence of Dr. B. was properly admitted; but in any event the prisoner's case was not so affected by the evidence as to warrant a reversal of the conviction, even if the evidence were not strictly admissible. *Regina v. Andrews, 12 O. R. 184.—C. P. D.*

## II. ASSAULT.

1. *The Offence.*

The defendants were convicted for unlawfully assaulting F. V. "by standing in front of the horses and carriage driven by the said V., in a hostile manner, and thereby forcibly detaining him, the said V., in the public highway against his will:—Held, that the conviction was bad in stating the detention as a conclusion, and not as part of the charge, which, as shewn by the conviction, was merely standing in front of the horses, and did not amount to an assault. *Regina v. McElligott, 3 O. R. 535.—Wilson.*

An assault with intent to commit a felony is an attempt to commit such felony within the meaning of section 183 of the R. S. C. c. 174. On an indictment for rape a conviction for an assault with intent to commit rape is valid.—On such conviction the prisoner was held properly sentenced to imprisonment under R. S. C. c. 162, s. 38. *John v. The Queen, 15 S. C. R. 384.*

A warrant of commitment issued by two justices of the peace, for nonpayment of a fine and costs imposed on J. D., who had been convicted of an offence under the Indian Act, directed the constables of the county of B. to take and deliver J. D. to the keeper of the common jail of the county, to be kept there for two months, unless the fine and costs imposed, including the costs of conveying to the jail, should be sooner

paid:—Held, that the justices having had jurisdiction over the offence, and the warrant being valid on its face, it afforded a complete protection to the constable executing it, and that the defendant was properly convicted of assaulting the constable while attempting to execute the warrant, notwithstanding that the awarding of the punishment may have been erroneous in directing imprisonment for the nonpayment of the fine and costs, including costs of conveying to jail, as not authorized by the said act. *Regina v. King, 18 O. R. 566.—C. P. D.*

2. *Evidence.*

On an indictment for assault and battery, occasioning actual bodily harm:—Held, that the defendant is not a competent witness on his own behalf under 43 Vict. c. 37 (Dom.). *Regina v. Richardson, 46 Q. B. 375.—Q. B. D.*

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault, evidence was tendered of the conduct of the prisoner towards her subsequent to the assault:—Held, that the evidence was admissible as tending to shew the indecent quality of the assault, and as being in effect a part or continuation of the same transaction as that with which the prisoner was charged. Per Hagarty, C. J., and Armour, J. The evidence was properly admissible as evidence in chief. *Regina v. Chute, 46 Q. B. 555.—Q. B. D.*

The defendant was convicted of having unlawfully assaulted the complainant, who was the daughter of the convicting justice, where the only evidence was, that the defendant had, in company with one Spragge, gone to the complainant's house at the hour of about ten o'clock p.m., and Spragge had knocked at the door and told the complainant that he desired to introduce the defendant, whereupon the complainant replied that they had come to insult her, and that she would have them both arrested in the morning:—Held, that there was no evidence of an assault, and the conviction must be quashed. *Regina v. Langford, 15 O. R. 52.—Rose.*

An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of the Canada Temperance Act, is an assault on a peace officer in the due execution of his duty, and indictable under R. S. C., c. 162, s. 34. On the trial of an indictment for such assault the wife of the defendant is not a competent witness on his behalf. *MacFarlane v. The Queen, 16 S. C. R. 393.*

See *Regina v. Triganzie, 15 O. R. 294, p. 453.*

## III. BIGAMY.

The prisoner was convicted of bigamy under 32 & 33 Vict. c. 20, s. 58, which enacts that whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony \* \* provided that nothing in this section contained shall extend to any second marriage contracted

elsewhere than the subject of H. leaving the offence. The Toronto, the judge at the prisoner was and to the s him guilty:— jury found h they found h of his being a subject of H that he had le offence; and the Crown to Wilson, C. J. not have be Pierce, 13 O.

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elsewhere than in Canada, by any other than a subject of Her Majesty, resident in Canada, and leaving the same with the intent to commit the offence. The first marriage was contracted in Toronto, the second in Detroit, U. S. The judge at the trial directed the jury that if the prisoner was married to his first wife in Toronto, and to the second in Detroit, they should find him guilty:—Held, a misdirection, and that the jury should have been told in addition that before they found him guilty they ought to be satisfied of his being at the time of his second marriage a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence; and:—Held, that it was incumbent on the Crown to prove these matters. *Quere*, per Wilson, C. J., whether the trial should or should not have been declared a nullity. *Regina v. Pierce*, 13 O. R. 228.—Q. B. D.

Held, that R. S. C. c. 161, s. 4, which enacts that every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere is guilty of felony, provided that the person who contracts such second marriage is a subject of Her Majesty, resident in Canada, and leaving the same with intent to commit the offence, is not ultra vires the Dominion legislature either as being repugnant to Imperial legislation or on any other grounds. Per Boyd, C.—This statutory law is nearly half a century old; it has been confirmed by the court, passed upon more than once by competent colonial legislatures, and ratified by the express sanction of the Imperial Parliament and Her Majesty in person. *Regina v. Brierty*, 14 O. R. 525.—Chy. D.

In order to prove the second marriage, which took place in Michigan, the evidence of the officiating minister was tendered, who shewed that during the last twenty-five years he had solemnized hundreds of marriages, that he was a clergyman of the Methodist church, that he understood the laws of Michigan relating to marriage, that he had been all the while resident in Michigan, that he had had communications with the Secretary of State regarding these laws, and that this so called second marriage was solemnized by him according to the marriage laws of that State:—Held, that this evidence was admissible in proof of the validity of the second marriage, and was sufficient proof of the same, even assuming that such ought not to have been presumed. *Ib.*

Per Boyd, C.—In the case of a second marriage, it is not essential to prove the foreign law where British subjects are concerned, as in this case. *Regina v. Griffin*, 14 Cox, C. C. 308, followed. *Ib.*

#### IV. BRIBERY.

The giver of a bribe as well as the receiver may be indicted for bribery. *North Victoria Election* (Dom.)—*Cameron v. Macleannan*, 1 H. E. C. 554.

On demurrer to an indictment (set out in the report of the case) for conspiracy to bring about a change in the government of the province of Ontario, by bribing members of the legislature to vote against the government:—Held, O'Connor, J., dissenting. 1. That an indictable of-

fence was disclosed; that a conspiracy to bribe members of parliament is a misdemeanour at common law, and as such indictable. 2. That the jurisdiction given to the legislature by R. S. O. (1877) c. 12, ss. 43, 44, 47, 48, to punish as for a contempt, does not oust the jurisdiction of the courts where the offence is of a criminal character, but that the same act may be, in one aspect a contempt of the legislature, and in another aspect a misdemeanour. 3. That the legislative assembly has no criminal jurisdiction, and hence no jurisdiction over the matter, considered as a criminal offence. 4. That the indictment, considered as a pleading, sufficiently stated the offence intended to be charged. Per O'Connor, J.—1. That the bribery of a member of parliament, in a matter concerning parliament or parliamentary business, is not an indictable offence at common law, and has not been made so by any statute. 2. That in all matters and offences done in contravention of the law and constitution of parliament, with the exception of treason, felony, and breaches of the peace, parliament alone has jurisdiction, and the ordinary courts, civil and criminal, have no jurisdiction. 3. That the *lex et consuetudo* Parliament reserves to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members, and its business, with the above three exceptions. *Regina v. Bunting*, 7 O. R. 524.—Q. B. D.

#### V. CONSPIRACY.

Held that the defendants, members of a trade union, in conspiring to injure a non-unionist workman, B., by depriving him of his employment, were guilty of an indictable misdemeanour, and that what they conspired to do was not for the purposes of their trade combination, within the meaning of R. S. C. c. 173, s. 13, sub-s. 2; and that upon the evidence the conviction of the defendants, for unlawfully conspiring together to injure B. in his trade and, to prevent him from carrying it on, was right. Semble, also, that the indictment in this case was sufficient. *Regina v. Gibson*, 16 O. R. 704.—Q. B. D.

See *Regina v. Bunting*, 7 O. R. 524, *supra*; *Soulanges Election* (Dom.)—*Cholette v. Bain*, 10 S. C. R. 652.

#### VI. EMBEZZLEMENT.

See *In re Hall*, 8 A. R. 31, p. 436.

#### VII. FALSE PRETENCES.

The defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay \$240 for seed wheat. The defendant also represented that he was the agent of H., whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his, H.'s, favour for the \$240. The contract did not provide for the giving of a note, and when the representations were made the giving a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract. The defendant was indicted for that he, by false pretences, fraudulently induced the prosecutor to write his name

upon a paper so that it might be afterwards dealt with as a valuable security; and upon a second count for, by false pretences, procuring the prosecutor to deliver to H. a certain valuable security:—Held, upon a case reserved, that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as when obtained or procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H., did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R. S. C. c. 164, s. 78; but:—Held, that the note before it was delivered to H. was not a valuable security, but only a paper upon which the prosecutor had written his name, so that it might be afterwards used and dealt with as a valuable security; and the conviction of the defendant upon the second count could not stand. *Rex v. Danger, Dears & B. C. C. 307*, followed. *Regina v. Ry-mal*, 17 O. R. 227.—Q. B. D.

The defendant was indicted in the first count of the indictment for obtaining from one H. a promissory note with intent to defraud, and in the second count with inducing H. to make the said note with like intent. The evidence shewed that on 4th May, 1887, the defendant's agent called on H., and obtained from him an order addressed to defendant to deliver to H., at R. station, thirty bushels of Blue Mountain Improved Seneca Fall Wheat, which H. was to put out on shares, and to pay defendant \$240 when delivered, and to equally divide the produce thereof with the holder of the order, after deducting said amount. On 23rd May, defendant called, produced the order, and by false and fraudulent representations as to the quality of the wheat, and his having full control of it, its growth and yielding qualities, and that a note defendant requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar frauds on others, shewing that defendant was at the time engaged in practising a series of systematic frauds on the community. The defendant was found guilty and convicted:—Held, on a case reserved, that the conviction should be affirmed on the second count, as the evidence shewed that the note was signed by H. not merely to secure the carrying out of the contract contained in the order, but on the faith of the representations made; and it was immaterial that a note was taken when the order called for cash; and, also, that the evidence objected to was properly receivable. *Regina v. Hope*, 17 O. R. 463.—C. P. R.

See *Abrahams v. The Queen*, 6 S. C. R. 10, p. 445; *Regina v. Goodman*, 2 O. R. 468, p. 447; *Goodman v. Regina*, 3 O. R. 18, p. 447.

#### VIII. FORGERY AND UTTERING FORGED INSTRUMENTS.

##### 1. The Offence.

Held, that the alteration of a \$2 Dominion note to one of the denomination of \$20, such al-

teration consisting in the addition of a cypher after the figure two, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted therefor. *Regina v. Bail*, 7 O. R. 228.—Q. B. D.

The prisoner was a clerk in the employ of the mayor and common council of the city of Newark, (in the State of New Jersey, U. S. A.), a portion of his duties being to receive payment of taxes payable to the city; and on the 18th of November, 1881, a sum of \$562.32, for taxes, etc., due upon certain lands in that city, was paid to him—such sum being included with other taxes in a cheque of the party assessed for \$4,094. The \$562.32 was composed of three items: costs \$7.70, interest \$72.08, and taxes \$482.54—each of which required to be entered in a separate column of the cash book belonging to the office of the comptroller. The gross sum (\$562.32) had apparently been entered first in the column headed "Totals," and subsequently in making the separate entries the sum of \$482.54 was entered as \$282.54, and the figure "3" in the total column substituted; the difference (\$200) being abstracted by the prisoner from moneys paid to him on that day:—Held, per Osler, J. (9 P. R. 373), and Boyd, C., and Proudfoot, J. (3 O. R. 331), that the offence was forgery. On appeal:—Held (per Spragge, C. J. O., and Galt, J.), that this act amounted to the crime of forgery, and, as such, rendered the prisoner liable to extradition. Per Burton and Patterson, J.J.A., that such alteration was not forgery, though the act amounted to one of embezzlement, and therefore that the prisoner was entitled to be discharged, embezzlement not being one of the offences for which a party was at the time liable to be extradited under the Ashburton Treaty. *In re Hall*, 8 A. R. 31.

It is not necessary to constitute the crime of forgery that another's right shall have been actually prejudiced, the possibility of prejudice to another is sufficient; and if publication be necessary, the books in question being of a public character, the forged entry in them must be regarded as having been published as soon as made. *S. C.*, 3 O. R. 331.—Chy. D.

P. was the superintendent of the Blockley Almshouse, situated in and supported by the city of Philadelphia, U. S. A. Parties supplying provisions, etc., for the use of the charity were paid by warrants duly prepared and signed by the proper officers thereof. Three such warrants for the payment of certain persons or firms were in the hands of W., the secretary of the almshouse, to be delivered to them on their respectively signing the stub or counterfoil of the warrants. P., who was well known to the secretary, applied to him for these warrants, stating that he had authority from the several parties to sign for them, which he did accordingly, and W. handed over to him the warrants, which were subsequently cashed at the office of the city treasurer. P. having fled to this Province, an application was made for his extradition before the judge of the County Court of Wentworth, when expert evidence was adduced, proving that according to the statute law of Pennsylvania, as also at common law as there interpreted, these facts constituted the crime of forgery:—Held, on appeal, per Spragge, C. J. O., and Patterson, J. A., (affirming the judgment of the Queen's

Bench Div. 1 to the crime liable to be ex Ferguson, J., cion of any facts would r forgery; but a infer that W. combined toge the fraud by was therefore of P. for the the order for h be affirmed. P which is the confined to the *Re Phipps*, 8

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W., a division against the pr same they arr and endorsed the note in qu order of A. D prisoner, who A. D. M.'s end wards with th He then hand his name as r took it away v forgery. The the endorseme victed:—Held 2 M. & Rob. 143, and Reg the conviction dictment as fr

Bench Div. 1 O. R. 586) that the acts amounted to the crime of forgery, and so rendered P. liable to be extradited. Per Burton, J. A., and Ferguson, J., that in the absence of any suspicion of any complicity of W. in the fraud, the facts would not have made out the crime of forgery; but as the evidence afforded ground to infer that W. and P. were in collusion, and had combined together for the purpose of committing the fraud by means of the false documents, and was therefore sufficient to warrant the committal of P. for the crime of forgery at common law, the order for his committal for extradition should be affirmed. Per Spragge, C. J. O.—The forgery which is the subject of the treaty cannot be confined to the statutory felony of forgery. *In Re Phipps*, 8 A. R. 77.

The prisoner, who was collector of the county of Middlesex, in the State of New Jersey, kept a book in which to enter the payment and receipts of all moneys received by him as such collector, and which was the principal book of account kept by him. The book was purchased with the money of the county, and was kept in the collector's office, and was left by him at the close of his term of office; it was by statute open to the inspection of those interested in it, and contained the certificate of the county auditors as to the correctness of the matters therein contained:—Held, that the book was the public property of the county, and not the private property of the prisoner. After the book had been examined by the proper auditors as to the amounts received and paid out by and through the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter, with intent to cover up his defalcation, altered the book by making certain false entries therein of moneys received and paid out, and changing the additions to correspond. Some of these entries were by the prisoner himself, and others by his clerk under his direction, but the clerk on finding that such entries were false changed them back:—Held, that this constituted forgery at common law, as well as under our statute 32-33 Vict. c. 19 (Dom.):—Held, also, that under the Extradition Act of 1877, 40 Vict. c. 25 (Dom.), it is essential that the offence charged should be such as if committed here would be an offence against the laws of this country. The offence, however, was also proved to be forgery by the laws of New Jersey. *In re Jarrard*, 4 O. R., 265.—C. P. D. Affirmed, 20 C. L. J. 145.

W., a division court bailiff, had an execution against the prisoner and H. M., and to settle the same they arranged to give a note made by A. M. and endorsed by A. D. M. W. then drew up the note in question, which was payable to the order of A. D. M., and which he handed to the prisoner, who took it away to obtain, as he said, A. D. M.'s endorsement, returning shortly afterwards with the name A. D. M. endorsed thereon. He then handed the note to A. M., who signed his name as maker and handed it to W., who took it away with him. The endorsement was a forgery. The prisoner was indicted for forging the endorsement on a promissory note, and convicted:—Held, following *Regina v. Butterwick*, 2 M. & Rob. 196; *Regina v. Mopsey*, 11 Cox 143, and *Regina v. Harper*, 7 Q. B. D. 78, that the conviction could not be sustained on the indictment as framed. The instrument, by reason

of the maker's name not being signed to it at the time of the forgery, was not a promissory note; and neither could the conviction be sustained on the count for uttering, as after it was signed by A. M. it was never in the prisoner's possession, but was delivered by A. M. to witness. Per Cameron, C. J. As to the meaning of section 45 of 32 & 33 Vict. c. 19 (Dom.), that possibly a conviction could be had under it, unless it only extended to forging by making a copy of some existing document or thing written or printed or otherwise made capable of being read for the purpose of fraud, and not to forging a name on a paper written properly as an original paper, and not as a copy of any existing document or writing. *Regina v. McFee*, 13 O. R. 8.—C. P. D.

A cargo of oats was received at an elevator for the S. Co., of which the prisoner was a member, and also secretary and financial manager, with power to sign notes, etc. On the day of their receipt, a clerk of the S. Co., who was authorized so to do, prisoner having nothing to do with the buying and selling of the grain, signed an order for the delivery of 19,886 bushels of the oats to a railway company, consigned to the S. Co.'s agents in New York, on whom two drafts were drawn by the S. Co., signed by the prisoner, which were accepted and paid. Warehouse receipts transferable by endorsement were given to the S. Co. for these oats, though after the delivery thereof to the railway company, and were allowed to remain with the S. Co. without any demand being made for their cancellation. Subsequently, the prisoner, in the name of the S. Co., discounted two promissory notes at a bank, and endorsed the warehouse receipts as security for the payment thereof, the notes containing a statement that the receipts were pledged as such security with authority to sell, etc., in default of payment:—Held, in extradition proceedings, that the endorsement to the bank of the receipts did not constitute a forgery. *In re Sherman*, 19 O. R. 315.—C. P. D.

## 2. Evidence.

By section 218 of R. S. C. c. 174, "The evidence of any person interested or supposed to be interested in respect of any deed, writing, instrument, or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the 'Act respecting forgery,' shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution." The prisoner was indicted for forgery in feloniously uttering a cheque signed by H. J. & Co. on the Quebec Bank, which he had altered from \$400 to \$1,400. The evidence in support of the forgery was that of J., who though a member of the firm when the cheque was made, had ceased to be such at the time of the trial, and who had been released by his partner from all liability and disclaimed any interest in the cheque. There was some evidence of the liabilities of the firm to creditors at the time of J.'s withdrawal:—Held, (*Rose, J.*, dissenting), that J. was not a person interested, or supposed to be interested, within the meaning of the act; and his evidence did not require corroboration. *Regina v. Hagerman*, 15 O. R. 598.—C. P. D.

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The defendant was convicted of uttering, with knowledge that it was a forgery, the endorsement of the name "Taylor Brothers" upon a promissory note, which had been discounted by a bank, but given up and destroyed before maturity, upon security being furnished to the bank. The manager of the bank and the business partner of the defendant gave evidence of the forgery, and the three members of the firm of Taylor Brothers were also called as witnesses, and denied having endorsed the note, or having any knowledge of it:—Held, that the members of the firm of Taylor Brothers were not persons interested or supposed to be interested in respect of the endorsement, within the meaning of R. S. C. c. 174, s. 218, and their evidence therefore was sufficient to corroborate that of the other witnesses. *Regina v. Selby*, 16 O. R. 255.—Q. B. D.

Per Wilson, C. J., in extradition proceedings the evidence of interested parties need not be corroborated. *In re H. L. Lee*, 5 O. R. 583.

The prisoner was indicted along with W.; the first count charging W. with forging a circular note of the National Bank of Scotland; and the second with uttering it knowing it to be forged. The prisoner was charged as an accessory before the fact. Evidence was admitted shewing that two persons named F. and H. had been tried and convicted in Montreal of uttering similar forged circular notes, printed from the same plate as those uttered by W.: that the prisoner was in Montreal with F., they having arrived and registered their names together at the same hotel, and occupied adjoining rooms: that after F. and H. had been convicted on one charge, they admitted their guilt on several others; and that a number of these circular notes were found on F. and H., which were produced at the trial of the prisoner. Before the evidence was tendered, it was proved that the prisoner was in company with W., who was proved to have uttered similar notes. Evidence was also admitted shewing that a large number of the notes were found concealed at a place near where the prisoner had been seen, and were concealed, as was alleged by him, after W. had been arrested:—Held, that the evidence was properly received in proof of the guilty knowledge of the prisoner. *Regina v. Bent*, 10 O. R. 557.—C. P. D.

See *Regina v. Hovey*, 8 P. R. 345.

#### IX. FRAUDULENTLY DEPRIVING OF THE USE OF PROPERTY.

The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half interest to C. The horse-power had been hired from one M., and at the time of the sale, the term of hiring had not expired. At its expiry, M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept, and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32-33 Vict. c. 21, s. 110, (Dom.):—Held, that the conviction was bad, there being no offence against that section, and

no jurisdiction in the police magistrate to try summarily; and that it was bad also in not shewing the time and place of the commission of the offence. Remarks upon the improper use of the criminal law in aid of civil rights. *Regina v. Young*, 5 O. R. 400.—Rose.

#### X. FRAUDULENT REMOVAL OF GOODS.

The fraudulent removal of goods, under 11 Geo. II. c. 19, s. 4, is a crime, and a conviction therefor was consequently quashed, with costs against the landlord, because the defendant had been compelled to give evidence on the prosecution. *Regina v. Lackie*, 7 O. R. 431.—Rose.

#### XI. LARCENY.

Held, that if an indictment for stealing certain articles, be sustainable as to some of the articles stolen, the conviction is good, although the indictment may contain any number of articles as to which an indictment could not be sustained. *Regina v. St. Denis*, 8 P. R. 16.—Cameron.

The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vict. c. 28, s. 66 (Dom.), and was convicted:—Held (Wilson, J., dissenting), that he ought not to have been convicted, because (per Armour, J.), the wood, the subject of the alleged larceny, was not, in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act, and because (per O'Connor, J.) the affidavit required by section 64 had not been made, and was a condition precedent to a seizure. Per Wilson, C. J., section 64 cannot apply to trees found by the officer of the department in the act of being removed from the lot on which they have been wrongfully cut, or where there can be no doubt they have been unlawfully cut, for such an application would make it impossible to effect a seizure in such cases. *Regina v. Fearman*, 10 O. R. 660.—Q. B. D.

The information charged that the prisoner at a named time and place "being a trustee of a sum of money" the property of the C. B. of C. (a corporate body) for the use of the said C. B. of C., did unlawfully and with intent to defraud, convert and appropriate the same to his own use, contrary to the statute in that behalf:—Held, that the prisoner was by this information charged with a criminal offence under the Larceny Act, R. S. C. c. 164. *Regina v. Cox*, 16 O. R. 228.—MacMahon.

The defendant was indicted and convicted under the Larceny Act, R. S. C. c. 164, s. 65, for that he, being a trustee of two negotiable securities for the payment of \$5,250 each, the property of the C. bank, for the use and benefit of the C. bank, unlawfully and with intent to defraud, did convert and appropriate the two negotiable securities to the use and benefit of him, the defendant, etc. At the trial the following letter, written and signed by the defendant, dated 6th November, 1885, was produced: "I have this day been entrusted by A. (the cashier of the C. bank) with two notes of \$5,250 each, for the specific purpose of paying

two notes for on 8th Novem consider myse amenable to t produced at t defendant wer for \$5,250 each two drafts for answering the amount menti were not actu on the 9th No the 8th. It were held by appeared in ev one B. to disc B. retaining \$ part of the ba dant in diamo up the two \$5 ceeds of the t identified by v and entries i book, also pr transactions v judge stated a —Held, upon the property c in his private evidence, that documents wi and that, not to the nature and place of p dence to go t drafts produc tioned in the defendant sho ing the proce the securities for a purpose version of the the nature o an appropriat ties themselv bridge, J., ev definition of tion 2 of R. S of the indict proof was giv the Attorney 164, s. 65, sub this objection case reserved properly aris Queen, 5 B. & well, 17 O. R.

To an inc which was co defendant p ments comp true in subst the public be alleged libel that the plea set out the p fendant inter from 37 Vict the words " a justificati



two notes for \$5,000 that are due in Montreal on 8th November, 1885, and my failing this shall consider myself committing criminal offence and amenable to the criminal law." The securities produced at the trial as those converted by the defendant were two drafts, not promissory notes, for \$5,250 each, dated 7th November, 1885; and two drafts for \$5,000 each were also produced answering the description of the notes for that amount mentioned in the letter, except that they were not actually notes, and were due at Toronto on the 9th November instead of at Montreal on the 8th. It was shewn, however, that they were held by a person in Montreal. It also appeared in evidence that the defendant procured one B. to discount the two drafts for \$5,250 each, B. retaining \$1,000 for an old debt, and paying part of the balance of the proceeds to the defendant in diamonds. The defendant did not take up the two \$5,000 drafts and retained the proceeds of the two new drafts. The drafts were identified by witnesses as to dates, amounts, etc., and entries in the defendant's memorandum book, also produced, shewed the nature of the transactions with the cashier and B. The trial judge stated a case for the opinion of the court:—Held, upon the evidence, that the drafts were the property of the bank and not of the cashier in his private capacity; and, upon the law and evidence, that the defendant was a trustee of the documents within the meaning of the statute; and that, notwithstanding the discrepancies as to the nature of the instruments, the due date, and place of payment, there was sufficient evidence to go to the jury of the identity of the drafts produced at the trial with the notes mentioned in the letter. It was contended that the defendant should have been indicted for converting the proceeds of the securities, inasmuch as the securities were entrusted to the defendant for a purpose which rendered necessary the conversion of the securities themselves:—Held, that the nature of the transaction with B. shewed an appropriation by the defendant of the securities themselves to his own use; and, per Falconbridge, J., even if it had been otherwise, the definition of property in sub-section (e.) of section 2 of R. S. C. c. 164 shewed the sufficiency of the indictment. It was objected that no proof was given at the trial that the sanction of the Attorney-General, required by R. S. C. c. 164, s. 65, sub-s. 2, had been given:—Held, that this objection was not open to the court upon a case reserved, not being a question that could properly arise at the trial. *Knowlden v. The Queen*, 5 B. & S. 532, followed. *Regina v. Barnett*, 17 O. R. 649—Q. B. D.

## XII. LIBEL.

To an indictment for libel, the language of which was couched in vague general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit that the matters charged in the alleged libel should be published by him:—Held, that the plea was insufficient, because it did not set out the particular facts upon which the defendant intended to rely; and that the omission from 37 Vict. c. 38, s. 5 (R. S. C. c. 163, s. 4) of the words "in the manner required in pleading a justification in an action for defamation,"

which were contained in C. S. U. C. c. 103, s. 9, had not the effect of altering the rule:—Held, also, that this was a case in which the court should, in the exercise of its discretion, quash the plea upon a summary motion, without requiring a demurrer, a course permitted by section 143 of R. S. C. c. 174, as interpreted by section 2, sub-section (c). *Regina v. Creighton*, 19 O. R. 339.—MacMahon.

## XIII. MALICIOUS INJURY TO PROPERTY.

In an indictment purporting to be under 32 & 33 Vict. c. 22, s. 45 (Dom.), for malicious injury to property, the word "feloniously" was omitted:—Held, bad, and ordered to be quashed. *Regina v. Gough*, 3 O. R. 402.—C. P. D.

Under section 58 of the Malicious Injuries to Property Act, R. S. C. c. 163, the offence must be "unlawfully and maliciously" committed, and the damage must exceed twenty dollars. In this case the warrant of commitment charged the offence as having been wilfully and maliciously committed, omitting the word "unlawfully":—Held, that this was fatal to the commitment and it was directed to be quashed:—Held, also, that the commitment should have alleged that the damage exceeded twenty dollars. *Regina v. Fife*, 17 O. R. 710.—C. P. D.

See *Regina v. McDonald*, 10 O. R. 553, p. 453; *Regina v. McDonald*, 12 O. R. 381.

## XIV. MALICIOUSLY WOUNDING.

On motion to discharge prisoner on habeas corpus on conviction before a police magistrate, the conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grievous bodily harm":—Held, that, the addition of the words, "with intent to do grievous bodily harm," did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding:—Held, also, that imprisonment at hard labour for a year was properly awarded under 38 Vict. c. 47 (Dom). *Regina v. Boucher*, 8 P. R. 20.—Hagarty. Affirmed, 4 A. R. 191. See *Cassels Dig.* 180.

## XV. MURDER AND MANSLAUGHTER.

An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th November, 1881; the other with manslaughter of the said M. J. T. on the same day. The grand jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only:—Held, affirming the judgment of the court a quo, that the indictment was sufficient. *Theal v. The Queen*, 7 S. C. R. 397.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death, (17th October preceding) the prisoner had knocked his

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wife down with a bottle: she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side. On the reserved questions, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment:—Held, affirming the judgment of the supreme court of New Brunswick, that the evidence was properly received, and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner. *Ib.*

At the trial of the prisoner upon an indictment for murder, a witness for the Crown swore upon direct examination that deceased lived about thirty rods from him, and that one night, about half an hour after he had heard shots in the direction of deceased's house, deceased came to the witness's house, and asked the witness to take him in, for he was shot. The witness did so, and deceased died there some hours afterwards. Evidence of statements made by deceased after being taken into the witness's house was rejected. Upon a case reserved it was contended on behalf of the prisoner: (1) that his counsel was entitled to ask the witness in cross-examination whether deceased mentioned any particular person as the person who attacked him; (2) that statements made by deceased after he arrived at the witness's house were admissible as part of the *res gestæ*; (3) that such statements or some of them were admissible as dying declarations:—Held, (1) That the admission of evidence of a complaint having been made ought properly to be confined to rape and its allied offences, but even if such evidence is admissible in other cases, it can only be so where, as in such offences, the complainant has been examined as a witness; and moreover, in this case, when deceased asked the witness to take him in, for he was shot, he was not making a complaint at all, but merely assigning a reason for asking to be taken in, and the question proposed to be asked was not relevant. (2) That the statements made by deceased after he was taken into the house were not admissible as part of the *res gestæ*, being made after all action on the part of the wrong doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased. *Regina v. Beddingfield*, 14 Cox 341, and *Regina v. Goddard*, 15 Cox, 7, followed. (3) That upon the evidence, the statements made by deceased after being taken into the house were not made under a settled hopeless expectation of death, and were therefore not admissible in evidence as a dying declaration. *Regina v. McMahon*, 18 O. R. 502.—Q. B. D.

#### XVI. PERJURY.

D., in answering to faits et articles on the contestation of a saisie arrêt, or attachment, stated among other things, "1st, that he, D., owed nothing for his board; 2nd, that he, D.,

from about the beginning of 1880 to towards the end of the year 1881, had paid the board of one F., the rent of his room, and furnished him all the necessaries of life with scarcely any exception: 3rd, that he, F., during all that time, 1880 and 1881, had no means of support whatever." D. being charged with perjury, in the assignments of perjury and in the negative averments, the facts sworn to by D. in his answers were distinctly negatived, in the terms in which they were made:—Held, that under the general terms of the negative averments, it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on faits et articles, and the conviction could not be set aside because of the admission of such proof. Even if the evidence was inadmissible, there being other charges in the same count which were pleaded to, a judgment given on a general verdict of guilty on that count would be sustained. *Dowrie v. Regina*, 15 S. C. R. 358.

Semble, that if the county judge in the course of an investigation under R. S. O. (1887), c. 184, s. 477, proceeded to the United States to take evidence, any oath administered by him in the United States would have no legal significance, and any false statement made by a person sworn before him under such circumstances would not have attached to it the consequences of perjury. *In re Godson and the City of Toronto*, 16 O. R. 275.—Robertson.

#### XVII. RAPE.

The defendant was indicted and convicted for committing a rape on his daughter. The learned judge left it to the jury to say whether on the evidence the act of connection was consummated through fear, or merely through solicitation:—Held, that the question was one of fact entirely for the jury, and could not have been withdrawn from them, there being ample evidence to sustain the charge, and it having been left to them with the proper direction in such a case. *Regina v. Cardo*, 17 O. R. 11.—C. P. D.

See *John v. The Queen*, 15 S. C. R. 384, p. 431; *Regina v. Lloyd*, 19 O. R. 352, p. 448.

#### XVIII. RECEIVING STOLEN GOODS.

See *Regina v. St. Denis*, 8 P. R. 16, p. 446.

#### XIX. REFUSING TO PROVIDE FOR FAMILY.

Held, Armour, J., dissenting, that the evidence of a wife is inadmissible, on the prosecution of her husband for refusal to support her, under 32-33 Vict. c. 20, s. 25 (Dom.) *Regina v. Bissell*, 1 O. R. 514.

Under 32-33 Vict. c. 20, s. 25 (Dom.), as amended by 49 Vict. c. 51, s. 1 (Dom.), defendant was charged by his wife, before a magistrate, with refusing to provide necessary clothing and lodging for herself and children. At the close of the case for the prosecution, defendant was tendered as a witness on his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence;

and subsequent committed defendant's evidence; the defence; the such evidence such weight exercise of to review tion of the and duties and that t cludes the well as befo 11 P. R. 47

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and subsequently, without further evidence, committed him for trial:—Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review:—Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher court. *Regina v. Meyer*, 11 P. R. 477.—Wilson.

## XX. OTHER OFFENCES.

As to whether indictment or mandamus is the appropriate remedy to compel a municipality to repair an existing bridge or erect a new one. See *In re Townships of Moulton and Canborough and the County of Haldimand*, 12 A. R. 503.

Quære, as to whether one company using electric wires are liable to indictment for interfering with the wires of another company. See *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 O. R. 571.

As to authority of inspector of prisons to make rules creating an indictable offence. See *Hamilton v. Massie*, 18 O. R. 585.

## XXIV. PROCEDURE, PRACTICE AND TRIAL.

### 1. Indictment.

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury. Montreal, 6th October, 1880:—By J. A. Mousseau, Q. C.; C. P. Davidson, Q. C.; L. O. Loranger, Attorney-General. Messrs. Mousseau and Davidson were the two counsel authorized to represent the Crown in all the criminal proceedings during the term. A motion supported by affidavit was made to quash the indictment on the ground, inter alia, that the preliminary formalities required by s. 28 of 32-33 Vict. c. 29, had not been observed. The chief justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was Held, on appeal, reversing the judgment of the Court of Queen's Bench, that under 32-33 Vict. c. 29, s. 28, the Attorney-General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the Attorney-General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside. *Abrahams v. The Queen*, 6 S. C. R. 10.

An indictment was found against the defendants in the High Court of Justice, at its sittings of oyer and terminer and gaol delivery, and on being called upon to plead, the defendants demurred to the indictment. A writ of certiorari was subsequently obtained by the defendants,

in obedience to which the indictment, demurrer, and joinder were removed to the Queen's Bench division. Upon the return, the Crown took out a side-bar rule for a concilium, and the demurrer was set down for argument. A motion was made by the defendants to set aside the proceedings of the Crown, on the ground that they should have been called upon to appear and plead de novo in this division:—Held (Wilson, C. J., dissenting), that the court of assize of oyer and terminer and general gaol delivery is now, by virtue of the Judicature Act, the High Court of Justice; that the indictment was found, and the defendants appeared and demurred thereto in the High Court of Justice; and that it was not necessary to plead de novo to the indictment. *Regina v. Butling*, 7 O. R. 118.—Q. B. D.

An order made pursuant to Dominion statute 32 & 33 Vict. c. 29, s. 11, directing a change of venue, would be sufficient although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection, and even in a court of error there could be no valid objection to a conviction founded on such order. *In re Robert Evan Sproule*, 12 S. C. R. 140.

Where two or more names are laid in an indictment under an alias dictus, it is not necessary to prove them all. *Jacobs v. The Queen*, 16 S. C. R. 433.

J. was indicted for the murder of A. J., otherwise called K. K. On the trial it was proved that the deceased was known by the name of K. K., but there was no evidence that she ever went by the other name:—Held, affirming the judgment of the court below, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter. *Id.*

See *Regina v. Gough*, 3 O. R. 402, p. 442; *Regina v. St. Denis*, 8 P. R. 16, p. 440; *Theal v. The Queen*, 7 S. C. R. 397, p. 442; *Regina v. Goodman*, 2 O. R. 468, p. 447; *Regina v. Gibson*, 16 O. R. 704, pp. 434, 447.

### 2. Summary Trial before County Judge.

The prisoner was convicted before a county judge's criminal court on a charge of receiving stolen goods, knowing them to have been feloniously stolen, and was sentenced to imprisonment. On an application for a habeas corpus:—Held, that the court was a court of record, and that under R. S. O. (1877), c. 70 s. 1, there was therefore no right to the writ. *Regina v. St. Denis*, 8 P. R. 16.—Cameron.

Held, also, that the judge had power to imprison. *Id.*

The prisoners were committed for trial on a charge of gambling in a railway train. On the case coming before the county judge for trial, an indictment was preferred, under 42 Vict. c. 44, s. 3 (Dom.), for obtaining money by false pretences. The prisoners' counsel objected to the prisoners being tried on a different charge from that on which they had been committed. The objection was overruled, and the charge read over to the prisoners, and on its being explained that they could be tried forthwith or remain in custody until the next sittings of oyer and terminer,

etc., they pleaded not guilty, and said that they were ready for trial. The case then proceeded, and the prisoners were convicted; no question being raised as to their having been tried without their consent, although their counsel took other objections to the proceedings. A writ of habeas corpus having been issued, and the prisoners' discharge moved for, on the ground of the absence of such consent:—Held, that the motion must be refused. Per Wilson, C. J. It was unnecessary to decide whether the prisoners' remedy was by habeas corpus or writ of error, because, on the facts, they were not entitled to either remedy. Per Oler, J. The prisoners having been imprisoned under the conviction of a court of record, an objection of error in a proceeding must be by writ of error; the writ of habeas corpus was therefore inappropiately issued, and should be quashed. *Regina v. Goodman*, 2 O. R. 468.—C. P. D.

The plaintiffs in error were charged with having defrauded one C. by a game called three card monte. They consented to be summarily tried. When brought up for trial, the crown attorney asked for and obtained leave to substitute a charge of combining to obtain money by false pretences, the prisoners objecting. The trial proceeded without the consent of the prisoners obtained to be tried summarily for this offence. They were convicted and sentenced to one year's imprisonment:—Held, in error, that their consent to be summarily tried on the substituted charge should appear, and that in its absence the conviction was bad:—Held, also that it was bad in adjudging the sentence of one year, the Act, 40 Vict. c. 32 (Dom.), only authorizing a sentence for any term less than a year. *Goodman v. Regina*, 3 O. R. 18—Q. B. D.

### 3. Case Reserved.

Under C. S. U. C. c. 112, any question of law which may have arisen on a criminal trial, may be reserved for the consideration of the justices of either of Her Majesty's superior courts of common law. Quere, per Armour, J., having regard to the provisions of the Judicature Act, whether a reservation to the justices of the Queen's Bench division of the High Court of Justice was authorized. *Regina v. Bissell*, 1 O. R. 514.

Held, that a police magistrate cannot reserve a case for the opinion of a superior court under C. S. U. C. c. 112, as he is not within the terms of that Act. *Regina v. Richardson*, 8 O. R. 651—Q. B. D.

Held, that a Crown case reserved should be reserved for the consideration of the justices of one of the divisions of the High Court, not of a divisional court, and when the court is asked whether on the evidence the defendants were lawfully convicted the whole of the evidence should not be made part of the case, but merely the material facts established by the evidence. *Regina v. Gibson*, 16 O. R. 704.—Q. B. D.

Held, that the sufficiency of an indictment upon motion to quash is not a question of law which arises on the trial, and therefore cannot be reserved under R. S. C. c. 174, s. 259, and the court has no power to entertain it. Falconbridge, J., dubitante. *Ib.*

On a Crown case reserved it is not proper to reserve the question whether there is sufficient evidence in support of the criminal charge, that being a question for the jury; whether there is any evidence is a question of law for the judge. The evidence against the prisoners here was the uncorroborated evidence of the woman charged to have been raped which, in view of admissions made by her, and the circumstances, was unsatisfactory:—Held, that the evidence was properly submitted to the jury, but the court directed that the attention of the executive should be called to the case. *Regina v. Lloyd*, 19 O. R. 352.—C. P. D.

To an indictment for murder, the prisoner pleaded, challenging the array of the jury panel, which plea was demurred to and judgment given in favour of the crown by the judge holding the court of oyer and terminer, who, at the request of the prisoner, reserved a case for the consideration of the Common Pleas division:—Held, not a matter which could be reserved under C. S. U. C. c. 112, and the case was therefore directed to be quashed. *Regina v. O'Rourke*, 32 C. P. 388.—C. P. D. See S. C., 1 O. R. 464; *Morin v. The Queen*, 18 S. C. R. 407.

Semble, per Wilson, C. J., that a writ of error was the proper remedy, and that, notwithstanding the Judicature Act, it would lie in the first instance to either the Queen's Bench or Common Pleas division, and not to the Court of Appeal. *Ib.*

See *Regina v. Andrews*, 12 O. R. 184, p. 452; *Regina v. Barnett*, 17 O. R. 649, p. 441; *Brincobois v. The Queen*, 15 S. C. R. 421, p. 449.

### 4. Jury.

By the Dominion Act 32 & 33 Vict. c. 29, s. 44, the selection of jurors in criminal cases is authorized to be in accordance with the provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such act. By the provincial Acts 42 Vict. c. 14, and 44 Vict. c. 6, the mode of selection of jurors in criminal cases, as provided by C. S. U. C. c. 31, as amended by 26 Vict. c. 44, was changed, by excluding the clerk of the peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these provincial Acts. Semble, that the 32 and 33 Vict. c. 29 (Dom.), was not ultra vires the Dominion parliament as being a delegation of their powers, and that the selection made in accordance with the provincial Acts, was valid. *Regina v. O'Rourke*, 32 C. P. 388.—C. P. D.

Quere, whether the selection and summoning of jurors is a matter of procedure, or relates to the constitution and organization of criminal courts. *Ib.* See next case.

By 32 & 33 Vict. c. 29, s. 44 (Dom.), every person qualified and summoned to serve as a juror in criminal cases according to the law in

any province in such province before the 1st of January 1870, and in so far as with any Act 42 Vict. c. 14, the mode of selection regulated by the jury was selected, and to which the crown given for the guilty and sentenced. —Held, per statute was not in and applicable criminal procedure. 464.—Q. B. D.

Semble, that c. 31, where dealing of the are not assigned.

Per Armour, raised by the challenge to the

Quere, where, been reserved afterwards be *Ib.*

In the court, the jury stable, and them, referring murder in P. the slightest they were try. The prisoner judgment of the in Nova Scotia the clergyman be said that th as to affect t 15 S. C. R. 40.

B. having having admission murder, move ground that o had not been panel of jurors Lamoureux and panel for the prisoner was Lamoureux. reux's summons returned Jose moned. Moie and answered sworn, as a j was tried. C per Ritchie, C JJ., that the served by the question arising of section 259 Taschereau a judgment of t assuming the 246, c. 174 R larly complain dissenting. 421.

any province, is declared to be qualified to serve in such province, whether such laws were passed before the B. N. A. Act or after it subject to, and in so far as such laws are not inconsistent with any Act of the Parliament of Canada. By 42 Vict. c. 14 (Ont.), and 44 Vict. c. 6 (Ont.), the mode of selecting jurors in all cases, formerly regulated by 26 Vict. c. 44, was changed. The jury was selected according to the Ontario statutes, and the prisoner challenged the array, to which the crown demurred, and judgment was given for the crown. The prisoner was found guilty and sentenced, and he then brought error:—Held, per Hagarty, C. J., that the Dominion statute was not ultra vires by reason of its adopting and applying the laws of Ontario as to criminal procedure. *Regina v. O'Rourke*, 1 O. R. 464.—Q. B. D.

Semble, that under s. 139, Con. Stat. U. C. c. 31, where no "unindifference" or fraudulent dealing of the sheriff is shown, any irregularities are not assignable for error. *Ib.*

Per Armour and Cameron, JJ. The objection raised by the prisoner was not a good ground of challenge to the array. *Ib.*

Quære, whether, when such a question has been reserved by a judge at the trial, it can afterwards be made the subject of a writ of error. *Ib.*

In the course of a trial for murder by shooting, the jury attended church in charge of a constable, and the clergyman directly addressed them, referring to the case of a man hung for murder in P. E. I., and urging them, if they had the slightest doubt of the guilt of the prisoner they were trying, to temper justice with equity. The prisoner was convicted:—Held, affirming the judgment of the court of crown cases reserved, in Nova Scotia, that although the remarks of the clergyman were highly improper it could not be said that the jury were so influenced by them as to affect their verdict. *Preeper v. Regina*, 15 S. C. R. 401.

B. having been found guilty of feloniously having administered poison with intent to murder, moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such. The general panel of jurors contained the names of Joseph Lamoureux and Moise Lamoureux. The special panel for the term of the court, at which the prisoner was tried, contained the name of Joseph Lamoureux. The sheriff served Joseph Lamoureux's summons on Moise Lamoureux, and returned Joseph Lamoureux as the party summoned. Moise Lamoureux appeared in court and answered to the name of Joseph and was sworn as a juror without challenge when B. was tried. On a reserved case it was Held, per Ritchie, C. J., and Taschereau and Gwynne, JJ., that the point should not have been reserved by the judge at the trial, it not being a question arising at the trial within the meaning of section 259, c. 174 R. S. C.:—Held, also, per Taschereau and Gwynne, JJ., affirming the judgment of the Court of Queen's Bench, that assuming the point could be reserved, section 246, c. 174 R. S. C. clearly covered the irregularity complained of, Strong and Fournier, JJ., dissenting. *Brisecois v. Regina*, 15 S. C. R. 421.

### 5. Evidence.

#### (a) Confessions and Admissions.

Where it appeared that a police constable gave the usual caution to the prisoner, who was arrested on a charge of obstructing a railway train by placing blocks upon the line, but afterwards said to him: "The truth will go better than a lie. If any one prompted you to it you had better tell about it," whereupon the prisoner said that he did the act charged against him:—Held, that the admission was not receivable in evidence, and a conviction grounded thereon was improper. *Regina v. Fennell*, 7 Q. B. D. 147, followed. *Regina v. Romp*, 17 O. R. 567—Chy. D.

#### (b) Dying Declarations.

See *Regina v. McMahon*, 18 O. R. 502, p. 443.

#### (c) Depositions.

Upon a prosecution for uttering forged notes, the deposition of one S. taken before the police magistrate on the preliminary investigation was read, upon the following proof that S. was absent from Canada:—R. swore that S. had a few months before left his (R.'s) house, where she (S.) had for a time lodged, that she had since twice heard from her in the U. S. A., but not for six months. The chief constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S. by means of personal enquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife:—Held, upon a case reserved, Cameron, J., dissenting, that the admissibility of the deposition was in the discretion of the judge at the trial, and that it could not be said that he had wrongly admitted it. *Regina v. Nelson*, 1 O. R. 500—Q. B. D.

#### (d) Competent and Compellable Witnesses.

Assault. See *Regina v. Richardson*, 46 Q. B. 375, p. 432; *McFarlane v. The Queen*, 16 S. C. R. 393, p. 432.

Fraudulent removal of goods. See *Regina v. Lackie*, 7 O. R. 431.

Husband and wife. See *Regina v. Bissell*, 1 O. R. 514; *Regina v. Meyer*, 11 P. R. 477; *McFarlane v. The Queen*, 16 S. C. R. 393.

Upon trial of an information for practising contrary to the provisions of the Ontario Medical Act, R. S. O. (1877), c. 142:—Held (following *Regina v. Roddy*, 41 Q. B. 291), that the defendant was properly rejected as a witness in his own behalf. *Regina v. Sparham*, 8 O. R. 570.—Rose.

Held, that under section 123 of the Canada Temperance Act, 1878, a defendant is compellable, when called as a witness, to answer questions, even though tending to criminate himself. *Regina v. Halpin*, 12 O. R. 330, not followed. Review of legislation on the subject of such evidence. *Regina v. Fee*, 13 O. R. 590.—Chy. D.





is demanded to shew by evidence that what he is charged with is not an extradition crime:—*Semble*, that the evidence here offered, as stated in the report of the case, was not improperly rejected. *In re Phipps*, 8 A. R. 77.

Two indictments were preferred against the defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. The defendants were put on their trial on the charge of destroying M.'s trees; and evidence relating to the offence charged in the other indictment, was admitted as showing that the offences had been committed by the same person:—*Held*, that the evidence was properly received. *Regina v. McDonald*, 10 O. R. 553.—C. P. D.

A witness was called at the trial to give evidence as a medical expert, and in answer to the crown prosecutor, he said, "there are indicia in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement, and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired, in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body:—*Held*, Strong, J., and Fournier, J., dissenting, that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shown by cross-examination, or other testimony, that there were no such indicia as stated, his evidence as to the distance at which the shot was fired, was properly received. *Preeper v. The Queen*, 15 S. C. R. 401.

An indictment for an assault occasioning actual bodily harm contained a second count charging a prior conviction for an indictable offence. The offence disclosed by the indictment upon which the prisoner was tried was not one of that class of offences for which, after a previous conviction for felony, etc., additional punishment might be imposed. The first part of the indictment, only, was read in arraigning the prisoner, and no allusion was made to the second part charging the prior conviction. The prisoner in his defence gave evidence of good character. The crown gave some general evidence in rebuttal, and then tendered, under section 26 of c. 29, 32-33 Vict., a certificate to prove a prior conviction, and read the second clause of the indictment charging such prior conviction:—*Held*, that this evidence was not properly admissible as to character, and that such evidence can only be as to general reputation; evidence of a prior conviction going to the matter of punishment, and not to general character. *Regina v. Rowton*, 10 Cox C. C. 25, followed. *Regina v. Trigantze*, 15 O. R. 294.—Q. B. D.

See *Theal v. The Queen*, 7 S. C. R. 397, p. 442.

## XXV. NEW TRIAL.

The defendants having been convicted on an indictment for a nuisance which had been re-

moved into the Queen's Bench by certiorari, moved for a new trial, which was refused:—*Held*, that no appeal would lie to this court from the judgment refusing the new trial, and that it could make no difference that the indictment had been removed by certiorari, and tried on the civil side. *Regina v. Eli*, 13 A. R. 526; *Regina v. Laliberté*, 1 S. C. R. 117, referred to. *Regina v. City of London*, 15 A. R. 414.

Quere, whether in any case of misdemeanour a new trial can now be granted, C. S. U. C. c. 12, 112, 113—32 & 33 Vict. c. 29, s. 90 (Dom.). *Ib.*

## XXVI. ERROR.

See *Regina v. Goodman*, 2 O. R. 468, p. 447; *Goodman v. Regina*, 3 O. R. 18, p. 447; *Regina v. O'Rourke*, 32 C. P. 388, p. 448; *S. C. 1 O. R. 464*, p. 449.

## XXVII. APPEAL.

### 1. To Privy Council.

The rule of the privy council is not to grant leave to appeal in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place. *Riel v. The Queen*, 10 App. Cas. 675.

See 51 Vict. c. 43 (Dom.).

### 2. To Supreme Court of Canada.

The only appellate power conferred on the Supreme Court in criminal cases is by section 49 of the Supreme and Exchequer Courts Act which limits appeals in criminal cases to those of the highest importance, and does not impose on the court the duty of reversal in matters of fact of all summary convictions before magistrates. *In re Médina Trepanier*, 12 S. C. R. 111.

## XXVIII. APPREHENSION AND ARREST OF OFFENDERS.

The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—*Held*, that a person cannot, under the Imperial Act 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a superior court in this country. Such warrant must disclose a felony according to the law of this country, and *Semble*, that the expression "felony, to wit, larceny," is insufficient. The prisoner was therefore discharged. *Regina v. McHolme*, 8 P. R. 452.—Cameron.

See *Hamilton v. Massie*, 18 O. R. 585, p. 215.

## XXIX. BAIL.

The recognizance entered into by the defendants on the removal of the proceedings from the sittings of oyer and terminer and general gaol delivery, to the Queen's Bench Division of the High Court, provided that they should "appear

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in this court and answer and comply with any judgment which may be given upon or in reference to a certain indictment, etc., or upon or in reference to the demurrer to such indictment, and plead to said indictment if so required." Per Wilson, C. J. Semble, that the practice and procedure before the Judicature Act should be maintained in its entirety; though possibly it might be varied by agreement. By the recognition the defendants had not agreed to vary it, but they might thereunder elect to appear and answer to the indictment, or to appear and argue the demurrer; and they, being ready to appear and answer the indictment, would fully perform the condition of the recognizance by so doing. *Regina v. Bunting*, 7 O. R. 118.

Held, that a judge of the High Court has power under section 83 of the Criminal Procedure Act, R. S. C. c. 174, to admit to bail in cases where the accused has not been finally committed for trial if he "think it right so to do;" but in this case, the charge being a serious one, the magistrate before whom the prisoner appeared, having refused to admit him to bail, and no depositions having been taken, an order for bail was refused. *Regina v. Cox*, 16 O. R. 228.—MacMahon.

#### XXXI. COSTS AND EXPENSES OF CRIMINAL JURISDICTION.

Held, that the liability of the crown to the payment of expenses connected with the administration of criminal justice in the province out of the consolidated revenue fund is restricted, under R. S. O. (1877), c. 86, s. 1, to such expenses as are mentioned in the schedule to the Act; and that the county, under R. S. O. (1877), c. 85, is required to pay all other proper expenses connected therewith. *Re Fenton and the Board of Audit of the County of York*, 31 C. P. 31.—Wilson.

Where the account of the county attorney of York, for the quarter ending 31st December, 1879, for expenses connected with the administration of criminal justice, was audited by the county board of audit and paid, but certain of the items were disallowed by the provincial treasurer as not payable by the Crown out of the consolidated revenue fund, not being contained in the schedule, and the board of audit, therefore, in auditing the county attorney's account for a subsequent quarter, deducted therefrom the amount of said disallowed items, a mandamus was granted to the board to rescind their order for such reduction. *Ib.*

See *In re Stanton and the Board of Audit for the County of Elgin*, 3 O. R. 86, p. 405.

#### XXXII. PRIVATE PROSECUTORS.

##### 1. Liability for Costs.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor, into this court, and the defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. *Regina v. Hart*, 45 Q. B. 1.—Q. B. D.

The Court, however, has power to make payment of costs a condition of any indulgence

granted in such a case, such as the postponement of the trial or a new trial. *Ib.*

Evidence that defendant was private prosecutor in an action by plaintiffs to recover costs under R. S. C. c. 8, s. 111. See *May v. Reid*, 16 A. R. 150.

#### CROPS.

The plaintiff, who had been married in 1864, cultivated land living upon it with her husband and working it under his advice, one-half of which had in 1874 been devised to her by the father of her husband, the other half having been in like manner devised to her son. In an interpleader action brought by her against an execution creditor of her husband:—Held, affirming the judgment of the court below, (46 Q. B. 52,) that the plaintiff was entitled to the crops on the whole farm as against the execution creditor. *Ingram v. Taylor*, 7 A. R. 216.

Upon default made in payment of a mortgage the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security. Therefore, when land was sold in July under a decree made in a mortgage suit, without any reservation of crops:—Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the unsecured growing crops, mature and immature. *McDowall v. Phippen*, 1 O. R. 143.—Chy. D.

Crops to be sown upon certain land may be the subject of sale, as any other after-acquired property, and the property in them will pass, when sown, if they are so described as to be capable of being identified when acquired. *Grass v. Austin*, 7 A. R. 511.

As to growing crops comprised in chattel mortgages. See *Hamilton v. Harrison*, 46 Q. B. 127; *Laing v. Ontario Loan and Savings Co.*, 46 Q. B. 114; *Grass v. Austin*, 7 A. R. 511; *Cameron v. Gibson*, 17 O. R. 233.

Construction of provisions in lease as to crops. See *Harrison v. Pinkney*, 6 A. R. 225.

C. being in default on his mortgage of realty to the plaintiffs, in April, 1882, gave them a chattel mortgage, in consideration of which they agreed to allow him to remain in possession and take the year's crop. On the 2nd July, 1882, the plaintiffs took formal possession of the land. On the 17th July, 1882, the defendant, having obtained judgment against C., placed a fi. fa. in the hands of the sheriff, who seized the growing crops on the land in question on the same day, and sold them in August. The plaintiffs had commenced ejectment proceedings on the 15th June, and they signed judgment on the 30th September, in the same year. The plaintiffs claimed the crops, and an interpleader issue was tried:—Held, affirming the judgment of the Common Pleas Division, (5 O. R. 371), that the defendant had the right on the 17th July, by virtue of the agreement made in April, to seize the crops, as C.'s property. The seizure and sale having taken place before the judgment in ejectment, the rule that the judgment related back to the day of the commencement of the action, so

as to make C. could not avail and *Loe* 250.

Action to recover the value of a with weed put of injury—*Join v. Free*, 13 O.

Growing crop and intended being fructus under execution not an interest the statute of delivery to the owner, and the act of the Registry Act, independently of transfer them, severance at the pass to the purchaser. O. R. 233.—St.

A. C., owner to a loan company successive mortgage 1877, A. C. sown in January, 18 this wheat to properly registered the harvest, conveyed to H. the to what was due small additions to H. On April 1877, A. C. wheat was ripe but it sent and gage, and A. J. recover its value conveyance from mortgagee, were strongly against the mortgagee de G.'s rights as of point of time to must be dismissed doubt have had the crops as paid.

See *Cleaver Mortgage Co.* 17 O. R. 525.

See *Supr*

as to make C. himself a trespasser from that date, could not avail the plaintiffs. *Hamilton Provident and Loan Society v. Campbell*, 12 A. R. 250.

Action to recover damages for depreciation in the value of a farm, caused by sowing seed, mixed with weed purchased from defendant—evidence of injury—joinder of mortgagee. See *McMullen v. Free*, 13 O. R. 57.

Growing crops sown by the person in possession and intended to be reaped at maturity, being fructus industriales, are chattels seizable under execution, and the ownership of them is not an interest in land within the 4th section of the statute of frauds. They are bound by the delivery to the sheriff of an execution against the owner, and they must equally be bound by the act of the owner. They are not within the Registry Act because they are chattels independently of the form of the agreement to transfer them, and of the period before or after severance at which the property in them is to pass to the purchaser. *Cameron v. Gibson*, 17 O. R. 233.—Street.

A. C., owner of certain lands, mortgaged them to a loan company, and afterwards executed two successive mortgages to one H. Afterwards, in 1877, A. C. sowed a quantity of fall wheat, and in January, 1888, made a chattel mortgage of this wheat to G., which chattel mortgage was properly registered. On April 4th, 1888, before the harvest, under pressure from H., A. C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages, and a small additional unsecured debt due from him to H. On April the 5th, 1888, H. leased the property to A. J. C. for a year. When the fall wheat was ripe A. J. C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A. J. C. now brought this action to recover its value:—Held, that on his taking the conveyance from A. C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G.'s rights as chattel mortgagee became prior in point of time to the title of H., and the action must be dismissed. As mortgagee H. would no doubt have had the right to take possession of the crops as part of his security. *Id.*

See *Cleaver v. North of Scotland Canadian Mortgage Co.*, 27 Chy. 508; *O'Neill v. Owen*, 17 O. R. 525.

## CROSS ACTION.

See ACTION.

## CROSS APPEALS.

See SUPREME COURT OF CANADA.

## CROSS BILL.

See PLEADING.

## CROSS INTERROGATORIES.

See EVIDENCE.

## CROSS PETITIONS.

See PARLIAMENTARY ELECTIONS.

## CROWN.

- I. PEROGATIVE, 458.
- II. COMPENSATION FOR LAND TAKEN OR INJURED, 459.
- III. LIABILITY FOR TORTS, 461.
- IV. MISCELLANEOUS CASES, 461.
- V. ESCHEAT—See ESCHEAT.
- VI. PETITION OF RIGHT—See PETITION OF RIGHT.
- VII. CROWN LANDS—See CROWN LANDS.
- VIII. CROWN TIMBER—See CROWN LANDS.
- IX. PRESCRIPTION AGAINST THE CROWN—See LIMITATION OF ACTIONS.
- X. CUSTOMS—See REVENUE.

### I. PEROGATIVE.

The Bank of Prince Edward Island became insolvent and a winding-up order was made on the 19th June, 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of \$93,494.20, being part of the public moneys of Canada which had been deposited by several departments of the government to the credit of the receiver-general. The first claim filed by the minister of finance at the request of the respondents (liquidators of the bank) did not specially notify the liquidators that Her Majesty would insist upon the privilege of being paid in full. Two dividends of fifteen per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of \$65,426.95. On that day the respondents were notified that Her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay in full Her Majesty's claim. The following objection to the claim was allowed by the Supreme Court of Prince Edward Island, viz.: "That Her Majesty the Queen, represented by the minister of finance and the receiver-general, has no prerogative or other right to receive from the liquidators of the bank of Prince Edward Island the whole amount due to Her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the court below, (1) that the Crown, claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45

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Vict. c. 23; (2) that the Crown had not waived its right to be preferred in this case by the form in which the claim was made, and by the acceptance of two dividends. *Regina v. The Bank of Nova Scotia*, 11 S. C. R. 1.

The prerogatives of the Crown exist in British colonies to the same extent as in the United Kingdom. *The Queen v. Bank of Nova Scotia*, 11 S. C. R. 1, followed. *Liquidators of the Maritime Bank v. The Queen*, 17 S. C. R. 657.

The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large, her prerogatives are exercised by the Dominion government. *Ib.*

The Crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors, is not interfered with by the provision of the Bank Act (R. S. C. c. 120, s. 79), giving note holders a first lien on such assets, the Crown not being named in such enactment. *Gwynne and Patterson, J.J., contra*—Held, per Gwynne, J., that under legislation of the old Province of Canada, left unrepealed by the B. N. A. Act, no such prerogative could be claimed in the Provinces of Ontario and Quebec; the court would not, therefore, be justified in holding that such a right attached, under the B. N. A. Act, in one Province of Canada which does not exist in them all. *Ib.*

An insurance company, in order to deposit \$50,000 with the minister of finance and receive a license to do business in Canada, according to the provisions of the Insurance Act (R. S. C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed the government claimed payment in full of this money as money deposited by the Crown:—Held, reversing the judgment of the court below, Strong, J., dissenting, that it was not the money of the Crown but was held by the finance minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors. *Ib.*

See *Clarkson v. Attorney-General of Canada*, 15 O. R. 632; 16 A. R. 202.

## II. COMPENSATION FOR LANDS TAKEN OR INJURED.

The government of Canada, having taken the land of the defendant's testator for the purposes of the Welland canal, paid into court, under the statute, a sum awarded by the valuers, intended to cover all claims which the owner might have of any kind. The owner was to be at liberty to remove buildings, etc., and on payment of the money to convey free from all other incumbrances, including taxes. The plaintiff was lessee of the property so taken, and claimed compensation for disturbance:—Held, that the plaintiff was entitled to compensation out of the money paid into court, and that his claim was one which the owner was liable, under 37 Vict. c. 13, s. 1 (Dom.), to pay, and which should have been taken into consideration, and

which the evidence shewed had been taken into consideration, in settling the amount to be paid by the government on taking possession of the lands. *In re the Welland Canal Enlargement—Fitch v. McRae*, 29 Chy. 139.—Ferguson.

When land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia, 4th series, c. 36, s. 40 et seq., the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land. *Kearney v. Kean*, 3 S. C. R. 332.

T. C. S. devised his estate of Clark Hill, with the islands, lands, and grounds appertaining, to his nephew M. M.'s grandmother by her will, directed her executors to pay him \$2,000 a year so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate, and beautify the property known as Clark Hill, and the islands connected therewith:—Held, that the expropriation, under an Act of the legislature, of a part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated the arbitrators properly excluded the consideration of any contemplated loss by M. of this annuity. *In re Macklem and the Commissioners of the Niagara Falls Park*, 14 A. R. 20.

A failure by M. to reside and occupy would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate which must be by his own act or default; the vis major of a binding statute could not work a forfeiture. Upon the evidence the court refused to interfere with the amount of compensation awarded. *Ib.*

The statute 48 Vict. c. 21 (Ont.), does not empower the commissioners appointed thereunder to expropriate the rights of a road company or to close up any part of the road for the purposes of the Niagara Falls Park. *Re Niagara Falls Park—Fuller's Case*, 14 A. R. 65.

The statute 48 Vict. c. 21 (Ont.), authorized the taking of land for the purpose of a public park, and defined land, as including "any parcel of land, stream, \* \* \* and any easement in any land." There was no express provision for compensation for lands injuriously affected, the compensation, price, or value mentioned in the Act, being only for the land taken. Fourteen acres of an estate of thirty-three acres owned by B. were taken for the park. The thirty-three acres were separated by a road from another property owned by B. and leased by him for the purposes of an hotel for a term of twenty years from February, 1881. The water supply for the hotel was, and had been for thirty years, derived from springs on the fourteen acres. The court refused to interfere with the amount of compensation awarded, and the appeal was therefore dismissed, except as to the question of the supply of water for the hotel property. As to that, it being an easement which passed to the tenant under the lease, and being "land" within the meaning of the Act, the fourteen acres might be expropriated, leaving the easement to be enjoyed by B. as appurtenant to the hotel property; or it

might be extended to be a proper subject appearing upon whether or not award was refused under the circuit party. Per statute made, stating the value taken, it was tionately to the diminution in associated from arbitrators were in determining *Re Bush and Falls Park*, 1

See *Tylee v. Queen v. Regi Canal—Re the Wharf*, 1

## III.

The maxim applies to all a public debt *Mill Co. v. T*

As to liability of its servant C. R. 216.

For misfeas *McLeod*, 8 S.

## IV.

Proceedings ing debtor for *gina v. Stewa*

Per Ritchie nor the clerk officer in char minion of Car express or in Crown to any ally authorize tract duly on the contractor the specific m terms of the 4 S. C. R. 522

Forfeiture rations con See *McDiarm*

S. et al. m the Queen, re works, for t lump sum. a final estima and payment ferred a claim in such final in the constru changes and engineer of s cording to the new contract versing the exchequer, I

might be extinguished, in which case it would be a proper subject for compensation, and it not appearing upon the material before the court whether or not this had been considered, the award was referred back to the arbitrators, but under the circumstances without costs to either party. Per Patterson, J. A., although the statute made no express provision for compensating the owner for the part of his land not taken, it was fair and reasonable to add proportionately to the price of the part taken for any diminution in value of the part left when dissociated from the other; and therefore the arbitrators were right in acting upon that view in determining the amount of compensation. *Re Bush and the Commissioners of the Niagara Falls Park*, 14 A. R. 73.

See *Tylee v. The Queen*, 7 S. C. R. 651; *McQueen v. Regina*, 16 S. C. R. 1; *Re Trent Valley Canal—Re "Water Street" and "the Road to the Wharf"*, 11 O. R. 687.

### III. LIABILITY FOR TORTS.

The maxim that the Crown can do no wrong applies to alleged tortious acts of the officers of a public department of Ontario. See *Muskoka Mill Co. v. The Queen*, 28 Chy. 563.

As to liability of the Crown for the negligence of its servants. See *Regina v. McFarlane*, 7 S. C. R. 216.

For misfeasance of its servants. See *Regina v. McLeod*, 8 S. C. R. 1.

### IV. MISCELLANEOUS CASES.

Proceedings by attachment against absconding debtor for debt due to the Crown. See *Regina v. Stewart*, 8 P. R. 297, p. 2.

Per Ritchie, C. J. That neither the engineer nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada, have any power or authority, express or implied under the law, to bind the Crown to any contract or expenditure not specially authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *O'Brien v. The Queen*, 4 S. C. R. 529.

Forfeiture by the Crown of lands held by corporations contrary to the statutes of mortmain. See *McDiarmid v. Hughes*, 16 O. R. 570.

S. et al. made a contract with Her Majesty the Queen, represented by the minister of public works, for the construction of a bridge for a lump sum. After the completion of the bridge a final estimate was given by the chief engineer, and payment thereof made, but S. et al. preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, and caused by changes and alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of the claimants, a new contract between the parties:—Held, reversing the judgment of Henry, J., in the exchequer, Fournier, J., dissenting, that the

engineer could not make a new contract binding on the crown; that the claim came within the original contract and the provisions thereof which made the certificate of the chief engineer a condition precedent to recovery, and such certificate not having been obtained, the claim must be dismissed. *Regina v. Starrs*, 17 S. C. R. 118.

The Crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed. *Id.*

Semble, per Gwynne, J. There is no sound reason why the government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca v. Attorney-General of Canada*, 17 S. C. R. 612.

See *McArthur v. The Queen*, 10 O. R. 191, p. 472.

## CROWN LANDS.

I. PROPERTY OF THE DOMINION OR PROVINCES—See CONSTITUTIONAL LAW.

II. DOMINION LANDS ACT, 462.

III. FREE GRANTS AND HOMESTEADS ACT, 464.

IV. CROWN PATENTS.

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IX. CROWN TIMBER.

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XIII. ASSESSMENT OF—See ASSESSMENT AND TAXES.

XIV. POSSESSION OF—See LIMITATION OF ACTIONS.

XV. POWERS OF RAILWAY COMPANIES—See RAILWAYS AND RAILWAY COMPANIES.

### II. DOMINION LANDS ACT.

The plaintiff in his bill of complaint, alleged in the sixth paragraph as follows: "Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein, and procured proper affidavits, according to the statute, whereby he proved to the satisfaction of the dominion lands agent in that behalf (and the plaintiff charges the same to be true), that

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the said defendant Farmer had never settled on or improved the said lands assumed to be homesteaded by him or the lands herein in question, but had been absent therefrom continuously since his pretended homesteading and preemption entries, and thereupon the claim of the defendant Farmer under the said entries became and was forthwith forfeited, and any pretended rights of the defendant Farmer thereunder ceased, and the plaintiff thereunder, on or about the 8th May, 1875, and then and there with the assent and by the direction of the dominion lands agent, who caused the same to be prepared for the plaintiff, signed an application for homestead right to the lands in question in this suit, according to form A, mentioned in 35 Vict. c. 23, s. 33, and did make and swear to an affidavit according to form B, mentioned in section 33, sub-section 7, of the same Act, and did pay to the same agent the homestead fee of \$10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the statute and the regulations of the department, and that the statute said: Upon making this affidavit and filing it, and on payment of an office fee of \$10 (for which he shall receive a receipt from the agent), he should be permitted to enter the lands specified in the application; and thereupon, and in pursuance thereof, and in good faith, the plaintiff did forthwith enter upon said land and take actual possession thereof, and has ever since remained in actual occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of the said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate \$1,000." On demurrer for want of equity:—Held, reversing the judgment of the court below and allowing the demurrer, that the plaintiff had no locus standi to attack the validity of the patent issued by the crown to the defendant, as he had not alleged a sufficient interest or right to the land therein mentioned, within the meaning of section 69, or of sub-sections 7 and 8 of section 33 of 35 Vict. c. 23, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the crown, or a sufficient allegation that the crown was ignorant of the facts of plaintiff's possession and improvements, (Taschereau and Gwynne, J.J., dissenting.) *Farmer v. Livingstone*, 8 S. C. R. 140.

On the 21st November, 1881, Sinnott et al. obtained a permit from the crown timber agent, Manitoba, "to cut, take and have for their own use from that part of range 10 E that extends five miles north and five miles south of the Canadian Pacific Railway track," the following quantities of timber: 2,000 cords of wood and 25,000 ties; permit to expire 1st May, 1882. They obtained another permit on the 10th February, 1882, to cut 25,000 ties. In February, 1882, under leave granted by an order in council of 27th October, 1881, Scoble et al. cut timber for the purpose of the construction of the Canadian Pacific Railway from the lands covered by the permit of the 21st November, 1881. Sinnott et al., by their bill of complaint, claimed to be entitled

by their permit to the sole right of cutting timber on the said lands until the 1st May, 1882, and prayed that the defendants Scoble et al. might be restrained by injunction from cutting timber on said lands, and might be ordered to account for the value of the timber cut. An interim injunction was granted against Scoble et al., who justified their acts under the order in council of the 27th October, 1881, and denied the exclusive possession or title to the lands or standing timber. The injunction was made perpetual by the judge who heard the cause, but, on rehearing, the judgment was reversed, and it was ordered that an inquiry should be made as to damages suffered by defendants by reason of the issue of the interim injunction at the instance of the plaintiffs:—Held, that the decree made on rehearing by the court of Queen's Bench, Manitoba, should be affirmed, and that the permit in question did not come within the provisions of the Dominion Lands Act of 1879, and did not vest in Sinnott et al. (the plaintiffs), any estate, right or title in the tract of land upon which they were permitted to cut, nor did it deprive the government from giving like licenses or others of equal authority to other persons, as long as there was sufficient timber to satisfy the requirements of the plaintiffs' licenses. *Sinnott v. Scoble*, 11 S. C. R. 571.

### III. FREE GRANTS AND HOMESTEADS ACT.

By R. S. O. (1877), c. 24, free grants of lands for homesteads are only authorized to be made to men. *Rogers v. Louthian*, 27 Chy. 559.—Proudfoot.

The plaintiff was, in March, 1884, located as the purchaser of a lot in the township of Burleigh, and obtained a patent therefor in November, 1888, the patent being in the usual form of a patent in fee to a purchaser, without any reservation of timber or any reference to the "Free Grants and Homesteads Act." The defendants, assuming to act under a timber license issued in May, 1888, covering this and other lots, entered upon the lot after the issue of the patent and took timber therefrom. In the license the lot was referred to as "located and sold." The township of Burleigh was within the geographical limits described in section 4 of the Free Grants and Homesteads Act, R. S. O. (1887) c. 25, but had never been appropriated or set apart as free grant lands under the provisions of that Act:—Held, that the lot was not "land located or sold within the limits of the free grant territory," within the meaning of that Act, and that the patent was not subject to the reservations as to timber in that Act contained. The expression "Free Grant Territory" in section 10 does not refer to the whole territory or tract defined in section 4, but only to such portion of that territory or tract as may be actually set apart and appropriated by the Lieutenant-Governor in council under the Act:—Held, further, that there being no actual reservation in the patent the defendants had no right to cut the timber after its issue, and were liable in damages. Judgment of MacMahon, J., affirmed. *Shairp v. Lakefield Lumber Co.*, 17 A. R. 322.

The defendant was locatee of certain lands under the Free Grants and Homesteads Act, R. S. O. (1887) c. 25, and duly obtained patents there-

for. Afterwards he conveyed parts of the lands to secure the mortgage, empty from the meaning of a preemption extension or interest in the original location patent; but, in a nation, a mor does not vest "interest" in the land. *Cann v. Knol*, affirmed 20 O. J.

Plaintiff was homesteaded lot in May, 1877, order in council providing that he have the right to the uncleared to make necessary etc. The patent in June, 1883, reservations of waters. The timber license was justified by the authority affirming 13 O. J. or exceptions mentioned in the patent was not subject to council. Sent only before the order under the order as rights of the plaintiff upon the license. *Dunkin v. Coe*.

See Langmuir.

Per Strong, the letters patent is conclusive, behind the patent. C. R. 140.

Per Patterson, it is essential that the patent cannot be applied for by the crown. *Moffatt*.

In a patent in the 11th clause was described the patent on its face, and the statement of the patent (Grants and Homesteads Act, 1887) c. 25; and there was a locatee or that the locatee thereunder: deemed to be unconditional; have issued under



for. Afterwards he and his wife sold and conveyed parts of the land, he taking back mortgages to secure the purchase money:—Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of section 20, sub-section 2. The exemption extends to the land or any part thereof or interest therein, so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him *quâ* locatee. The word "interest" used in the sub-section does not extend to the chattel interest of a mortgagee. *Cann v. Knott et ux.*, 19 O. R. 422.—*Boyd. Affirmed* 20 O. R. 294.—Q. B. D.

Plaintiff was a locatee of a free grant and homestead lot, which, at the time he located it, in May, 1877, was subject to a regulation of an order in council of the 27th of May, 1869, providing that holders of timber licenses should have the right to haul their timber or logs over the uncleared portion of any land so located, and to make necessary roads thereon for that purpose, etc. The patent in favour of plaintiff was issued in June, 1883, and contained only the usual reservations of mines, minerals and navigable waters. The defendant was the holder of a timber license issued after the date of the patent, and justified the trespasses complained of under the authority of the order in council:—Held, affirming 13 O. R. 254, that the only reservations or exceptions from the grant were those mentioned in the patent, and that the plaintiff's land was not subject to the regulations of the order in council. Semble, that such regulations apply only before the issue of the patent to lands located under the order in council, and then only so far as rights of way, etc., are expressly conferred upon the licensee by the terms of his license. *Dunkin v. Cockburn*, 15 A. R. 493.

See *Langmaid v. Mickle*, 16 O. R. 111, p. 470.

#### IV. CROWN PATENTS.

##### 1. Generally.

Per Strong, J., that when the crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot set up equities behind the patent. *Farmer v. Livingstone*, 8 S. C. R. 140.

Per Patterson, J. A.—The rule that acceptance is essential to the operation of an instrument cannot be applied to letters patent from the crown. *Moffatt v. Scratch*, 12 A. R. 157.

In a patent from the Crown, of lots 16 and 17, in the 11th concession of Snowdon, the patentee was described as "a free grant settler;" but the patent on its face purported to grant the land absolutely and unconditionally, and did not contain the statements required by section 16 of the Free Grants and Homesteads Act, R. S. O. (1877), c. 24; and there was no evidence that the patentee ever was a locatee of the land under said Act, or that the Crown intended issuing the patent thereunder:—Held, that the land must be deemed to have been granted absolutely and unconditionally. Semble, that the patent might have issued under section 12 of the Public Lands

Act, R. S. O. (1877), c. 23. *Canada Permanent Loan and Savings Co. v. Taylor*, 31 C. P. 41.—*Osler*.

Held, that, in construing a patent, reference might be had to papers in the crown lands office connected with the application for the patent. *Brady v. Sadler*, 13 O. R. 462.—*Proudfoot*. See S. C., 16 O. R. 49; 17 A. R. 365.

See *Kennedy v. City of Toronto*, 12 O. R. 211, p. 493; *Dunkin v. Cockburn*, 15 A. R. 493, p. 465.

#### V. RIGHTS BEFORE ISSUE OF PATENT.

The R. S. O. c. 25, s. 26 (1877), declares that any mortgage or lien created by the nominees of the crown in lands for which the patent has not issued, shall in law and equity have the same force and effect, and no other, as if letters patent had before the execution of such instrument been issued in favour of the grantor:—Held, that under this provision a mortgagor and mortgagee had all the rights and liabilities as between themselves, that they would have had, had the freehold been actually vested in the mortgagor; that the mortgagor was entitled to set up the statute of limitations against any one claiming under such mortgage; that the exercise of the power of sale by the mortgagee had not the effect of stopping the running of the statute, and that the fact that the commissioner of crown lands before the issuing of the patent, had made a memorandum in his "ruling" upon the claims of the parties, that the sales made to them were "not intended to cut out the right, if any, Dr. Dickenson may have as such mortgagee," had not the effect of eschepping the mortgagor or those claiming under him, from claiming the benefit of the statute.—*Spragge, C.*, dissenting. *Walson v. Lindsay*, 27 Chy. 353. Affirmed, 6 A. R. 609.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. Neither can parties in possession of crown lands before patent issued dedicate any portion of the same; parties so in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained. *Rae v. Trim*, 27 Chy. 374.—*Blake*.

Where a person is in possession with the assent of the Crown, paying rent, or where a person is a purchaser, although the patent has not issued, such person can maintain trespass against a wrong-doer. *Brucya v. Rose*, 19 O. R. 433.—*MacMahon*.

See also Subhead IX. 1, p. 469.

#### VI. RIGHTS OF GRANTEES.

L., in 1875, applied for a homestead entry for the S. W.  $\frac{1}{4}$  of section 30, township 6, range 4 west, preempted by F., and paid \$10 fee to a clerk at the office, but was subsequently informed by the officers of the Crown that his application could not be recognized, and was re-



funded the \$10 he had paid. F. subsequently paid for the land by a military bounty warrant in pursuance of section 23 of 35 Vict. c. 23. L. entered upon the land and made improvements. In 1878, after the conflicting claims of F. and L. had been considered by the officers of the Crown, a patent for this land was granted by the Crown to F., who brought an action of ejectment against L. to recover possession of the said land. F., at the trial, put in, as proof of his title the letters patent, and L. was allowed against the objection of F.'s counsel, to set up an equitable defence, and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The judge, who tried the case without a jury, rendered a verdict for the defendant:—Held, on appeal, reversing the judgment of the court of Queen's Bench (Manitoba), that L. not being in possession under the statute, had no parliamentary title to the possession of the land, nor any title whatever that could prevail against the title of F. under the letters patent. *Farmer v. Livingston*, 5 S. C. R. 221.

Right of commissioner of crown lands to grant a right to construct a wharf over the navigable waters of the bay of Toronto. See *Clendinning v. Turner*, 9 O. R. 34.

Quere, whether the soil at the bottom of the Toronto bay at the place in question was vested in the province or in the city of Toronto, under the patent from the Crown of the island. *Id.*

Rights of patentee as riparian proprietor. See *Hawkins v. Mahaffy*, 29 Chy. 326; *Ratle v. Booth*, 10 O. R. 351; 11 O. R. 491; 14 A. R. 419; 15 App. Cas. 188.

See *Watson v. Lindsay*, 27 Chy. 253; 6 A. R. 606; *Duncan v. Cockburn*, 15 A. R. 493, p. 465.

See also Subhead IX., p. 469.

## VII. CANCELLATION OF PATENT.

Where the crown lands commissioner had erroneously returned certain lands to the municipal officers as patented, whereas, although a patent had been prepared, it had never been intended to be operative, nor been delivered to the grantee, B., who had paid only a part of the purchase money, and the lands were afterwards sold for taxes:—Held, per Ferguson, J., B. having assigned his interest, and the assignee having surrendered his interest to the Crown, before the issue of the patent to M., it could not be said that at the time of the issue of the patent to M., there was any "adverse claim" to the lands in question within 23 Vict. c. 2, s. 22, so as to debar the commissioner from cancelling the patent to B. under that section. *O'Grady v. McCaffray*, 2 O. R. 309.—Chy. D.

It is not essential to the validity of a disclaimer that it should be by deed or by record. Where therefore on the 19th June, 1818, a free grant or patent for 200 acres of crown lands was issued in favour of W., as daughter of a U. E. Loyalist, who shortly afterwards petitioned the Governor in council, stating that the lands were granted to her by mistake and without her authority. whereupon an order in council was

passed in 1820 allowing her to surrender them:—Held, affirming the judgment of the C. P. D., 8 O. R. 147 (*Patterson, J. A.*, dissenting), that the lands by reason of W. disagreeing to the grant never passed out of the Crown. *Moffatt v. Scratch*, 12 A. R. 157.

Letters patent having been issued to F. of certain lands claimed by him under the Manitoba Act (35 Vict. c. 3, as amended by 35 Vict. c. 52), and an information having been filed under R. S. C. c. 54, s. 57, at the instance of a relator claiming part of said lands to set aside said letters patent as issued in error or improvidence:—Held, that a judgment avoiding letters patent upon such an information could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by *scire facias*. *Fonseca v. Attorney-General of Canada*, 17 S. C. R. 612.

The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters patent; and F.'s title having been recognized by the government as good and valid under the Manitoba Act, and the lands granted to him in recognition of that right, the letters patent could not be set aside as having been issued improvidently except upon the ground that some other person had a superior title also valid under the Act. *Id.*

Letters patent cannot be judicially pronounced to have been issued in error or improvidently when lands have been granted upon which a trespasser, having no colour of right in law, has entered and was in possession without the knowledge of the government officials upon whom rests the duty of executing and issuing the letters patent, and of investigating and passing judgment upon the claims therefor; or when such trespasser, or any person claiming under him, has not made any application for letters patent; or when such an application has been made and refused without any express determination of the officials refusing the application, or any record having been made of the application having been made and rejected. *Id.*

Per Patterson, J.—That in the construction of the statute effect must be given to the term "improvidence" as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land, which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the court to form a definite opinion as to the relative strength of opposing claims. *Id.*

See *McArthur v. The Queen*, 10 O. R. 191, p. 472.

## VIII. MINERALS.

See *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 App. Cas. 295, p. 314.

Under sect amended by the locattee of trees as may building and may also cut to be removed for cultivation necessary but the limit of s was nothing ing and cult in various sh good faith o vating, as w being necess together and cut such pin fencing wher they can be when the tre clearing for disposed of. *Lumber Co.*,

Trees cut of cultivation owner, and timber licens taken by the It was prove other logs a Cameron, C him by being lumber at hi

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## IX. CROWN TIMBER.

## 1. Rights of Locatees.

Under section 10 of R. S. O. (1877), c. 24, as amended by section 2 of 43 Vict. c. 4 (Ont.), the locatee of land "may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, and may also cut and dispose of all trees required to be removed in the actual clearing of such land for cultivation, but no pine trees (except for the necessary building aforesaid) shall be cut beyond the limit of such actual clearing :"—Held, there was nothing to prevent the locatee cutting, clearing and cultivating the land in several parcels in various shapes and forms, so long as done in good faith for the purpose of clearing and cultivating, as was found to be the fact here; it not being necessary that the clearings should be together and contiguous; that the locatee may cut such pine trees necessary for building and fencing wherever he chooses on the land, but they can be only used for such purpose; but when the trees are cut in the actual process of clearing for cultivation they may be sold and disposed of. *Cockburn v. Muskoka Mill and Lumber Co.*, 13 O. R. 343.—C. P. D.

Trees cut by the locatee in the actual process of cultivation were sold to the plaintiff, a mill owner, and were seized by the defendants, the timber licensees, who also had a mill, and were taken by them thereto and cut up into lumber. It was proved that the plaintiff could not get other logs at that season of the year:—Held, Cameron, C. J., dissenting, that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the logs into lumber at his mill. *Id.*

Where a locatee of lands, in clearing a portion thereof, reserved twenty-six pine trees thereon, thinking that they would be useful for building, but had previously erected a permanent house and stable, and put up fences, and had enough timber left for building a barn without reserving these trees:—Held, that by thus reserving these trees, the locatee left them the property of the Crown, and a licensee of timber under the Crown had a right to cut and remove them. *Parker v. Maxwell*, 14 O. R. 239.—Chy. D.

Where a locatee of lands left certain trees standing temporarily on a certain portion of the land which he was in process of clearing, intending first to burn the fallow and then to cut them down:—Held, that a licensee of timber under the Crown, had no right to interrupt the locatee in clearing the lands and to cut and remove such trees. *Id.*

The meaning of 43 Vict. c. 4 (Ont.), is, that all standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee; otherwise, when cut, it still continues the property of the Crown. *Id.*

In 1871, S., under the Free Grant and Homesteads Act, located certain land in the crown lands department, but never entered into possession, or performed the settlement duties. The lot was located through B., the crown lands agent for the district. In 1873 S. sold the timber on the lot to B. In 1875 B. wrote the department

asking if a cancellation and relocation would affect his title to the pine, and that it be relocated subject to his claim. The department replied that if the purchase was a bona fide one, and in accordance with the order in council, a relocation would not affect his claim. The order in council was that the department would recognize the right of all purchasers or locatees of free grant lands who had purchased or located any lot on or before 30th September, 1871, and who on that day were in actual occupation of, or resident on the lots located, to sell and dispose of all pine trees on the said lots. On 10th September, 1875, S.'s location was cancelled for nonperformance of the settlement duties; and on the 3rd July, 1876, the lot was relocated to the plaintiff. The plaintiff was informed by B. of his purchase of the timber, and stated that he had a good title to it, which the plaintiff believed, and acted on that belief. On the 9th November, 1886, the patent issued to the plaintiff, and contained no reservation of the pine trees. In 1883, B. sold the timber to the defendant, who in October, 1886, cut same notwithstanding he was notified by the plaintiff to desist. The timber was removed by defendant after the issue of the patent. In an action by plaintiff to recover the value of the timber:—Held, that as the patent contained no reservation of the pine trees standing or being on the land, and as the land was located prior to 43 Vict. c. 4 (Ont.), the trees "remaining on the land" at the time of the patent passed to the plaintiff; that prior to the issue of the patent, the locatee under R. S. O. (1877), c. 24, s. 10, had no right to cut timber except for building, fencing, and fuel, and in the actual clearing of the land for cultivation; nor was there any right under 37 Vict. c. 23 (Ont.), for the locatee was not on or before 30th September, 1871, "in actual occupation or resident on the lots located;" and, semble, that the words, "remaining on the land," applied only to the trees not then cut; but it was not necessary to decide this point, for the plaintiff being in possession with the assent of the Crown, he had title to the timber as against the defendant a wrong-doer:—Held, also that the plaintiff having, acted on B.'s misrepresentations, was not estopped from bringing the action. *Langmaid v. Mickle*, 16 O. R. 111.

## 2. Rights of Licensees.

The plaintiff herein, a timber licensee, sold his interest in the license and limits to one W., who entered and cut timber, but the transfer was not proved, and by the regulations of the crown lands department all transfers were to be in writing and subject to their approval, and were to be valid only from such approval:—Held, that the legal title to the limits and timber thereon was in the plaintiff, and that W.'s possession was the plaintiff's, who was entitled to maintain an action for damage done to the limits. *Booth v. McIntyre*, 31 C. P. 183.—C. P. D.

Under the provisions of the Quebec Act, 41 Vict. c. 14, the D. of C. L. Co., in November, 1881, alleging themselves to be proprietors and in possession of a number of lots in the township of Whitton, P. Q., obtained an ex parte injunction, restraining G. B. H. et al. from further

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prosecuting lumbering operations which they had begun on these lots. G. B. H. et al. were cutting in virtue of a license from the government, dated 3rd May, 1881, which was a renewal of a former license. By a report of the executive council of the province of Quebec, dated 1st April, 1881, and approved by the lieutenant-governor in council on the 7th of the same month, the commissioner of crown lands was authorized to sell to the company the lands in question, and the company deposited \$12,000 to the credit of the department, to be applied on account of the intended purchase. On the 9th May, the company gave out a contract for the clearing of a portion of the land, and on the 19th July, 1881, the commissioner executed a deed of sale in favour of the company, subject, amongst other conditions, "to the current licenses to cut timber on the lots." Upon the writ being returned, the injunction was suspended. G. B. H. et al. answered the petition, and the superior court dissolved the injunction. On appeal to the court of Queen's Bench, this judgment was reversed and the injunction applied for made perpetual. On appeal to the Supreme Court of Canada it was:—Held (Henry and Gwynne, J.J., dissenting), that the D. of C. L. & C. Co. had not acquired any valid title to the lands in question prior to the 19th July, 1881, and that by the instrument of that date their rights were subordinated to all current licenses, and G. B. H. et al. having established their right to possess said lands for the purpose of carrying on their lumber operations, under a license from the Crown dated 3rd May, 1881, the injunction granted ex parte to the D. of C. L. & C. Co., in November, 1881, under the provisions of 41 Vict. c. 14 (Que.), had been properly dissolved by the superior court. *Hall v. Dominion of Canada Land and Colonization Co. (Limited)*, 8 S. C. R. 631.

McA. filed an application with the proper government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the commissioner of crown lands; but owing to a defective survey it was impossible then to convey the berths. Subsequently the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he having removed to the United States, never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for \$4,000. B. afterwards became entitled by subsequent assignments for value to all McA.'s interest, the assignments being duly filed in the crown lands department. McA. and B., in 1884 joined in a petition of right for the issue of the license, and the Attorney-General demurred to the same:—Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would probably be under ordinary circumstances, a defence to a claim for specific performance; but under the facts in this case a vendor would not be allowed to set up such a defence:—Held, also, that as the assignments were duly filed, and the Crown had the power of forfeiting the claim for nonpayment, and

did not do so, even were the rule between subjects to apply, it would not be a bar in this case:—Semble, it may be doubted whether the same Rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited. *McArthur v. The Queen*, 10 O. R. 191.—Proudfoot.

Construction of railways through lands under timber license. See *Booth v. McIntyre*, 31 C. P. 183; *Foran v. McIntyre*, 45 Q. B. 288; *McArthur v. Northern and Pacific Junction R. W. Co.*, 15 O. R. 733; 17 A. R. 86.

See *Sinnott v. Scohle*, 11 S. C. R. 574, p. 464; *Parker v. Macwell*, 14 O. R. 239, p. 469; *Dunkin v. Cockburn*, 15 A. R. 493, p. 465.

#### X. HIGHWAYS VESTED IN THE CROWN.

See *Rae v. Trim*, 27 Chy. 374; *Re Trent Valley Canal*—"Re Water Street and The Road to the Wharf," 11 O. R. 687.

### CROWN TIMBER.

See CROWN LANDS.

### CUMMINGS ISLAND.

See *Regina v. County of Carleton*, 1 O. R. 277.

### CURTESY, TENANT BY.

See ESTATE.

### CUSTODY OF INFANTS.

See INFANT.

### CUSTOM AND USAGE.

Quare, whether evidence as to how contracts for artesian wells were usually made in Barrie, should have been properly received in this case. *Barrie Gas Co. v. Sullivan*, 5 A. R. 110.

The plaintiffs alleged that it was the custom of agents to give each other credit for premiums on reinsurance and to settle at the end of the month, when the balance, if any, was handed over, but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents, was proved:—Held, that even if such a custom had been proved to exist between local agents, it would not be binding on the company, unless authorized by it. *Western Assurance Co. v. Provincial Ins. Co.*, 5 A. R. 190.

Evidence of custom in foreign country rejected where the contract was made in Ontario. See *Williams v. Corbey*, 5 A. R. 626.

Held, that the colt in question in this case, five weeks old, following its dam, could not be said to

be running at country, which thus to follow *Trunk R. W.*

Held, that barbed wire for other municip erect them, al shewing that ous or a nuisa

At the trial draft was retu understand by To this ques the judge rule (which it was by the usage of, had a meat them in their could not be p ers could not the meaning governed, and Ex. 200) a pro for the questio have been ask ces which wo words in othe that upon pro tion would ha the judge's ru counsel from trial was order 475—Q. B. D.

A promisor rity, but was banking corpor indorsers of p that the indors thereon as a de interest be dec charge interest it if possible.

Custom of h stock. See *M land v. Cor*, 6

Custom of F C. R. 318.

See *Provinci 5 S. C. R. 258*; *real Forwards Proctor*, 5 O.

See *Attorney 13 S. C. R. 29*

DA

be running at large, the universal custom of the country, which ought to govern, being for colts thus to follow the dam. *Hillyard v. Grand Trunk R. W. Co.*, 8 O. R. 583—Q. B. D.

Held, that evidence of the common use of barbed wire fences in other townships, and that other municipalities held out inducements to erect them, should not have been rejected, as shewing that they were not considered dangerous or a nuisance. *Id.*

At the trial the bank manager to whom the draft was returned, was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the judge ruled that in the absence of evidence (which it was admitted could not be given), that by the usage of bankers the words complained of, had a meaning other than that conveyed by them in their natural construction, the question could not be put:—Held that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, and (following *Daines v. Hartley*, 3 Ex. 200) a proper foundation had not been laid for the question; that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered. *Huber v. Crookall*, 10 O. R. 475—Q. B. D.

A promissory note was dishonoured at maturity, but was not protested by the holders (a banking corporation) because of a waiver by the indorsers of presentment and notice:—Held, that the indorsers were not liable to pay interest thereon as a debt. Nor could a contract to pay interest be deduced from a usage of banks to charge interest on overdue debts, and to collect it if possible. *Re McDougall*, 12 A. R. 265.

Custom of brokers in dealing with customers' stock. See *Mara v. Cox*, 6 O. R. 359; *Sutherland v. Cox*, 6 O. R. 505; 15 A. R. 541.

Custom of Paris. See *Pilon v. Brunet*, 5 S. C. R. 318.

See *Provincial Ins. Co. of Canada v. Connolly*, 5 S. C. R. 258; *Morton v. Kingston and Montreal Forwarding Co.*, 32 C. P. 360; *Page v. Proctor*, 5 O. R. 238.

## CUSTOMS.

See REVENUE.

## COY-PRÉS.

See *Attorney-General of Nova Scotia v. Azford*, 13 S. C. R. 294.

## DAMAGE FEASANT.

See DISTRESS.

## DAMAGES.

- I. GENERALLY, 474.
- II. PROXIMATE OR REMOTE, 476.
- III. PRACTICE OF APPELLATE COURTS, 478.
- IV. ACTIONS ON CONTRACTS.
  1. *Carriage of Goods*—See RAILWAYS AND RAILWAY COMPANIES—SHIP.
  2. *Sale of Goods*—See SALE OF GOODS.
  3. *Sale of Land*—See SALE OF LAND.
  4. *Sale of Timber*—See TIMBER.
  5. *Warranty*—See WARRANTY.
  6. *Work and Labour*—See WORK AND LABOUR.
  7. *Liquidated Damages or Penalty*—See PENALTY BY CONTRACT.
- V. ACTIONS ON COVENANTS.
  1. *Generally*—See COVENANT.
  2. *Covenants for Title*—See COVENANTS FOR TITLE.
  3. *In Leases*—See LANDLORD AND TENANT.
- VI. ACTIONS FOR PERSONAL INJURIES.
  1. *Libel and Slander*—See DEFAMATION.
  2. *Malicious Proceedings*—See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.
  3. *Negligence*—See NEGLIGENCE.
- VII. ACTIONS FOR INJURY TO PROPERTY.
  1. *Distress*—See DISTRESS.
  2. *Mesne Profits*—See EJECTMENT.
  3. *Party Walls*—See BUILDINGS.
  4. *Lateral Support*—See LATERAL SUPPORT.
  5. *Liability of Municipalities*—See MUNICIPAL CORPORATIONS—WAY.
  6. *Liability of Railway Companies*—See RAILWAYS AND RAILWAY COMPANIES.
  7. *Trespass*—See TRESPASS.
  8. *By Drainage*—See WATER AND WATER COURSES.
- VIII. COMPENSATION IN ACTIONS FOR SPECIFIC PERFORMANCE—See SPECIFIC PERFORMANCE.
- IX. ASSESSMENT OF DAMAGES.
  1. *Notice of*—See TRIAL.
  2. *By Master or Referee*—See PRACTICE.
  3. *By Jury*—See TRIAL.
  4. *Entering Judgment*—See JUDGMENT.
- X. EXCESSIVE DAMAGES—See NEW TRIAL.
- XI. OTHER PARTICULAR CASES—See THE SEVERAL TITLES.

### I. GENERALLY.

Damages for sale of stock given in pledge before default of pledgor. See *Carnegie v. Federal Bank*, 5 O. R. 418.

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Damages to a municipal corporation upon failure of defendant in performance of contract to carry on manufactures according to the terms of a by-law granting him aid. See *Village of Brussels v. Ronald*, 4 O. R. 1; 11 A. R. 605.

Petition of right for damages for failure on the part of the Crown to perform agreement. See *Windor and Annapolis R. W. Co. v. Regina*, 11 App. Cas. 335.

The measure of damages recoverable by tenant for life of insured premises is the full value of such premises to the extent of the sum insured. *Caldwell v. Stadacona Fire and Life Insurance Co.*, 11 S. C. R. 212.

The plaintiff had agreed with the defendant to purchase the claim to land scrip in Manitoba, of a half-breed, and defendant procured to be assigned to plaintiff the claim of one alleged to be a child of a half-breed. This proved to be erroneous, and the scrip which had been issued to him was worthless:—Held, affirming the judgment of the County Court that the plaintiff was entitled to recover from the defendant the amount paid by the plaintiff for the purchase of the so-called right; the plaintiff to assign to the defendant, quantum valeat, the land scrip he had received. *Burns v. Young*, 10 A. R. 215.

Per Hagarty, C. J. O., and Galt, J.—No court has or ought to have the right *ex proprio motu* to direct judgment for nominal damages where a jury has refused to award them. Per Osler, J. A.—Nominal damages should not be added, unless it clearly appear that such damages are a mere matter of form, or that the omission to find them was accidental, or unintentional, or an oversight following a distinct intention to find the plaintiff's cause of action proved. *Wills v. Carman*, 14 A. R. 656.

Per Patterson, J. A.—The jury having left no fact undetermined, the plaintiff was entitled to judgment, which might properly be entered for nominal damages with full costs. *Id.*

Defendant agreed to furnish plaintiff with money to construct a drain in the township of Dunwich known as the Mennie drain, the amount to be furnished "not to exceed the sum of \$1,500 at any time," and to pay the same to plaintiff as often and in such sums as might be required, the plaintiff to give the defendant his note for each sum required, and to pay defendant interest at twelve per cent. per annum for the use of said moneys. Plaintiff alleged that upon the strength of this agreement he contracted with the township to construct the drain. Defendant furnished money from time to time to the plaintiff, exceeding in all \$1,500, but not sufficient to complete the drain, and defendant refused to furnish more. The plaintiff borrowed moneys from others at less than twelve per cent. interest, but claimed damages for alleged breach of his agreement, contending that he was thereby delayed in completing the drain, and that owing to such delay and to the winter setting in he lost largely, instead of making a profit, which he would otherwise have made:—Held, that whether the agreement was to furnish money to the extent of \$1,500 only, or to such extent as might be necessary for the construction of the drain, not exceeding \$1,500 at any one time, the only damages for which defendant was liable would be

the difference between the rate of interest payable to the defendant under the agreement and the market rate of interest at the time of the breach. Per Armour, J., under the true construction of the agreement the defendant was bound to supply \$1,500 only. *Mennie v. Leitch*, 8 O. R. 397.—Q. B. D.

The defendant, who was a contractor for certain work in this province, entered into an agreement with the plaintiffs that if they would go to New York, at their own expense, and procure about 200 labourers, he would give them work at \$1.25 a day. The plaintiff brought the labourers but the defendant refused to employ them. The plaintiffs were allowed as damages for the breach of the agreement, \$25 their expenses in going to and returning from New York, and \$700 the amount of advances made by them in paying the fares of certain of the labourers from New York. They were not allowed commission that would have been received by them from the men if employment had been furnished. Judgment of the Queen's Bench Division affirmed. *Mandia v. McMahon*, 17 A. R. 34.

Damages in action against sheriff for taking insufficient bond in action of replevin. See *Norman v. Hope*, 13 O. R. 556; 14 O. R. 287.

See *Duggan v. London and Canadian Loan & Agency Co.*, 19 O. R. 272, but see S. C. in Court of Appeal.

## II. PROXIMATE OR REMOTE.

Plaintiff bought seed barley from defendant guaranteed to be clean. The seed was sown and it was afterwards discovered that it was mixed with a weed called wild vetches or wild peas, which took root and grew up with the barley. In an action to recover damages for depreciation in the value of the farm the evidence shewed that the plaintiff had not sustained any damage to his crop, but he tendered evidence to shew depreciation in the value of the farm which the learned judge refused to receive. On motion for a new trial:—Held (reversing the judgment of Galt, J.), the plaintiff should have been allowed to substantiate if he could that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm. *McMullen v. Free*, 13 O. R. 57.—Chy. D.

The defendants having built a subway in front of the plaintiffs' property, and in so doing lowered the highway so as to cut off the access thereto, which was previously enjoyed, under the circumstances set out in 7 O. R. 270; 8 O. R. 59; 12 A. R. 393; 12 S. C. R. 250, and 12 App. Cas. 602, it was referred to an official referee, to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants, and to fix the compensation proper to be paid in respect thereof. On such reference the referee ruled, (1) that the measure of damages was the difference in value of the property before and after the construction with interest added; (2) that the prospective capabilities or value of the land could not be taken into account except so far as such element entered into the computation of the then market value, or had regard to what would have been the present value of the property had the subway not been constructed; and

(3) that the special damages appeal from the corporation: were not part of their tort by good all damages would lie for ages being of jury to the evidence. If, in the event, it was not covered under the insurance might the property prospective of the trespasser's compensation on to be used to detriment of the present and *West v. Park*

Where a contract entered the eastern western part, on a reference actual depreciation of the city, yet from such defect for consideration a loss in tax reasonably caused fault formed capitalized so compensation titled. Statute much less been municipality by regulation being personal loss sellers or citizen station, or the land individual could not be of the damage. Held, also, that they were to the waste should be as done either recting a year *v. Credit Valley* Boyd.

After the Ditches and completion of the labouring land of the parties required nearer, to inspecting it complete the plaintiff inspect the work according to the of the award. If in consequence water remain the provision



(3) that the plaintiffs were not entitled to special damages for injury to their business. On an appeal from this ruling it was:—Held, that the corporation were liable as wrong-doers, who were not protected from the consequences of their tort by any statutory provision, to make good all damages sustained, for which an action would lie for their unauthorized act, such damages being of a twofold character, involving injury to the plaintiffs' land and to their business. If, in the evidence, one injury could be discriminated from the other, it was competent to recover under both heads. Held, also, that evidence might be received of the present value of the property with a view to throw light on the prospective capabilities of the land at the date of the trespass, but not to form a basis for compensation on its present value; such evidence to be used to aid in fixing compensation for the detriment sustained at the date of the perpetration of the wrong, having regard to the then present and potential value of the property. *West v. Parkdale*, 15 O. R. 319.—Boyd.

Where a railway company in breach of a contract entered into by them to run trains from the eastern part of the city of St. T. to the western part, ceased to run such trains:—Held, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners, and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly the enquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued. Constat, that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighbourhood could not be reckoned as constituents per se of the damages suffered by the corporation. Held, also, that if the railway company admitted that they were never again going to run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment. *City of St. Thomas v. Credit Valley Railway Co.*, 15 O. R. 673.—Boyd.

After the time fixed by an award under the Ditches and Watercourses' Act, 1883, for the completion of certain drainage work by neighbouring landowners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work with the object of having it completed according to the award, but as the plaintiff alleged the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, etc.:—Held, that the provisions of section 13 of the above Act as

to the inspection by the engineer is imperative, and an action would lie for breach of his duty; but even if the evidence had shown such a breach, the damages claimed were not the proximate, necessary, or natural result thereof. The other provisions of section 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance. Those who by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages. *O'Byrne v. Campbell*, 15 O. R. 339.—Q. B. D.

### III. PRACTICE OF APPELLATE COURTS.

The court on appeal directed a verdict to be entered for the plaintiff against a tavern keeper for selling liquor to her husband after being forbidden by the plaintiff, his wife, to do so, but referred it back to the County Court judge to assess the damages, declining to follow the course adopted in *Denny v. The Montreal Telegraph Co.*, 3 A. R. 628. *Audin v. Davis*, 7 A. R. 478.

In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages. *Levi v. Reed*, 6 S. C. R. 482.

Per Gwynne, J., a Court of Appeal should not interfere with damages awarded by a judgment under consideration in appeal unless they appear to have been calculated upon a wrong principle, or arrived at without regard to considerations which ought to govern a tribunal in awarding damages. It is not sufficient if the judges in the appeal sitting as judges in the first instance might have given, as some of the judges in the court below in this case, were disposed to give larger damages. *Mayor of the City of Montreal v. Hall*, 12 S. C. R. 74.

### DEATH.

I. ABATEMENT OF ACTION—See ACTION.

II. PRESUMPTION AS TO—See EVIDENCE.

III. OF PARTNER—See PARTNERSHIP.

IV. OF SURETY—See PRINCIPAL AND SURETY.

V. SOIRE FACIAS AND REVIVOR—See SOIRE FACIAS AND REVIVOR.

Death of sole defendant—Adding parties. See *McCarthy v. Arbuckle*, 31 C. P. 48.

Death between verdict and judgment. See *Sibbald v. Grand Trunk R. W. Co.*, 19 O. R. 164; *Muirhead v. Shirreff*, 14 S. C. R. 735; *White v. Parker*, 16 S. C. R. 699.

Order for judgment when after a verdict the judge who presided at the trial died before giving



ing judgment thereon. See *Wellbanks v. Conger*, 12 P. R. 354.

Death of sheriff appointed assignee under R. S. O. (1887), c. 124. See *Brown v. Grove*, 18 O. R. 311.

Dying declaration. See *Regina v. McMahon*, 18 O. R. 502.

## DE BENE ESSE.

See EVIDENCE.

## DEBENTURES.

I. MUNICIPAL—See MUNICIPAL CORPORATIONS.

II. RAILWAY—See RAILWAYS AND RAILWAY COMPANIES.

Action on a debenture, by which the defendants agreed to pay to the bearer £200 stg. at the office of a named bank and on a named day, upon presentation and surrender there of the debenture. Averment of performance of all conditions precedent. Breach, non-payment of the principal sum:—Held, by Osler, J., and affirmed by the full court, (1) that the presentation and surrender of the debenture at such place and date were conditions precedent, and the performance of such conditions having been averred in the declaration, a replication alleging presentation on a later day was a departure; (2) that it was no objection to a replication that it shewed for the first time that interest only was claimed, for that being merely an accessory to the principal, need not be claimed as damages:—Held, also, that a plea which, after traversing the presentation of the debenture modo et forma, alleged it was afterwards paid and was then duly surrendered to the defendants, was a good plea, as the plaintiffs, by excepting to it, admitted payment of the principal sum, which would include the nominal damages, if any, alone recoverable for its detention, while the surrender of the debenture would shew that the payment was in satisfaction and discharge of the debt, if not of the damages also: that it was no answer to the plea to say that the surrender before the damages were paid was by mere oversight and inadvertence so long as it appeared to be intentional; but that it would be a good answer to say that such delivery was on the express agreement that the right to damages was reserved:—Held, also, that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants. *Osborne v. Preston and Berlin R. W. Co.*, 9 C. P. 241, and *Fellows v. Ottawa Gas Co.*, 19 C. P. 174, commented upon. *Montreal City and District Savings Bank v. County of Perth*, 32 C. P. 18.—C. P. D.

The C. P. & M. Railway company being authorized by 38 Vict. c. 47 (Ont.), to issue preferential debentures, the holders of which, it was enacted might, on default in payment, obtain a

foreclosure or sale of the railway by suit in chancery, the directors passed a by-law enacting that such debentures should be issued, under the seal of the company, and should "be negotiated from time to time as the proceeds thereof shall be required for the purposes of the company by the managing director." Debentures were accordingly issued in blank, and handed to the managing director, who, subsequently, the railway being indebted to the plaintiff, delivered certain of them to the latter, as security for such debt. The debentures were in the following form: debenture No.

The C. P. & M. Railway Company owes the bank of Toronto, or order, the sum of \$1,000 payable in ten years \* \* \* with interest at eight per cent. per annum, payable half-yearly, on presentation of the proper coupons hereto attached. The name, "Bank of Toronto" was not filled in until about the time of delivery to the plaintiffs, who now brought this action for an account of what was due under the debentures and payment, or, in default, a sale by the court of the property of the company:—Held, that the debentures were valid, and judgment must go as asked. The strict rules of the common law relating to deeds are not applicable to such debentures, but rather the rules of the law merchant relating to negotiable securities. But if this were not so, the fact that the name, bank of Toronto, was not filled in until delivery to the plaintiffs did not make the debentures void; it would come within that class of cases where deeds have been held good notwithstanding an alteration or subsequent addition, because, at the time of execution, there was something which could not be ascertained, and was therefore to be filled up afterwards. Here, however, there was no execution, which imports delivery, prior to the time when the name was filled in:—Held also, that, though the debentures were under seal, this did not detract from their character, which was rather that of promissory notes than of mortgages; and though the Act made them a charge on all the property of the company, with a right of foreclosure and sale, this was something superinduced upon the security by virtue of the statute:—Held, further, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and the company would be estopped from relying on such defences as the above:—Held, lastly, that inasmuch as it appeared that these debentures were delivered with a view to facilitate the company's operations in getting out and disposing of ore, the main branch of its business, this was a "negotiation" of them "for the purposes of carrying on the company's business," and so within the meaning of the aforesaid Act and by-law. *Bank of Toronto v. Cobourg, Peterborough, and Marmora R. W. Co.*, 7 O. R. 1.—Boyd.

Illegal issue of railway bonds rendered valid by Act of the legislature. See *City of Quebec v. Quebec Central R. W. Co.*, 10 S. C. R. 563.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada that a debenture being a negotiable instrument a railway company that has complied with all the conditions precedent stated in the by-law to the issu-

ing and deli municipality, from any dec mentioned in ture, such as etc. Article dissenting. 14 S. C. R. 7.

See *Jones v. B. 250*, p. 302.

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A municipi or park, on lar by any trust in any manne Municipal A where no pri consequence deal with la special purpo section 467. from the act the municipa purpose indic to the public were the wor from any ere the municipa thereof, and church. In B. 211.—Os

ing and delivery of debentures granted by a municipality, is entitled to said debentures free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the future keeping up of the roads, etc. Article 962, Municipal Code, Fournier, J., dissenting. *Parish of St. Césaire v. McFarlane*, 14 S. C. R. 738.

See *Jones v. Canada Central R. W. Co.*, 46 Q. B. 250, p. 302.

## DECEIT.

See FRAUD AND MISREPRESENTATION.

## DECISIONS.

CONFLICTING DECISIONS.—See COURTS.

## DECLARATION.

IN PLEADINGS.—See PLEADING.

## DECLARATION OF OFFICE.

See MUNICIPAL CORPORATIONS.

## DECLARATORY JUDGMENT.

See JUDGMENT.

## DECEE.

I. OF FORECLOSURE.—See MORTGAGE.

II. ON BILL FOR SALE.—See MORTGAGE.

III. IN OTHER ACTIONS.—See PRACTICE.

## DEDICATION.

A municipal corporation laying out a square or park, on lands acquired by them untrammelled by any trust as to its disposal, may deal with it in any manner authorized by section 509 of the Municipal Act, R. S. O. (1877), c. 174, at least where no private rights have been acquired in consequence of their action; but they cannot so deal with lands dedicated by the owner for a special purpose, which case is provided for by section 467. Whether the dedication arises only from the act of the owner, or by express grant, the municipality must accept it, if at all, for the purpose indicated. The owner of land dedicated to the public a square, by filing a plan upon which were the words, "Square to remain always free from any erection or obstruction:"—Held, that the municipality had no power to close up part thereof, and to dispose of it to trustees of a church. *In re Peck and the town of Galt*, 46 Q. B. 211.—Osler.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. Neither can parties in possession of crown lands before patent issued dedicate any portion of the same; parties so in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained. *Rae v. Trim*, 27 Chy. 374.—Blake.

Held, that the registration of a plan of a subdivision of a town lot and sales made in accordance with it, does not constitute a dedication of the lands thereon to the public. *In re Morton and the City of St. Thomas*, 6 A. R. 323.

The mere fact of the owner of lands selling them in lots according to a plan shewing streets and lanes adjoining the several lots does not bind him to continue such streets and lanes, unless a purchaser is materially inconvenienced by the closing of any of them. *Carey v. City of Toronto*, 11 A. R. 416; 14 S. C. R. 172.

See *Van Koughnet v. Denison*, 28 Chy. 485; 1 O. R. 349; 11 A. R. 699, p. 421; *Kennedy v. City of Toronto*, 12 O. R. 211, p. 493.

## DEED.

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## I. EXECUTION.

## 1. Seal.

The defendants' Act of Incorporation provided that "all policies shall \* \* be signed \* \* and being so signed and countersigned and under the seal of the company, shall be deemed valid and binding upon them." The policy sued on was issued by the company without the corporate seal being affixed, although the attestation clause stated that the company had thereunto affixed its seal:—Held, affirming the judgment of the C. P. (29 C. P. 221), that the policy was a valid contract to grant an insurance. *Per Moss, C. J. A.* The policy supplied internal evidence of a mutual mistake against which a court of equity would, if necessary, relieve. *Wright v. Sun Mutual Life Ins. Co.*, 5 A. R. 218. Affirmed, *London Life Ins. Co. v. Wright*, 5 S. C. R. 466.

The testimonium clause in a power of attorney declared that the principal set his hand and seal to the instrument. The attestation clause declared that it was signed and sealed in the presence of a subscribing witness, and opposite the signature of the principal was a visible impression made by the pen in the form of a scroll in which was inscribed the word "seal."—Held, a sufficient sealing of the document. *Re Bell and Black*, 1 O. R. 125—Boyd.

Defence to an action on a bond against sureties that the bond when executed had no seals. See *Marshall v. Municipality of Shelburne*, 14 S. C. R. 737. See also *Regina v. Chesley*, 16 S. C. R. 306.

## 2. In Blank.

Evidence of bond of suretyship to the Crown being executed in blank.—Estoppel of defendant from denying execution. See *Regina v. Chesley*, 16 S. C. R. 306.

## II. ESCROW.

See *Confederation Life Association of Canada v. O'Donnell*, 10 S. C. R. 92; 13 S. C. R. 218.

## III. ALTERATION.

H. obtained from his debtor an absolute conveyance of land as security, which was attacked by the plaintiff, who had subsequently recovered an execution against the grantor, as being a fraudulent preference. It was shown that the deed, after its execution, had been altered by the grantee so as to convey the correct lot (22 instead of 122), the only lot owned by the grantor, but no re-execution or acknowledgment took place; the grantor, however, accepted a lease from H. of the correct lot, which he after-

wards surrendered to H.:—Held, that as the grantor, according to the ruling in *Sayles v. Brown*, 28 Chy. 10, could not claim to have the conveyance vacated, so neither could his creditor, the plaintiff. *Sommerville v. Rae*, 23 Chy. 618.

Alteration of discharge of mortgage by mortgagee's agent. See *Sayles v. Brown*, 28 Chy. 10.

In an action to recover possession of land it appeared that one of the deeds forming a link in the plaintiff's title had been altered by the grantor's agent under authority of a letter from the grantor. The alteration consisted in the agent rewriting the first two pages and substituting a new grantee. The letter was not under seal; and the deed was not re-executed or re-delivered by the grantor. The plaintiff proved that he had a good equitable right to possession:—Held, that the deed was void at law; but that the plaintiff was entitled to recover on his equitable title. Leave was also granted to add the owner of the legal estate as plaintiff if necessary. *Thorne v. Williams*, 13 O. R. 577.—C. P. D.

Alteration of bond bond after execution. See *Woodworth v. Dickie*, 14 S. C. R. 734.

See *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. R. 476.

## IV. CONSTRUCTION AND OPERATION.

## 1. Description of Parties.

The deed to the defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had then been changed:—Held, a sufficient descriptive personae, to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681.

## 2. Consideration.

The defendant being the owner of the equity of redemption in certain lands, executed a deed on October 18th, 1884, purporting to convey them directly to his wife for a consideration of \$100, the receipt of which was acknowledged in the margin and in the body of the deed. The plaintiff, who claimed by conveyance from the wife brought this action to recover possession from the defendant, who contended that the deed to his wife had been made without consideration, and was, therefore, void. The plaintiff purchased bona fide without notice of there having been no consideration:—Held, that under 49 Vict. c. 20, s. 10 (Ont.), the acknowledgment of the consideration in the deed authorized the plaintiff to deal on the footing of its having been paid upon execution of it, and the defendant could not now dispute the consideration. That section of the Act is not to be restricted to claims upon alleged vendors' liens and the like. Semble, that even if the deed in question were to be considered voluntary and without consideration, the authorities, though not at all in unison, were sufficient to support a judgment in the plaintiff's favour, inasmuch as he had at all events a good title in equity, which was now sufficient. *Jones v. McGrath* (2), 16 O. R. 617.—Chy. D.

The premises tax deed, from plaintiff, were the east half front east by breadth of the northwards acres of each ward's might take for we Chy. 211.—C

A description to other contents sufficient. 624.—Blake

Held, that less," following of land, might be rejected 29 Chy. 338.

D. sold to the plaintiff certain following (want, the plaintiff):—"But it is always one residence including p been sold u again to the very parts of that parcel what was m or description Van Kouphen

In 1851, the Crown, acres, and document books On 30th October, J. sold ment to R. described as less." In parcel, des acres, more the east part took out a described as being all the 28th August not sold to land being out the w been erased patent was to R., thro of his father the other conveyed his two so J. took on plaintiff's the seventh 1874, he p instruction which was J. jointly the plaintiff exceeded

### 3. Description of Land.

The premises intended to be conveyed by a tax deed, from the warden and treasurer to the plaintiff, were described therein as 180 acres of the east halves of two lots "commencing at the front east halves of said lots, taking the full breadth of each half respectively and running northwards so far as required, to make ninety acres of each east half."—Held, that "northwards" might be rejected, being evidently a mistake for westward. *Ferguson v. Freeman*, 27 Chy. 211.—Chy. D.

A description of land in a deed by reference to other conveyances for a fuller description is sufficient. *In re Treleven and Horner*, 28 Chy. 624.—Blake.

Held, that the words "be the same more or less," following the description of the quantity of land, improperly inserted in a sheriff's deed might be rejected as surplusage. *Nellea v. White*, 29 Chy. 338.—Sprague.

D. sold to the predecessor in title of the plaintiff certain lands, and the deed contained the following (which was held to amount to a covenant, the benefit of which passed to the plaintiff):—"Bellevue square is private property, but it is always to remain unbuilt upon except one residence with the necessary outbuildings, including porter's lodge." The land having been sold under a mortgage, a portion came again to the hands of D., who proceeded to convey parts of it for building purposes:—Held, that parol evidence was admissible to show what was meant by "Bellevue square," no plan or description being incorporated in the deed. *Van Koughnet v. Denison*, 11 A. R. 699.

In 1851, J. purchased the whole of lot 20 from the Crown, the lot nominally containing 200 acres, and described in the crown lands department books as containing 175 acres, more or less. On 30th October, 1852, before taking out his patent, J. sold and assigned, by a written assignment to R., the east half or part of the lot described as seventy-five acres, "neither more or less." In 1863, R. sold to B. his interest in this parcel, described as containing "seventy-five acres, more or less," and as being composed of the east part of the lot. On 22nd July, 1883, B. took out a patent of his portion, the land being described as "seventy-five acres, more or less," being all the lot except the west 100 acres. On 28th August, 1868, J., who retained all he had not sold to R., took out a patent himself, the land being described as the west 100 acres, without the words more or less, these words having been erased from the printed form on which the patent was written. Subsequently B. reconveyed to R., through whom the plaintiff claimed as heir of his father, and as having acquired the title of the other heirs. J., after obtaining his patent, conveyed the northerly and southerly portions to his two sons, the defendants. About the time J. took out his patent, by instructions from the plaintiff's father, a surveyor ran a line dividing the seventy-five acres from the 100 acres; and in 1874, he procured another line to be run under instructions to lay off the seventy-five acres, which was done, and the plaintiff's father and J. jointly erected a fence on such line. In 1883, the plaintiff discovered that the actual acreage exceeded 175 acres by some eleven acres. The

actual occupation under B.'s patent was confined to the seventy-five acres:—Held, that B.'s patent would of itself include the eleven acres; and there was nothing to show that the patent was issued by fraud or mistake so as to entitle defendants to have it reformed; and that defendants on the evidence, except as to a small portion thereof, failed to shew any possessory title to the land in question. *Cain v. Junkin*, 6 O. R. 532.—C. P. D. Affirmed, 13 A. R. 525.

In 1861, W. D. P., who owned a piece of land bounded on the south by Queen street, on the east by William street, on the west by Dummer street, and running north some distance, laid out the southerly portion into lots depicted upon a plan, which plan showed the boundary line between the plaintiff's and defendant's lots to be exactly 600 feet from Queen street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of land so laid out. Many years afterwards the remaining land to the north of the parcel so laid out, was laid out in lots, so depicted on another plan, and a street was shown between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from Queen street was greater than the first plan on its face showed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if Queen street and the street on the north of the first plan were actual limits of the plan. Per Strong, J., 1. The true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from Dummer street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary in question; 2. Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lot so conveyed. *Grasell v. Carter*, 10 S. C. R. 105.

Per Strong, J., where lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description. *Id.*

In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed. *Id.*

When a conveyance describes the property by reference to a plan, the plan becomes incorporated with the conveyance, and just as much part of the description as if it had been drawn upon the face of the conveyance, and to determine what passes by the conveyance, the description and plan alone are to be looked at, their construction being a question of law. *Smith v. Melhous*, 16 A. R. 140; 15 O. R. 453.

Where, therefore, lots were sold by reference to a plan, and in the plan the lots were laid out in rectangular and not in rhomboidal shape, the dividing lines between the lots were held to run

WILLIAM STREET  
QUEEN STREET  
DUMMER STREET  
THE IRONWORKS

at right angles to the admitted line of frontage, and the ownership of the land in dispute was determined by this test. *S. C.*, 16 A. R. 140. Reversing, 15 O. R. 453.

When a close or parcel of land is granted by a specific name, and it can be shewn what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is super-added a particular description by metes and bounds, or by a plan which does not shew the whole contents of the land as included in the designation by which it is known. *Attrill v. Platt*, 10 S. C. R. 425.

In 1859, the then owners of part of the lands in question had a plan prepared and registered, and in 1871, they conveyed a parcel which they described as block F. —Held, that it must be presumed they intended to convey the same parcel of land shewn on said plan as block F with the same natural boundaries as those indicated thereon. *Ib.*

Held, that though a plan not certified as required by the registry law, R. S. O. (1877), c. 111, s. 82, sub-s. 2, had, although deposited in the registry office, no effect under the registry law, yet in a deed reference might be made to it, as it might to any other document in the registry office or elsewhere, for the description or designation of a lot. *Ferguson v. Winsor*, 10 O. R. 13—O'Connor. See 11 O. R. 88.

In an action of ejectment the question to be decided was whether the locus was situate within the plaintiff's lot, No. 5 in concession 18, or within defendant's lot adjoining No. 24 in concession 17. The grant through which the plaintiff's title was originally derived, gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost, and this starting point could not be ascertained:—Held, affirming the judgment of the Court of Appeal, (11 A. R. 788, which reversed 2 O. R. 614), Strong and Tascheranu, JJ., dissenting, that such southern boundary could not be ascertained by measuring back exactly eighty-four chains from the river. *Phanb v. Steinhoff*, 14 S. C. R. 739.

A patent from the Crown purported to grant the W. half of a certain lot of land, through which flowed the F. river, issuing out of the C. lake in the N. W. corner of the half lot, and running across the half lot in a diagonal direction. In the metes and bounds given in the patent occurred the following courses: "Then S. 73 degrees 15 minutes W. 24 chains, more or less, to C. lake; thence southerly, along the water's edge, to the allowance for road between the 9th and 10th concessions; thence S. 16 degrees 45 minutes E. 21 chains, more or less, to the place of beginning; containing seventy-six acres, more or less, together with the waters thereon lying and being." From the point thus indicated on the margin of the C. lake, which was about the place of issuance of the F. river from it, a shoal, a good part of which was exposed, extended across in a southerly direction to the road between the 9th and 10th concessions. It was contended that the said metes and bounds indi-

cated that a course was to be taken from the said point on the margin of the C. lake along the E. bank of the river to the imaginary eastern boundary line of the half lot, then across the river, and up the other side to the said road, and that this interpretation coincided with the acreage mentioned in the patent, and that none of the land covered by the F. river passed to the grantee:—Held, however, that the plan and description of the lot, together with the other circumstances of the case, shewed that by the "water's edge" was meant the edge of the lake, i. e., the shoal above mentioned, which was to be taken as the margin of the lake, and the course indicated was across the lake on the line of the said shoal, so that the bed of the river crossing the half lot passed to the grantee, notwithstanding that by this interpretation about fourteen acres above the quantity mentioned in the patent passed thereby. There being a reasonably accurate particularization of the four boundaries, the quantity of acres must not be regarded as the controlling term of the description. The fair presumption was that such a course was meant as would give the most direct points of connection between the termini thereof. *Re Trent Valley Canal and Lands Expropriated at Fenelon Falls*, 12 O. R. 153.—Boyd.

Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part thereof lying N. or E. of the said river to one party, and the part lying S. or W. of the said river to the other party:—Held, that this would carry the ownership of the soil to the mid thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instrument. *Ib.*

A crown patent, issued in 1852, conveyed to the plaintiff M. B. a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons." The lot actually contained 200 acres, but the dry part was only sixty acres. At and before the issue of the patent, there was a certain mill-dam on the S. river, which raised the waters of the river and flooded a portion of lot 9; the plaintiffs did not object to the flooding of lot 9 by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam, which raised the water about a foot. The two judges composing the Divisional Court, agreed in reversing the judgment of Proudfoot, J., (13 O. R. 692), and in holding that the defendants had no prescriptive right to overflow the plaintiffs' lands by means of the bracket boards, but disagreed as to the construction of the patent; as to which it was:—Held, per Armour, C. J., that the words in the grant, "containing by admeasurement sixty acres, be the same more or less," did not control or affect the description of the land granted, that description being plain and unambiguous; that the words "exclusive of the lands covered by the waters of the S. river, which are hereby reserved," meant the waters of the river S. in its natural channel,

the waters in condition; a patent, not of the drowned river; and title to the land back by dam. Per S. description in the construction would make the water with the tent; and, the strued as if both within the river; the measured by as mountain boards. But that the word not mean the natural channel height at which the effect of rise of the lot in the instance of the at their natural ordinary channel. *Sadler*, 16 O.

The property was described same being 3 dale, on the shown that of Parkdale, as such street avenue, but road or way description v reference to the property. *Stevenson v. guson*.

L. in convey composed of the 4th concess and bounds of the same only part of sale was the lot 17, giving east half, the same quantity. The sheriff lot sold by the south h concession. Held, follow deed was void the exceptio void for u land, 17 O.

Held, the deed to S. o to be convey were contro

See *McCaslin v. Booth*, 1 Cas. 158; 624; *McCaslin*



the waters between its shores in its natural condition; and therefore that B. took under the patent, not only the dry part of lot 9, but also the drowned land, excluding the channel of the river; and the plaintiffs had established their title to the land upon which the water was penned back by the use of bracket boards upon the dam. Per Street, J.—The language of the description in the patent admits of two different constructions, and that should prevail which would make the quantity of land conveyed agree with the quantity mentioned in the patent; and, therefore, the patent should be construed as if it excluded all the drowned land both within and without the actual channel of the river; the extent of the drowned land being measured by reference to the height of the water as maintained by the dam without the bracket boards. But:—Held, by the court of appeal that the words "the waters of the S. river" did not mean the waters of that river flowing in its natural channel merely, or the waters at the height at which they might happen to be on the day of the issue of the patent, but had the effect of reserving from the grant that portion of the lot liable to be covered, owing to the existence of the dam, by the waters of the river, at their natural height at any time during the ordinary changes of the seasons. *Brady v. Sadler*, 16 O. R. 49.—Q. B. D; 17 A. R. 365.

The property in an agreement for exchange, was described as "135 feet on G. avenue, the same being 337 feet west from R. avenue, Parkdale, on the north side of said avenue. It was shown that R. avenue was the west boundary of Parkdale, and G. avenue a street in it, which, as such street, would have its termination at R. avenue, but it extended across R. avenue as a road or way outside of Parkdale, and no further description was given, such as the depth or by reference to a plan or otherwise:—Held, that the property was not sufficiently described. *Stevenson v. McHenry*, 16 O. R. 139.—Ferguson.

L. in conveying land to S. described it as being composed of the southerly half of lot 17, in the 4th concession of King, giving it the metes and bounds of the east half, but excepting out of the same forty-five acres sold for taxes. The only part of lot 17 which L. had before the tax sale was that conveyed to him by B. as part of lot 17, giving it the metes and bounds of the east half, the same as in the deed to S.; and the same quantity was conveyed in both deeds. The sheriff's deed described a portion of the lot sold by him for taxes as "forty-five acres of the south half of said lot number 17, in the 4th concession of the said township of King:—Held, following the decisions that the sheriff's deed was void for uncertainty:—Held, also, that the exception in the deed to S. was likewise void for uncertainty. *Mulholland v. Mulholland*, 17 O. R. 502.—Q. B. D.

Held, that the metes and bounds given in the deed to S. correctly described the lands intended to be conveyed, and the words "southerly half" were controlled by them. *Id.*

See *McArthur v. Gillies*, 20 Chy. 223; *Ratté v. Booth*, 11 O. R. 491; 14 A. R. 419; 15 App. Cas. 158; *Cottingham v. Cottingham*, 11 A. R. 624; *McArthur v. Brown*, 17 S. C. R. 61.

### 5. Conditions, Reservations, and Exceptions.

Defendant conveyed to his son J. L., jun., the east half of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the lands hereby conveyed, where the said parties of the first and second parts see fit." Defendant continued to live on the lands with his son till the latter's death, in 1876. Several years before his death, J. L., jun., built a small house on the land, which was occupied by his men till his death. After his son's death the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in the deed from J. L., sen., (the defendant) to J. L., jun.:"—Held, that the reservation in the deed from the defendant to his son was more properly an exception than a reservation: that an estate for the joint lives of the defendant and his wife, and for the life of the survivor, remained in the defendant; and he therefore was entitled to select the acre at any time, and was not bound to do so in the lifetime of his son. *Burnham v. Ramsey*, 32 Q. B. 49, distinguishing *Lapointe v. Lafleur*, 46 Q. B. 16.—Q. B. D.

The estate in question had been conveyed to G. D. & L. P., between whom a partition had been made, not under seal, giving to L. P. the east half. Afterwards G. D. conveyed to the defendant his interest in the east half, and after the execution of the deed by the defendant to his son L. P. by deed reciting that by oversight there was no release from him of the east half, and that he was desirous of completing the son's title, released the east half to the son. It was contended that the defendant owned only an undivided moiety of the lot when he conveyed to his son, and that the plaintiff, claiming through the son, could recover an undivided moiety of the acre selected by the defendant; but:—Held, otherwise, for the plaintiff took his deed subject to the reservation in the defendant's deed to his son, and the deed from L. P. to the son would enure only to the benefit of the title conveyed to him by his father. *Id.*

R. G., being seized in fee, by an instrument purported to lease to his daughters "three acres, with the right of way to a well, including an orchard and dwelling-house, after the decease of his beloved wife, J. G.," to hold to his daughters for and during their lives, or the life of the survivor of them, at the yearly rent of twenty cents, if demanded. Ten days afterwards he conveyed in fee to his son W. G., the land of which the three acres formed part, the son having actual notice of the agreement between his sisters and R. G. Subsequently, W. G. conveyed to the plaintiff, "subject to the right of R. G.'s wife and daughters to occupy the house and three acres during the life of them or the

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survivor, and the right to and from the well," and subject to a mortgage, which the plaintiff agreed to pay off. To this deed the plaintiff was an executing party. The plaintiff brought ejectment against R. G.'s daughters for the three acres:—Held, that the agreement by which R. G. intended to demise the three acres created a term at once, the wife of R. G. retaining the right to occupy during her life:—Held, also, that the words "subject to," etc., in the conveyance to the plaintiff, either operated as an exception, or, by reason of the execution of the deed by the plaintiff, as a regrant of the three acres to her vendor. In either case, therefore, the plaintiff was entitled to succeed. *Quere*, also, if the deed operated as a regrant to W. G., whether if the lease were void, as contended, as creating a freehold interest to commence in futuro, W. G., having notice of his sisters' claim under it, would not be restrained from disturbing them. *Wilson v. Gilmer*, 46 Q. B. 545.—Q. B. D.

The grantor conveyed certain lands to the grantee, his heirs and assigns, and by a proviso at the concluding part of the deed declared "nevertheless, that the above L. shall have no right to sell, alien, or dispose in any way whatsoever of the above-mentioned premises, but have only the use during his life-time, after which his children will have full right to the said property above mentioned:—Held, on demurrer, that such proviso was repugnant to the grant and habendum, in fee, and therefore void. *Lario v. Walker*, 28 Chy. 216.—Spragge.

By 18 Vict. c. 250, W. F. and his brother were authorized to sell certain entailed property in consideration of a non-redeemable rent representing the value of the property. On the 7th September, 1860, W. F., the appellant, and E. F., assigned to their brother, A. F., a piece of land forming part of the above entailed property, in consideration of a rente foncière of six pounds, payable the first day of October of each year. The deed was registered and contained the following stipulation: "But it is agreed that the assignee cannot alienate in any manner whatever the said land, nor any part thereof, to any person without the express and written consent of the assignors under penalty of the nullity of the said deed." The property was subsequently seized by a judgment creditor of A. F., and appellant opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate:—Held, on appeal, affirming the judgment of the court below, that the deed was made in accordance with the provisions of 18 Vict. c. 250, and being a purely onerous title on its face, the prohibition to alienate contained in said deed was void. Art. 970 C. C. L. C. *Quere*, whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration. *Fraser v. Poulton*, 4 S. C. R. 515.

On September 26th, 1844, J. Le B. by deed bargained and sold, etc., to the municipal council of D. district, in consideration of five shillings, a certain lot for the purpose of erecting thereon a school-house for the use of the D. district. Habendum, for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso, that the said council

should within one year from its date erect a school-house for the use of the said district, or if the said council should at any time erect any other building save said school-house and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. Le B. and his heirs to re-enter and avoid the estate of the said municipal council. J. Le B. by his will, dated July 23rd, 1847, devised all his real estate to certain nieces, and died in the year 1848, without having revoked or altered said will. The municipal council complied with the condition by building a school-house, and at the time of the making of the will, the condition had not been broken, but the successors of D. district dealt with the land otherwise than was authorized by the deed, and broke the condition. The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. Le B. or his heirs-at-law were entitled to the proceeds thereof:—Held, that the word "possibility" in R. S. O. (1877), c. 106, s. 2, includes a "right of entry for condition broken," mentioned in section 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition no new estate was acquired, so as to require words applicable to after-acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made, and the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession:—Held, also, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room; and that the condition in this case was therefore perfectly valid. The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it. *In re Melville*, 11 O. R. 626.—Proudfoot.

Certain ordinance land vested in the Crown was, in 1858, patented to the corporation of the city of T., with the following clause in the patent: "Provided always, and this grant is subject to the following conditions, viz., that (the land) \* \* \* shall be dedicated by the said corporation, and by them maintained for the purpose of a public park for the use, benefit, and recreation of the inhabitants of the said city of T., for all time to come" \* \* \*. The corporation of T., in 1876, obtained from the Ontario Legislature an Act empowering them "to lease, sell, or otherwise dispose of" the said land, and one of their committees transferred it to another to use as a cattle market, receiving a yearly rent therefor which they applied to a park fund as provided by the Act giving the power to sell, etc. In an action by a ratepayer to prevent the land being used as a cattle market, and more money being spent on it for that purpose, in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the Act of the provincial legislature was ultra vires in dealing with it, it was:—Held, on demurrer, that the words in the patent "Provided always, and this grant is subject to the following conditions," did not

create a condition but a trust was used had been that by the their estate words "other the rest of the property and the demedy v. City of

In an action justified under deed through and in which followed by ing a right of in width also Held, that t way to t the soil. W Q. B. D.

T. and his settlement of non-profession settlement the essential to the land, love and affection and assigns, unto and to D., his heirs brought this that the deed hold to com not essential sufficient of to D., the ex and affection whom the d seized, would whether the habendum implication at the date so much of limited, viz vested in T. Boyd. Th be reforme Dunlap v.

See *Brigg v. Birmingham*, 9 Young, 91 v. Metcalfe

7. De

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create a condition annexed to the estate granted, but a trust was created the same as if the words used had been "upon the following trusts," and that by the grant the grantors parted with all their estate and interest:—Held, also, that the words "otherwise dispose of," when read with the rest of the Act, covered the mode of using the property adopted, viz., as a cattle market, and the demurrer was allowed with costs. *Kennedy v. City of Toronto*, 12 O. R. 211.—Ferguson.

In an action of trespass *q. c. f.* the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title and in which the description of the property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot:—Held, that this was only a reservation of a right of way to the grantor and not an exception of the soil. *Wright v. Jackson*, 10 O. R. 470.—Q. B. D.

#### 6. Habendum.

T. and his son D. desired to effect a certain settlement of landed property, but employed a non-professional conveyancer to draw the deed of settlement, who failed to provide for many of the essential provisions of the agreement, and as to the land, made T., in consideration of natural love and affection, grant the same to D., his heirs and assigns, habendum "after the decease of T. unto and to the only proper use and behoof of D., his heirs and assigns for ever;" and D. now brought this action for waste against T.:—Held, that the deed was not void as passing only a freehold to commence in futuro, for the habendum is not essential to a deed, and the granting part was sufficient of itself to pass the immediate freehold to D., the expressed consideration of natural love and affection sufficing to carry the use to D., in whom the deed, viewed as a covenant to stand seized, would vest the entire estate. But quere, whether the express limitation of the use in the habendum after T.'s death would not rebut the implication of an immediate vesting of the use at the date of the deed in D., so that the use of so much of the estate as was not expressly limited, viz., for the life of T., resulted to and vested in T. *Dunlap v. Dunlap*, 6 O. R. 141.—Boyd. The decree which directed the deed to be reformed was reversed. See *S. C.*, *sub nom.*, *Dunlap v. Dunlap*, 10 A. R. 670.

See *Bright v. McMurray*, 1 O. R. 172; *Re Bingham and Wigglesworth*, 5 O. R. 611; *Re Young*, 9 P. R. 521; *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.

#### 7. Deeds Under the Short Forms Acts.

##### (a) Generally.

The operation of an ordinary deed of bargain and sale under R. S. O. (1877), c. 102, conveying lands to trustees considered and acted on. *Seaton v. Lunney*, 27 Chy. 169.—Chy. D.

In a deed purporting to be under the Short Forms Act, the covenant was that the grantor had the right to convey, omitting the words "Notwithstanding any act of the said Covenantor:—Held, following *Brown v. O'Dwyer*, 35 Q. B. 354, that although not in accordance

with the statute it bound the covenantor as an absolute covenant that he was seized and had a right to convey in fee simple. *McKay v. McKay*, 31 C. P. 1.—C. P. D.

See *Maughan v. Cenci*, 5 O. R. 518; *Keays v. Emard*, 10 O. R. 314; *Winfield v. Fowlie*, 14 O. R. 102.

#### 8. Bargain and Sale.

By indenture of bargain and sale made in 1856 between L. and K., L. in consideration of \$4,000 (the receipt whereof was thereby acknowledged) did remise, release, and quit claim unto K., his heirs and assigns, the south half, etc., to have and to hold, etc.:—Held, that since 14 and 15 Vict. c. 7, s. 2, the words "remise, release and quit claim" may operate as a grant; and either before or since that enactment they would operate as a bargain and sale. *Acre v. Livingstone*, 26 Q. B. 282, not followed. *Pearson v. Mulholland*, 17 O. R. 502.—Q. B. D.

#### 9. Other Cases.

Per H. E. Taschereau and Gwynne, JJ., that a deed, taken under 9 Vict. c. 37, s. 17, before a notary (though not under the seal of the commissioners) from a person in possession, which was subsequently confirmed by a judgment of ratification of a Superior Court, was a valid deed, that all rights of property were purged, and that if any of the auteurs of the petitioner failed to urge their rights on the moneys deposited by reason of the customary dower, the ratification of the title was none the less valid. *Chevrier v. The Queen*, 4 S. C. R. 1.

On the 28th June, 1877, the appellants entered into an agreement before Hunter, N. P., by which, without any reserve, they acknowledged to owe, and promised to pay certain sums of money, amongst others, to Mrs. L., transferee of one of the vendors, who, on the 3rd of April, 1875, sold the Windsor hotel property in Montreal to the appellants, and by the same deed, Mrs. L. agreed to assist the appellants in obtaining a loan of \$350,000, and to relinquish the priority of her hypothec for her share on the property, to extend to six years the period for the payment of the balance due her, waiving also any right to interest until the appellant company had an available surplus after paying interest and insurance in connection with the new loan. Subsequently, on 15th June, 1880, Mrs. L., by notarial deed, transferred to the respondent the balance alleged to be due her under the deed of the 28th June, 1877, and the respondent brought an action to recover this balance with interest from the 1st July, 1877, to the 15th December, 1885, date of the action. To this action the appellants pleaded *inter alia*, that under the deed of the 28th June, 1877, interest could be demanded only from the 1st July, 1881, the secretary of the company having on said date testified for the first time there was an available surplus; and also that both principal and interest were compensated by the sum of \$1,901.70 paid the city for assessments imposed under 42 & 43 Vict. c. 53, (Que.), for the costs of public improvements made in the vicinity of the property prior to the sale of the property to the company in 1875. The assess-

ment rolls originally made for these improvements were set aside by two judgments in 1876 and 1879:—Held, that under the circumstances the respondent could not be said to be the guarant of the purchasers of the property, and therefore he was entitled to the payment of the balance alleged to be due under the deed of the 28th June, 1877, notwithstanding any claim the appellants might have against their vendors under the general warranty stipulated in the deed of purchase of April, 1875:—Held, also, that by the terms of the deed of the 28th of June, 1877, interest could be recovered only from the 1st of July, 1881. *Windsor Hotel Co. v. Cross*, 12 S. C. R. 624.

## V. RECTIFYING AND VARYING.

### 1. Rectifying.

Held, that the evidence set out in the report of this case shewed that the agreement of the parties was that the plaintiff should have a deed with covenants as distinguished from a quit claim deed, and that it was through the mistake of all the parties that the covenant, as framed, was entered into, and that the deed should be accordingly reformed by limiting the covenant to the grantor's own acts in the usual form. *McKay v. McKay*, 31 C. P. 1.—C. P. D.

A mortgage which had been executed by the defendant I., reciting that it had been agreed to be given to secure notes held by the plaintiffs, and containing covenants for title, was reformed, on parol evidence, by substituting for one of the parcels inserted by mistake, which did not belong to I., another lot proved to be his at the time of creating the mortgage; and being the only other lot owned by him. Such a mortgage is not voluntary or without consideration so as to exclude reformation. *Bank of Toronto v. Irwin*, 28 Chy. 397.

The plaintiffs sought a rectification of the description of the premises covered by a mortgage to them, by including therein the water lots and dock property in front of the lots described in the mortgage. The plaintiffs relied on parol testimony, while the documentary evidence was all in favour of the defendant:—Held, affirming the decree of Sprague, C., 27 Chy. 68, that no case was made for a reformation of the mortgage. *Dominion Loan Society v. Darling*, 5 A. R. 576.

Rectifying articles of partnership. See *Macdonald v. Worthington*, 7 A. R. 531; 9 S. C. R. 327.

Rectifying deed executed mainly to protect property from an anticipated action for breach of contract. See *Mundell v. Tinkis*, 6 O. R. 625.

Action to obtain from defendants a conveyance of a certain lot which had been included by mistake in a mortgage of which the defendants were assignees. See *Bridges v. Real Estate, Loan and Debiture Co.*, 8 O. R. 493.

In an action to restrain waste it was shown that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document that it was his will he was making, and the conveyancer who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he

would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made as alleged by the plaintiff. The court reversed the decree of the court below (6 O. R. 141), directing the deed to be reformed; and ordered the bill to be dismissed, with costs, and the deed to be delivered up to be cancelled. *Dunlop v. Dunlop*, 10 A. R. 670.

A. F., sr., in January, 1877, conveyed to A. F., jr., part of lot 7, and A. F., jr., in 1879 conveyed the same to H. B. in October, 1877, A. F., sr., executed a deed purporting to convey to J. S. all lot 7, without excepting any portion, J. S. giving a mortgage back to secure the purchase money. In 1878 A. F., sr., died, having devised to M. F. all his lands not previously conveyed by him. In 1882 M. F. conveyed all lands so devised to him to plaintiff. In 1881 J. S. failing to pay the mortgage debt the executors of A. F., sr., sold the property comprised in the mortgage deed to T. G., and in 1884 T. G. conveyed the same to the defendant. It appeared that in the original conveyance to J. S., and in all the subsequent transactions depending thereupon, without deceit or fraud on either side, but from accident and ignorance there had been the same mutuality of mistake between the parties dealing with each other, not as to what piece of land was sold and purchased, nor as to what was intended to be conveyed, but in designating the land as the whole of lot 7 instead of only the part thereof intended to be conveyed and dealt with. In an action for the rectification of certain deeds Held, per O'Connor, J.:—That it was not necessary or right that the executors of A. F., sr., should be parties to the action. *Ferguson v. Winsor*, 10 O. R. 13.

Per O'Connor, J., that the rule that the court will not interfere to rectify an instrument upon parol evidence on the ground of mutual mistake when the defendant denies that there was such mutual mistake only applies where the defendant so denying was a party to the instrument in question.

Per Boyd, C., reversing the judgment of O'Connor, J. The evidence in this case does not come up to the standard laid down in *Dominion Loan Society v. Darling*, 5 A. R. 577, by Moss, C. J., that "It must be demonstrated what the true terms of the bargain were, and that by mutual mistake they were not incorporated in the writing. The proof must be clear, satisfactory, and conclusive." The defendant bought lot 7, as contained in S.'s mortgage, and obtained a deed from the executors according to a registered plan which is to be treated as incorporated therewith, and he is, even as against his representation to the plaintiff that the piece in dispute was a portion of the property she was in treaty for and subsequently purchased, entitled to claim the benefit of G.'s position as purchaser and registered owner for value. Per Proudfoot, J.—Even if the representation were proved the plaintiff owned no property, at the time it was made, to be affected by it, and such an expression of opinion should not estop him from purchasing lot 7 eighteen months afterwards. The purchasers at the auction sale got a better bargain than they thought they had made, but they had no knowledge of any right to be interfered with had they chosen to assert their title to the whole lot. This raises no equity against them in the

plaintiff's favour notice of the claim the beneficiaries at the

M. being part of a mortgage, many years to the other things, the first year of the purposes of a mortgage assigned to him. The defendant due, and claiming there payment of of fee, and claim respect of each year on was proved to between the last expressed in to be reformed should not have, he being without notice equity rested

This case was an action against mortgagor, latter on equity mistake, and the parties, to ed in the pro have been, omitted. In Patterson, J., rectifying his contention by the full The appeal was of Appeal on ment of Hagg that the defendant rescission on tion of the mortgage never having Savings Co.

In order to instrument, to be adduced. the circumstances the instrument would reasonably agreement credibility of their interest ing their test able doubt t the true agreement rectify it. tiff and de gages. The to the defendant's personal liability her mortgage sued her up that the mortgage was invalid secured. Held, upon ment was defendant sh

plaintiff's favour. Even if the defendant had notice of the plaintiff's equity he is entitled to claim the benefit of the want of notice to the purchasers at the auction sale. *S. C.*, 11 O. R. 88.

M. being possessed of certain lands subject to a mortgage, made a lease thereof for a term of years to the plaintiff, which provided, amongst other things, that \$15 should be expended in the first year of the term in procuring manure for the purposes of the farm. Afterwards he created a mortgage in favour of the defendant, and assigned to him this lease as collateral security. The defendant distrained for rent claimed to be due, and plaintiff replevied the goods seized, claiming there was no rent due; and proved the payment of certain moneys to the first mortgagee, and claimed also credit for \$15 a year in respect of manure furnished and expended in each year on the premises, which, at the trial, was proved to have been the true agreement between the landlord and tenant, though not so expressed in the lease, and the lease was ordered to be reformed accordingly:—Held, that the lease should not have been reformed as against defendant, he being a bona fide purchaser for value, without notice of the facts on which the plaintiff's equity rested. *Forse v. Sovereign*, 14 A. R. 482.

This case is reported in 44 Q. B. 106. It was an action of ejectment by mortgagees against mortgagor, which was defended by the latter on equitable grounds, namely, that by mistake, and contrary to the true agreement of the parties, the quarterly repayments mentioned in the proviso were larger than they should have been, and that the remise clause was omitted. Judgment was given at the trial by Patterson, J. A., in favour of the defendant, rectifying the agreement in accordance with his contention, which was afterwards affirmed by the full court, Hagarty, C. J., dissenting. The appeal was allowed on appeal to the Court of Appeal on the grounds mentioned in the judgment of Hagarty, C. J., in the court below, viz., that the defendant was entitled to a decree for rescission only, and that a decree for rectification of the mortgage was improper, the parties never having been ad idem. *Superior Loan and Savings Co. v. Lucas*, 15 A. R. 748.

In order to secure the rectification of an instrument, the clearest evidence is required to be adduced. If the court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of witnesses, paying due regard to their interest in the subject matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should rectify it. The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant, guarded himself against personal liability; but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment, that the mortgage assigned was a good and valid security, alleging that it was not so:—Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect

of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged. *Clarke v. Jonelin*, 16 O. R. 68—Q. B. D.

Per Ferguson, J.—In order that a deed may be reformed by the court, there must be at least two things established, namely, an agreement differing from the document, well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement, and a mutual mistake of the parties by reason of which such agreement was not properly expressed in the deed. *McNeill v. Haines*, 17 O. R. 479.

The lessee set up an agreement between himself and the lessor that the lease should expire at her death, in case she should not live for the full term of ten years, and asked that the lease should be reformed accordingly. The only evidence in support of this, was that of the lessee and his wife, and of a relation of theirs, whose memory was shewn to be untrustworthy:—Held, that this evidence was not sufficient, after so many years of acquiescence, and after the death of the lessor, to justify the reformation of the lease. *Thatcher v. Bowman* 18 O. R. 265—Street.

In one of the conveyances in the chain of title, the grant was to the party of the third part, whereas there were only two parties to the conveyance, and the party of the second part did not execute it:—Held, that this was a valid objection, though the instrument would be at once corrected or reformed as against the grantors; or could be cured by another conveyance drawn with proper certainty. *Re Clarke and Chamberlain*, 18 O. R. 270.—Boyd.

Rectification of the mortgage deed as to the time of the first payment of principal, was refused where it was sought by the mortgagors at a time when the payment in any event was long past due, and the mortgagees, without fraud, had acted upon the mortgage as executed, and without notice of the intention of the mortgagors to have the payment fixed for a later period; and where also there was really no agreement upon which to found the rectification, the defendants' local appraiser and agent to receive applications having no express or implied authority to make such agreements. *Edmonds v. Hamilton Provident and Loan Society*, 19 O. R. 677.—Q. B. D.

## DEFAMATION.

### I. PRIVILEGED COMMUNICATIONS.

1. *Discharge of a Duty*, 499.
2. *Criticism on Public Men and Matters*, 500.
3. *As to Standing of Business Men*, 501.
4. *Other Cases*, 502.

### II. CHARGING CRIME, 505.

### III. IMMORALITY OR UNFITNESS FOR SOCIETY, 506.

### IV. AFFECTING PERSONS IN TRADE, BUSINESS OR OTHER EMPLOYMENT, 506.

### V. ACTIONS FOR.

1. *By and Against Whom*, 508.

2. *Pleadings.*(a) *Statement of Claim and Innuendo*, 509.(b) *Defence*, 510.(c) *Other Cases*, 511.3. *Particulars*, 511.4. *Evidence.*(a) *Examination before Trial*, 511.(b) *Of Publication*, 512.(c) *Proof of Defamatory Matter and Innuendo*, 513.(d) *Of Malice*, 514.(e) *Other Cases*, 514.5. *Damages*, 516.6. *Costs*, 516.7. *New Trial—See NEW TRIAL.*VI. *Apology*, 517.VII. *Miscellaneous Cases*, 517.VIII. *Slander of Title*, 517.I. *Privileged Communications.*1. *Discharge of a Duty.*

The appellant D., having been appointed chief post office inspector for Canada, was engaged, under directions from the postmaster-general, in making enquiries into certain irregularities which had been discovered at the St. John post office. After making enquiries, he had a conversation with the respondent, W., alone in a room in the post office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the assistant postmaster was called in, and the appellant said: "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The respondent having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the assistant postmaster:—Held, on appeal, 1. That the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the assistant postmaster were privileged. 2. That the onus lay upon respondent to prove that the appellant acted under the influence of malicious feelings, and as the jury found that the appellant had not been actuated by ill-feeling, the respondent was not entitled to retain his verdict, and the rule for a nonsuit should be made absolute. *Dewe v. Waterbury*, 6 S. C. R. 143.

The defendant's son, alleged to be an infant within twenty-one years of age, was brought before a magistrate charged with assault. The defendant attended before the magistrate. On the plaintiff being called as a witness on the prosecutor's behalf, the defendant objected to his giving evidence, stating that "he," plaintiff, "is a perjurer, he perjured himself three times at Butt's trial before you." There was no evidence to shew that the defendant was acting

for and on behalf of his son, with his son's consent, nor was it absolutely proved that the son was a minor:—Held, that the communication was not privileged, and could not be withdrawn from the jury. A nonsuit entered by the judge at the trial was therefore set aside and a new trial directed, with costs to the plaintiff, if he succeeded, but, if not, without costs, unless the parties agreed to the action being dismissed, with costs to be paid by the defendant. Per Cameron, C. J.—Under like circumstances a counsel, attorney, or party to the action or proceeding would be privileged; and Semble, also, even a stranger when permitted by another to act for him with the magistrate's sanction. Per Cameron, C. J., also. If the defendant was acting in good faith and without malice, under the belief that it was his duty to inform the magistrate of the witness's bad character, he might have a qualified privilege, but the question of malice would be for the jury. *Cowan v. Laudell*, 13 O. R. 13.—C. P. D.

See *Farmer v. Hamilton Tribune Printing and Publishing Co.*, 3 O. R. 538, p. 506.

2. *Criticism on Public Men and Matters.*

In an action of libel, paragraphs 3 and 4 of the defence set up that the alleged libel was published on a privileged occasion; the ground of privilege being that it was a fair and bona fide comment upon a matter of public and general interest, which had become such by means of the plaintiff's own appeal to the public through the medium of the press, inviting public attention to his professional character and position, and challenging public criticism upon his conduct in connection with all the matters referred to in the alleged libel, which was printed and published by the defendant bona fide, for the public benefit, and without malice:—Held, affirming the judgment of Rose, J., (8 O. R. 53), a good defence. *Farmer v. The Hamilton Tribune Co.*, 3 O. R. 538, and *Murphy v. Halpin*, Ir. R. 8 C. L. 127, distinguished. *Macdonell v. Robinson*, 12 A. R. 270.

In an action of libel the libel consisted of letters of a very gross character published in the defendants' newspaper reflecting on the plaintiff as warden of the Central Prison. The defendants refused to give the name of the writer of the letters, and assumed responsibility therefor. The learned judge told the jury that "every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose \* \* \* such comments are not libellous, however severe in their terms, unless they are written intemperately and maliciously." The jury found for the plaintiff with \$8,000 damages:—Held, that the libel was not privileged, or published on a privileged occasion: that no exception could be taken to the judge's charge: nor could it be said that the libel was a fair comment upon a public matter in which the public had an interest. *Massie v. Toronto Printing Co.*, 11 O. R. 362.—C. P. D.

The plaintiffs brought a written advertisement to the defendant for the purpose of having it published in his newspaper, but the defendant refused to insert it, and the plaintiffs took it away intimating that it would be immediately

published in his newspaper; and the defendant, in the defence, wrote an article, written in the defendant's name, for the purpose of making the plaintiff a fair criticism libellous. It was held that the plaintiff was not entitled to recover damages because it had no evidence to shew that the defendant was actuated by ill-feeling toward the plaintiff. *Gr. Q. B. D.*

In an action of libel the plaintiff was referred to by the defendant as part of the defence; and the plaintiff was held to be entitled to recover damages because it had no evidence to shew that the defendant was actuated by ill-feeling toward the plaintiff. *Gr. Q. B. D.*

See *Farmer v. Hamilton Tribune Printing Co.*, 3 O. R. 538, p. 506.

3. *As to*

The defendant, in the defence, wrote an article, written in the defendant's name, for the purpose of making the plaintiff a fair criticism libellous. It was held that the plaintiff was not entitled to recover damages because it had no evidence to shew that the defendant was actuated by ill-feeling toward the plaintiff. *Gr. Q. B. D.*

A subscriber applied to the defendant for a copy of a certain issue of a newspaper, and the defendant refused to give it, and the plaintiff was held to be entitled to recover damages because it had no evidence to shew that the defendant was actuated by ill-feeling toward the plaintiff. *Gr. Q. B. D.*

It is the duty of a newspaper to publish all news, and the defendant was held to be liable for damages because it had no evidence to shew that the defendant was actuated by ill-feeling toward the plaintiff. *Gr. Q. B. D.*

Semble, company business p



published in another newspaper. It was so published; and on the day of its publication an article, written before its publication, appeared in the defendant's newspaper, referring to it as unfit for publication. The plaintiffs sued the defendant for libel. The trial judge told the jury that if the article was nothing more than a fair criticism of the advertisement, it was not libellous. It was objected that the defendant was not entitled to criticise the advertisement because it had not been published before the article criticising it:—Held, that this was not a valid objection. *Graham v. McKimm*, 19 O. R. 475.—Q. B. D.

In an action for libel the trial judge ruled that the plaintiffs were bound to produce and put in as part of their case the written advertisement referred to by the defendant in the article complained of; and the plaintiffs, though protesting, accepted the ruling and put in the evidence:—Held, that the ruling was wrong; but that the plaintiffs were not entitled to a new trial, the only injury to the plaintiffs being to let the defendant's counsel have the last word with the jury. *Ib.*

See *Farmer v. Hamilton Tribune and Publishing Co.*, 3 O. R. 538, p. 506; *Wills v. Carman*, 17 O. R. 223, p. 515.

### 3. As to the Standing of Business men.

The defendant published of and concerning the plaintiff, a business man, in a written circular, called "The Legal Record Co., Renfrew," a statement meaning that plaintiff had given a chattel mortgage on his property, whereas he had only assigned one held by him against another:—Held, libellous, and not privileged. *Lemay v. Chamberlain*, 10 O. R. 638.—Q. B. D.

A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it, they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject. In an action by the customer against the local agent for an alleged libel consisting of the information given by him to the company in answer to their request:—Held, reversing the judgment of the court below, (12 O. R. 791) that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendant might fairly state, the communication was privileged, and there being no proof of express malice, the plaintiff was not entitled to recover. *Todd v. Dun, Wiman & Co.*, 15 A. R. 85.

It is the occasion of publishing the alleged libel which constitutes the privilege. Where privilege exists, implied malice is negated, and the burden of shewing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof that the defendant knew that what he was stating was untrue, is not evidence of express malice. *Clark v. Molyneux*, 3 Q. B. D. 235; *McIntee v. McCulloch*, 2 E. & A. 390, referred to and followed. *Ib.*

Semble, per Osler, J. A., a mercantile agency company have no higher privilege for their business publications than other members of

the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged. *Ib.*

The plaintiff and one S. had been in partnership, S. having retired and left the country. Subsequently the plaintiff made an assignment for the benefit of creditors. The defendant was a creditor and was appointed one of the inspectors of the estate. S. wrote a letter to one F. relative to the plaintiff's business, a portion of which the plaintiff claimed to be libellous, the remainder being admittedly privileged. F. forwarded the whole letter to the defendant who shewed it to his conspector, a creditor, and also to another creditor. In an action against the defendant for the publication:—Held, that the occasion of the publication was privileged, and that the privilege attached to the whole letter, it having been shown only to persons equally interested with the defendant in the matter. *Howarth v. Kilgour*, 19 O. R. 640.—C. P. D.

### 4. Other Cases.

Claim: That the defendant, an inspector of licenses, falsely and maliciously published of the plaintiff a circular which he caused to be sent to all licensed victuallers, etc., in the riding, containing the following words: "W. R. (and others) are in the habit of drinking intoxicating liquors to excess, and you are hereby notified that you are not to sell, give, etc., intoxicating liquors to the said parties, or to the wife, husband, child, employee, agent, or any member of the family, or household of the said parties." Defence: That the commissioners in good faith, intending to act within the scope of their powers, passed a resolution, "That no intoxicating liquors shall, under any pretence, be sold in any tavern, etc., to any person who has the habit of drinking intoxicating liquors to excess, or the wife, etc., of such person, or any person concerning whom notice had been given to the landlord by the husband, etc., of such person, or any justice of the peace or inspector, that such person is in the habit of drinking," etc.: that the licenses were issued to the persons to whom the notices were addressed, subject to the right of suspending them for breach of the resolution. And the defendant justified upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution:—Held, on demurrer, that the license commissioners had no power to pass the resolution, and therefore that the defence was bad, for the communication was not privileged, and the defendant's belief in the validity of the resolution could not create any privilege. *Roberts v. Climie—Murphy v. Climie*, 46 Q. B. 264.—Osler.

The defendants and others signed a petition to the license commissioners of the city of Hamilton, praying that a license might not be granted to the plaintiff, and stating that his tavern was one of the worst drinking holes in the county: that it was kept very disorderly: that there was no suitable accommodation, and that the landlord was very much given to drinking:—Held, that the occasion of the presentation or publication of the petition was not absolutely privileged, but that the onus lay upon the plaintiff to prove express malice, and that the defendants used the

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occasion for some indirect or wroth motive. The jury gave a verdict for the plaintiff for \$1,000, and the court was of opinion on the evidence, verdict, and general merits, that there should be a new trial, Cameron, J., before whom the case was tried, dissenting. *Wilcocks v. Howell*, 5 O. R. 300.—Q. B. D.

The plaintiff was assistant in the shop of C., a druggist, over which the defendant and her husband, a physician, lived, the latter being C.'s landlord and customer. The defendant having in the presence of a witness accused the plaintiff of having taken \$4 from her trunk upstairs, her husband told C. that the plaintiff must be discharged, or he would send him no more prescriptions. A meeting was, however, arranged between the parties in the presence of the witness, for the purpose, as they said, of an investigation. On this occasion the slanderous words were repeated, and the plaintiff was discharged from C.'s employment:—Held, that what was said at this meeting was privileged, and the case having been left to the jury gave a verdict for the plaintiff was set aside. *Harpreaves v. Sinclair*, 1 O. R. 200.—Q. B. D.

The plaintiff, a school trustee, with another trustee, under the authority of the school board, purchased a quantity of firewood for use in the school-house. In December, shortly before the municipal and school trustee elections, the defendant and H., another school trustee, were discussing the taxes, when defendant said that the trustees had paid too much for the wood: that plaintiff had culled it, and sold the best of it, and had drawn the culled wood to the school-house: and, on H. remonstrating with him, said: "Oh, but he did, and I can prove it:" that he could prove it by a person named N. Subsequently in the same month, a discussion took place between defendant and B., first as to council, and then as to school matters, when defendant related the conversation he had had with N. in which he had said to N. that the wood was dear, and that N. had said that it was No. 2 at that: that there was something strange about the wood, and it must have been culled, for they bought No. 1, and drew No. 2 to the school-house. In an action for slander:—Held, Rose, J., dissenting, that the words having been spoken by a person interested to another, also interested, the occasion was privileged; and in the absence of proof of express malice no action would lie. *Blagden v. Bennett*, 9 O. R. 593.—C. P. D.

Quere, whether defamatory words spoken of a person holding an elective office with regard thereto, not followed by special damage, are actionable when they would not be so when spoken of the holder in his private capacity. *Id.*

There was no evidence to sustain the slander laid in this case; but an amendment was allowed, to comply, as was alleged, with the evidence. The only objection made at the trial by the defendant was that he should be allowed to examine witnesses on the new count, which was done. An objection to the amendment in term was therefore not allowed. The evidence in support of the amended count consisted not of statements made voluntarily by the defendant, but of answers to questions put to him, after he had laid a charge against the plaintiff, as to the nature of

it:—Held, that this was not sufficient to sustain an action for slander: and that words so spoken were privileged. *McCann v. Preneveau*, 10 O. R. 573.—C. P. D.

W. was in the employ of a mining company, of which L. was president, and had been working in the mining district under an arrangement by which his wife was to draw half his wages at the headquarters of the company (her home). After he ceased to be employed by the company, but while still in the mining district and before he was settled with and his wages paid up, his wife, with a companion, went to L. to apply for some of her husband's wages, and he replied, "We don't owe him anything now, he stole the boat, the cooking stove, and a lot of other things and sold them." The secretary of the company had previously received a letter stating that the plaintiff had done what the defendant said he had. The defendant by his statement of defence denied using the words, and gave evidence to that effect at the trial, but proposed also to give evidence that whatever the words used were, he honestly believed them to be true, and leave was asked to amend by setting this up. The judge who tried the case, held that the occasion was not privileged, and refused to allow the amendment, and on a motion for a new trial it was:—Held (reversing the judgment of O'Connor, J.), that the occasion was privileged, and a new trial was granted to give the plaintiff an opportunity to prove malice. *Wells v. Lindop*, 13 O. R. 434.—Chy. D.

Where one used defamatory language of another under circumstances of quasi privilege, but used the words in bad faith, not believing them to be true:—Held, that the expressions must be considered as in excess of the requirements of the occasion and malicious, and he was not protected in an action for damages. *Jacob v. Lawrence*, 4 L. R. (Ir.) C. L. 582, cited and relied on. *Wells v. Lindop* (2), 14 O. R. 275.—Chy. D. Affirmed 15 A. R. 695.

The plaintiff had been working for a couple of days for the defendant as a seamstress, when the defendant missed \$11, and so informed plaintiff. She drove plaintiff home that evening, stating she would require her again in a week or so. Next day defendant laid the case before the chief of police, who said plaintiff must have taken the money. The defendant then went to a Mrs. W. for whom she thought the plaintiff was working, and on being informed the plaintiff was not there, asked to see Mrs. W. alone, and said, "I have missed \$5. I went to the chief of police and laid the case before him," and he said "plaintiff had taken the money;" that plaintiff was the only one at defendant's house except defendant's children and sister. Defendant asked what she should do, and asked if she could have the plaintiff arrested. Mrs. W. advised her not to, but to go and see plaintiff. The defendant then went to a Mrs. B. for whom the plaintiff was working, and called plaintiff outside and told her what the chief had said; she then put her hand on plaintiff's shoulder and said, "You did, you must have taken it," and asked her to confess and give back the money, and defendant would give her all her sewing. The plaintiff denied taking the money, and asked to be taken to her father, and the defendant drove her to her father's residence.

Before doing was the matter defendant accused Mrs. B. said, blown open, did, you must to. On arrival did not want asking what plaintiff, defence some money, police had a knew plaintiff be accused in defendant applied and said she the father the own responsibility. Held, that the words were privileged and those any criminal 644.—C. P. D.

The plaintiff ship of C. from the auditors' \$1,400 and \$ him, he was appointed by amined into t his report at mistake of th the \$132.32, accounted for attended a m defendant, who after examining council that t planation as interest on h township fun report to tha plaintiff wro to pay the council, and he owed, wh paper, statin the mixing debted in \$ had made i township, a age and stil In an action discussed in which defe and a mem qualified p say wheth language e was in exce if in excess of malice. the court r 17 O. R. 2

See *Brady v. Graham*, P. R. 604.

Held, o an action

Before doing so, Mrs. B. asked plaintiff what was the matter, and plaintiff said that defendant accused her of taking some of her money. Mrs. B. said, that through the door having been blown open, she heard the defendant say, "You did, you must have," and then the door slammed to. On arrival at her father's, the defendant did not want to go in, but on his pressing her, asking what was the matter between her and plaintiff, defendant informed him she had missed some money, and told him what the chief of police had said. The father asked her if she knew plaintiff's character, and why she should be accused more than defendant's sister. The defendant appeared shocked at the suggestion, and said she would have plaintiff arrested; and the father then said that she would do so on her own responsibility. In an action of slander:—Held, that the action was not maintainable; that the words spoken to the plaintiff's father were privileged, while those heard by Mrs. B. and those spoken to Mrs. W. did not impute any criminal offence. *Gorst v. Barr*, 13 O. R. 644.—C. P. D.

The plaintiff had been treasurer of the township of C. from 1882 to 1886, when by reason of the auditors' report, shewing that two sums of \$1,400 and \$132.32 were not accounted for by him, he was dismissed. A commissioner was appointed by the Lieutenant-Governor, who examined into the matter, and in December made his report stating that the \$1,400 item was a mistake of the auditors, and that, except as to the \$132.32, all the township moneys were accounted for. The commissioner subsequently attended a meeting of the council, at which defendant, who was a councillor, was present, and after examining plaintiff on oath informed the council that he was satisfied with plaintiff's explanation as to \$125 of this sum, namely, being interest on his own moneys deposited with the township funds; and he made an addition to his report to that effect. In February following the plaintiff wrote to a newspaper that he was ready to pay the township any moneys either the council, auditors, or commissioner could shew he owed, whereupon the defendant wrote to the paper, stating that the commissioner, apart from the mixing of moneys, had found plaintiff indebted in \$125, and also stating that plaintiff had made several thousand dollars out of the township, and could well afford to pay his shortage and still have some thousands to the good. In an action for libel:—Held, that the matter discussed in the defendant's letter being one in which defendant was interested as a ratepayer and a member of the council, there might be a qualified privilege, still it was for the jury to say whether under the circumstances the language employed was within the privilege, or was in excess of what the occasion justified; and if in excess, they could properly draw inference of malice. The jury having found for plaintiff the court refused to interfere. *Colvin v. McKay*, 17 O. R. 212.—C. P. D.

See *Bradley v. McIntosh*, 5 O. R. 227; *Bromley v. Graham*, 11 P. R. 451; *Hall v. Gowenlock*, 12 P. R. 604, p. 512.

## II. CHARGING CRIME.

Held, on demurrer to a statement of claim in an action of slander, that any defamatory charge

referable to wrong-doing under section 26, or section 58, of the Act relating to malicious injuries to property, R. S. C. c. 168, is actionable, without proof of special damage; for the punishment of imprisonment, and not merely the infliction of a fine is imposed in the case of such offences; but it is otherwise in the case of a defamatory charge referable to section 27, or section 59 of that Act, for such offences are punishable by fine only. *Routley v. Harris*, 18 O. R. 405—Boyd.

See *Gorst v. Barr*, 13 O. R. 644, p. 505; *Switzer v. Laidman*, 18 O. R. 420, p. 515.

## III. IMMORALITY OR UNFITNESS FOR SOCIETY.

To a statement of claim, charging the defendants with the publishing of the plaintiff, in their newspaper, that he had seduced and betrayed one B. P., and was a man unfit for the society of respectable people, etc., whereby the plaintiff was injured in his credit, etc., the defendants pleaded that the article was published bona fide and without malice, and for the public benefit, and in the usual course of the defendants' duty as public journalists, and was a correct, fair, and honest report of proceedings of public interest and concern:—Held, on demurrer, bad, for the publication complained of was in no sense for the public benefit, nor published in the course of the defendants' duty. *Farmer v. Hamilton Tribune Printing and Publishing Co.*, 3 O. R. 538—Wilson.

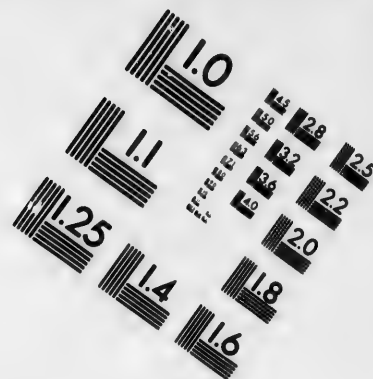
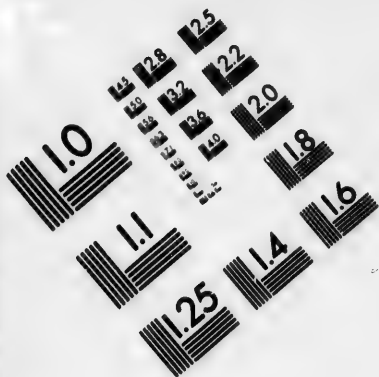
See *Palmer v. Solmes*, 45 Q. B. 15, p. 509.

## IV. AFFECTING PERSONS IN TRADE, BUSINESS OR OTHER EMPLOYMENT.

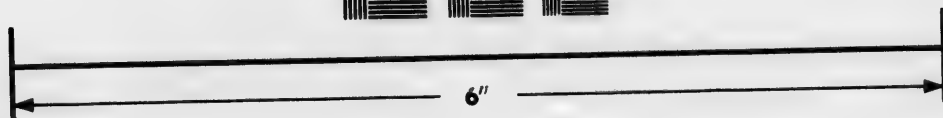
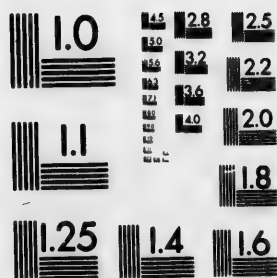
The defendant spoke of the plaintiff, a miller and grain buyer, that one of the big millers, (meaning the plaintiff) had run away owing money to him and others: that he, the defendant had come in to catch the plaintiff, but that he had gone or cleared out. At the trial a nonsuit was entered, on the objection that the words were not shewn to have been used with reference to the plaintiff's business, and no special damage was proved:—Held, that the nonsuit was wrong, for the words used cast an imputation upon the solvency and financial standing of the plaintiff, and it was for the jury to say whether they were spoken in reference to his business, and calculated to injure him therein. *Lott v. Drury*, 1 O. R. 577.—Q. B. D.

S. et al., (respondents) partners in trade, sued the D. T. Co., (appellants) for defamation of the respondents in their trade. In the declaration it was alleged:—1. That they were wholesale and retail merchants at Halifax. That appellants wrongfully, falsely and maliciously, by means of their telegraph lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated and published the false and defamatory message following: "John Silver & Co., wholesale clothiers, of Grenville street, have failed; liabilities heavy." 2. That same message was caused also to be published in other parts of the Dominion. 3. That the appellants promised and agreed with the proprietor or publisher of the St. John Daily Tele-

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graph newspaper, and entered into an arrangement with him, whereby the appellants agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages, and should publish them in his newspaper, and that in pursuance of said agreement, the appellants wrongfully, maliciously, and by means of said telegraph, transmitted, sent, and published from their office in Halifax to their office in St. John, and there falsely and maliciously caused to be written, printed, copied, circulated, and published the above message, whereby many customers who had heretofore dealt with plaintiffs, ceased to do so, and their credit and business standing and reputation were thereby greatly damaged. The D. T. Co. denied the several publications charged, and also the entering into the agreement mentioned in the third count and the forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper, was corrected in the evening edition, and that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatch was not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication, they ceased to do business with the respondents as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange and sometimes discounting their notes. The counsel for the defendants moved for a nonsuit, which was refused, and the case was submitted to the jury who, upon the evidence, rendered a verdict for the plaintiffs with \$7,000 damages. On appeal to the Supreme Court of Canada, it was:—Held, (Taschereau and Gwynne, JJ., dissenting), that the appellants, D. T. Co., were responsible for the publication of the libel in question. Per Taschereau and Gwynne, JJ., assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, and that Snyder had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded. 2. Sir W. Ritchie, C. J., doubting, and Henry, J., dissenting, that the damages were excessive, and therefore a new trial ought to be granted:—Held, also, per Strong, Taschereau and Gwynne, JJ. No special damages having been alleged in the declaration, the evidence as to such damages, having been objected to, was inadmissible, and therefore a new trial should be granted. *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238.

The statement of claim alleged that from 1874 to 1883 the plaintiff was registrar of deeds of the county of Bruce: that in 1880 on a petition of the defendants to the Lieutenant-Governor, a commissioner was appointed to enquire into the conduct of the plaintiff as registrar, and an en-

quiry held, when charges of a defamatory character were made against the plaintiff, setting them out: that the charges were not sustained in law or by the evidence, and were shewn to be, and were, untrue in fact, and to have been made maliciously and with the design of injuring the plaintiff: that before the commissioner had made any report on the charges the defendants maliciously, and without any reasonable or probable cause, and with design and intention of injuring the plaintiff in his reputation, character and business, caused the accusations, charges, and defamatory statements thereinbefore specially mentioned, and portions of the evidence adduced before the said commissioners, together with certain statements made by one R., who, during the investigation, acted as defendants' solicitor, to be printed and published in pamphlets and in the minutes of the county council, and circulated throughout the county and elsewhere in the province, greatly to the prejudice, detriment, damage, and injury of the plaintiff:—Held, on demurrer, that a good cause of action for libel was shewn, and that such action lies against a municipal corporation. *McLay v. County of Bruce*, 14 O. R. 398.—Wilson.

See *Skirring v. Ross*, 31 C. P. 423, *infra*; *Farmer v. Hamilton Tribune Printing and Publishing Co.*, 3 O. R. 538, p. 506; *Huber v. Crookall*, 10 O. R. 475, p. 513; *Livingston v. Trout*, 9 O. R. 488, p. 509; *Scott v. Crerar*, 11 O. R. 541, 14 A. R. 152, p. 515.

#### V. ACTIONS FOR.

##### 1. By and against Whom.

A medical practitioner registered in Great Britain but not in this province, cannot maintain an action against a person slandering him in his profession. See *Skirring v. Ross*, 31 C. P. 423.—C. P. D.

Held, under R. S. O. (1877), c. 125, that in an action for a tort (in this case the action was for slander) committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone. *Amer v. Rogers*, 31 C. P. 195.—Oslar. See *Lee v. Hopkins*, 20 O. R. 666.

A married woman may bring an action of libel in her own name without joining her husband as plaintiff. The omission of the words "either in contract, or in tort or otherwise," found in section 2 (2) of the Married Woman's Property Act, 1884, from section 3 (2), R. S. O. (1887) c. 132, does not limit the legal effect and operation of that section. *Spahr v. Bean*, 18 O. R. 70.—Boyd.

Where slanderous words were spoken under such circumstances as that the person to whom they were spoken did not know to which of a class of two persons they were intended to be applied:—Held, that either of the two members of the class was entitled to sue, but it was necessary for her to prove that the words were untrue of the other member, otherwise she could not recover. *Albrecht v. Burkholder*, 18 O. R. 287.—Street.

See *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 338, p. 507; *McLay v. County of Bruce*, 14 O. R. 398, *supra*.

(a) Sta

A declaratory judgment is not a remedy for adultery with a woman of special dignity of her husband's friends, who though the defendant in no way mes, 45 Q.

The statement brought by the adjuster, a liquidator of the defendant's paper company, of libel in a defendant in a libel damages case, surprised the plaintiff for plaintiff's reputation was allowed evidence, unless a complete compensation on said trial was not maliciously put as an insult have been claim in a of which pany which ceived from ted; the had been accepted, an unfair defendant the public innuendo that the the ques tiff by v been com liest opp article should in respo the com was afte demurr and sec alleged proved false to made in malice, damage was no a defen murren Trout, W., brought contain his p In th fendan lately occur

## 2. Pleadings.

## (a) Statement of Claim and Innuendo.

A declaration by a married woman for slander, imputing that she had committed incest and adultery with her father, and alleging as grounds of special damage (1), the loss of the consortium of her husband, (2), the loss of the society of friends, was:—Held, on demurrer, good, although the second ground was clearly insufficient in not naming the friends. *Palmer v. Solmes*, 45 Q. B. 15.—Osler.

The statement of claim in an action of libel brought by plaintiff, an insurance inspector and adjuster, and at the time of action brought the liquidator of an insurance company, alleged that defendant in an article published in his newspaper commenting on the trial of a previous action of libel brought by plaintiff against defendant in which plaintiff had recovered one shilling damages, stated that he would not have been surprised if the jury had found more favourably for plaintiff, for though evidence of general reputation was admitted, the court had refused to allow evidence of specific acts of improper conduct, unless directly connected with the insurance company; and that in further commenting on said trial in his said article falsely and maliciously published of the plaintiff, in his business as an insurance adjuster, that plaintiff would have been asked to explain the purchase of a claim in respect of a loss, one half of the amount of which he afterwards received from the company while their adjuster; and as to gifts received from persons whose losses he had adjusted; the innuendo alleged being that plaintiff had been dishonest in adjusting claims and had accepted bribes, etc.; and that the article was an unfair and false report of the trial. The defendant by his statement of defence admitted the publication of the article, but denied the innuendo, and also any malice, etc.; and alleged that there was an inaccuracy in the article as to the question which might have been asked plaintiff by which a wrong impression might have been conveyed which was corrected at the earliest opportunity in defendant's newspaper by an article stating that the question referred to should have been that the purchase was made in respect of a loss which occurred while he was the company's adjuster, but that the payment was after he had left the company:—Held, on demurrer, that the difference between the first and second articles as to the payment on the alleged purchase was material, for if it was proved that the first article was in this respect false to the knowledge of the defendant, and he made no correction, this would be evidence of malice, and would probably materially affect the damages; but even if immaterial the plaintiff was not prejudiced: that it was only offered as a defence to a portion of the damages. The demurrer was therefore overruled. *Livingston v. Trout*, 9 O. R. 488.—Rose.

W., a judge of the supreme court of B. C., brought an action against H., editor, for a libel contained in the following article published in his paper: "The McNamee-Mitchell Suit. In the sworn evidence of Mr. McNamee, defendant, in the suit of McKenna v. McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership (in the

dry dock contract) out in British Columbia, one of whom was the premier of the province.' The premier of the province at the time referred to was Hon. Mr. Walkem, now a judge of the supreme court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McNamee must be labouring under a mistake. Had the statement been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly or allowed to pass unheeded." The innuendoes alleged by the declaration to be contained in this article were: 1. That W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money. 2. That he did so under cloak of his public position and by fraudulently pretending that he acted in the interest of the government. 3. That he committed criminal offences punishable by law. 4. That he continued to hold his interest in the contract after his elevation to the bench:—Held, that the article was susceptible of the first of the above innuendoes, but not of the others which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial. On the trial the jury found a verdict for the plaintiff, with \$2,500 damages:—Held, per Strong, Fournier, Taschereau and Gwynne JJ., that the case was improperly left to the jury but the only prejudice sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to \$500:—Held, per Ritchie, C. J., that there had been a mistrial, and the consent of both parties to such reduction was necessary. *Higgins v. Walkem*, 17 S. C. R. 225.

See *Huber v. Crookall*, 10 O. R. 475, p. 513.

## (b) Defence.

In an action for libel the plea of not guilty was held inconsistent with a plea of apology and payment into court, and was ordered to be struck out. *Doyle v. Owen Sound Printing Co.*, 8 P. R. 69.—Daiton, Q. C.

Held, that the omission to plead privilege as a defence did not preclude the defendant from setting it up at the trial. *Blagden v. Bennett*, 9 O. R. 593.—C. P. D.

To an action of slander the defendant set up as a defence facts which amounted to a justification, but restricted their effect to the mitigation of the damages:—Held, this constituted a good defence. *Wilson v. Woods*, 9 O. R. 687.—Rose.

In libel a plea in mitigation of damages must in its nature be an admission that the plaintiff is entitled to recover some compensation; but it amounts to a contention that the amount of the plaintiff's recovery shall be limited to the value of the plaintiff's character, which value is affected by the facts pleaded. Such a plea, based upon the plaintiff's bad character, must either shew that the plaintiff is a man of bad general reputation or character, or that the plaintiff has a bad character with regard to some specific act



which relates to the charge in the libel complained of. *Moore v. Mitchell*, 11 O. R. 21.—Q. B. D.

It is not permissible to a defendant to plead justification to a libel, and under that defence to offer evidence of the plaintiff's bad character in mitigation of damages. *Wilson v. Woods*, 9 O. R. 687, disapproved of. *Ib.*

See *Livingston v. Trout*, 9 O. R. 488, p. 509; *Switzer v. Laidman*, 18 O. R. 420, p. 515.

#### (c) Other Cases.

Counter claim for libel excluded in an action for negligence. See *McLean v. Hamilton Street Railway Co.*, 11 P. R. 193.

And in an action on a promissory note. See *Central Bank of Canada v. Oslori*, 12 P. R. 160.

Amendment of pleadings. See *McCann v. Preneveau*, 10 O. R. 573.

#### 3. Particulars.

In an action of libel the plaintiff alleged that the defendant had accused him in a newspaper article of having made false returns to the government in his business of distiller. To this the defendant pleaded justification:—Held, that the plaintiff was entitled to particulars of the defence intended to be set up under this plea. *Corcoran v. Robb*, 8 P. R. 49.—Dalton, Q. C.

In an action for slander in charging the plaintiff with theft, particulars were ordered shewing the person to whom the words were spoken, or if such person were unknown, or the words were spoken to the plaintiff, then the name of any person who was present and heard or might have heard the words spoken. *Thornton v. Capstock*, 9 P. R. 535.—Cameron.

Particulars in an action for libel cannot be struck out as insufficient; if those delivered are too general, the judge at the trial will exercise his discretion as to the admission of evidence thereunder. *Citizens' Insurance Co. v. Campbell*, 10 P. R. 129.—Dalton, Master.—Cameron.

An order for particulars, under the statement of claim in an action of slander, of the names of the persons to whom the alleged slander was spoken, was rescinded because the examination of the plaintiff gave to the defendant all the discovery that he sought to obtain by the order for particulars:—Sembler, in actions of slander the practice laid down in *Thornton v. Capstock*, 9 P. R. 535, as to particulars to be furnished should be followed in preference to that prevailing in England. *Gould v. Beattie*, 11 P. R. 329.—Boyd.

#### 4. Evidence.

##### (a) Examination before Trial.

Held, that the assistant or sub-editor of the defendants was an officer of the company examinable for the purpose of discovery under R.

S. O. (1877), c. 50, s. 156. *Mailand v. Globe Printing Co.*, 9 P. R. 370.—Oaler.

In an action for libel against a newspaper, the defendants, on a motion under Rule 285, O. J. Act, (Con. Rule 566) were with certain restrictions, allowed to examine the plaintiff before defence filed. *Tate v. Globe Printing Co.*, 11 P. R. 253.—Dalton, Master.

No man can be compelled to answer a question incriminating himself. And where the defendant upon his examination for discovery in an action of libel refused to answer questions as to the authorship of an alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him:—Held, that he was entitled to the privilege, and that it was not too late to claim it. The costs of the motion to commit, were made costs to the plaintiff in the cause. *Hall v. Gowanlock*, 12 P. R. 604.—Boyd.

##### (b) Of Publication.

The plaintiff had been a servant of the defendant, and on leaving the defendant's service, asked for a statement of account, whereupon the defendant made out an account as follows: "Mr. Joseph Jackson to Wm. Staley, Dr." Amongst the items were the following: "Stole hay during winter, \$4.00," and "stole hatchet-hammer, \$1.50." The account was placed in an unsealed envelope and handed to M., the plaintiff's then employer who took it to the plaintiff's house and put it on the table between the plaintiff and his wife while at supper. The wife took up the envelope and taking out the account read it to the plaintiff who could neither read nor write. There was no evidence to shew that the defendant knew that the plaintiff could not read, the only knowledge that defendant could have had being that the wife had signed plaintiff's contract with defendant, but it did not appear that the defendant's attention was called to this fact or that he knew that the signature was not the plaintiff's own hand-writing; nor was there any evidence that M. read the account or took it out of the envelope, and he was not called as a witness. In an action of libel on the account, it was:—Held, that there was no evidence of publication; and as the onus of proof thereof was on the plaintiff, the action failed. *Jackson v. Staley*, 9 O. R. 334.—C. P. D.

The plaintiff was the patentee and manufacturer of an automatic steam injector, and the defendants were a company manufacturing automatic steam injectors, one J. being their manager. A printed circular signed "Penberthy Injector Company," contained certain statements as to the mode in which the plaintiff had obtained his patent, and this action was brought by him on the ground that these statements were libellous. At the trial it was proved that the circular had been found in various places, but the only proof of publication was an admission by J., made in conversation with the plaintiff, that the circular had been issued by the Penberthy Injector Company in reference to a circular issued by the plaintiff:—Held, that no authority can be inferred in a general man-

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##### (c) Proof.

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ager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel by his admissions to any person that he had published a libel on another person by their authority, and that there was therefore no proof of publication. If J. had been called as a witness and proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation. *Tench v. Great Western R. W. Co.*, 33 Q. B. 8, distinguished. Decision of the Queen's Bench Division reversed. *Carroll v. Penberthy Injector Co.*, 16 A. R. 446.

(c) *Proof of Defamatory Matter and Innuendo.*

A draft drawn on the plaintiff being presented for acceptance at his place of business by a clerk in an agency of a bank, answer was returned that the drawee (plaintiff) was away from home, in the Western States, and the clerk so noted the answer on the back of the draft. The defendant, the manager of the bank agency, added in his own handwriting to what the clerk had written the words "or San Francisco, or the Rocky Mountains," and the draft was thereupon returned to another bank, by which it had been sent for presentation, and by which after its return it was handed to the bankers of the drawers. Innuendo, "that the defendant meant to impute that the plaintiff had left for parts unknown, not intending to return to Ontario, and with intent to defraud" his creditors:—Held, that the words were capable of the libellous meaning alleged, and a nonsuit was therefore set aside and a new trial directed, in order to submit to the jury the question whether the words did in fact bear that meaning:—Held, also, on the facts set out in the report, that there was evidence to go to the jury in support of the innuendo. At the trial the bank manager to whom the draft was returned was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the judge ruled that in the absence of evidence (which it was admitted could not be given), that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put:—Held, that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, but (following *Daines v. Bartley*, 3 Ex. 200) that nevertheless a proper foundation had not been laid for the question; that the witness should have first been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered. *Huber v. Crookall*, 10 O. R. 475.—Q. B. D.

In an action against a mercantile agency company the alleged libel consisted of the publication among the general body of the defendants' subscribers of a notice or circular containing the words, after the plaintiff's name: "If interested inquire at the office." The defendants pleaded that the notice also contained words explanatory of the alleged libel, which should be read in con-

nection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue. At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to, and explanatory of it. The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection, that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired:—Held, that there was a variance between the libel alleged and that proved, and that as the proposed amendment would have raised a new issue to which the evidence did not apply the plaintiff should have been nonsuited. *Todd v. Dun, Wiman & Co.*, 15 A. R. 85; 12 O. R. 71.

See *McCann v. Preneveau*, 10 O. R. 573.

(d) *Of Malice.*

In an action for malicious prosecution and slander:—Held, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected as was done here. *McCann v. Preneveau*, 10 O. R. 573.—C. P. D.

See *Dewe v. Waterbury*, 6 S. C. R. 143, p. 499; *Wilcocks v. Howell*, 5 O. R. 360, p. 503; *Wells v. Lindop*, 14 O. R. 275; 15 A. R. 695, p. 504; *Todd v. Dun Wiman & Co.*, A. R. 85, p. 501; *Colvin v. McKay*, 17 O. R. , p. 505.

(e) *Other Cases.*

Action for libel contained in anonymous circulars written on a type-writer imputing unprofessional conduct to the plaintiff in sending "bummers" round "touting" for business, and in inducing other solicitors' clients to leave them and employ plaintiff's firm. The evidence, which was circumstantial, was that on the 13th October, P. M. and McK., members of the legal profession in Hamilton, received through the post the above circulars all of the same import though not copies, marked with the 2 p.m. post mark, and must have been posted between 2 and 3 p.m., as the practice was to change the post mark as the hour struck. The defendant and a firm of C. & W. had their office in the same building, the latter having a caligraph which the defendant, who was an expert writer thereon, was in the habit of using. About 12.30 on the day in question the defendant borrowed the caligraph and had it away long enough to write the circulars. About 2.30 after the defendant had returned the machine, he came back with a piece of paper in his hand which looked like foolscap with the edge torn off and similar in appearance to one of the circulars, which he put into the machine and wrote something on. He then went out, and returned in about three minutes and got an envelope, which resembled an envelope enclosing one of the circulars, which he put into the machine. It appeared, however, that the envelope was one of a job lot which a clerk in M.'s office had disposed of amongst the profession. In the type-writer there were pecu-

liarities, namely, in certain of the letters being blurred, which were found in the circulars. The circular also contained expressions similar to those used by defendant in speaking about plaintiff. After C. had been subpoenaed to produce the machine, the defendant advised him not to do so; and a brother of C.'s, of whom the defendant was legal adviser, wrote to C. also advising him not to produce it, but he said he did not write at defendant's request. The plaintiff also tendered evidence as to the defendant's style of composition, which was rejected:—Held, *Rose, J.*, dissenting, (1) that the evidence was not sufficient to be submitted to the jury and it was therefore properly withdrawn from them; and (2) that the evidence of style of composition was properly rejected. *Scott v. Crerar*, 11 O. R. 541.—C. P. D. Reversed in appeal, 14 A. R. 152.

Semble, a witness could not be asked his opinion as to the authorship of a letter. *S. C.*, 14 A. R. 152.

Per *Burton and Osler, JJ.A.* Evidence of literary style on which to found a comparison, if admissible at all, is not so otherwise than as expert evidence. *Ib.*

In this action of libel the defendant did not plead justification, but he said in his defence that the alleged libel was a fair comment upon matters of public and general interest:—Held, that he was entitled under this defence to shew that the matters upon which he commented were true. *Lefroy v. Burnside*, 4 L. R. (Ireland) 556; *Davis v. Shenstone*, 11 App. Cas. 187; and *Riordan v. Wilcox*, 4 Times L. R. 475, referred to. *Wills v. Carman*, 17 O. R. 223.—Q. B. D.

When in an action for slander and libel, imputing criminal offences, the defendant set up by way of mitigation of damages, that the plaintiff had confessed to a third party that he had done the acts charged against him:—Held, that evidence of such a confession was only admissible under a plea of justification, unless the defendant added on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff, although she honestly believed it to be true at the time she repeated the words complained of:—Held, also, that objection should have been taken to the pleading either by demurrer or by application to strike it out as embarrassing. *Switzer v. Laidman*, 18 O. R. 420.—Chy. D.

Action for libel. The libel consisted of a letter published in a Boston, U. S., newspaper, claimed to have been written by defendant. The letter, which was signed by a person of the same name as the defendant, stated that it was written in answer to an anonymous letter, dated 15th September, published in the same newspaper, which the writer stated he had seen the manuscript of, and which was a clumsy attempt to make the writer believe was written further off than Ottawa, and had also seen the manuscript of a letter written by an Ottawa shoe dealer to a Boston firm, and that the handwriting of both were the same. The anonymous letter referred to a trip made by defendant to New Brunswick, which was also referred to in the letter in question. The letter in question also spoke of the writer of the anonymous letter

as a person who had come to Ottawa and opened a boot and shoe business, and stayed at the same hotel as the writer of the letter in question. The letter also spoke of a certain machine called the Crescent Heel Plate Machine as *our* machine. The defendant at the trial refused to answer whether or not he was the writer of the letter in question, claiming privilege on the ground that it might criminate him, and the publishers, for the examination of whom a commission issued, refused to be examined for the like reason. The defendant in his examination stated that both he and the plaintiff were boot and shoe dealers in Ottawa; that he was a subscriber and correspondent to this paper; that he had been on a trip to New Brunswick, and on his return saw the anonymous letter of 15th September in this newspaper, as also the manuscript thereof, as well as the manuscript of a letter to a Boston firm, both apparently in the same handwriting. The plaintiff's counsel stated that in addition to the above he intended proving that when plaintiff came to Ottawa, he stopped at the same hotel as defendant, and that defendant was the sole agent for the Crescent Heel Plate Machine:—Held, that this was sufficient evidence to go to the jury of defendant being the author of the letter in question. Quere, whether the refusal to answer the direct question as to authorship, or the claim of privilege against criminal proceedings, afforded any evidence thereof, by way of admission or estoppel or otherwise. *Harkins v. Doney*, 17 O. R. 22.—C. P. D.

See *Wilcocks v. Howell*, 5 O. R. 360, p. 503; *Bradley v. McIntosh*, 5 O. R. 227; *Livingston v. Trout*, 9 O. R. 488, p. 509; *Moore v. Mitchell*, 11 O. R. 21, p. 511; *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238, p. 507; *Millette v. Little*, 10 P. R. 265; *Graham v. McKimm*, 19 O. R. 475, p. 501.

### 5. Damages.

Held, per *Cameron, C. J.*, and *Galt, J.*, that in this case the damages were excessive, and they were directed to be reduced to \$1,000, provided such sum was paid by a named date and plaintiff elected to take such sum, otherwise a new trial was directed. Per *Rose, J.*, that under the circumstances the damages were not excessive; but as plaintiff's counsel had intimated that a smaller amount would be accepted if paid within a reasonable time, he would accede to the reduction, on plaintiff accepting such amount, otherwise the motion for a new trial should be dismissed. *Massie v. Toronto Printing Co.*, 11 O. R. 362.—C. P. D.

Nominal Damages. See *Wills v. Carman*, 14 A. R. 656.

See *Wilcocks v. Howell*, 5 O. R. 360, p. 503; *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238, p. 507; *Higgins v. Walkem*, 17 S. C. R. 225.

See also next Subhead.

### 6. Costs.

Where in an action of libel a verdict for \$1 damages was found, and the judge at the trial

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gave no certificate for costs:—Held, that the plaintiff was entitled to tax full costs. *Garnett v. Bradley*, 3 App. Cas. 944, considered and followed. *Wilson v. Roberts*, 11 P. R. 412.—Q. B. D.

Where, in an action for libel, the plaintiff obtained a verdict for twenty cents damages:—Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only. *Wilson v. Roberts*, 11 P. R. 412, followed. *Wellbanks v. Conger*, (2) 12 P. R. 447.—C. P. D.

Recommendation of jury as to costs. See *Farquhar v. Robertson*, 13 P. R. 156.

Order of judge dismissing action and ordering defendant to pay plaintiff's costs where the jury found that the defendant was guilty of libelling, but that the plaintiff had sustained no damage—set aside. See *Wills v. Carman*, 14 A. R. 656.

See *Cowan v. Landell*, 13 O. R. 13, p. 500.

#### VI. APOLOGY.

See *Dóyle v. Owen Sound Printing Co.*, 8 P. R. 69, p. 511.

#### VII. MISCELLANEOUS CASES.

Separation of jury after judge's charge. See *Stilwell v. Rennie*, 7 O. R. 355.

A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel. *Wilcocks v. Howell*, 8 O. R. 576.—Q. B. D.

Limitation in action for libel. *Mayor of Montreal v. Hall*, 12 S. C. R. 74.

It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it. *Wills v. Carman*, 17 O. R. 223.—Q. B. D.

#### VIII. SLANDER OF TITLE.

Counter claim for slander of title in a mortgage action. See *Odell v. Bennett*, 13 P. R. 16.

See *Ontario Industrial Loan and Investment Co. v. Lindsey*, 3 O. R. 66; 4 O. R. 473.

#### DEFICIENCY OF ASSETS.

See EXECUTORS AND ADMINISTRATORS.

#### DELAY.

See LACHES.

#### DELEGATION.

POWER OF ATTORNEY—See PRINCIPAL AND AGENT.

A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered so to do. *In re Queen City Refining Co.*, 10 P. R. 415.—Hodgins, Master in Ordinary.

Of power of appointment. See *Smith v. McLellan*, 11 O. R. 131.

Of payment in hypothec. See *Reeves v. Perreault*, 10 S. C. R. 616.

#### DELIVERY.

I. OF GIFT—See GIFT.

II. OF GOODS—See SALE OF GOODS.

III. OF POSSESSION—See SALE OF LANDS.

Of insurance policy as an escrow. See *Confederation Life Association of Canada v. O'Donnell*, 10 S. C. R. 92; 13 S. C. R. 218.

#### DEMURRAGE.

See SHIP.

#### DEMURRER.

I. PLEADING—See PLEADING — SPECIFIC PERFORMANCE.

II. JUDGMENT ON—See JUDGMENT.

#### DEPARTURE IN PLEADING.

See PLEADING.

#### DEPOSITIONS.

UNDER COMMISSIONS—See EVIDENCE.

Evidence of deposition taken before police magistrate on proof of absence of witness from Canada. See *Regina v. Nelson*, 1 O. R. 500.

#### DEPOSITS.

See BANKS.

#### DESCENT.

See ESTATE.

#### DESCRIPTION OF GOODS.

See BILLS OF SALE AND CHATTEL MORTGAGES.

**DESCRIPTION OF LAND.**

- I. IN DEEDS—*See* DEED—SALE OF LAND.  
 II. IN PATENTS—*See* DEED.  
 III. IN WILLS—*See* WILL.  
 IV. OF ROAD OR RIGHT OF WAY—*See* WAY.

**DESERTION.**

ALIMONY FOR—*See* HUSBAND AND WIFE.

**DESISTMENT.**

*See* RAILWAYS AND RAILWAY COMPANIES.

**DETENTION.**

*See* CONVERSION.

**DETINUE.**

*See* CONVERSION.

**DEVASTAVIT.**

*See* EXECUTORS AND ADMINISTRATORS.

**DEVISE.**

*See* WILL.

**DEVOLUTION OF ESTATES ACT.**

WIDOWS ELECTION—*See* DOWER.

The Devolution of Estates Act has not superseded but is to be read in conjunction with R. S. O. (1877), c. 106, ss. 36, 37, and mortgaged land devised by will is primarily liable to pay its own burdens unless the will otherwise directs by such terms as distinctly and unmistakably refer to or describe the mortgage debts. *Mason v. Mason*, 13 O. R. 725.—Boyd.

Where a will devised lands to the executors on trust to sell the same:—Held, that the case was not within section 8 of the Devolution of Estates Act, and the approval of the official guardian or an order of the court was not necessary to validate a sale. *In re Booth's Estate*, 16 O. R. 429.—Ferguson.

The word "devolve" in section 8, is not used in its strict and accepted meaning of falling upon by way of succession, but in the sense merely of "passing," and what is meant is that where infants are concerned no real estate which, but for the preceding sections, would not come to the executors or administrators by a devise, gift or conveyance, can be validly sold

without the written consent of the official guardian. *Ib.*

On a sale of lands the purchaser objected to the title on the grounds (1) that there was no evidence that a certain mortgage had been discharged and (2) that the title being deduced through the devisee of a person who had died since the coming into force of the "Devolution of Estates Act," R. S. O. (1887) c. 108, the legal estate was outstanding in the executor of such person. It appeared that all debts of the testator had been paid:—Held, that both matters were matters of conveyancing, and not of title. *Martin v. Magee*, 19 O. R. 705.—Chy. D.

Under the "Devolution of Estates Act," where debts have been paid, or where there are no debts, executors will hold the bare legal estate for the devisee of the land of the deceased. *Ib.* Reversed on appeal.

*See Re Nixon*, 13 O. R. 314; *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. 397.

[*See* 54 Vict. c. 18 (Ont.)]

**DICKINSON'S ISLAND.**

Dickinson's Island in Lake St. Francis is part of the county of Glengarry. *Regina v. Duquette*, 9 P. R. 29.—Osler.

**DIRECTORS.**

*See* COMPANY—RAILWAYS AND RAILWAY COMPANIES.

**DISCLAIMER.**

- I. IN ACTIONS—*See* COSTS.  
 II. OF OFFICE—*See* MUNICIPAL CORPORATIONS.

Application by defendants to have their names struck out in an action of ejectment disclaiming any interest in the land, and not being in possession at or subsequent to the issue of the writ. *See Anglo-Canadian Mortgage Co. v. Cotter*, 8 P. R. 111.

It is not essential to the validity of a disclaimer of a grant of land that it should be by deed or by record. *Moffatt v. Scratch*, 12 A. R. 157.

**DISCONTINUANCE.**

- I. IN ACTIONS—*See* PRACTICE.  
 II. OF POSSESSION—*See* LIMITATION OF ACTIONS.

**DISCOVERY.**

- I. EXAMINATION OF PARTIES—*See* EVIDENCE—EXAMINATION OF JUDGMENT DEBTOR.

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- II. OF DOCUMENTS—See EVIDENCE.  
 III. OF NEW EVIDENCE—See NEW TRIAL.

Adding parties in the master's office for the purpose of discovery. See *Hopper v. Harrison*, 28 Chy. 22.

## DISMISSING ACTIONS.

See PRACTICE.

## DISQUALIFICATION.

- I. OF ARBITRATORS—See ARBITRATION AND AWARD.  
 II. OF MEMBERS OF MUNICIPAL COUNCILS—See MUNICIPAL CORPORATIONS.  
 III. OF PARLIAMENTARY CANDIDATES—See PARLIAMENTARY ELECTIONS.  
 IV. OF SCHOOL TRUSTEES—See PUBLIC SCHOOLS.  
 V. OF MAGISTRATES—See INTOXICATING LIQUORS—JUSTICE OF THE PEACE.  
 VI. OF VOTERS—See PARLIAMENTARY ELECTIONS.

Where two shareholders, who were also provisional directors, and who were candidates for re-election, were appointed scrutineers, and directors were then elected excluding the plaintiff:—Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate, that they were disqualified from so acting. *Dickson v. McMurray*, 28 Chy. 533.—Proudfoot.

## DISTRESS.

### I. FOR RENT AND CHARGES ON LAND.

1. *What Constitutes a Distress*, 522.
2. *For what Rents*.
  - (a) *Powers in Mortgages*, 522.
  - (b) *After Insolvency of Lessee*, 526.
  - (c) *When Amount of Rent not Determined*, 527.
3. *For Annuity*, 528.
4. *Set-off or Counter Claim*, 528.
5. *What may be Distressed*.
  - (a) *Property of Joint Owners*, 528.
  - (b) *Property of Third Parties*, 528.
  - (c) *Goods in Custody of the Law*, 528.
  - (d) *Exemptions for Benefit of Trade*, 529.
  - (e) *Goods Subject to Chattel Mortgages*, 529.
  - (f) *Fixtures—See FIXTURES*.
6. *Abandonment and Retaking*, 530.
7. *Wrongful or Irregular Distress*.
  - (a) *Action for Removal of Goods*, 530.

- (b) *Justification as Owner*, 530.
- (c) *Double Value*, 530.
- (d) *Damages*, 530.
- (e) *Other Cases*, 531.

### II. FOR MUNICIPAL TAXES—See ASSESSMENT AND TAXES.

### III. PURCHASE OF DISTRESS BY DISTRAINOR, 531.

### IV. DAMAGE FEASANT, 531.

### V. UNDER MAGISTRATE'S WARRANT—See JUSTICE OF THE PEACE.

### VI. LANDLORD'S CLAIM FOR RENT ON EXECUTION—See SHERIFF.

### I. FOR RENT AND CHARGES ON LAND.

#### 1. *What Constitutes a Distress.*

The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on the 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent, and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenant's waiving an inventory, advertising, etc., sold them within two days to a nephew of the landlord:—Held, that the landlord's two visits of 17th and 24th February did not amount to a distress. Quære, whether a tenant can waive all statutable formalities as to inventory, etc., as regards the mortgagee. *Whimsell v. Giffard*, 3 O. R. 1.—Q. B. D.

#### 2. *For what Rents.*

##### (a) *Powers in Mortgages.*

By a mortgage under the Short Forms of Mortgages Act, the interest was made payable on the 30th of January in each year, and the mortgage contained a power of distress for arrears of interest. On the 30th January, 1879, two years' interest was overdue, and on 23rd May following the defendants, under power of attorney from the mortgagee, and as his agents, entered upon the mortgaged premises, and distrained the plaintiff's goods for arrears of interest. The plaintiff was tenant of the mortgagor, and had entered after the mortgage. The defendants notified the plaintiff that they had distrained, but they did not remove the goods, nor place any one in charge. On the 18th August following the defendants distrained, and sold the plaintiff's goods for \$8.75 and costs, being for a half-year's interest, ending 30th July, 1879, in addition to the previous seizure and demand:—Held, that the defendants having abandoned the first seizure, could not seize a second time for the same demand:—Held, also, that the half-year's interest claimed by the second seizure was not due by the terms of the



mortgage, and that the distress was for that reason illegal:—*Quere*, whether the goods of a stranger could be seized under such a distress clause. *La Vassaire v. Heron*, 45 Q. B. 7.—Q. B. D.

A mortgage of land contained no attornment clause, and no provision expressly creating the relationship of landlord and tenant between the mortgagor and mortgagee, but it provided for possession by the mortgagor until default; that on default in payment of any one instalment for two months all should become due, and that on default in payment of any instalment the mortgagees might distrain therefor, and by distress warrant recover by way of rent reserved, as in the case of a demise of the said lands, so much as should be in arrear. The first instalment fell due on the 1st November, 1879, and the mortgagees being in possession, the mortgagees distrained therefor on the 6th October, 1880:—Held, that this right to distrain was a mere license, and did not warrant the taking of a stranger's goods upon the premises. *Semble*, per *Cameron, J.*, that the mortgagees, on default, ceased to hold as tenants, and the distress therefore was illegal, as having been made more than six months after their term had expired. *Laing v. Ontario Loan and Savings Co.*, 46 Q. B. 114.—Q. B. D.

The plaintiff mortgaged his land to the F. L. & S.'s Co. by a mortgage which contained a distress clause, and gave a second mortgage to the defendant, by which it was agreed between them that if default was made in payment of interest to the company the defendant should be at liberty to pay it, and should have the same remedies for its recovery from the mortgagor that the company had. Default having been made the company exercised their power of sale, and the defendant became the purchaser. After signing a contract for the purchase he distrained the goods of the plaintiff for the interest that had fallen in arrear to the company. Shortly afterwards he obtained a formal conveyance of the land expressed to be under the power of sale in the company's mortgage:—Held, that the plaintiff's estate having paid the mortgage debt to the company in full the defendant could not be said by means of his purchase thereof to have paid the interest in arrear so as to entitle him to distrain therefor. *Harron v. Yemen*, 3 O. R. 126.—Q. B. D.

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unaltered in its usual place, viz.: after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *McKay v. Howard*, 60 R. 135.—Boyd.

The plaintiff's father executed a mortgage, declared to be in pursuance of the short form of Mortgage Act, of certain land, dated 17th November, 1881, to the defendants, but which was not executed by them, for the term of seven years, the principal and interest being repayable by instalments on the 1st November in each year. The mortgage contained a demise clause for the term of the mortgage at a rental equal to the instalment of principal and interest and due at the same time, and also a distress clause. The mortgagor was to remain in possession until default. He remained in possession and paid the instalments due on the 1st November, 1882 and 1883. He died intestate in December, 1884, when the plaintiff, a son, by arrangement with the other heirs-at-law and the widow, occupied the land. At the father's death there was due for principal \$100, and for interest \$147. The interest was subsequently paid by the plaintiff. In October, 1885, after the interest had been so paid, the defendants executed a distress warrant to their bailiff, directing him to levy \$112.55, "the amount of interest due on the 1st November, 1884," under which the bailiff distrained the plaintiff's goods:—Held, that by reason of the provisions of the mortgage, the mortgagor remaining in possession, and the payments made by him, the relationship of landlord and tenant on the basis of a tenancy from year to year was created between the parties, with the right to distrain, which was not put an end to by the death of the mortgagor:—Held, also, that notwithstanding the distress was stated to be for interest, the defendants, being entitled to distrain for principal, could justify therefor. *McDonell v. Building and Loan Association, Toronto*, 10 O. R. 580.—C. P. D.

The distress clause in the Short Forms of Mortgages Act is merely a license to take the goods of the mortgagor; the intention being to provide in a concise referential manner for the disposal of the goods when seized in the same manner as goods seized for rent. *Trust and Loan Co. v. Lawerson*, 6 A. R. 286.

A mortgage made in pursuance of this Act, contained the following: "and the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." It also provided that the mortgagees on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession:—Held, *Osler, J.*, dissenting, reversing the judgment of the Queen's Bench, 45 Q. B. 176, that though the relation of landlord and tenant may have been thereby created, yet there was no rent fixed for which there was power to distrain, and the plaintiffs therefore could not claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mortgage before removal by the sheriff. *Id.* Affirmed on appeal to Supreme Court, 10 S. C. R. 679.

On the 31st of May, 1883, one D. mortgaged to the plaintiffs certain lands to secure the sum of \$20,000 then advanced by them to him. The advances were repayable as follows: \$500 on the 1st of December, 1883; \$500 in each of the

months of four follow June, 1888 seven per June, 1883 days of June mortgage v. specting Sh the followi "Re-demise lease to the date hereof the last p secured un assigns, he every year every of t demption hereby sec amount th spectively any deduc ments wh and be in so then p The mort tress claus possession was not time it was of certain the annu the other occupation an annual cution of to be occ tenants a were duly on one of gage, and execution tiffs claim to be paid amount of of princ 1886:— Queen's claim wa and tena the part absence Trust an S. C. R. Debutu In 18 defendat tained a gages A for arrea by whic maturit amount plaintiff trained the mat for the action f existed mortgag after t Ontario (Lamite

months of June and December in each of the four following years; and \$15,500 on the 1st of June, 1888; together with interest at the rate of seven per centum per annum from the 1st of June, 1883, to be paid half-yearly on the 1st days of June and December in each year. The mortgage was made in pursuance of the Act respecting Short Forms of Mortgages and contained the following clause described in the margin as "Re-demise clause": "And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso." The mortgage did not contain the statutory distress clause or the statutory clause providing for possession by the mortgagor until default, and it was not executed by the mortgagees. At the time it was given D. was himself in occupation of certain of the properties comprised in it of the annual rental value of about \$1,200 while the other properties comprised in it were in the occupation of tenants of D. and were producing an annual rental of about \$2,000. After the execution of the mortgage the properties continued to be occupied in the same manner by D. or his tenants and some payments under the mortgage were duly made by D. In 1887 the goods of D. on one of the properties comprised in the mortgage, and occupied by him, were seized under executions against him and sold, and the plaintiffs claimed that as landlords they were entitled to be paid out of the proceeds of the sale the amount due to them for the unpaid instalments of principal and interest of June and December, 1886:—Held, reversing the judgment of the Queen's Bench Division, 15 O. R. 440, that this claim was well founded, the relation of landlord and tenant having been validly created between the parties, and the execution creditors in the absence of fraud not being entitled to complain. *Trust and Loan Co. v. Lawrason*, 6 A. R. 286, 10 S. C. R. 679, distinguished. *Ontario Loan and Debenture Co. v. Hobbs*, 16 A. R. 255.

In 1881 plaintiff made a mortgage to the defendants maturing in 1886, in which was contained a proviso under the Short Forms of Mortgages Act, that the mortgagees might distrain for arrears of interest, and a special provision by which plaintiffs leased the lands until the maturity of the mortgage, at a rental of the same amount as the interest. In August, 1888, while plaintiff was in possession, the defendants distrained on his goods for rent or interest due at the maturity of the mortgage in 1886 and also for the amount in 1887 and 1888:—Held, in an action for illegal distress, that no right of distress existed as to the rent due at the maturity of the mortgage, as more than six months had elapsed after the expiry of the tenancy. *Klink v. Ontario Industrial Loan and Investment Co. (Limited)* 16 O. R. 562.—Boyd.

Held, on the evidence, that there was no definite tenancy after the maturity of the mortgage, and that the interest thereafter being recoverable not by the terms of the contract, but as damages, the rent became uncertain, and therefore there was no right of distress. 16.

#### (b) After Insolvency of Lessee.

The defendant made a lease under seal to R., dated the 8th November, 1884, for five years from the 12th November, at the rent of \$400, payable half-yearly in advance on the 12th November, and May in each year. The lease contained a covenant that, "if the lessee shall make any assignment for the benefit of creditors, \* \* the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable." R. paid the first half-year's rent. On the 5th May, 1885, R. made an assignment for the benefit of creditors; and on the 8th May, the defendant, claiming to do so, under the above covenant, distrained for the half-year's rent, which, in the regular course of time would have been payable in advance on the 12th May:—Held, that the distress was valid; for that under the above covenant it might be held that the money reserved as rent accrued due at the same instant as the lease terminated, and not thereafter; but, even if that construction could not be given to it, the distress would nevertheless be valid, although made for money claimed for rent falling due after the expiration of the term, by reason of the lessee's express personal covenant declaring and constituting the sum as rent; and the covenant which was binding on the tenant was equally binding on the plaintiff as his assignee. *Graham v. Lang*, 10 O. R. 248.—Wilson.—But see the next case.

Defendants, in 1881, by indenture under the Short Forms Act, leased certain premises to O., for ten years, at a yearly rent, payable quarterly in advance, with a covenant that if the lease should be taken in execution, or if the lessees should make an assignment for the benefit of creditors, the lease should immediately become forfeited and void, and the next ensuing one year's rent should be at once due and payable. There was also a proviso for re-entry on nonpayment of rent, or seizure or forfeiture of the term for any of the causes aforesaid. In August, 1883, O. assigned to B., as trustee for the benefit of creditors, who went into possession, whereupon defendants distrained for six months' rent then in arrear, and one year's rent payable in consequence of the assignment. Three executions were soon after placed in the sheriff's hands, and the solicitors for the plaintiff under the first and third executions paid the rent claimed to prevent the sale of the goods by defendants and B., though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitors:—Held, that the distress was illegal, for the statute 8 Anne c. 14, s. 6, applies only to cases where the tenancy has been determined by lapse of time, and not by forfeiture; and that the plaintiff B. was entitled to recover the amount received by defendants. *Graham v. Lang*, 10 O. R. 248, not followed. Per Armour, J.—The year's rent became due only by virtue of the forfeiture, the

distress was an unequivocal act indicating the intention to forfeit, and evidence of such an intention previously formed; so that before the distress defendants had elected to treat the term as forfeited, and having done so their right to distrain was at an end. Moreover they had not distrained during the possession of the tenants from whom the rent became due, and even if defendants had a right to distrain, the provision making one year's rent payable was fraudulent as against creditors:—Quare, per Wilson, C. J., as to this latter point. Per Armour, J.—The execution creditors for whom the money was paid, in order to enable the sheriff to seize under their executions, might also recover; Wilson, C. J., doubting. But held by the Court of Appeal that the money so paid could not be recovered back, either by the execution creditors on whose behalf it was paid or by B. as assignee. *Baker v. Atkinson*, 11 O. R. 735.—Q. B. D.; 14 A. R. 409.

B., by lease dated 28th of November, 1887, was lessee for five years from the 1st of February, 1888, of certain premises at a yearly rental of \$370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. It was also agreed that the Act, 50 Vict. c. 23 (Ont.), should not apply to the lease. B. paid \$100 on account of rent on the 7th July, 1888, and on the 16th July, 1888, made an assignment to the plaintiff for the benefit of his creditors, and the plaintiff went into possession of the premises, and remained in possession until the 1st of September, 1888. On the 24th July, 1888, the defendants distrained for, and were paid by the plaintiff as assignee, \$270, the balance of the current year's rent:—Held, that the lease did not become void because of the assignment, but only voidable; that the right to claim the accelerated rent depended, not upon the lessors' election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefits of his creditors; that the clause was divisible; and that the lessors might distrain for the rent as they had not elected to forfeit the term, the distress itself not being an election to forfeit. Held, also, that the goods in the possession of the assignee were not in custodia legis so as to protect them from distress. The position and liability of such an assignee on becoming assignee of the term, considered. *Wylde v. Clarkson*, 12 O. R. 589, explained; *Atkinson v. Baker*, 14 A. R. 409, and *Griffith v. Brown*, 21 C. P. 12, considered. *Linton v. Imperial Hotel Co.*, 16 A. R. 337.

#### (c) When Amount of Rent not Determined.

The defendant leased certain land to the plaintiff for a term, during which the latter was to make improvements, and at the expiration of the term the value of such improvements, as well as the amount of the rent, was to be fixed by arbitration. The defendant having distrained for rent claimed to be due:—Held, that there being no fixed rent agreed upon there was no right of distress, and the defendant was therefore merely a trespasser and liable in damages to the actual

value of the goods, but not to double their value, as it was not a case within 2 W. & M. Sess. 1, c. 5, s. 5, which refers to the wilful abuse of the power of distress. *Mitchell v. McDuffy*, 31 C. P. 266.—Galt. But *Wilson C. J.*, and *Oslar, J.*, did not concur. See *S. C.*, *Id.*, 649.

Seemable, that although there may be no rent in arrear until the same is fixed by arbitration, there cannot be said to be none due. *Id.*

#### 3. For Annuity.

See *Crone v. Crone*, 27 Chy. 425, p. 23.

#### 4. Set-off or Counter Claim.

The defendant having distrained for rent in arrear, the plaintiff claimed that defendant was indebted to him in damages for breach of the covenants in the lease to repair, and to lease to plaintiff an adjoining piece of land, and obtained ex parte an interim injunction restraining proceedings under the distress which was dissolved on the ground of concealment of facts:—Held, that the damages claimed by the plaintiff were not a "debt" within section 3 of 50 Vict. c. 23 (Ont.), so as to constitute a set-off against the rent; and although under the O. J. Act they might be the subject of counter claim they would not justify an injunction as against a distress levied as here. *Walton v. Henry*, 18 O. R. 620.—MacMahon.

#### 5. What may be Distressed.

##### (a) Property of Joint Owners.

Where the plaintiff had not shown that he was solely entitled to possession of the logs, the subject of distress, and the seizure as regarded his co-owner being lawful the plaintiff could not maintain replevin. *Sprague, C. J. O.*, dissenting. *Patterson v. Thompson*, 9 A. R. 326.

##### (b) Property of Third Parties.

C. having paid rent due by R. to H. in order to secure the sum so paid and other advances, took an assignment of the residue of the term from R. who forthwith took a lease from C. for a term of three months, the rental being the amount of C.'s advances to R.:—Held, that such a lease, however binding between the parties, could not create the relation of landlord and tenant so as to enable C. to distrain the goods of third parties on the premises, the intention, as disclosed by the evidence set out in the report, being manifestly not to create such relation except as a scheme to enable C. to seize such goods. *Thomas v. Cameron*, 8 O. R. 441.—Q. B. D.

See *Laing v. Ontario Loan and Savings Co.*, 46 Q. B. 114, p. 523; *La Vassaire v. Heron*, 45 Q. B. 7, p. 523.

See also Subhead I., 5, (d), p. 529.

##### (c) Goods in the Custody of the Law.

A landlord cannot distrain goods held under execution and in custody of the law. See *Grant v. Grant*, 10 P. R. 40.

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The tenant of certain freehold premises executed an assignment under 48 Vict. c. 26 (Ont.), and afterwards, but before possession of the tenant's property had been taken by the assignee, or such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment:—Held, that the landlord's right of distress was not affected by the assignment:—Held, also, that goods so assigned were not to be therefore deemed in custodia legis. *Eacrett v. Kent*, 15 O. R. 9.—Q. B. D.

See *Linton v. Imperial Hotel Co.*, 16 A. R. 337, p. 527.

(d) *Exemptions for Benefit of Trade.*

The defendant distrained for rent a reaping machine on premises leased by him to one G., from whom the plaintiff, an hotel keeper, had the use of the yard and stable. The machine had been left at the plaintiff's hotel about six months before by one R., an agent for the sale of reaping machines, when he was stopping there, and R. had never been at the hotel since, except perhaps on one occasion. The plaintiff was paid nothing for keeping the machine, nor did he assume any responsibility therefor. At the trial it was sought to prove that it was essential to the plaintiff's business to receive and keep such machines brought by his customers, but the evidence merely shewed that a refusal to do so would or might render his hotel less popular:—Held, reversing the judgment of the County Court, that the machine was not exempt from distress. *Mitchell v. Coffee*, 5 A. R. 525.

The exemption from distress of goods entrusted to persons carrying on certain public trades, to exercise their trades upon them, is a privilege grounded on public policy for the benefit of trade. In this case saw-logs were taken to a saw-mill by the plaintiff, to be converted into lumber in the due course of business of the mill, and were distrained there for rent by defendant:—Held, that the business of sawing lumber for hire is a trade in which is exempted from distress for rent the property of a stranger brought in to be converted into lumber. *Paterson v. Thompson*, 46 Q. B. 7.—Q. B. D. See *S. C.*, 9 A. R. 326.

(e) *Goods Subject to Chattel Mortgages.*

A mortgage provided that on default in payment of any one instalment for two months all should become due, and that in default of payment of any instalment the mortgagees might distrain. The first instalment fell due 1st November, 1879, and the mortgagors being in possession the mortgagees distrained therefor on the 6th October, 1880. They distrained crops produced from the land after the 1st November, 1879, and the plaintiffs claimed them under a chattel mortgage, given on 31st May, 1880, of such crops, which had then been just sown:—Held, that the growing crop passed by the chattel mortgage to the plaintiffs, who were entitled to recover for them as against the defendants. *Laing v. Ontario Loan and Savings Co.*, 46 Q. B. 114.—Q. B. D.

Duty of tenant to protect mortgaged goods. See *Herring v. Wilson*, 4 O. R. 607.

6. *Abandonment and Retaking.*

See *La Vassaire v. Heron*, 45 Q. B. 7, p. 523.

7. *Wrongful or Irregular Distress.*

(a) *Action for Removal of Goods.*

The plaintiff having remained in possession and paid rent after the expiry of his term the defendants levied a distress upon plaintiff's goods in the premises, situate six miles from Toronto, for two months' arrears of rent, and removed the goods to Toronto to impound and sell. The plaintiff brought an action of trespass, claiming that he was not defendant's tenant:—Held, 1. That the relationship of landlord and tenant existed at the time of the distress. 2. That the removal to Toronto, unless unnecessary and unreasonable, or malicious, was not a good ground of action. *MacGregor v. Defoe*, 14 O. R. 87.—Q. B. D.

(b) *Justification as Owner.*

Where a party distrained, as landlord, on goods which as a matter of fact had, by subsequent agreement between himself and the tenant, but before the distress, become his absolutely:—Held, that he might justify the taking on this latter ground. *Armour, J.*, dissenting, on the ground that the instrument under which the defendant claimed the goods, set out in the report, had not the effect of transferring the property in them to the defendant. *Bell v. Irish*, 45 Q. B. 167.—Q. B. D.

(c) *Double Value.*

Per Cameron, J.—Where a plaintiff claims double value for distraining when no rent was due, he must make such claim at the trial and ask to have the jury directed upon it. *Bell v. Irish*, 45 Q. B. 167.

In an action for illegal distress, in which the judge who tried the case found that the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and that the distress was therefore illegal, upon which the plaintiffs claimed double the value of the goods as damages, under 2 W. & M. sess. 1, c. 5, s. 5:—Held, that the 5th section of the statute, by reference to the 2nd section, does not extend to a holding of land where there is no rent reserved, and that the plaintiff was not entitled to double value. *McCaskill v. Rodd*, 14 O. R. 232.—Rose.

See *Mitchell v. McDuffy*, 31 C. P. 266, 649, p. 528.

(d) *Damages.*

In proof of an alleged tender to the bailiff, the plaintiff said that he asked the bailiff for a bill of demands, with all costs, and he would pay him: that he, plaintiff, had then \$87 in his hand, which was sufficient to pay the rent and

costs, and said, "Here is your money;" but that the bailiff refused to receive it. This was denied by the bailiff; but the question was left to the jury, who found that there was a tender. The goods distrained were afterwards sold by the bailiff:—Held, that on the evidence the finding of the jury could not be interfered with, and there must be held to have been a tender to the bailiff; and that the landlord was responsible for the bailiff's act (*Matheson v. Kelly*, 24 C. P. 598, distinguished), and that by reason of the illegal distress the plaintiff would be entitled to recover as damages the difference between the goods and the rent due; but as the sale was after the tender, the plaintiff could recover the full value of the goods:—Held, also, that on the evidence the damages found were not excessive. *Howell v. Listowell Rink and Park Co.*, 13 O. R. 476.—C. P. D.

For wrongful proceedings under power of sale in a mortgage, illegal distress upon chattels, and consequent wrongs:—Held, that the plaintiffs were entitled to recover more than their mere money loss. *Edmonds v. Hamilton Provident and Loan Society*, 19 O. R. 677.—Q. B. D.

#### (e) Other Cases.

On a distress for rent no notice thereof in writing was given to the lessee; nor a legal appraisal made before sale; and the actual value of the goods sold was much greater than the amount due for rent:—Held, that the distress was illegal. *Howell v. Listowell Rink and Park Co.*, 13 O. R. 476.—C. P. D.

See *McKay v. Howard*, 6 O. R. 135, p. 523; *Walton v. Henry*, 18 O. R. 620, p. 528.

### III. PURCHASE OF DISTRESS BY DISTRAINOR.

H., who was the president of the defendants, an incorporated company, and also a member of an incorporated gas company, purchased the goods at the sale for the gas company. The judge at the trial charged the jury, that H. was both seller and buyer, and that the sale was void:—Held, a misdirection; but as it appeared that no substantial wrong or miscarriage was occasioned thereby, the court, under Rule 311, O. J. A., (Con. Rule 791) could not interfere. *Howell v. Listowell Rink and Park Co.*, 13 O. R. 476.—C. P. D.

### IV. DAMAGE FEASANT.

A municipal council by by-law, passed pursuant to the Municipal Act, enacted that certain descriptions of animals (naming them), and all four-footed animals known to be breachy, should not be allowed to run at large in the township; and provided for fixing the height of fences. The plaintiff's cattle strayed from the highway into the lands of defendant Williams, whose fences were not of the height required by the by-law. He distrained them and they were impounded, defendant Steeper being the pound-keeper. In an action of replevin:—Held, that as the by-law did not affirmatively authorize these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the plaintiff was

liable at common law, and under R. S. O. (1877) c. 195, for the damage done, irrespective of any question as to the height of the defendant's fences. *Croce v. Steeper*, 46 Q. B. 87.—Q. B. D.

Defendant seized the plaintiff's oxen damage feasant in his wheat field, and being unable to find a pound-keeper, turned them loose near the plaintiff's gate. On the evening of the same day the defendant again seized them for doing damage to his meadow and impounded them, giving a statement of his claim for damage to the wheat, but making no claim for injury to the meadow:—Held, that the damage to the wheat had been abandoned, and that the impounding and sale of the oxen for the damage so claimed were illegal. The plaintiff forbade the sale, when defendant told the pound-keeper to sell and that he would be responsible:—Held, that the defendant and pound-keeper were both liable. *Spafford v. Hubbell*, M. T. 2 Vict., R. & J. Dig. Col. 1517, explained. *Buist v. McCombe*, 8 A. R. 598.

The defendants by an agreement under seal with one S. acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others to enter upon the land in question:—Held, that the defendants had no right under this agreement to distrain the plaintiff's cattle damage feasant upon the land:—Semble, the defendant's remedy (if any) was by action on the covenant against S. *Graham v. Spettigue*, 12 A. R. 261.

A distraint of cattle damage feasant cannot be supported unless the cattle are taken at the time the damage is done; if they are driven out after doing damage, they cannot be seized on their re-entry for the former damage. *Id.*

Replevin will not lie against a pound-keeper. In this case the sheep which were impounded were grazing upon an open common with the consent of the owner thereof, and were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance:—Held, that the sheep were not "running at large," in contravention of a by-law of the municipality on the subject, and that the constables were liable in replevin for impounding them; but that replevin would not lie against the pound-keeper:—Held, also, that the constables were not entitled to notice of action.—Per O'Connor, J.—because, although they were public officers, it was no part of their duty as such officers to distrain and impound the sheep, even if they were "running at large" contrary to the by-law; they were merely "other" persons, who under the by-law were empowered to take and deliver to the pound-keeper. Per Wilson, C. J.—Unless some facts existed which might give rise to an honest belief that the sheep were at large, and unless they honestly believed that such a state of things existed, they were not entitled to notice of action, but such a state of facts did not exist under the evidence in this case. *Ibbotson v. Henry*, 8 O. R. 625.—Q. B. D.

See *Re Milloy and the Township of Onondaga*, 6 O. R. 573.

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## DISTRIBUTION OF ESTATE.

## I. STATUTE OF DISTRIBUTIONS, 533.

## II. DEVOLUTION OF ESTATES—See DEVOLUTION OF ESTATES ACT.

## III. HOTCHPOT—See HOTCHPOT.

## IV. PARTITION OF ESTATE—See PARTITION.

## V. ACCORDING TO TESTAMENTARY DISPOSITIONS—See WILL.

## VI. ADMINISTRATION PROCEEDINGS—See EXECUTORS AND ADMINISTRATORS.

## VII. PARTIES TO DISTRIBUTE—See EXECUTORS AND ADMINISTRATORS.

## I. STATUTE OF DISTRIBUTIONS.

The proviso in the statute of distributions that "There be no representatives admitted amongst collaterals after brothers' and sisters' children" excludes the children of a deceased nephew of the intestate. *Crowther v. Cawthra*, 1 O. R. 128.—Boyd.

See *Arkell v. Roach*, 5 O. R. 699; *Re Quimby—Quimby v. Quimby*, 5 O. R. 738.

## DISTRICT COURTS.

## I. JURISDICTION, 533.

## II. APPEALS FROM, 533.

## III. EXECUTION, 534.

## I. JURISDICTION.

Held, that the jurisdiction conferred on the District Court of the Provisional Judicial District of Thunder Bay by 47 Vict. c. 14, ss. 4, 5, (Ont.) is not subject to the exceptions to the general jurisdiction of the County Courts mentioned in R. S. O. (1877), c. 43, s. 18, and that, therefore, the District Court has power to try actions in which the title to land comes in question. *McQuoid v. Cooper*, 11 O. R. 213.—Q. B. D.

The District Court of the Provisional Judicial District of Thunder Bay has jurisdiction in interpleader under R. S. O. (1887), c. 91, s. 56; for it has "the jurisdiction possessed by County Courts," which is by R. S. O. (1877) c. 43, s. 19, sub-s. 6, "in interpleader matters as provided by the Interpleader Act"; and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the District Court, and not by the amount for which the recovery was had or the process issued. *Iebister v. Sullivan*, 16 O. R. 418.—Armour

The High Court of Justice has no jurisdiction on by virtue of R. S. O. (1887), c. 91, s. 56, sub-s. 2, or otherwise to entertain a motion against a verdict or judgment obtained in the District Court in an interpleader issue. *Ib.*

## II. APPEALS FROM.

There is an appeal to the Court of Appeal from the judgments of the District Courts of the

Provisional Judicial Districts. Section 34 of R. S. O. (1877), c. 90, imports that when by the law in force with regard to County Courts an appeal lies from those courts to the Court of Appeal, it lies also from the District Courts. *Bank of Minnesota v. Page*, 14 A. R. 347.

An order for leave to sign judgment under Rule 80 (Con. Rule 739) is in its nature final and not merely interlocutory, and therefore such an order if made in a County Court would be appealable by virtue of 45 Vict. c. 6, s. 4 (Ont.), and is also appealable when made in a District Court. *Ib.*

47 Vict. c. 14, s. 4 (Ont.), assumes the existence of the right of appeal from District Courts; and the optional right to move against the verdict in the High Court, provided by sub-section 5, is not the appeal referred to in the first part of the section, in the words "subject to appeal." *Ib.*

## III. EXECUTION.

Upon a transcript from a Division Court to a District Court, it is not necessary to issue a *fi. fa.* goods from such District Court before a valid sale can take place under a *fi. fa.* lands issued therefrom. *Kehoe v. Brown*, 13 C. P. 549, observed upon. *Daby v. Gehl*, 18 O. R. 132.—C. P. D.

## DITCHES AND DRAINAGE.

See MUNICIPAL CORPORATIONS—WATER AND WATER COURSES.

## DIVIDEND.

See BANKRUPTCY AND INSOLVENCY.

## DIVISION COURTS.

## I. JURISDICTION.

1. *Where Actions must be Brought*, 535.
2. *Title to Land in Question*, 536.
3. *Claims Ascertained by Signature of Defendant*.
  - (a) *Notes*, 537.
  - (b) *Other Cases*, 538.
4. *Abandonment of Excess*, 539.
5. *Splitting Causes of Action*, 540.
6. *Other Cases*, 541.
7. *In Matters of Practice*—See SUBHEAD IX., p. 548.
8. *Notice Disputing Jurisdiction*, 542.
9. *Application for full Costs*—See COSTS.

## II. SECURITY FOR COSTS, 542.

## III. ATTACHMENT.

1. *Of Debts*, 542.
2. *Of Goods*, 544.

## IV. EXECUTION, 544.

## V. INTERPLEADER, 545.



In an action by the county for \$200 and costs (the junior lien) judgment for the accrued interest for prohibition is clear, no debt or no which does was granted 501, and 187, referred *Morden*,  
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possession for a considerable time. The plaintiff brought a Division Court action for use and occupation. The defendant set up that the contract had not been rescinded when he gave up possession and that he never became tenant to the plaintiff nor liable to pay rent:—Held, that the plaintiff was bound to prove a contract, express or implied, to pay compensation for the use and occupation, and in order to do so, it might have been necessary to shew when the contract of sale went off; but that was not a bringing of the title into question so as to oust the jurisdiction of the Division Court. *Re Crawford v. Seney*, 17 O. R. 74.—Q. B. D.

In prohibition the court must be satisfied that the title really comes in question; it is not enough that some question is raised by the defendant's notice. *Purser v. Bradburne*, 7 P. R. 18, distinguished. Order of Street, J., granting prohibition reversed. *Ib.*

See *Vandewater v. Horton*, 9 O. R. 548, p. 376; *Re Bushell v. Moss*, 11 P. R. 251, p. 547.

See also COUNTY COURTS II, 2, p. 396.

### 3. Claims Ascertained by Signature of Defendant.

#### (a) Notes.

Plaintiff having paid a note of which he and defendant were joint makers, for \$169, but which the plaintiff signed as a surety only:—Held, that plaintiff could not sue defendant in a Division Court for the money so paid, the amount not being ascertained by the signature of defendant. A summons for prohibition was made absolute without costs, there being no meritorious defence. *Kinsey v. Roche*, 8 P. R. 515.—Osler.

Plaintiff sued on a promissory note for \$73.14, payable with interest at seven per cent.; the principal and interest together amounting to \$103.44:—Held, that under the Division Courts Act, 1880, the amount of fixed legal damages in the nature of interest for nonpayment of a promissory note need not be under the signature of defendant, and the above claim could therefore be recovered in a Division Court. *McCracken v. Creswick*, 8 P. R. 501.—Hagarty.

The plaintiff sued on a promissory note for \$158, payable with interest at ten per cent., the principal and interest amounting to \$185.65:—Held, following *McCracken v. Creswick*, 8 P. R. 501, that under the Division Courts Act, 1880, 43 Vict. c. 8 (Ont.), the above claim could be recovered in the Division Court. *In re Widmeyer v. McMahon*, 32 C. P. 187.—C. P. D.

In an action in the ninth Division Court of the county of Hastings, on a promissory note for \$200 and interest, the judge who tried the case (the junior judge of the county) entered judgment for \$200, the amount of the note, \$7.17 accrued interest and costs:—Held, on a motion for prohibition, that the wording of the statute is clear, namely, "all claims for the recovery of debt or money demand the amount or balance of which does not exceed \$200," and the motion was granted: *McCracken v. Creswick*, 8 P. R. 501, and *Widmeyer v. McMahon et al.*, 32 C. P. 187, referred to and distinguished. *Re Young v. Morden*, 10 P. R. 276.—Roe.

A promissory note was dated at Milton, in the county of Halton, 17th September, 1877, and was

for \$100, payable three months after date at Milton, with interest at eight per cent. per annum. The amount claimed was \$149.50. The maker died in the county of Essex, long after the maturity of the note; her will was proved in Essex, and the defendants, at the time of the action resided in that county. The plaintiff having sued upon the note in a Division Court of the county of Halton:—Held, that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors were no part of the cause of action, which was complete before the granting of the probate:—Held, also, that the Division Court of Halton, which was sought to be prohibited, had jurisdiction by virtue of 43 Vict. c. 8, ss. 8, 12, (Ont.) *Re McCallum v. Gracey*, 10 P. R. 514.—C. P. D.

See *In re Stogdale and Wilson*, 8 P. R. 5, p. 539; *In re Ontario Bank v. Harston*, 9 P. R. 47, p. 541.

#### (b) Other Cases.

Where the original demand, no matter how large, is ascertained by the signature of the party liable, and a balance not exceeding \$200 remains due, the Division Courts under the Act of 1880 have jurisdiction. *Bank of Ottawa v. McLaughlin*, 8 A. R. 543.—Spragge.

By the Division Courts Act, 1880, these courts have jurisdiction in actions for a debt, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant. Where the claim was upon the following document: "Received from R. W., an order from C. B., ordering me to pay him the sum of \$140, which is accepted on the following conditions, providing he carries out his agreement with me as cheese-maker." Signed by the defendant:—Held, that the Division Court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as it depended upon the happening of certain events with respect to which evidence had to be adduced. *Wiltie v. Ward*, 8 A. R. 549.—Spragge.

"Mr. Thomas Forfar.—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1883, for the sum of \$115 and shafting.—G. Climie & Son:—Held, that the foregoing order did not ascertain the amount due, so as to bring the case within the increased jurisdiction of the Division Courts under 43 Vict. c. 8 (Ont.). *Forfar v. Climie*, 10 P. R. 90.—Rose.

Where a cheque was given to the defendant by the plaintiff as a loan of the money represented by it:—Held, that the endorsement of the signature of the defendant on the cheque which was payable to his order, was a sufficient ascertainment of the amount of the plaintiff's claim by the signature of the defendant to satisfy section 54 of R. S. O. (1877) c. 47, as amended by section 2 of 43 Vict. c. 8 (Ont.), and to give a Division Court jurisdiction where the amount claimed without ascertainment would have been beyond its competence. *Kinsey v. Roche*, 8 P. R. 515, overruled; and *Wiltie v. Ward*, 8 A. R. 549, and *Forfar v. Climie*, 10 P. R. 90, specially referred to. *Cushman v. Reid*, 20 C.

P. 147, distinguished. *Re Graham v. Tomlinson*, 12 P. R. 367.—Wilson.—Q. B. D.

The defendant, for valuable consideration, executed a bond in favour of the plaintiff, conditioned for the payment of the principal and interest secured by a mortgage executed by the plaintiff. The defendant having made default in payment of the interest for four years, the plaintiff was compelled to pay the arrears amounting in all, together with interest on the amount unpaid, to \$163, for the recovery of which he sued the defendant in the County Court when judgment was given for that sum, together with Division Court costs, against which the amount of the defendant's County Court costs was ordered to be set-off:—Held, (reversing the judgment of the court below) (1) that the debt or money demand arose from payment of the money by the plaintiff, and the amount of it was not ascertained by the signing of the bond. (2) That under the circumstances the judge had no discretion to refuse the plaintiff, who had been successful in the litigation, his full County Court costs. *Mitchell v. Vandusen*, 14 A. R. 517, considered and followed. *Kinsey v. Roche*, 8 P. R. 515; *Wiltie v. Ward*, 8 A. R. 549; *Forfar v. Clinie*, 10 P. R. 90, approved. *Graham v. Tomlinson*, 12 P. R. 367, referred to. *McDermid v. McDermid*, 15 A. R. 287.

The defendant signed a writing in these words: "Brantford, Oct. 9th, 1886. If anything happens to me sudden, this is to insure my son Joseph (the plaintiff) to take \$100 from his sister Hannah's share, to repay money lent to her; if I live until this time next year I will settle it with him."—Held, that this was not a sufficient ascertainment of the amount due, by the signature of the defendant, within the meaning of R. S. O. (1887), c. 51, s. 70, to allow of a claim upon it and other items (amounting to about \$60) being joined in a Division Court action. *McDermid v. McDermid*, 15 A. R. 287, followed; *Re Graham v. Tomlinson*, 12 P. R. 367, referred to. *Moses v. Moses*, 13 P. R. 12.—Robertson. Affirmed, *ib.* 144.—Chy. D.

See *White Sewing Machine Co. v. Belfry*, 10 P. R. 64, p. 369; *Re Gordon v. O'Brien*, 11 P. R. 287, p. 540.

#### 4. Abandonment of Excess.

The plaintiff sued the defendant in the Division Court for \$100, and endorsed on the summons as particulars a promissory note for \$125:—Held, that the plaintiff might at the trial abandon in his particulars the excess above \$100, so as to bring the case within Division Court jurisdiction. *In re Stoplate and Wilson*, 8 P. R. 5.—Hagarty.

The plaintiff sued in the Division Court on a claim which was originally composed of a solicitor's bill of costs, \$36.06; damages, \$69.33; due for advice, \$6; total \$111.39. The plaintiff abandoned as to 11.39, without specifying from what items he threw the amount off. The plaintiff, at the trial, agreed to take \$30 for the first item, and the judge reduced the \$69.33 to \$62, the \$6 item was struck out, and the total then stood \$92.33. This sum was further reduced to \$80, for which judgment was entered:—Held, affirming the judgment of Wilson, C. J., that

prohibition was properly directed; that the abandonment being general, it could not be assumed that the plaintiff had made a reduction in his demand for damages, so as to give the court jurisdiction; and even if the court had power to confine the prohibition to the claim for damages, it could not be done here, for it did not appear how much of the \$80 was applicable to such claim. *Meek v. Scobell*, 4 O. R. 553.—C. P. D.

See *Re White v. Galbraith*, 12 P. R. 513, p. 551; *Re Eberts v. Brooke*, 10 P. R. 257; 11 P. R. 206, p. 541; *Public School Trustees of Section 9 Nottawasaga v. The Township of Nottawasaga*, 15 A. R. 310, *infra*, p. 552.

#### 5. Splitting Causes of Action.

The defendant rented certain premises from the plaintiff for a year, agreeing in writing to pay monthly \$125 therefor, but no formal lease was executed. When the rent had become four months in arrear the plaintiff entered three plaints in a Division Court against the defendant, each for a month's rent, \$125:—Held, that the sums claimed in the three plaints were payable under the one contract, and would have been included in one count under the old system of pleading; and, therefore, that the division into three plaints was improper under R. S. O. (1887), c. 47, s. 59:—Held, also, that the defendant's signature to the memorandum of lease could not be construed as ascertaining the amounts claimed in the plaints; and prohibition was ordered. *Re Gordon v. O'Brien*, 11 P. R. 287.—O'Connor.

In 1887, the plaintiffs sued the council in the Division Court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the County Court for the surplus received in the five subsequent years. The defendants contended that the claim was res judicata by reason of the judgment in the Division Court, and also that the plaintiffs were not entitled to recover, because by suing in the Division Court for the surplus of 1881 alone, they had divided their cause of action into two or more suits contrary to section 77 of the Division Courts Act, R. S. O. (1887), c. 51:—Held, reversing the judgment of the County Court, (1) that the recovery in the Division Court being for a wholly distinct and separate cause of action, and not upon a balance of account under section 77, or after abandonment of excess under D. C. Rule No. 8, was no defence to an action for the surplus rates received by the defendants in the subsequent years. (2) That if there had been a splitting of the cause of action within the meaning of the Act, by suing for the surplus of one year alone, the objection should have been taken as a defence, or by way of motion for prohibition, in the first suit, and could not be pleaded as a bar to this action. Semble, that the several claims being entirely distinct and unconnected, did not form "cause of one action" so as to come within the prohibition of section 77 against dividing a cause of action. *Re Ackroyd*, 1 Ex. 479, referred to. *Public School Trustees of Section 9 Nottawasaga v. The Township of Nottawasaga*, 15 A. R. 310.

As to prohibition of the married woman's action, *Alahon*, 32

The Division Court to the Division Court and unorganised ordered to be adjudicated for \$110. 9 P. R. 47.

The procedure outside the County Court. *Co. v. Swan*

The plaintiff Court for \$100, and to the plaintiff a set-off of \$100. The Court the plaintiff denied, then the value of the plaintiff from the trial found, been such a plaintiff v. Livini Snarr, 6 P. R. for the judgment whether or the plaintiff's determination, and *Jenkins v.*

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A claim than \$200 one liquid than \$100 Per Armo sued together that Act, the question Vict. c. 13 by Vogt assumed the enactment regulate being silent are he excluded Elliott, 1

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## 6. Other Cases.

As to proceeding for debts within the jurisdiction of the Division or County Courts against married women. See *Re Widneyer v. McMahon*, 32 C. P. 187.

The Division Courts' Act, 1880, does not apply to the Division Courts in territorial divisions, and unorganized tracts, and a prohibition was ordered to restrain a stipendiary magistrate from adjudicating upon a claim on a promissory note for \$110. In *Re The Ontario Bank v. Hurston*, 9 P. R. 47.—Osler.

The process of Division Courts is of no effect outside the province of Ontario. *Ontario Glass Co. v. Swartz*, 9 P. R. 252.—Cameron.

The plaintiff brought his action in a Division Court for \$74.31, his claim being \$156.36, an unascertained amount, as against which he admitted a set-off of \$82.05. At the trial in the Division Court the plaintiff affirmed, and the defendant denied, that there had been an agreement between them to set-off against the plaintiff's claim the value of certain purchases made by the plaintiff from the defendant, and the judge at the trial found, as a matter of fact, that there had been such an agreement:—Held, following *Fleming v. Livingstone*, 6 P. R. 63, and *Dixon v. Snarr*, 6 P. R. 336, that it was a question of fact for the judge of the Division Court to determine whether or not there was an agreement between the plaintiff and defendant; and the judge having determined that there was, there was jurisdiction, and a prohibition was refused. In *re Jenkins v. Miller*, 10 P. R. 95.—Cameron.

Application for a prohibition to the judge of the first Division Court of the county of Kent, and to the plaintiffs, to prohibit them from prosecuting an action, which was brought upon a County Court judgment for \$211.87, the plaintiffs abandoning the excess of their claim over \$100, and claiming \$100:—Held, that an inferior court has no jurisdiction to entertain an action brought upon the judgment of a superior court. *Re Eberts v. Brooke*, 10 P. R. 257.—Galt. Reversed, 11 P. R. 296.—Q. B. D.

A Division Court has jurisdiction to entertain a claim for less than \$100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than \$400. Such a claim is an equitable cause of action for money had and received. *Re Legarie v. Canadu Loan and Banking Co.*, 11 P. R. 512.—Boyd.

A claim aggregating more than \$100 and less than \$200, which is made up of two amounts, one liquidated and one unliquidated and both less than \$100, cannot be sued in a Division Court. Per *Armour, J.*—The claims could not have been sued together before 49 Vict. c. 15, s. 6 (Ont.), and that Act does not expressly or impliedly affect the question. Per *O'Connor, J.*—But for 49 Vict. c. 15, s. 6 (Ont.), the case would be governed by *Vogt v. Boyle*, 8 P. R. 249. It must be assumed that the legislature intended by that enactment to lay down a rule of combination to regulate the whole subject; and the enactment being silent as to the combination of such claims as are here sued on, they must be taken to be excluded from the jurisdiction. *Re Walsh v. Elliott*, 11 P. R. 520.—Q. B. D.

See *Truax v. Dixon*, 13 P. R. 279, p. 373.

## 8. Notice Disputing Jurisdiction.

Held, affirming the judgment of Cameron, J., 8 P. R. 374, that the notice mentioned in section 14 of 43 Vict. c. 8 (Ont.), refers only to suits otherwise of the proper competence of the Division Court, but which have been brought in the wrong division. *Re Mead v. Creary*, 32 C. P. 1.—C. P. D.

Held (disagreeing with the court below, 11 O. R. 138, and affirming *Mead v. Creary*, 8 P. R. 374, 32 C. P. 1), that the notice under 48 Vict. c. 14, s. 1, amending 43 Vict. c. 8, s. 14, disputing the jurisdiction, is only required when a suit otherwise of the proper competence of the Division Court has been brought in the wrong Division, and the want of such notice cannot give the Division Court jurisdiction if the title to land is brought in question. (Hagarty, C.J.O., expressing no opinion on this point.) *Re Knight v. Medora*, 14 A. R. 112.

Held, doubting, but following *Re Knight v. Medora*, 14 A. R. 112, and *Re Mead v. Creary*, 32 C. P. 1, that the operation of section 14 of the Division Courts Act, 1880, is restricted to cases within the general jurisdiction of the Division Courts, and the absence of a notice under that section disputing the jurisdiction cannot give jurisdiction where the amount claimed is beyond the competence of a Division Court. *Re Graham v. Tomlinson*, 12 P. R. 367.—Wilson.—Q. B. D.

See *Clarke v. Macdonald*, 4 O. R. 310, p. 543.

## II. SECURITY FOR COSTS.

Under R. S. O. (1877) c. 47, s. 244, an order for security for costs may be made in a Division Court. *Re Fletcher and Noble*, 9 P. R. 255.—Cameron.

## III. ATTACHMENT.

## 1. Of Debts.

Held, reversing the judgment of Cameron, J., 8 P. R. 374, that a primary creditor can garnish part of a debt due by a third person to the primary debtor for which, as between the primary debtor and the garnishee, a suit could not be maintained in the Division Court by reason of the amount being in excess of the jurisdiction. *Re Mead v. Creary*, 32 C. P. 1.—C. P. D.

Semble, that money paid to a Division Court clerk for a suitor in a cause is paid in to the use of the suitor, and is garnishable. *Bland v. Andrews*, 45 Q. B. 431.—Q. B. D.

Per Cameron, J. It does not become a debt from the Division Court clerk to the suitor till demand made, and so is not garnishable until then. *Id.*

Where the garnishee, who was clerk of the first Division Court of the county of York, had submitted himself to the jurisdiction, and had paid the money in his hands into the tenth Division Court of the county, from which latter court the summons issued, and the judge of the Division Court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the

debt was attachable:—Held, that the order of Galt, J., discharging a summons for a prohibition was right; and a rule nisi to rescind the same, and for a writ of prohibition, was discharged. *Dolphin v. Layton*, L. R. 4; C. P. D. 130. Remarked upon. *Id.*

A plaintiff in a Division Court, proceeding against a primary debtor and a garnishee in a court which would not have jurisdiction against the primary debtor alone, must prove a garnishable debt in the hands of the garnishee; otherwise, a prohibition will lie. *In re Holland v. Wallace*, 8 P. R. 186.—Hagarty.

A garnishee is not a defendant within the meaning of the R. S. O. (1877), c. 47, s. 62. *Id.*

A garnishee is not a "party to a cause," under 43 Vict. c. 8, s. 17, for the purpose of an appeal. *Cameron v. Allen*, 10 P. R. 192.—Cameron.

The garnishees, though partners, resided in different places out of the jurisdiction of the Division Court, and but one of them was served. No order was made dispensing with service on the other. The Division Court judge gave judgment against both in their absence. Per Armour, J. The prohibition might be supported on this ground. R. S. O. (1877), c. 47, s. 134 construed. The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act. *Clarke v. Macdonald*, 4 O. R. 310.—Q. B. D.

Held, affirming the judgment of Armour, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vict. c. 8, s. 14 (Ont.), though no objection can be taken to this jurisdiction of the Division Court in that court, the jurisdiction of the High Court of Justice to prohibit the proceedings is not ousted. *Id.*

The defendant was the medical health officer of the city of London, and his monthly salary as such was attached in the hands of the city corporation, in a Division Court action. It was claimed by the defendant that \$25 of the amount due him was exempt from attachment under R. S. O. (1877) c. 47, s. 125. No facts were in dispute, and the Division Court judge determined, as a matter of law, upon the construction of the above section, and of the Public Health Act, 1884, and amending Acts, the Municipal Act, 1883, section 281, and a by-law of the city of London, that the defendant's salary was not so exempt:—Held, by Rose, J., in chambers, that the decision of the judge could be reviewed upon a motion for prohibition, and that he had determined wrongly:—Held, by the Q. B. D. Wilson, C. J., dissenting, that the defendant was not an employee within the meaning of R. S. O. (1877) c. 47, s. 125, and that it was therefore rightly determined that his salary was not exempt. *Re Macfie v. Hutchinson*, 12 P. R. 167.

Held, reversing the decision of Street, J., in Chambers, that the judge of a Division Court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor, and for such a cause prohibition will lie. *Re Johnston v. Therrien*, 12 P. R. 442.—Q. B. D.

There is nothing in the sub-section substituted by 49 Vict. c. 16, s. 12, for R. S. O. (1877) c. 47, s. 136, sub-a. 2, which repeals the condition precedent in section 132 to the judge's giving judgment against the garnishee. *Id.*

Held, that, if necessary, the writ of prohibition should go to compel the repayment to the garnishee of money paid by him into the Division Court. *Id.*

Where money comes into the hands of a Division Court clerk under a garnishee summons, and he is made aware of a writ of attachment under the Absconding Debtors' Act, he must pay the money to the sheriff and not to the primary creditor, under the provisions of section 16 of the Absconding Debtors' Act, R. S. O. (1877), c. 66. *Re Moore v. Wallace*, 13 P. R. 201.—Q. B. D.

Where after the service upon the garnishees of a Division Court garnishee summons a County Court writ of attachment was placed in the hands of the sheriff, and the garnishees paid the amount owing by them to the primary debtor, to the sheriff, but the judge in the Division Court ordered the sheriff to pay the money to the Division Court clerk, and the clerk to pay it out to the primary creditors in the Division Court:—Held, that the judge was right in ruling that the money should have been paid by the garnishees to the Division Court clerk under section 189 of the Division Courts Act, R. S. O. (1887) c. 51, and therefore his order upon the sheriff to pay it to the clerk could not be interfered with; but the order to pay out to the primary creditors was contrary to section 16 of the Absconding Debtors' Act; and prohibition to restrain the clerk from so paying out the money was directed. *Id.*

See *Macpherson v. Tisdale*, 11 P. R. 261, p. 89.

## 2. Of Goods.

Of goods of absconding debtor. *See Darling v. Smith*, 10 P. R. 360.

## IV. EXECUTION.

Per Osler, J. A married woman's separate personal estate, but not her real estate, may be charged and sold under a judgment against her in the Division Court. The omission to prove the existence of such personal estate, though it may be urged as a defence, does not affect the jurisdiction. Prohibition was therefore refused. *In re Widmeyer v. McMahon*, 32 C. P. 187.

Held, that the terms "fieri facias" and "warrant of execution," used in the Division Courts Act, are convertible terms. *Macfie v. Hunter*, 9 P. R. 149.—Cameron.

Quære, under R. S. O. (1877), c. 47, s. 160, whether a person whose goods have been seized under Division Court process can have any further relief than the restoration of his goods. *Tuckett v. Eaton*, 6 O. R. 486.—C. P. D.

The plaintiffs recovered judgment in the Division Court and issued an execution thereon under which nothing was made and which expired by lapse of time. At the request of the

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Held, that S. O. (1877) tion 12, in Division Court ties to, and pleader appointed, 9 P. R.

The plaintiff seized a quantity claimed, and its return to defendant towards the judge having put order above pay the costs such bailiff recover the detained possession. Held, on County Court by the judge valent to and was finally bailiff had stone, 7 A.

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plaintiffs' solicitor the bailiff returned the writ nulla bona, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of their Division Court judgment in regular form and filed the same in the office of the clerk of the County Court and sued out a writ of fi. fa. goods in order to obtain the benefit of the provisions of the Creditors Relief Act. The respondent S., the holder of a warrant of execution in the Division Court, then moved to set aside the plaintiffs' proceedings and they were accordingly set aside by the County Court judge on the ground that the judgment in the court was void, being founded on a return to an expired execution.—Held, that a return of nulla bona where there were goods, was no more than an irregularity to be complained of by the defendant. *Ontario Bank v. Kirby*, 16 C. P. 35, followed. Nor could a third party object that such a return was made at the instance of the solicitor of the plaintiffs.—Held, also (reversing the judgment of the County Court), that a return of nulla bona could be properly made after the expiration of the writ and that the transcript and judgment in the County Court founded thereon were valid and regular. *Molson's Bank v. McMeekin, Ex Parte Sloan*, 15 A. R. 535.

See *Dalby v. Gehl*, 18 O. R. 132, p. 553.

#### V. INTERPLEADER.

There is no right of appeal from the decision of the judge in an interpleader suit in a Division Court, even when the amount in dispute exceeds \$100. *In re Turner v. Imperial Bank of Canada*, 9 P. R. 19.—Osler.

Held, that the term "execution creditors," used in section 11 of the Interpleader Act (R. S. O. (1877) c. 54), taken in connection with section 12, includes parties holding executions in Division Courts, who are therefore proper parties to, and should be called upon in an interpleader application by a sheriff. *Macfie v. Hunter*, 9 P. R. 149.—Cameron.

The plaintiff, a Division Court bailiff, having seized a quantity of wheat under a warrant of execution against one P, which the defendant claimed, an interpleader summons issued, and on its return was adjourned with leave to the defendant to file his claim in fifteen days. Afterwards the case came up for final hearing, when the judge made this order, "the claimant not having put in his claim or complied with the order above made is barred, and is ordered to pay the costs in fifteen days." The plaintiff, as such bailiff, thereupon brought this action to recover the wheat, which the defendant had obtained possession of pending the summons.—Held, on appeal, affirming the decision of the County Court judge, that the minute so made by the judge in the interpleader issue was equivalent to stating that the claim was dismissed, and was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the wheat. *Hunter v. Vanstone*, 7 A. R. 750.

On an interpleader proceeding in the Division Court under 48 Vict. c. 14, s. 6, sub-s. 3 (Ont.), in respect of a claim to goods taken in execu-

tion, any claims between the parties themselves for damages arising out of the execution of the process, must also be brought before and adjudicated upon by the judge who hears the interpleader summons. Whether such claims are then brought forward or not the adjudication upon the summons is final and conclusive between the parties, and no action can afterwards be maintained in respect of them. In such an action the fact of the previous adjudication may be properly pleaded as a defence. Reversing *Wilson, C. J.*, 9 O. R. 767:—Quere, whether the proceedings therein can be summarily stayed on motion:—Quere, whether an appeal lies under c. 14, s. 7, sub s. 2, from the adjudication of the judge of the Division Court on a claim for damages. *For v. Syngington*, 13 A. R. 296.

#### VI. EXAMINATION OF JUDGMENT DEBTOR.

The order of a Division Court judge upon judgment summons directed that the defendant should pay the judgment debt within a fixed period, and in default that he should be committed to gaol:—Held, that the part of the order as to imprisonment was not sustainable; the defendant, if he did not pay within the time limited, was entitled to a day to shew cause why he did not pay; and the prohibition was ordered:—Semble, the defendant should have called upon the clerk of the court to shew cause against the issuing of any order for imprisonment, as such order is merely a ministerial act. *Re Woltz v. Blakely*, 11 P. R. 430.—Wilson.

A judgment against a married woman by virtue of the Married Woman's Property Act creates no general personal liability, but merely charges her separate estate; and the provisions of section 177 of the Division Courts Act, R. S. O. (1877) c. 47, as amended by 43 Vict. c. 8, touching the examination of judgment debtors, are not applicable to a married woman against whom judgment has been obtained in the Division Court, and even if liable to be examined, such a person is not liable to be committed to gaol under section 172. *Metropolitan L. & S. Co. v. Mara*, 8 P. R. 355, distinguished. *Re McLeod v. Emigh*, 12 P. R. 450.—C. P. D.

Held, following *Regina v. The judge of the Brompton County Court*, 18 Q. B. D. 213, that the judge's endorsement on the judgment summons was the order upon such summons; and that a subsequent order was illegal. *Id.*

See *Re Young v. Parker & Co.*, 12 P. R. 646, p. 549.

#### VII. PROHIBITION.

On an application for a prohibition to a Division Court after judgment and execution, where the question of jurisdiction depends upon disputed facts—as in this case, upon whether the person by whom the bargain sued upon was made, acted as plaintiff's or defendant's agent—if the Division Court judge has decided this question on evidence, and found in favour of his jurisdiction, the court will not interfere with his finding; but here, there having been no such decision, and the want of jurisdiction being clear upon the affidavits filed, a prohibition was granted. *Stephens v. Laplante*, 8 P. R. 52.—Hungarty.



No case exists for prohibition to a Division Court pending an appeal from that court to the Court of Appeal under 43 Vict. c. 8, (Ont.). *Willsey v. Ward*, 9 P. R. 216.—Cameron.

The nature of the claim, as appearing on the summons, is the claim recognizable on a motion for prohibition. *Meek v. Scobell*, 4 O. R. 553.—C. P. D.

A., entered a notice disputing plaintiff's claim in a Division Court suit, and objecting to the jurisdiction of the court, but did not appear at the trial when the junior judge of the county of York, upon proof of the plaintiff's claim, and such facts as in the absence of proof to the contrary established a prima facie case of jurisdiction entered a judgment in favour of the plaintiff for \$44.75. On motion for prohibition on the ground of want of jurisdiction:—Held, following *Archibald v. Bushey*, 7 P. R. 304, that the granting of prohibition under the circumstances was discretionary: that it would be unfair to place upon the judge trying the case, the burden of cross-examining the witnesses to ascertain jurisdiction: that if a prima facie case of jurisdiction is made out the defendant is himself to blame if it is not displaced: and as neither a good defence on the merits was shewn, nor despatch used in making the application, the motion was refused with costs. *Friendly v. Needler*, 10 P. R. 267.—Rose. Affirmed, *Ib.* 427.—C. P. D.

Upon proceedings being taken in the Division Court in an action in which that court has not jurisdiction, the defendant is entitled to prohibition immediately upon the action being brought, and the fact of no notice of statutory defence being given under section 92 R. S. O. (1877), c. 47, does not affect the defendant's right to prohibition. *In re Summerfeldt v. Worts*, 12 O. R. 48.—Q. B. D.

The plaintiff sued in a Division Court for the conversion of a mirror, which the defendant contended was annexed to the freehold and had passed to him therewith. The judge of the Division Court found that the mirror was a chattel and gave judgment for the plaintiff:—Held, reversing the decision of O'Connor, J., who had directed a writ of prohibition to issue, that, the judge of the Division Court having found as a fact that the mirror was a chattel, his decision should not be interfered with by way of prohibition. *Re Bushell v. Moss*, 11 P. R. 251.—C. P. D.

Where a defendant, upon being sued in the first Division Court in the county of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion returnable before a judge in chambers for an order directing the issue of a writ of prohibition to the said Division Court, to prohibit the judge thereof and the plaintiff from proceeding with the suit in that Division Court on the ground of want of jurisdiction in that court to hear and determine the same, but did not entitle his notice of motion, nor the affidavit filed in support of the motion, in any division of the High Court of Justice:—Held, affirming the order of O'Connor, J., in chambers, granting the writ, no. a fatal objection, but one which could and should be amended under Rule 474, O. J. Act (Con. Rule 444):—*Re Olmstead v. Errington*, 11 P. R. 366.—Q. B. D.

Held, that, although before the motion for prohibition came on to be heard the plaintiff in the Division Court caused the plaintiff to be transferred to the proper Division Court in the county of Lambton, nevertheless the defendant, upon being sued in a wrong Division Court, had the right to apply for prohibition, and the judge in chambers having in his discretion given the defendant his costs of the motion of prohibition, that discretion could not be interfered with. *Ib.*

Motion for prohibition to a Division Court on the ground that the western fair association did not exist in fact or in law, and could have no title to the ground stand in dispute, and therefore the court had no jurisdiction to enforce the judgment in the suit:—Held, that the question of corporation or no corporation was one of fact, and that the decision thereon was not reviewable in prohibition. *Re The Western Fair Association v. Hutchinson*, 12 P. R. 40.—Rose. Affirmed, *Ib.* 41.—Q. B. D.

The determination by a Division Court judge of the question, depending upon the construction of certain statutes, whether a medical health officer of a city was an employee within the meaning of R. S. O. (1877) c. 47, s. 125, is reviewable on a motion for prohibition. *In re Macfie v. Hutchinson*, 12 P. R. 41.—Rose. Affirmed, *Ib.* 167.—Q. B. D.

A motion for prohibition to a Division Court on the ground that the action was revived by the administrator of the plaintiff without serving a summons or notice on the defendant, as required by the Division Court rules, was refused, the irregularity complained of being a mere matter of practice, and therefore not reviewable in prohibition. *Re McKay v. Palmer*, 12 P. R. 219.—Rose. See also *Fee v. McIlhargey*, 9 P. R. 329.

By R. S. O. (1877) c. 52, s. 2, a successful party on application for a writ of prohibition is entitled to and should be awarded costs unless the court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof. Under the circumstances of this case, reported 12 P. R. 450, the defendant was allowed costs of a successful motion for prohibition to a Division Court. *Re McLeod v. Emigh* (2), 12 P. R. 503.—C. P. D.

Held, that an application by the defendant to the superior court to set aside a judgment was not a bar to the motion for prohibition. *Re McGregor v. Norton*, 13 P. R. 223.—C. P. D.

Prohibition was granted to a Division Court where there were no facts in dispute and the judge in the inferior court applied a wrong rule of law to the facts and grounded his judgment upon a misconstruction of certain statutes. *Re Long Point Co. v. Anderson*, 19 O. R. 487.—Q. B. D. Reversed on appeal.

See *Kinsey v. Roche*, 8 P. R. 515, p. 537; *In re Johnston v. Therrien*, 12 P. R. 442, p. 543.

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## IX. PRACTICE AND PROCEDURE.

## 1. Service.

Service upon a defendant resident out of the jurisdiction is not a principle of practice within the meaning of section 244 of the Division Court Act, but a branch or system of practice, or a means of relief which the procedure in Division Courts does not admit of being applied. Neither R. S. O. (1877) c. 47, s. 244, nor Rules 8 and 45 O. J. Act, (Con. Rules 232, 271) make applicable to Division Courts the statutory rules and practice governing service on defendants out of the jurisdiction in actions in the Superior Courts. *In re Guy v. Grand Trunk R. W. Co.*, 10 P. R. 372.—Osler.

Held, that the service of the writ in this action on the station-master of the defendants at Bowmanville, was void, but the defendants having appeared at the trial, and after their objection to the jurisdiction had been overruled, having proceeded with the defence and cross-examined witnesses, etc.:—Held, that they had thereby precluded themselves from objecting to the jurisdiction. *Ib.*

In an action on a promissory note, brought in a Division Court, M., the indorser, was made a defendant by the order of the judge, and was served by the original defendant, the maker of the note, with a notice claiming relief over and indemnity, but was not served with the summons or a copy of the plaintiff's demand. M. filed a notice disputing the defendant's claim against him and the jurisdiction of the court to try it, and also appeared at the trial, and gave evidence and objected to the jurisdiction. Judgment was given for the plaintiffs against both the original defendant and M.:—Held, that judgment could not have been given against M. in his absence, because the writ of summons and statement of claim had not been served upon him; but that by appearing in the suit and taking part in the proceedings both before and at the trial M. had waived service of the summons and demand. *In re Merchants' Bank v. Van Allen*, 10 P. R. 348.—Osler.

After judgment obtained against the firm of P. & Co. in a Division Court, upon service of summons on M. P., who was in fact the only member of the firm, an after-judgment summons was issued and served on R. P. The Division Court judge determined that R. P. had made himself liable as a partner by holding himself out as such, and was bound by the judgment, and liable to be examined as a judgment debtor:—Held, on motion for prohibition, that subsections 4, 5, and 6 of section 108 of the Division Courts Act, R. S. O. (1877) c. 51, are applicable only to persons who are in truth partners; and prohibition was ordered. *Munster v. Railton*, 10 Q. B. D. 475; 11 Q. B. D. 435; 10 App. Cas. 680, referred to. *Re Young v. Parker & Co.*, 12 P. R. 646.—Armour.

At the time of the issue of the summons in a Division Court plaintiff the defendant was in Ontario, but she left without its having been served upon her, and an order was made after she had left for substitutional service. In the material upon which she supported a motion for prohibition she did not negative the existence of such facts as would give jurisdiction to make an order

for substitutional service, and from her own affidavit it was to be inferred that the summons had come to her knowledge:—Held, that, as the judge in the Division Court had jurisdiction under section 100 of R. S. O. (1877) c. 61 as amended by 51 Vict. c. 10, s. 1, to order substitutional service if certain facts were made to appear, and as the defendant was subject to the summons at the time it was issued, it was for the judge to determine whether the facts necessary to give jurisdiction appeared, and his determination could not be reviewed by the High Court. *Re Hibbitt v. Schilbroth*, 18 O. R. 399.—Q. B. D.

See *McKay v. Palmer*, 12 P. R. 219, p. 548; *Re Soules v. Little*, 12 P. R. 533, p. 551.

## 2. Payment of Money into Court.

The defendant in a Division Court suit paid a sum of money into court as a full satisfaction of the plaintiff's demand, under R. S. O. (1877), c. 51, s. 125, and the plaintiff was notified thereof. The plaintiff notified the clerk of the court, but not in writing, that he intended to proceed for the remainder of his claim. Section 128 of R. S. O. (1877) c. 51 provides that when payment is made into court under section 125 the plaintiff is to be notified, "and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice the plaintiff signifies in writing to the clerk his intention to proceed \* \* \* in which case the action shall proceed as if brought originally for such remainder only":—Held, that the words of the statute are imperative; and in the absence of the written notice all proceedings were stayed. A trial which took place afterwards was therefore a nullity; and prohibition was granted restraining proceedings upon the judgment recovered by the plaintiff at such trial:—Held, also, that an application by the defendant to the inferior court to set aside the judgment so recovered was not a bar to the motion for prohibition:—Semble, it was a convenient practice to move in the inferior court. Decision of Falconbridge, J., 13 P. R. 28 reversed. *Re McGregor v. Norton*, 13 P. R. 223.—C. P. D.

## 3. Other Cases.

A witness in a Division Court suit having admitted that he was the real debtor, the plaintiff was allowed, under D. C. Rule 115 to substitute the witness as a defendant and obtain a judgment against him:—Held, on an application for a prohibition, that the Division Court Judge had the power to do this. *In re Henney v. Scott*, 8 P. R. 251.—Galt.

The plaintiff residing within the limits of the ninth Division Court of Wentworth, sued, in that court two defendants, who both resided in St. Catharines, on a cause of action which partly arose in St. Catharines. One defendant put in a notice of defence disputing the claim and the jurisdiction of the court. At the trial neither defendant appeared, and the Division Court judge gave judgment for the plaintiff without requiring any proof of the claim, in accordance, it was said, with the practice in that county:—Held, that proof of the claim should have been

given, and a prohibition was ordered with costs: Held, also that an application for a new trial by the defendant who had given the notice was no waiver of his right to object to the jurisdiction; and that the other defendant could not prejudice such right by having given no notice of defence. *In re Evans v. Sutton*, 8 P. R. 387.—Cameron.

In a suit in a Division Court upon a negotiable instrument, where the summons is specially endorsed, and defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of such instrument. *In re Drinkwater v. Claridge*, 8 P. R. 504.—Hagarty.

The Judicature Act and rules in relation to procedure do not apply to the Division Courts; and Rule 330 of the Supreme Court of Judicature (Con. Rule 797) applies only to the courts to which in terms it is made applicable. *Bank of Ottawa v. McLaughlin*, 8 A. R. 543.

Quere, whether the third party clauses of the O. J. Act apply to Division Courts. *In re Merchants' Bank v. Van Allen*, 10 P. R. 348.

The judge of a Division Court has no jurisdiction to set aside a judgment after the expiry of fourteen days from the trial. *Re Foley v. Moran*, 11 P. R. 316.—Wilson.

Although the defendant has fourteen days to move against a judgment in the Division Court, it is proper for the plaintiff to enter judgment and issue execution forthwith, unless restrained by the judge to a future named day. *Ib.*

The practice under Rule 270, O. J. Act, (Con. Rule 795) is not applicable to Division Courts. *Ib.*

General Rule 8 of the Division Courts provides that when the excess of a claim is abandoned to bring the amount within the jurisdiction, it must be done in the first instance on the claim;—Held, that this rule does not prevent the judge before or at the trial from permitting the plaintiff to amend his claim upon such terms as he thinks fit; General Rule 118 and section 304 of the Division Courts Act afford ample authority for permitting such amendment; but the judge cannot be compelled by mandamus to exercise his discretion to permit an amendment. *Re White v. Galbraith*, 12 P. R. 513.—Armour.

T., one of the defendants in a Division Court action, resided out of Ontario, and process was served substitutionally upon him. L., the other defendant, objected that the court had no jurisdiction by reason of T.'s absence from the Province. No written notice of this objection was given before the trial, there was a conflict of evidence as to whether it was taken at the trial, and the suit was defended on a different ground. The trial was on the 13th of January, 1888, when judgment went for the plaintiff for more than \$100; a new trial was moved for by L., and was refused on the 23rd of February, 1888; execution then issued, under which goods of L. were seized, and became the subject of an interpleader. L. did not appeal, but on the 16th of May 1888, moved for prohibition:—Held, that L. having taken his chances at the trial, and not having appealed nor sufficiently accounted for his delay in moving, the discretion of the court should not be exercised in his favour. *Re Soules v. Little*, 12 P. R. 533.—Falconbridge.

An objection to splitting a cause of action should be taken as a defence or by way of motion for a prohibition and not as a bar to a subsequent action. *See Public School Trustees of Section No. 9, Nottawasaga v. The Township of Nottawasaga*, 15 A. R. 310.

The proper form of judgment in the Division Court when the excess is abandoned or the action is for balance of an account, pointed out. *Ib.*

When the action was called for trial the plaintiff and his agent were accidentally absent from the court, and the action was dismissed. The plaintiff afterwards obtained from the judge ex parte an order for the restoration of the case to the docket for trial at the next sittings. The defendant made a motion to rescind this order, which was refused, and he then applied for prohibition:—Held, that the judge had power to dispense with notice of motion for the order; and the motion for prohibition was refused. *Re Backhouse v. Bright*, 13 P. R. 117.—Rose.

In a Division Court suit a jury was demanded and called, but the presiding judge withdrew from their consideration everything except the amount of damages to be awarded, saying there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The jury assessed the damages, and judgment was entered for the plaintiff:—Held, that where the plaintiff furnishes evidence which the judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence does not conclude the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition. *Re Lewis v. Old*, 17 O. R. 610.—Q. B. D.

*See Re Woltz v. Blakely*, 11 P. R. 430, p. 546; *In re Knight v. United Townships of Medora and Wood*, 11 O. R. 138, p. 216; *Fee v. McIlhargey*, 9 P. R. 329, *infra*.

#### X. NEW TRIAL.

After judgment in an action in a Division Court of the county of Victoria, the defendant within the fourteen days required by the Division Courts Act, R. S. O. (1877) c. 47, s. 107, moved on notice filed with the clerk of the court, for a new trial on the ground of the discovery of fresh evidence, but did not within the fourteen days file an affidavit as required by the Division Court Rule 142. An affidavit was subsequently filed, the motion heard, and a new trial granted by the County Court Judge. A motion for prohibition was refused, the transgression of a rule of practice forming no ground for such motion. *Fee v. McIlhargey*, 9 P. R. 329.—Osler.

An action was tried in a Division Court with a jury on the 15th January, when they found for the plaintiff with a recommendation that plaintiff should pay his own and defendant's costs, whereupon judgment was entered for the

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plaintiff with costs reserved. On 24th January the judge directed "judgment for plaintiff with costs on verdict of jury." On 5th February an application was made for a new trial which was granted on 16th February:—Held, that the application for the new trial was too late, not having been made within fourteen days from the trial as required by section 145 of the Division Courts Act, R. S. O. (1887) c. 51; and a prohibition was therefore directed. *Bland v. Rivers*, 19 O. R. 407.—Galt.

See *In re Evans v. Sutton*, 8 O. R. 367, p. 551.

#### XI. APPEAL FROM.

At the trial the plaintiff elected to take a nonsuit, and the judge refused a new trial:—Held, that plaintiff was entitled to move to set aside the nonsuit, and if refused could appeal therefrom. *Bank of Ottawa v. McLaughlin*, 8 A. R. 543.

An appeal does not lie under the Division Courts Act, 1880, on a question arising between a primary creditor or plaintiff and a garnishee. Section 17 of the Act gives the right of appeal to "any party to a cause," but a garnishee is not a "party to a cause," he is merely a party to the proceedings. *Beswick v. Bappy*, 9 Ex. 315, followed, but not approved of. *Cameron v. Allen*, 10 P. R. 192.—Cameron.

In interpleader suits. See *In re Turner v. Imperial Bank of Canada*, 9 P. R. 19, p. 545; *For v. Symington*, 13 A. R. 296, p. 546.

See *Wiltsey v. Ward*, 9 P. R. 216, p. 547.

#### XII. TRANSCRIPT OF JUDGMENT.

The defendant filed a notice disputing the claim and the jurisdiction of the first Division Court of the county of Middlesex, but did not appear at the trial, and judgment was given against him. Subsequently a transcript of the judgment was transmitted to the seventh Division Court of Simcoe.—Held, that the judgment did not thereby become a judgment of the Simcoe Court, and prohibition to the Middlesex Court was granted after such transmission. *Re Elliott & Son v. Norris*, 17 O. R. 78.—Galt.

Upon a transcript from a Division Court to a District Court, it is not necessary to issue a *fi. fa.* goods from such District Court before a valid sale can take place under a *fi. fa.* lands issued therefrom. *Kehoe v. Brown*, 13 C. P. 549, observed upon. *Daby v. Gehl*, 18 O. R. 132.—C. P. D.

#### XIII. JUDGE.

Under the authority of the following deputation: "Belleville, Ont., 24th July, 1880." I hereby appoint E. B. Fralick, Esq., barrister-at-law, as my deputy to hold the second Division Court of the County of Hastings, on Monday, the 26th day of July, instant, at the Town Hall, in the township of Sydney. T. A. Lazier, judge, C. H." The person therein named tried this case at the time and place appointed, but delivered his judgment, according to a postponement for that purpose, on 2nd August fol-

lowing, at the judge's chambers in Belleville, outside the limits of the second Division Court, but within the county, without having named a day and hour for delivery thereof in writing at the clerk's office:—Held, (1) That the word "judge" in section 20 of R. S. O. (1877) c. 47, includes the junior judge, and that the deputation was therefore valid. (2) That the proper construction of the same was, "to hold the second Division Court of the County of Hastings, to be holden on Monday," etc., and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fralick with all the powers of the junior judge during the time of his appointment, wherever he might be within the county. And the rule was therefore made absolute to rescind the order made by Galt, J., for a prohibition. *Cameron, J.*, dissenting. *In Re Leibes v. Ward*, 45 Q. B. 375.—Q. B. D.

As to right of provincial government to appoint a Division Court judge. See *In re Wilson v. McGuire*, 2 O. R. 133.

#### XIV. CLERK AND HIS SURETIES.

Effect of special arrangement made with clerk as to fees. See *Victoria Mutual Fire Insurance Co. v. Davidson*, 3 O. R. 378.

#### XV. BAILIFFS.

##### 1. Actions Against.

##### (a) Notice of Action.

Section 231 of the Division Courts Act, R. S. O. (1877), c. 47, enacts that any action or prosecution against any person for any thing done in pursuance of the Act, shall be commenced within six months after the fact was committed, etc., and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action:—Held, that personal service was not required, but that service on the wife at the defendant's residence was sufficient. *Hanns v. Johnston*, 3 O. R. 100.—C. P. D.

Held, that the court in which the action is to be brought, need not be stated in the notice; but even if required, Semble, that the statement in the notice that the action would be brought in the High Court of Justice, without naming the particular division was sufficient. *Id.*

##### (b) When Action to be Commenced.

Held, that in computing the time in which the action must be brought the day on which the fact was committed, must be excluded, so that an action commenced on the 5th June, for an act committed on the 5th December, was in time. *Hanns v. Johnston*, 3 O. R. 100.—C. P. D.

##### (c) For injury to Property.

The defendant, a bailiff of a Division Court, under an execution against plaintiff's father, seized two horses, waggon, etc., which, on an interpleader proceeding, were decided to be the goods of the plaintiff, who at the end of three

weeks obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damage done to the horses during the time they were in his possession, the jury under the direction of the judge, found a verdict for the plaintiff and \$80 damages, which verdict the judge subsequently refused to set aside—Held, affirming the judgment of the County Court, that the finding of the judge on the interpleader proceedings formed no ground of defence to a suit for damages for the alleged injury to the property. *Farrow v. Tobin*, 10 A. R. 69.

## 2. Canvassing at Elections.

Observations on the impropriety of Division Court bailiffs canvassing voters during an election. *North Victoria Election—Cameron v. Maclellan*, 1 H. E. C. 612—Morrison.

## XVI. DIVISION COURT BONDS.

All Division Court bonds made before 1st July, 1869, are effectually released by 36 Vict. c. 6, s. 5 (Ont.), as to liabilities incurred thereunder, both before and since that date. *Re Franklin*, 8 P. R. 470—Blake.

## DIVISIONAL COURT.

See HIGH COURT OF JUSTICE.

## DIVORCE.

See HUSBAND AND WIFE.

## DOCTORS.

See MEDICAL PRACTITIONERS.

## DOGS.

The owner of a sheep killed or injured by a dog, can, under R. S. O. (1887), c. 214, s. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the Act applies to a case where the dog has been set upon sheep.—*Regina v. Perrin*, 16 O. R. 446.—Q. B. D.

## DOMICILE.

See FOREIGN LAW—INTERNATIONAL LAW.

The local legislature are not restricted by the decree "Property and Civil rights in the Province" to legislation respecting bonds held therein, and where debts or other obligations are authorized to be contracted under a local Act passed in relation to a matter within the power of the Local Legislature, such debts may

be dealt with by subsequent Acts of the same legislature notwithstanding that by a fiction of law they may be domiciled out of the province. *Jones v. Canada Central R. W. Co.*, 46 Q. R. 250.—Oaler.

The validity of a divorce depends upon the domicile of the parties. See *Guest v. Guest*, 3 O. R. 344, 570; *Magurn v. Magurn*, 11 A. R. 178.

Change of residence to avoid arrest. See *Ker-ateman v. McLellan*, 10 P. R. 122.

In or about 1822, W., a native of Ireland, came to Canada and was employed as a shanty-man on the Bonnechère, in the Province of Upper Canada. In 1827 he got out timber for himself, and in 1828, while in Quebec, where he was in the habit of going every summer with rafts of timber, he was engaged to be married to one M. Q., the widow of one McM., in his lifetime of Upper Canada. W. was married to the widow in the month of September, and shortly after his marriage he returned to the Bonnechère to carry on lumbering operations there as formerly, and on his way up he left his wife and daughter in the neighbourhood of Aylmer, in Lower Canada. In the winter he came down for her and brought her to his home on the Bonnechère and lived there for ten or twelve years and acquired considerable wealth. W. declared in the presence of the priest who performed the ceremony that he was a journalier de la Province de Quebec, and he was so described in the certificate of marriage. M. Q. having died without a will W. married again, and by his will left his property to his second wife, the appellant. The respondents, by their action, claimed there was community of property between M. Q., their grandmother, and W., according to the laws of Lower Canada, and demanded their share of it in right of heirship. The appellant disputed this claim, contending there was no community:—Held, reversing the judgment of the court below, Fournier and Taschereau, JJ., dissenting, that the facts of the present case were not sufficient to prove that W. had acquired a domicile in the Province of Quebec at the time of this marriage. Also, that the certificate acte de marriage, has only relation to residence in connection with matrimonial domicile, and therefore has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties. *Wadsworth v. McCord*, 12 S. C. R. 466. Affirmed by *McMullen v. Wadsworth*, 14 App. Cas. 631.

Held, upon the facts set out in the judgment that although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U. S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors. *McCull v. McConnell*, 18 O. R. 36.—Robertson.

Action by a foreign company upon a contract made in a foreign country against two defendants, one of whom resided in Manitoba, and was there served with process. Upon a motion by

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this defendant to set aside the service, it was contended by the plaintiffs that the other defendant was ordinarily resident or domiciled in Ontario, within the meaning of Con. Rule 271 (c); and therefore that the court had jurisdiction. It appeared that at the time of the motion the latter defendant was an employee of the Government of the Province of Quebec; that prior to 1883, his domicile was in Quebec, whence he removed to Manitoba, where he resided until 1886; that he went to Australia; that in 1887 or 1888 he returned to Canada, and resided part of the time in Toronto, and part of the time in Winnipeg, until September, 1889, when he returned to Quebec; that he remained while in Toronto for only three months at a time; that his wife had recently gone to Europe and did not intend to return to Toronto; that his family were still in Toronto, but his intention was to keep them there only until he got something to do; that Toronto was never looked upon as a permanent home for the family; and that it was the intention of the family to go to him as soon as he should send for them:—Held, that he was neither "domiciled nor ordinarily resident within Ontario;" and the service was set aside. *Wanzer Lamp Co. v. Woods*, 13 P. R. 511.—Hodgins, *Master-in-Ordinary*.

See *Cartwright v. Hinds*, 3 O. R. 384.

## DOMINION LANDS ACT.

See CROWN LANDS.

## DOMINION PARLIAMENT.

- I. POWERS OF.—See CONSTITUTIONAL LAW.
- II. ELECTIONS TO.—See PARLIAMENTARY ELECTIONS.

## DONATIO MORTIS CAUSA.

See GIFT.

## DOUBLE VALUE.

See DISTRESS.

## DOWER.

- I. RIGHT OF.
  1. *Partnership Lands*, 558.
  2. *Mortgaged Lands*, 558.
  3. *Other Cases*, 561.
- II. RIGHT OF DOWRESS TO PARTITION.—See PARTITION.
- III. WIDOWS' ELECTION.
  1. *Accepting Devises or Bequests*, 562.
  2. *Under Devolution of Estates Act*, 566.

## IV. BARRED BY STATUTE OF LIMITATIONS, 567.

## V. SALE OF UNDER EXECUTION, 567.

## VI. ACTIONS FOR.

1. *Presumption of death of Husband*, 567.
2. *Pleading and Practice*, 567.
3. *Damages*, 560.

## VII. RIGHTS OF PURCHASERS WHEN THERE IS OUTSTANDING DOWER, 570.

## VIII. MISCELLANEOUS CASES, 571.

### I. RIGHT OF.

#### 1. *Partnership Lands*.

It appearing that certain lands owned by J. O'N. and R. O'N. were part of the assets of the partnership, having been purchased with partnership funds, and the rent afterwards collected and received by the partnership and treated in all respects as partnership moneys:—Held, that the wives of J. O'N. and R. O'N. had no inchoate right of dower in these lands. *In re Music Hall Block, Dumble v. McIntosh*, 8 O. R. 225—Ferguson.

#### 2. *Mortgaged Lands*.

Held, that the statute 42 Vict. c. 22 (Ont.), "An Act to amend the law of dower," does not apply to mortgages made before it was passed. *Martindale v. Clarkson*, 6 A. R. 1.

In respect to discharges of mortgages, what the Registry Act makes tantamount to a reconveyance is the certificate of discharge and the registration of it, not the execution of the certificate merely. Therefore, where in 1868, R. O'N., in partnership with J. O'N. executed a mortgage on certain real estate, and his wife joined to bar her dower, and the mortgage money was subsequently paid, and a discharge of the mortgage signed but not registered, and afterwards the partnership became insolvent, and the mortgagee's executors conveyed the property to the assignee in insolvency, who had now contracted to sell to a purchaser:—Held, that the wife of R. O'N. could not have dower at law in the land in question, neither could she have dower out of the equitable estate, because that had passed away from her husband to the assignee, and the former could not now die seized of it. *In re Music Hall Block, Dumble v. McIntosh*, 8 O. R. 225—Ferguson.

In 1868, J. O'N. and R. O'N. executed a mortgage on certain land, which was in full force and unsatisfied at the date of their insolvency. Afterwards in 1879, it was declared by judgment of the court to have been extinguished by lapse of time. Neither of the wives of J. O'N. and R. O'N. joined in this mortgage:—Held, nevertheless, that, in the face of the assignment in insolvency, the extinguishment of the mortgage did not have the effect of again vesting the estate in J. O'N. and R. O'N., so that the dower of their wives attached. *Id.*

In 1881, C. S. mortgaged certain lands to J. A., his wife M. S. joining and barring dower. In



1884, C. S. sold the lands to C., M. S. again joining in the conveyance. C. gave back a mortgage to secure payment of part of the purchase money, which mortgage was made to M. S. On a judgment creditor of C. S. seeking a declaration that M. S. held this mortgage as trustee for C. S., and for a sale and payment thereof of his judgment debt, M. S. alleged that the mortgage was made to her in consideration of her joining in the sale to C., and thus barring her right to dower:—Held, that M. S. had no such right of dower as alleged, and that there was no consideration for the making of the mortgage to C., and that she held the same as trustee for C. S. *Fleury v. Pringle*, 26 Chy. 67, and *Black v. Fountain*, 23 Chy. 174, followed. *Smart v. Sorrenson*, 9 O. R. 640.—Ferguson.

Where one died entitled to an equity of redemption in certain real estate, which he had originally purchased subject to the mortgage still existing thereon, and the same having been sold in certain administration proceedings, his widow now claimed arrears of dower in respect thereof during the period between the death and sale, when she was in possession by herself or her tenants:—Held, that there being no assignment of dower, and the husband not having died seized in fee so as to give his widow legal dower, she was not entitled to arrears of dower as of right, but only upon the equitable consideration of the court, and the proper mode of exercising the same was to deduct from the rents received by the widow plus an occupation rent charged against her, so much as she had properly applied in meeting necessary outlay and expenditure in respect of the land and buildings, and allow her one-third of the residue as her arrears of dower. *Re Percy, Stewart v. Percy*, 11 O. R. 374.—Boyd.

D. being owner in fee of certain lands, on 4th March, 1884, mortgaged the same, to secure payment five years after date, of certain moneys. On 15th March, 1884, he married the plaintiff, and died intestate on 16th August, 1884. He left no other estate:—Held, that the plaintiff could only claim dower in the equity of redemption, unless she contributed ratably to the amount of the mortgage incumbrance. Method of arriving at the amount of dower in such cases pointed out. *Reid v. Reid*, 29 Chy. 372, commented upon. *Dobbin v. Dobbin*, 11 O. R. 534.—Boyd.

H. being possessed of some lands executed mortgages of them, some of which were given to secure unpaid purchase money, and others to secure the repayment of money lent to H. The wife of the mortgagor had joined in the mortgages to bar dower. H. having died intestate:—Held, on sale of the lands under decree, directing a sum in gross, in lieu of dower, to be paid to the widow, that she was entitled to dower out of the whole amount realized from the sale, after deducting therefrom the amount of the mortgages given by H. to secure unpaid purchase money, but not of the other mortgages. *Re Hopkins; Barnes v. Hopkins*, 8 P. R. 160.—Blake.

The widow of a mortgagor, the defendant in a mortgage suit, did not prove her claim for dower on the reference before the master, as it was not then certain that the rights of the mortgagee would be fully protected, and she was not found an incumbrancer by the report. By consent of

all parties a sale was had, and the purchaser paid ten per cent. of the purchase money down, but subsequently applied for and obtained from the referee an order dispensing with the payment of the purchase money into court, and vesting the estate in the purchaser. The widow opposed the granting of this order, claiming to be allowed in to prove her claim for dower, but without avail. On appeal, Proudfoot, V.C., allowed the appeal, and reversed the referee's order, but without costs, as the dilatory conduct of the widow had invited discussion. *Hyde v. Barton*, 8 P. R. 205.

The defendant, a judgment debtor being the owner of lands subject to mortgages in which his wife had joined, sold the same, and allowed her to receive a part of the purchase money for her dower. On an application for a ca. sa.:—Held, that she was not entitled to anything for dower, and that the 42 Vict., c. 22, s. 2 (Ont.), does not apply to a case of voluntary sale by a husband. *Calvert v. Black*, 8 P. R. 255.—Galt.

W. H. in 1883 made a mortgage of vacant land to a loan company, purporting to be a security for an advance of \$6,000, but with an agreement of even date that, the purpose of the loan being to enable W. H. to erect a house on the land, the mortgage money should be advanced only on architect's certificates of the progress of the building. M. A. H., wife of W. H., joined in this mortgage for the purpose of barring her dower only. The house was built and the mortgage moneys went into the building as agreed. In 1886, W. H. died, and in the course of the administration of his estate real and personal by the court this land was sold.—Held, reversing the decision of the master-in-ordinary, that M. A. H. was entitled to dower in the full value of the land out of the balance of purchase money remaining after the payment off of the mortgage, and this on the authority of *Re Robertson*, *Robertson v. Robertson*, 24 Chy. 442, 25 Chy. 276, 486, and by virtue of 42 Vict. c. 22, s. 1 (Ont.). Whatever may be the full meaning of 42 Vict. c. 22, s. 1 (Ont.), it cannot be held to have the effect of making the rights of a dowress less than they were held to be in *Re Robertson*, *Robertson v. Robertson*, *Re Hague—Traders' Bank v. Murray*, 14 O. R. 660.—Ferguson.

Where one mortgaged certain lands in fee, his wife joining to bar dower, and subsequently in his life time conveyed away his equity of redemption, and the mortgages afterwards sold under the power of sale and had a surplus in their hands, which they desired to pay into court under R. S. O. (1887), c. 133, s. 7:—Held, reversing the decision of the Master in Chambers, that they should be allowed to do so, in view of the conflict of opinion and decision as to sections 5 and 8 of R. S. O. (1887) c. 133, entitled an Act respecting Dower. There is a sharp distinction made in those sections between the wife's dower in the legal estate which she has barred in a mortgage for her husband's benefit, and as to which her rights accrue, or rather enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage, and the dower which is given by section 1 in respect of a mere equitable estate; for by that section such equitable dower arises and attaches at the time of the husband's death and not before, and non constat that the widow had no claim to the sur-

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There can be no dower in land of which the husband had merely acquired the equity of redemption, and which he had parted with. *Re Crookery*, 16 O. R. 207, followed. *Gardner v. Brown*, 19 O. R. 202.—*MacMahon*.

R. G. and J. G. being the owners, subject to the dower of their mother R., and an annuity in her favour, of certain lands, mortgaged them to one C. to secure advances made by him to them. R. knew of the mortgage and was asked, but refused to execute it. Subsequently R. G. and J. G. mortgaged the lands to M. to secure advances made by him. R. released all her claims for the purpose of this mortgage, but received no benefit from the advances. This mortgage was taken by M. without any notice of the mortgage to C., and was registered before it and gained priority over it. Under this mortgage the lands were sold, and after payment of the claim of the plaintiffs a surplus remained which R. claimed in priority to C.—Held, reversing the decision of *Boyd*, C., 16 O. R. 321, that she was not entitled to priority. The priority gained by to M. by force of the Registry Act did not enure her benefit as she was not a purchaser or mortgagee, nor did that priority enure to her benefit as surety by virtue of the doctrine of subrogation, because that doctrine could not be invoked to defeat the honest claims and superior equities of third persons. *MacLennan v. Gray*, 16 A. R. 224. Reversed by the Supreme Court.

Certain lands were subject to a first mortgage, a charge registered by an Engine Company in respect to the price of an engine supplied by them, and a mortgage to the plaintiff registered subsequently to the said charge; and the lands having been sold under the power of sale in the first mortgage, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage. The Engine Company had resumed possession of the engine, and sold it, and claimed the balance of the price under the charge out of the said surplus in priority to the plaintiff:—Held, that they were entitled to make that claim, and that having sold the engine without notice to the plaintiff, the latter was entitled to impeach the sale by showing that a greater sum could have been realized, if it had been properly sold after proper notice. But:—Held, also, that the plaintiff was alone entitled to the value of the interest of the wife of the owner of the equity of redemption in the land as inchoate dower; inasmuch as she had barred her dower in his favour, whereas she had not done so in connection with the charge of the Engine Company. In the absence of arrangement, the value of this interest must be ascertained and retained in court to be paid out to the plaintiff if the right of dower attached by the wife surviving her husband, and to the Engine Company if it did not attach. *Discher v. Canada Permanent Loan and Savings Co.*, 18 O. R. 273.—*Boyd*.

See *Reid v. Reid*, 29 Chy. 372, p. 562; *Re Hewish*, 17 O. R. 454, p. 571.

### 3. Other Cases.

The general rule as between a tenant for life and the remainderman in respect of a charge

upon an estate, is, that the tenant for life must keep down the interest on such charge, and the duty of the remainderman is to pay the principal. This rule was applied where a widow claimed to have dower out of her husband's estate, which at the time of her marriage was subject to certain legacies and a mortgage, in preference to an annuity given her by his will; she being held bound to pay one-third of the interest on these claims until they became payable, after which the remainderman must pay all the interest as well as the principal thereof. *Reid v. Reid*, 29 Chy. 372.—*Spragge*.

Where a husband died entitled to the reversion in fee in certain lands expectant on a life estate therein:—Held, that dower could not be claimed therein, for that the husband had never been seized during coverture of an estate of inheritance in possession. The demandant, who was a stranger to the life estate, was held not entitled to set up that there had been a forfeiture thereof by nonpayment of rent or other breach of covenant. *Leitch v. McLellan*, 2 O. R. 587.—*C. P. D.*

See *Re Hewish*, 17 O. R. 454, p. 571.

## III. WIDOW'S ELECTION.

### 1. Accepting Devises or Bequests.

A testator devised and bequeathed to his wife, during widowhood, all his household goods, furniture, etc., together with an annuity of twenty dollars, and also the free use, during the same time, of the homestead lot, together with the several dwellings and other buildings thereon. Two parcels of his real estate he devised to his two sons, upon which he placed certain fixed valuations—found by the master to be the full values—and directed one of the sons to pay three fifths of the interest computed on the valuation of his lot to the three daughters of the testator for life, the other son to pay interest on the valuation of his lot to the executors during the life or widowhood of his mother. The homestead and the other portions of his real, as also his personal estate, the testator directed to be sold and the proceeds divided at the death or marriage of the widow:—Held, that she was not forced to elect, and that the direction to sell the lands was not sufficient to put her to her election. *Beilstein v. Beilstein*, 27 Chy. 41.—*Proudfoot*.

The testator by his will, executed in 1840, gave the annual income of all his real estate to his wife, for the support of herself and children during widowhood; and after her death or marriage, and the youngest child attaining majority, the property was to be divided. He appointed his widow and eldest son executrix and executor, both of whom continued to reside, with the other members of the family, in the homestead, and she, with the consent of her son, received the rents of the realty, which she applied in the support of the children for more than twenty years after the death of the testator, without having had dower assigned to her, or having made any demand therefor. Some of the lands had been acquired by the testator after the execution of the will, and as to them there was an intestacy. A bill having been filed by one of the heirs, seeking an account of rents received

by the widow, and a partition of descended lands:—Held, on rehearing (in this affirming the order of Proudfoot, V. C., 25 Chy. 293), that the widow was not bound to elect between the provision made for her by the will and her dower, and that notwithstanding the lapse of time she was entitled, out of the devised land to retain one-third of the rents in respect of past and future dower; but that, as to the descended lands, the remedy was barred by the Statute of Limitations; that the claim made by the widow in her answer, and awarded her by the decree, was a pursuing the remedy so as to bring the case within the statute, although as to the rents of these lands received, the widow was entitled to set off against the claim made by the plaintiff, the amount which she was entitled to have received thereout as dower. (*Proudfoot, V. C., dissenting who considered the widow entitled to the same relief in respect of these as of the lands devised.*) *Laidlaw v. Jukes*, 27 Chy. 101.—Chy. D.

The testator bequeathed to his widow for life an annuity of \$60, payable by his son J., his heirs, etc., together with all and singular his household furniture, etc., and in the event of his widow remaining in the dwelling-house on the premises after his decease, she was to have the free use of certain rooms therein; and in case of sickness while there this son was to see that she had proper medical attendance and nursing. This annuity as well as the other bequests the testator charged upon the lands in question, and devised the same so burthened to his said son, the defendant. The widow filed her bill for payment of the annuity alone, not claiming any lien on the land in respect of the charges created in her favour by the will or for dower. The usual decree for payment or in default sale was made, with reference to the master at Hamilton, under which the land was sold, without any reference to dower or the other charges, and the purchase money was paid into court. In the master's office the widow made no claim, either for dower or in respect of the other charges; but she afterwards presented a petition to have it declared that she was entitled to dower in the land and to compensation in respect of the bequests above set out, and prayed that a sum in gross out of the money in court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation for the other benefits:—Held, following *Murphy v. Murphy*, 25 Chy. 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in court; but that by her acquiescing in the sale of the land, and by her laches, she had waived her right to any compensation for the loss of the benefits bequeathed to her. *Ripley v. Ripley*, 28 Chy. 610.—Spragge.

A testator devised to his widow his "house and orchard for a home for herself and children as long as she may live," and to his son Duncan all his title and interest in the farm lot, and all implements thereon, "at the death of my wife as aforesaid, on condition that he shall provide for her board and maintenance, he, my son Duncan, holding possession of the land from the time of my decease, subject to the proviso aforesaid."—Held, that the widow was put to her election between her dower and the provision made for

her by the will; the latter forming a charge upon the lands devised. *McLellan v. McLellan*, 29 Chy. 1.—Boyd.

A testator devised all his real and personal estate, to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in a course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution, amongst them the share or respective shares only, which the deceased parent or parents would, if living have taken:—Held, that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will: and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose. *McGarry v. Thompson*, 29 Chy. 287.—Proudfoot.

A testator, amongst other things, made certain bequests in favour of his widow, and directed that his farm, the only real estate he possessed, should be leased to two of his three brothers named as executors until such time as his nephew and son attained twenty-one:—Held, that, under these circumstances, the widow was bound to elect between her dower and the benefits given by the will. *Rody v. Rody*, 29 Chy. 324.—Proudfoot.

The testator made a provision in favour of his widow, much more advantageous to her than her interest as dower, and which was expressly given in lieu of dower, and given during widowhood. The will was acted upon for two years, when the widow married a brother of her deceased husband, and thereupon filed a bill alleging that she had accepted the provisions and bequests made for and given to her by the will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and now sought to have dower assigned her:—Held, that the rule "*Ignorantia juris neminem excusat*" applied, and the bill was dismissed, with costs. *Gillam v. Gillam*, 29 Chy. 376.—Spragge.

In the case of separate devises though the wife may be barred of her dower in one she is not therefore barred of her dower in the others. *Cowan v. Bessner*, 5 O. R. 624.—Proudfoot.

A testator, by his will and codicils, devising his real estate, etc., to G. H. M. and B. M., trustees, and the survivor of them, and the heirs of such survivor, gave his widow an annuity, and provided that when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject however to the

annuity. should die said trustee real and personal or so much in trust to statute of pointed G. them, and and assigns executors in the same p twenty-one before attain without iss titled to he the statute tor, having as a blending also entitled between the *Re Quimby* Boyd.

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annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the statute of distributions." The last codicil appointed G. E. T. & G. R. and the survivor of them, and the heirs, executors, administrators and assigns of such survivor new trustees and executors in place of G. H. M. and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue:—Held, that the widow was entitled to her annuity as well as her share under the statute of distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby—Quimby v. Quimby*, 5 O. R. 738.—Boyd.

J. C., by his will devised as follows: First, I will and bequeath unto my beloved wife, E. C., one-half undivided of the place where I now live being \* \* \* so long as she shall live and no longer. I also will and bequeath unto my said wife one-half of all the goods and chattels I may own at the time of my demise \* \* \* Third, I will and bequeath unto my grandson, D. C., and to his heirs and assigns forever, the place or homestead where I now live, it being \* \* \* with all that appertains thereto: subject, nevertheless, to the following conditions, that is to say; my wife E. C. shall have quiet and peaceable possession of all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live \* \* \* I also will and bequeath unto my said grandson, D. C., one-half of all the goods and chattels I may own at the time of my demise." In an action by the wife, E. C., claiming both the legacy and her dower, it was:—Held, that she must elect. The testator having treated the homestead as one whole thing, the half of which he specifically bequeathed to his wife. *Card v. Cooley*, 6 O. R. 229.—Boyd.

A testator, after bequeathing certain legacies, devised his lands to his sons, charging them, however, with the legacies and also with an annuity of \$100 to his widow, to whom he also bequeathed his furniture, apartments in his dwelling house, and sundry other things. The estate was sufficient to answer all legacies, and also the widow's dower:—Held, that the widow was not put to her election as between the will and her dower. *Wilson v. Wilson*, 7 O. R. 177.—Osler.

Where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the benefits of the will as well, much less dealing with the property left to her, will evidence an election on her part to take under the will, than would be sufficient in the absence of such express provision:—Held, in this case, that, there being such provision, the evidence set out in the report of the case was sufficient to establish an election to take under the will, though otherwise it would not have been. *Nixon v. Ashenhurst*, 7 O. R. 664.—Cameron.

A will bequeathing to a wife the dwelling-house for her natural life, the household goods and an annuity of \$300 secured to her out of the estate was—Held not to put the widow to her election. *In re Biggar—Biggar v. Stinson*, 8 O. R. 372.—Ferguson.

A testator, by his will, left all his real and personal property to J. K., "subject to the following bequest, viz.: to my wife E. K., a one-third interest in all my real and personal estate, so long as she shall remain unmarried:—Held, that E. K. was bound to elect between the will and her dower, for the former imported that there was to be the same manner of division of the land as of the personalty, viz.: a division of the entire property of each kind, which would be defeated if dower were first subtracted from the realty. *Re Quimby—Quimby v. Quimby*, 5 O. R. 738, followed. *Amulen v. Kyle*, 9 O. R. 439.—Boyd.

By the first clause in his will, a testator directed that his executrix should pay his debts out of his personal estate, and then proceeded to leave to his wife, whom he named as his executrix, certain lands subject to incumbrances, and all his stock, cattle, etc., upon the said lands, and then devised the residue of his real and personal estate (after payment of his just debts and funeral expenses) and all the rents and issues thereof to a brother and sister for their lives, to be equally divided between them, share and share alike, and after their death, to their children, their heirs and assigns for ever, share and share alike. The brother predeceased the testator. The widow now brought this action for the construction of the will:—Held, that the widow was not put to her election as to dower, there being no such intention to be gathered from the will:—Held, also, that it was too late now for the widow to elect to take her interest in her husband's undisposed of real estate under the Devolution of Estates Act, R. S. O. (1887), c. 108, s. 4, sub-s. 2. By bringing this action she had made her election. *Rudd v. Harper*, 16 O. R. 422.—MacMahon.

Where a testator provided by his will: "that the farm be kept till the youngest surviving child comes of age, at which time I would desire the property to be sold and the proceeds to be equally divided between all my children, and my wife. \* \* \* My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." The farm referred to was the only real property possessed by the testator either at the time of making his will or at his death:—Held, per Ferguson, J., that the widow was intended to be included in the word family, and that the widow was put to her election as to dower, since owing to the direction to lease the farm, all the provisions of the will could not be carried into effect consistently with the dower being set apart. *Dawson v. Fraser*, 18 O. R. 496.

## 2. Under Devolution of Estates Act.

R. died intestate entitled to real and personal property leaving a widow and children:—Held, that the widow having elected to take her interest under section 4 of "The Devolution of

Estates Act, 1886." 49 Vict. c. 22 (Ont.), was entitled to one-third of the real estate absolutely. *Re Reddan*, 12 O. R. 781.—Boyd.

An election by a widow to take her distributive share in lieu of her dower under section 4, sub-section 2 of "The Devolution of Estates Act," may be made by will, which as to such election speaks from the time of its execution, and not from the time of her death. *Re Ingolsby*, 19 O. R. 283.—Robertson.

See *Rudd v. Harper*, 16 O. R. 422, p. 566.

#### IV. BARRED BY STATUTE OF LIMITATIONS.

The widow and heir joined in creating a term in the descended lands for ten years, and in the lease it was stated that it had been mutually agreed between the parties thereto that one-third of the rent should be paid to the widow in each year, which was accordingly done during the currency of the term.—Held, that this had the effect of preventing the lapse of time being set up as a bar under the statute to the widow's right to dower. *Fraser v. Gunn*, 27 Chy. 63.—Proudfoot.

The owner of land died intestate in 1858, leaving his widow and two infant daughters in possession, all of whom continued to occupy and cultivate the farm until 1883, when the daughters left the premises. In February, 1884, the widow intermarried with J. M. No proceeding had meanwhile been taken or claim made by the widow to have dower assigned to her. In an action brought by the daughters against J. M. and his wife, to recover possession thereof, the mother claimed she was entitled to retain possession of the premises in respect of her dower, but.—Held, that the right to dower was barred by 38 Vict. c. 16, s. 14 (Ont.), which requires proceedings to be taken to enforce a widow's dower within ten years from the death of her husband. *McDonnald v. McKae*, 13 A. R. 121.

See *Laidlaw v. Jackes*, 27 Chy. 101, p. 563; *Banks v. Bellamy*, 27 Chy. 342, p. 568; *Johnston v. Oliver*, 3 O. R. 26; *Pyatt v. McKee*, 3 O. R. 151.

#### V. SALE OF UNDER EXECUTION.

See *Douglas v. Hutchison*, 12 A. R. 110.

#### VI. ACTIONS FOR.

##### 1. Presumption of Death of Husband.

Held, that the presumption of death arising from continued absence of the defendant's husband, unheard of for seven years, is sufficient to sustain an action of dower as against the objection that he is still living. *Giles v. Morrow*, 1 O. R., 527.—Q. B. D.

##### 2. Pleading and Practice.

In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow

of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant E. D. (the widow) is not entitled to dower."—Held, a sufficient allegation that the defendant's right to dower was barred by the statute, though it omitted to state that this was the legal result of any particular statute. *Banks v. Bellamy*, 27 Chy. 342.—Sprague.

To a summons under "The Dower Procedure Act," R. S. O. (1877), c. 55, with the statutory notice endorsed under s. 10, claiming damages, the defendant entered an appearance under s. 20, with an acknowledgment that he was tenant of the freehold, and consent that plaintiff might have judgment for her dower, and take the necessary proceedings to have the same assigned to her. The plaintiff then served a declaration claiming dower as well as damages for its detention.—Held, that the declaration was bad, and must be set aside, in claiming dower when her right to it was admitted. Quere, whether such damages might not be recovered on a record properly framed. *Linfoot v. Duncombe*, 21 C. P. 484, remarked upon. *Harvey v. Pearsall*, 31 C. P. 239.—Wilson.

The report in an action of dower was filed on 29th May, during the Easter sittings of the court. A motion was made against it within the first four days of the Michaelmas sittings.—Held, that the motion was too late, for it should have been made to a vacation judge under Rules 482 and 483, (Con. Rule 215.) *Giles v. Morrow*, 4 O. R. 649.—Q. B. D.

A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant.—Held, that the plaintiff must proceed against the devisee by scire facias, and not by suggestion or revivor. *Davis v. Dennison*, 8 P. R. 7.—Hagarty.

In an action for dower and damages for detention of dower, defendants appeared under R. S. O. (1877) c. 55, s. 20, and filed acknowledgment of tenancy, consent to dower, etc. Plaintiff's solicitor thereupon entered judgment of seisin, issued writ of assignment of dower, and proceeded for damages. The judgment of seisin was held at the hearing to be final, and to preclude any proceeding for damages, but leave was given to plaintiff to move in chambers to vacate it. The master in chambers made an order vacating the judgment.—Held, on appeal, that the order was one in the discretion of the master, which was properly exercised under the circumstances in the plaintiff's favour, especially as judgment had been signed through mistake of her solicitor. *Ryan v. Fish*, 9 P. R. 458.—Proudfoot.

The statement of claim in an action of dower alleged that the plaintiff was the widow of L., who died seized of such an estate (in certain lands) as to entitle and give the plaintiff an estate of dower therein.—Held, that the pleadings in dower are governed by the O. J. Act; that the right of dower is a legal conclusion from certain facts, and these facts should be stated in the pleading. The statement of claim was therefore held insufficient, and was struck out, leave being given to amend. *Lauder v. Carrier*, 10 P. R. 612.—Proudfoot—Chy. D.

The writ of O. J. Act v. dower. The but added the plaintiff's right to proceedings under the c. 55. The claim, taking ment and rears.—He tiff to deli recover he elected to o Act, be co Dower Act Proudfoot.

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The writ of summons was endorsed under the O. J. Act with a claim for dower and arrears of dower. The defendant entered an appearance, but added to it an acknowledgment of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. (1877), c. 55. The plaintiff delivered a statement of claim, taking no notice in it of the acknowledgment and consent, and claiming dower and arrears:—Held, that it was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the O. J. Act, be compelled to take any steps under the Dower Act. *Moore v. Moore*, 11 P. R. 324.—Proudfoot.

In an action for damages for detention of dower, defendants pleaded (1) that the lands in question were wild, and plaintiff was not entitled to the sum claimed for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set off for moneys expended in respect of said lands; (4) that they did not detain, but were always willing, etc. On a motion in chambers, after issue joined, for an order directing a reference as to the damages under section 47 O. J. Act, and upon evidence by affidavit both for and against the truth of the pleas, the master made an order striking out the 2nd and 3rd pleas, and directing a reference:—Held, that the master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing. *Ryan v. Fish*, 10 P. R. 187.—Dalton, Master.—Proudfoot.

M. M. made his will April 13th, 1888, devising his farm to his two sons, appointed the defendants his executors, and died May 21st, 1888. In an action of dower by the widow of M. M. against the executors, in which they set up that the sons were the tenants of the freehold, and should be made parties, it was:—Held, that since the Devolution of Estates Act, R. S. O. (1887), c. 108, s. 4, devisees are not necessary parties to an action for dower. *Malone v. Malone*, 17 O. R. 101.—Robertson.

When no demand was made, although the plaintiff was entitled to judgment of seisin it should be without costs. *Id.*

See *Leitch v. McLellan*, 2 O. R. 587, p. 562; *Ryan v. Fish*, 4 O. R. 335, p. 570.

### 3. Damages.

Quere, whether damages for detention of dower, or for arrears of dower, can be recovered under the Dower Act. *Giles v. Morrow*, 1 O. R. 527.

R. brought an action for dower against F., the tenant of the freehold, who claimed title through the devisee of her husband, and endorsed her writ with a claim for damages for detention of dower. F. appeared and admitted his tenancy, and R.'s right to dower:—Held, that R. might, nevertheless, go on and recover damages for the detention from and after demand for dower made by her on F. *Ryan v. Fish*, 4 O. R. 335.—Wilson.

Held, that R. S. O. (1877), c. 55 has not taken away or diminished the right of a dowress to

damages as well as mesne profits, as for detention, against all persons and in all cases where they were recoverable before August 10th, 1850. *Id.*

Held, that, at all events, since the O. J. Act, s. 17, sub-s. 10, a tenant of the freehold claiming, as in this case, may plead that he has at all times, since he became such tenant, been ready and willing to render the plaintiff her dower, and if the plaintiff desires to avoid that plea she should reply a demand and refusal. *Id.*

Quere, whether if such demand and refusal be pleaded and proved, damages can be computed against such a tenant from the death of the husband or only from the date of the plaintiff's demand for dower. *Id.*

Held, that a widow cannot recover damages for detention of dower when her husband did not die seized, even though she made demand for dower. *Morgan v. Morgan*, 15 O. R. 194.—Chy. D.

Held, in this case, that as no demand was made, although the plaintiff was entitled to judgment of seisin, it should be without costs; and as defendants were always ready and willing to assign the dower, plaintiff was not entitled to damages for detention. *Malone v. Malone*, 17 O. R. 101.—Robertson.

See *Harvey v. Pearsall*, 31 C. P. 239, p. 568; *Ryan v. Fish*, 9 P. R. 458, p. 568.

### VII. RIGHTS OF PURCHASERS WHEN THERE IS OUTSTANDING DOWER.

At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April, one H. purchased and took an assignment of the dower of one S. in the land. On the 16th February, 1880, A. applied to be relieved from the contract to purchase on the ground of the outstanding dower. The evidence shewed that S. had agreed with the heir-at-law, to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that this application though in A.'s name, was really made by W.:—Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out. *Fraser v. Gunn*, 8 P. R. 278.—Spragge.

An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal. *VanNorman v. Beaupre*, 5 Chy. 599 followed. *Loughead v. Stubbs*, 27 Chy. 387.—Proudfoot.

On a sale of land by an infant under R. S. O. (1877), c. 40, ss. 75-83, an order was made under 44 Vict. c. 14, s. 5 (Ont.), barring the dower of the infant's mother who was a lunatic and confined in an asylum. *Re Colthart*, 9 P. R. 366.—Ferguson.

On a vendor and purchaser application, it appeared that in 1877, a decree was made for partition or sale of the lands in question, to which four married men were parties, whose wives,



however, were not made parties, either originally or in the master's office, and the lands were sold pursuant to the decree, and a vesting order granted to the purchaser, under whom the present vendor claimed title:—Held, that, notwithstanding the Conveyancing Act, R. S. O. (1887), c. 44, s. 53, sub-s. 10, the inchoate right of dower of the wives was not affected by the proceedings. *Re Hall-Dare's Contract*, 21 Chy. D. 41, considered. In the case of two of the wives, their husbands had, prior to the partition proceedings, mortgaged the lands, the wives joining to bar their dower:—Held, that these two no longer had any right of dower. In *Re Crokerry*, 16 O. R. 207, 209, referred to. *Re Hewish*, 17 O. R. 454.—Boyd.

#### VIII. MISCELLANEOUS CASES.

In ejectment the defendant was allowed to set up a counter claim for dower out of the lands in question. Remarks as to the form of decree in such a case. *Glass v. Glass*, 9 P. R. 14.—Osler.

Per Rose, J.—Evidence of the value of the right of dower is properly admissible in determining the value of a debtor's liabilities. *Rae v. McDonald*, 13 O. R. 352.

Validity of chattel mortgage executed by a husband to his wife to secure her against loss by reason of her having barred her dower in certain mortgages of land. See *Morris v. Martin*, 19 O. R. 564.

See *Lavin v. Lavin*, 2 O. R. 187.

#### DRAINS AND DRAINAGE OF LAND.

See MUNICIPAL CORPORATIONS—WATER AND WATERCOURSES.

#### DRUGGISTS.

See PHARMACY ACT.

#### DURESS.

The plaintiff being an agent for the defendants, an agricultural manufacturing company, sold to one S. a mowing machine for \$52, taking in exchange a horse, notwithstanding his instructions were to sell for cash only. The company, however, adopted the sale by accepting from the plaintiff a chattel mortgage on the horse for their claim. Shortly afterwards the defendants becoming dissatisfied, C. their general agent proposed to S. to return the mower and receive back the horse. This being agreed to, C. saw the plaintiff and informed him that he was authorised to take back the horse to S. and urged the plaintiff to do so himself or allow him (C.) to do so. S. at first objected, but on being threatened "with an action," he consented, and lent C. a horse and buggy, and also a halter so as to lead the horse away. Subsequently, on the same day, the plaintiff, when informed that the horse had been returned to S., told C. that

he had no right to take back the horse, alleging that he was worth \$95, for which sum he brought this action against the defendants. At the trial the jury found that the horse had been taken away against the will of the plaintiff, and under a threat of criminal proceedings, and judgment was given in favour of the plaintiff for \$85, as being the value of the horse. The county judge refused to set aside such judgment and findings:—Held, that there was no evidence of duress by threats, sufficient to avoid the plaintiff's consent to return the horse to S. The law as to duress by threats of imprisonment considered. Judgment of court below reversed. *Piper v. Harris Manufacturing Co.*, 15 A. R. 642.

Where duress is alleged, it must be manifest that force preponderated throughout, so as to disable the one interested from acting as a free agent. Although the plaintiff in this action, in which he sought to have his marriage with the defendant declared void, on the ground that he was forced into it by intimidation and threats, at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary and final details, and submitted to the proposed method of procedure, and intelligently forwarded its accomplishment:—Held, on the evidence, that his consent to the marriage was proved. *Lawless v. Chamberlain*, 18 O. R. 296.—Boyd.

S., a trader in Yarmouth, N.S., had a number of creditors in Montreal. J., one of such creditors, preferred a criminal charge against S., sent a detective to Yarmouth with a warrant, caused such warrant to be endorsed by a local magistrate, and had S. brought to Montreal, when the other creditors then issued writs of capias for their respective claims. The father of S. came to Montreal and, in consideration of the release of S. on both civil and criminal charges, transferred all his property for the benefit of the Montreal creditors, and S. was released from gaol, having given his own recognizance to appear on the criminal charge. In the settlement to the claims of the creditors was added the costs of both civil and criminal suits. In a suit to set aside the transfer as being obtained by duress and to stifle the criminal prosecution the evidence shewed that the creditors in taking the proceedings they did expected to obtain the security of the friends of S.:—Held, approving the judgment of the court below, that the nature of the proceedings and the evidence clearly shewed that the criminal process was only used for the purpose of getting S. to Montreal to enable the creditors to put pressure on him in order to get their claims paid or secured, and the transfer made by the father under such circumstances was void. *Shorey v. Jones*, 15 S. C. R. 398.

#### DUTIES.

See REVENUE.

#### DYING DECLARATION.

See *Regina v. McMahon*, 18 O. R. 502, p. 443.

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## EASEMENT.

I. RIGHTS BY PRESCRIPTION—See LIMITATION OF ACTIONS.

II. LATERAL SUPPORT—See LATERAL SUPPORT.

III. PARTY WALLS—See BUILDINGS.

IV. LIGHTS—See LIGHTS.

V. RIGHT OF WAY—See WAY.

VI. WATER—See WATER AND WATER COURSES.

One piece of land cannot be said to be burdened by an easement in favour of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parts comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact—quasi easements. If the quasi servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent. If the dominant tenement is first granted, all quasi easements which have been enjoyed as appendant to it over a quasi servient tenement retained by the grantor, pass by implication. *Atrill v. Platt*, 10 S. C. R. 425.

In 1843, B. et al. (the plaintiffs) by deed obtained the right of draining their property by passing a good drain through an alley left open between two houses on another lot in the town of St. John's. In 1880, W. et al. (defendants) built a barn covering the alley under which the drain was constructed, and used it to store hay, etc., the flooring being loose and the barn resting on wooden posts. In 1881 the drain needing repairs the plaintiffs brought an action confessoria against defendants as proprietors of the servient land, praying that they (plaintiffs) may be declared to have a right to the servitude constituted by the deed of 1843, and that the defendants be ordered to demolish such a portion of the barn as diminished the use of the drain, and rendered its exercise more inconvenient, and claiming damages; the defendants pleaded inter alia that there was no change of condition of the servient land contrary to law, and prayed for the dismissal of plaintiffs' action:—Held, Gwynne, J. dissenting, that by the building of the barn in question, the plaintiffs' means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment of the court below ordering the defendants to demolish a portion of their barn covering the said drain, in order to allow the plaintiffs to repair the drain as easily as they might have done in 1843, when said drain was not covered, and to pay \$50 damages should be affirmed. Per

Gwynne, J., That all plaintiffs were entitled to was a declaration of the right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion might require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature. *Wheeler v. Black*, 14 S. C. R. 242.

Right to damages against railway company for injury to easement in construction of their road. See *Wells v. Northern R. W. Co.*, 14 O. R. 594.

See *Davis v. Lewis*, 8 O. R. 1; *McKenzie v. McGlaughlin*, 8 O. R. 111; *Platt v. Grand Trunk R. W. Co. of Canada*, 12 O. R. 119, p. 427; *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 O. R. 571; *Re Bush and the Commissioners of the Niagara Falls Park*, 14 A. R. 73, p. 461.

## ECOLESIASTICAL CORPORATIONS.

See CHURCH.

## EJECTMENT.

### I. PLAINTIFF'S TITLE.

1. *Evidence of Title*, 574.
2. *Other Cases*, 576.

### II. BY PARTICULAR PERSONS.

1. *Landlord*, 576.
2. *Mortgagees*, 576.
3. *Married Women*, 577.

### III. PRACTICE AND PROCEDURE.

1. *Writ of Summons*.  
(a) *Issue of Writ*, 577.  
(b) *Service*, 577.
2. *Venue*, 577.
3. *Appearance*, 578.
4. *Adding and Striking out Parties*, 578.
5. *Statement of Claim*, 579.
6. *Counter Claim*, 579.
7. *Joinder of Actions*, 580.
8. *Equitable Defences*, 580.
9. *Judgment*, 580.
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11. *Costs*.  
(a) *Security for Costs*, 581.  
(b) *Liability of Administrator*, 582.

### IV. MESNE PROFITS, 582.

### V. EFFECT OF JUDGMENT AS AN ESTOPPEL—See JUDGMENT.

### I. PLAINTIFF'S TITLE.

1. *Evidence of Title*.

The plaintiff was assignee in insolvency of H., who bought from the purchaser at the sheriff's

sale. H. leased to T. and put him in possession, and had some small buildings put on the land. Subsequently, the defendant O. made untrue representations to T., which induced him to quit possession, whereupon O. went in and occupied, claiming under defendant W., who, he alleged, had an interest in the land. W. by his answer adopted O.'s possession and claimed under conveyance from the Crown, but failed to prove his title:—Held, following *Doe Johnson v. Baytop*, 3 A. & E. 188, that the possession so fraudulently obtained by O. did not entitle him to put the plaintiff upon proof of his title. *Nelles v. White*, 29 Chy. 338.—Spragge. Affirmed by Supreme Court, Cassels' Dig. 374.

Where land had been taken by the Great Western R.W. Co. for the purposes of their railway under 9 Vict. c. 81, s. 30, and 16 Vict. c. 99, the company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove strictly the title of their grantors. *Great Western R.W. Co. v. Lutz*, 32 C. P. 166.—C. P. D.

In an action to recover possession of land it appeared that one of the deeds forming a link in the plaintiff's title had been altered by the grantor's agent under authority of a letter from the grantor. The alteration consisted in the agent rewriting the first two pages and substituting a new grantee. The letter was not under seal; and the deed was not re-executed or re-delivered by the grantor. The plaintiff proved that he had a good equitable right to possession:—Held, that the deed was void at law; but that the plaintiff was entitled to recover on his equitable title. Leave was also granted to add the owner of the legal estate as plaintiff if necessary. *Thorne v. Williams*, 13 O. R. 577.—C. P. D.

Where in an action for recovery of lands by M. who had bought them at a sale under execution against J. K., it was objected that he had failed to prove that J. K. had at the time of such sale any title to the said lands:—Held, that it was no answer to this objection to say that the defendant had in setting up certain facts "by way of a further and separate defence" alleged that J. K. was the patentee of the lands in question, for that such an allegation could not be made use of by the plaintiff to satisfy any defect in his evidence to prove his case, the burden of which rested on him by reason of the said defendant having pleaded possession in herself and her tenants:—Held, also, that the fact that in the course of certain prior proceedings had by M. on an execution against A. K. the wife of J. K., for the purpose of selling the said lands, M. had then asserted that they belonged to her, did not estop M. from now as against J. K. and A. K., alleging that they belonged to J. K. *McGee v. Kane*, 14 O. R. 226.—Ferguson.

In an action for the recovery of land, the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of the will produced by them was the copy of the probate from the registry office with the affidavit of verification attached:—Held, that this was not proper evidence of the will. The plaintiffs, however, sought to support their case by reference to a certain statement in the defendants' pleading, in which, besides denying their

right to recover, she herself also claimed title under a deed from the executors of S.:—Held, that they could not take that part of the pleading which suited their purpose and reject the rest: they could not use a scrap of it to eke out the insufficiency of their own evidence. *Barber v. McKay*, 17 O. R. 562.—Chy. D.

See *Van Velsor v. Hughson*, 9 A. R. 390; *Rudd v. Frank*, 17 O. R. 758.

## 2. Other Cases.

Where the defendant, claiming to be the owner of certain land, procured the plaintiff's tenant to attorn to him and thereby claimed the possession:—Held, in ejectment, that the plaintiff was entitled to recover by reason of the defendant having thus obtained possession from the plaintiff's tenant; but that this was not to estop the defendant from disputing the plaintiff's title and shewing title in himself in any action he might bring to recover possession. *Mulholland v. Harman*, 6 O. R. 546.—C. P. D.

Where a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute. *McDiarmid v. Hughes*, 16 O. R. 570.—Q. B. D.

See *Turley v. Benedict*, 7 A. R. 300.

## II. BY PARTICULAR PERSONS.

### 1. Landlord.

In an action of ejectment by a landlord against a tenant whose term had expired:—Held, that the defendant was not precluded from setting up that the plaintiff's title expired or was put an end to during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession. *Kelly v. Wolff*, 12 P. R. 234.—Dalton, Master.—Rose.

Sections 65 and 66 of the Ejectment Act do not apply where a bona fide defence or dispute is raised; and in this case a motion by the plaintiff for security for damages and costs, under these sections, was refused, reversing the decision of the master in chambers. Quere, whether sections 65 and 66 would apply to any case where the tenant actually gives up possession, so that the landlord is in possession, and then retakes. *Id.*

Held, per the master in chambers, that it is not now necessary for the plaintiff to sign the notice under section 5 of the Ejectment Act, requiring the defendant to give the security sought. *Id.*

### 2. Mortgagees.

A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in chancery against him for a sale:—Held, that as the mortgagee could, since the Administration of Justice Act, R. S. O. (1877), c. 49, obtain in the chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed

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In an action of ejectment by mortgagees, on the application of the infant defendants, an order for immediate possession and sale of the mortgaged premises was made, with a reference to the master to take the usual accounts; but \$80 was ordered to be paid into court to meet the expenses of the sale. *Western Canada Loan and Savings Co. v. Dunn*, 9 P. R. 587.—Armour. Reversing S. C., 1b. 490.

See *In re Flint and Jellett*, 8 P. R. 361; *Frost v. Hines*, 12 O. R. 669.

### 3. Married Women.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the land in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for \$2,000, and expended it on improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession, and for use and occupation. No demand was made prior to service of writ:—Held, following *Donnelly v. Donnelly*, 9 O. R. 673, the plaintiff was entitled to possession; but could only recover for the use and occupation since the service of the writ. Held, also, that the defendant could not claim for the moneys expended by him on the land. *Till v. Till*, 16 O. R. 133.—C. P. D.

## III. PRACTICE AND PROCEDURE.

### 1. Writ of Summons.

#### (a) Issue of Writ.

A writ of ejectment for the recovery of the possession of land may issue out of the proper office in any county, without reference to the locality of the land. *Canada Permanent Loan and Savings Co. v. Foley*, 9 P. R. 273.—Dalton, Master.

#### (b) Service.

The writ of summons in ejectment was served upon defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance. *Trust and Loan Co. v. Jones*, 8 P. R. 65.—Dalton, Q. C.

### 2. Venue.

In an action of ejectment the place of trial may be changed by order of a judge. If the power to change is not given by Rule 254, O. J. Act (Con. Rule 653), it is not taken away thereby, and it previously existed under R. S. O. (1877), c. 51, s. 23. *Canadian Pacific R. W. Co. v. Manion*, 11 P. R. 247.—Proudfoot.—Chy. D.

An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning

of the exception in Rule 254, O. J. Act (Con. Rule 653), and the venue need not therefore in such an action be laid in the county where the lands lie. *Seymour v. DeMarsh*, 11 P. R. 472.—Dalton, Master.

### 3. Appearance.

In an action of ejectment, G., the landlady of the defendant C, intervened and appeared to the writ. C did not appear until statement of claim delivered, when he appeared and joined with G. in the statement of defence:—Held, that the appearance of C. was regular. *Goring v. Cameron*, 10 P. R. 496.—Dalton, Master.—Osler.

### 4. Adding and Striking out Parties.

In ejectment the plaintiff obtained a verdict, but as the defendant had made improvements on the land under a bona fide belief that the land was his own he was held entitled to the relief given by R. S. O. (1877), c. 95, s. 4, and the master in chancery at Ottawa was directed to ascertain the value of such improvements and report thereon which he did. A rule nisi having been obtained to refer back the report for the reasons stated, it appeared that after the report the defendant died intestate, and that no personal representative had been appointed, leaving a widow who was residing on the land in question and a son by a former wife but no children by the second wife, and also that defendant had assigned all his interest in the sum to be found due for improvements to a loan society. The court permitted the plaintiff to amend his rule nisi by calling on the widow or son of the deceased and on the loan society to shew cause why they should not be made parties to the suit and why the former should not be appointed under A. J. Act, s. 9, to represent the estate of the defendant for the purposes of this motion and all subsequent proceedings in the reference, and why in that event the relief asked by the rule should not be granted. The rule to be returnable on fourteen days' notice before a single judge. *McCarthy v. Arbuckle*, 31 C. P. 48.—Osler.

An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land, is regularly made before appearance, although the application would be entertained after appearance where the justice of the case required it. But where two defendants applied after appearance to have their names struck out, and the court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed, with costs. *Anglo-Canadian Mortgage Co. v. Cotter*, 8 P. R. 111.—Dalton, Q. C.

In an action of ejectment and for mesne profits, the defendant O. was tenant in possession, and had two months after the service of the writ upon him, paid rent to his co-defendant, his landlord. An application by O. to have his name struck out as a party to the suit, he having gone out of possession on the expiration of his lease, was refused with costs. *Johnston v. Oliver*, 9 P. R. 353.—Dalton, Master.

Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H., claiming indemnity; and, thereupon, by order in chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands:—Held, that the plaintiffs must pay H.'s costs. *Beard v. Credit Valley R. W. Co.*, 9 O. R. 616.—Ferguson.

See *Thorne v. Williams*, 13 O. R. 577, p. 575; *McMaster v. Mason*, 12 P. R. 278.

#### 5. Statement of Claim.

A writ in ejectment was served on 15th August, 1881, and an appearance entered after the 22nd of the same month:—Held, that plaintiff need not file a statement of claim, under the new practice, and that a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue. *Laidlaw v. Ashbaugh*, 9 P. R. 6.—Dalton, Master.

The plaintiff indorsed his writ of summons and filed his statement of claim to recover possession of the land in dispute, as being the assignee of a lease made by him to the defendants, who assigned to a third party, who assigned and surrendered to the plaintiff. The defence was that the lease was in effect a mortgage, and fraud and want of consideration were alleged:—Held, that the plaintiff could not amend his statement of claim, and ask a foreclosure of the land as mortgagee. *McIlhargey v. McGinnis*, 9 P. R. 157.—Wilson.

Held, that the mention of the date of issue of a writ of ejectment in the statement of claim was essential. But leave was given to amend on payment of costs. *Scott v. Creighton*, 9 P. R. 253.—Dalton, Master.

#### 6. Counter-Claim.

In ejectment the defendant was allowed to set up a counter-claim for dower out of the lands in question. Remarks as to the form of decree in such a case. *Glass v. Glass*, 9 P. R. 14.—Osler.

In an action for the recovery of land and for mesne profits, a counter-claim for damages for illegal distress against the plaintiff and his bailiff who executed the distress was held good. *Dockstader v. Phipps*, 9 P. R. 204.—Dalton, Master.

The defendant C. counter-claimed for damages in respect of a trespass by the plaintiff upon the lands in question, whilst he C. was in possession, and for an assault, etc., whereby he was compelled to quit the premises:—Held, that the counter-claim was not joining another cause of action with an action for the recovery of land within the meaning of Rule 116 O. J. Act (Con. Rule 341):—Held, also, that the counter-claim should not be disallowed or excluded under Rules 127 (b) (Con. Rule 374), or 168, O. J. Act, on the ground of inconvenience, it not appearing that there would be any inconvenience, and:—Semble, that the counter-claim was sufficiently connected with the cause of action to make it advisable that they should be tried

together. *Goring v. Cameron*, 10 P. R. 496.—Dalton, Master.—Osler.

To an action to recover possession of land it is a good cause of count.-claim that defendant was induced by his solicitor's fraud to make two promissory notes, which were then overdue, and in plaintiff's hands, who took them with knowledge of the fraud; and praying that plaintiff might be restrained from negotiating or parting with them, and that they should be delivered up to be cancelled; for the fact of the notes being overdue in plaintiff's hands had not the effect of destroying the right to have them delivered up. *Pritchard v. Pritchard*, 17 O. R. 50.—Street.

Held, the defendant can counter-claim without leave; but that he cannot in his counter-claim without leave under Con. Rule 341 join another cause of action with a claim for the recovery of land. *Id.*

#### 7. Joinder of Actions.

As to joining any other cause of action with an action for the recovery of land. See *Goring v. Cameron*, 10 P. R. 496.

The plaintiff, without leave, joined other causes of action in an action for the recovery of land, contrary to Con. Rule 341. Upon a motion by the defendant to set aside the writ of summons, the master in chambers made an order for the amendment of the writ by striking out the portion of the indorsement containing the other claims, upon payment of costs. *Robertson, J.*, on appeal, upheld the master's order. *White v. Ramsay*, 12 P. R. 626.

See *Pritchard v. Pritchard*, 17 O. R. 50, *supra*.

#### 8. Equitable Defences.

In ejectment where equitable issues are raised under R. S. O. (1877) c. 50, s. 257, the issues must be tried without a jury. *Bryan v. Mitchell*, 8 P. R. 302.—Dalton, Q. C.—Armour.

Per Gwynne, J.:—That under the practice which prevailed in England in 1870, which practice was in force in Manitoba under 38 Vict. c. 12, at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment. *Farmer v. Livingstone*, 5 S. C. R. 221.

#### 9. Judgment.

Application for order to sign final judgment under Con. Rule 756. See *Trust and Loan Co. v. Hill*, 9 P. R. 8; *Cook v. Lemieux*, 10 P. R. 577.

Where a statement of claim in an action for the recovery of land was held good on demurrer, and upon the case going down to trial, the plaintiff proved all the material allegations in it.—Held, that he was thereupon entitled to judgment, and that O. J. A. 1881, s. 44, did not apply, and an objection that the plaintiff had not sufficiently proved his title could not be entertained. *Johnasson v. Bonhote*, 2 Ch. D. 298, distinguished. *McGee v. Kane*, 14 O. R. 226.—Ferguson.

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Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of *res judicata* to an action subsequently brought by the defendant to try the same question. *Cochrane v. Hamilton Provident and Loan Society*, 15 O. R. 128 followed. *Ball v. Cathcart*, 16 O. R. 525.—C. P. D.

The action, to recover possession of land, was tried before a jury before the Consolidated Rules came into force, and the trial judge ordered that judgment should be entered for the plaintiff for possession of the land, and judgment was at once entered accordingly, and the plaintiff put in possession by the sheriff under a writ of possession:—Held, that under the practice, and having regard to Rules 273, 274, 275, 341, and 379, of the Ontario Judicature Act, 1881 (Con. Rules 682, 687, 688, 689), there was nothing to remove actions for the recovery of land out of the general rule, and the entry of judgment and subsequent proceedings were regular. Section 34 of R. S. O. (1877), c. 51, was repealed by Rule 273 (Con. Rule 682), of the Ontario Judicature Act, 1881. *Rudd v. Frank*, 17 O. R. 758.—Q. B. D.

See *Watson v. Ketchum*, 2 O. R. 237: *Trust and Loan Co. v. Jones*, 8 P. R. 65, p. 577.

#### 10. Writ of Assistance.

The application of R. S. O. (1877), c. 66 is not limited to merely common law actions pending in those courts before the Judicature Act, but extends to all writs of execution; and a writ of assistance in execution of a decree of the Court of Chancery for the recovery of land, is a writ of execution within the meaning of section 11 of that Act, and is not in force after one year from the teste, if unexecuted, unless renewed. *Adamson v. Adamson*, 12 P. R. 21.—Boyd.

#### 12. Costs.

##### (a) Security for Costs.

The defendants in an action of ejectment, in which the plaintiff claimed title as owner subject to a mortgage to a bank, moved for security for costs, on the ground that the plaintiff was not able to pay costs, and that the action was not really brought by him but by the bank. It was shewn that the plaintiff was financially worthless; that his interest in the land was so doubtful that he did not feel sufficient interest in the question to litigate it; that the bank instructed their own solicitor to look into the title, took the advice of counsel, and were advised to have an action brought in the name of the mortgagor, who was then for the first time consulted about bringing the action; that the ordinary solicitor of the bank was retained to bring the action; and that he admitted he knew the plaintiff was insolvent. It was fairly deducible from the evidence that the bank had really in fact retained the solicitor, and that the solicitor would look to the bank for his costs:—Held, that under these circumstances the action must be regarded as that of the bank, and not of the plaintiff; who was therefore required to give security for costs. *Parker v. Great Western*

R. W. Co., 9 C. B. 766, and *Andrews v. Marris*, 7 Dowl. P. C. 712, followed. *Delaney v. MacLellan*, 13 P. R. 63.—*Dalton, Master*.—*Rose*.

See *Kelly v. Wolf*, 12 P. R. 234, p. 579.

##### (b) Liability of Administrator.

A trustee or executor stands in the same position as any other litigant with respect to costs. And where an action of ejectment was brought by the administrator of a deceased person in whom the legal estate in certain land was vested, and by the holder of a mortgage created by the deceased person upon such land, and it appeared that the deceased purchased the land with such moneys of the defendant, and took the conveyance in his own name, and that the defendant was the true owner of the land:—Held, that the fact that there was no declaration of trust in favour of the defendant, and that the evidence in the hands of the administrator tended to shew that the deceased was in his lifetime owner and not trustee, did not relieve the administrator from liability for costs; which were given to the defendant against both plaintiffs. *Smith v. Williamson*, 13 P. R. 126.—*Rose*.

#### IV. MENSE PROFITS.

Quere as to when mense profits may now be recovered in ejectment. *McCarthy v. Arbuckle*, 31 C. P. 405.—C. P. D.

See *Pyatt v. McKee*, 3 O. R. 151; *Dockstader v. Phipps*, 9 P. R. 204, p. 579; *Seabrook v. Young*, 14 A. R. 97, p. 397; *Adamson v. Adamson*, 17 O. R. 407, p. 592.

#### ELECTION.

##### I. WIDOW'S ELECTION.—See DOWER.

##### II. UNDER WILLS.—See WILL.

##### III. OF DIRECTORS.—See COMPANY.

##### IV. OF MEMBERS OF MUNICIPAL COUNCILS.—See MUNICIPAL CORPORATIONS.

##### V. OF MEMBERS OF PARLIAMENT OR LEGISLATIVE ASSEMBLY.—See PARLIAMENTARY ELECTIONS.

##### VI. OF SCHOOL TRUSTEES.—See PUBLIC SCHOOLS.

##### VII. VOTERS' LISTS.—See PARLIAMENTARY ELECTIONS.

Where lands were advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession by his son of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was complete, and a subsequent incumbrancer offered to give the same price for them as the purchaser:—Held, that the petitioner should be put to his election, either to take the land without abatement of the purchase money, or let it go



to the subsequent incumbrancer. *Carmichael v. Ferris*, 8 P. R. 280.—*Stephens, Referee*.—*Blake*.

Application to remit action to the court to take evidence after refusal to call witnesses. See *Macdonald v. Worthington*, 7 A. R. 531.

Where the plaintiff filed his bill seeking to quash a certain municipal by-law, passed to open a road, and also an award made thereunder:—Held, that there was nothing inconsistent in this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award. *Harding v. Township of Cardiff*, 2 O. R. 329.—*Chy. D.*

Where, however, under such circumstances, the plaintiff, being called on by the court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor:—Held, he could not afterwards complain of having been forced to elect at the hearing. *Ib.*

In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of the clause, and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest, and costs, whenever tendered, although he does not pray for a personal order for immediate payment. *Drummond v. Quirkard*, cited in *Green v. Adams*, 2 Chy. Chamb. 124, overruled. *Craw v. Bond*, 1 O. R. 384.—*Boyd*; reversing *S. C.*, 9 P. R. 111.

Election by assignee to allow creditor to retain, at a valuation, property held by him as security. See *Bell v. Ross*, 11 A. R. 458.

Election to waive personal liability on a note and accept the liability of the company by proving against the company on the note, and accepting a dividend thereon. See *Brown v. Howland*, 9 O. R. 48; 15 A. R. 750.

J. E. Dunham carried on business at Montreal from February, 1886, to 1st September, 1886, under the style of J. E. Dunham & Co. The same J. E. Dunham with W. W. Park carried on business at Toronto from 1st May, 1886, to 1st August 1886, under the same style, J. E. Dunham & Co. By the articles of partnership between Dunham and Park it was agreed that Dunham should not sign the firm name to bills or notes. The dissolution of the partnership between Dunham and Park was not advertised until the 20th August, 1886. Dunham for purposes of his own, and without the knowledge of Park, upon the 11th of August, 1886, signed a series of notes amounting to \$21,000 with the firm name of J. E. Dunham & Co., and gave them to one Isaac. The note in question in this action was one of that series, but antedated upon the 30th of July. The plaintiffs who had no knowledge of Park being a member of J. E. Dunham and Co., took this note without notice of any infirmity, and to secure a pre-existing debt which was overdue. The judge at the trial charged the jury that the plaintiffs had a right to resort to either firm for

payment. Held, a misdirection, and that there was no such right of election; that it was for the creditor to prove who his debtor was and not for the defendants to prove that they were not the debtors. *Standard Bank v. Dunham*, 14 O. R. 67.—*Q. B. D.*

Election by suing one person instead of the members of the firm. See *Mail Printing Co. v. Devlin*, 17 O. R. 15.

Upon a motion for an interim injunction the defendants filed an affidavit and statement shewing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which by virtue of an acceleration clause in the mortgage, had become due:—Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that they must apply the insurance money, as required by R. S. O. ch. 102, sec. 4, sub-sec. 2, upon arrears of principal and interest. *Corham v. Kingston*, 17 O. R. 432, approved and followed. *Edmonds v. Hamilton Provident and Loan Society*, 19 O. R. 677.—*Q. B. D.* Reversed in appeal, 18 A. R. 347.

## EMBARRASSING PLEADINGS.

See PLEADINGS.

## EMBEZZLEMENT.

See CRIMINAL LAW.

## EMBLEMENTS.

See CROPS.

## EMINENT DOMAIN.

See CROWN—MUNICIPAL CORPORATIONS—RAILWAY AND RAILWAY COMPANIES.

Right of tenant to compensation. See *In re Welland Canal Enlargement*—*Fitch v. McRae*, 29 Chy. 139, p. 113.

Where the land itself upon which a trade is carried on, is expropriated, damage to the goodwill may be a proper subject of compensation. *Ricket's Case*, L. R. 2 H. L. 175, distinguished. *Re McCauley and City of Toronto*, 18 O. R. 416.—*Boyd*.

**ENDORSEMENT.**

I. OF WRITS—See PRACTICE.

II. OF BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

**ENTAIL.**

See ESTATE.

**ENTIRETIES, ESTATE BY.**

See ESTATE.

**EQUITABLE ASSETS.**See *Bank of Toronto v. Hall*, 6 O. R. 653.**EQUITABLE ASSIGNMENT.**

See CHOSE IN ACTION.

**EQUITABLE DEFENCE.**

See EJECTMENT—PLEADING.

**EQUITABLE ESTATE.**

See EXECUTION—MORTGAGE.

Per *Burton, J. A.* The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee. *Adamson v. Adamson*, 7 A. R. 592.

See also *S. C.*, 28 Chy. 221 ; 9 A. R. 592 ; 12 S. C. R. 564.

**EQUITABLE EXECUTION.**

See EXECUTION.

**EQUITABLE JURISDICTION.**

See COUNTY COURT—TRIAL.

**EQUITABLE LIEN.**

See LIEN.

**EQUITY OF REDEMPTION.**

See MORTGAGE.

**ERROR.**

See CRIMINAL LAW.

**ESCHEAT.**

Held, affirming the judgment of Proudfoot, V. C., 26 Chy. 126, that the doctrine of escheats applies to Ontario ; that the Attorney-General for Ontario is the proper person to represent the Crown and to appropriate the escheat to the uses of the Province ; that the Court of Chancery has jurisdiction in such a case ; and that it was proper for the Attorney-General to file a bill in the Court of Chancery to enforce the escheat. *Attorney-General of Ontario v. O'Reilly*, 6 A. R. 570. See *S. C. sub. nom. Attorney-General of Ontario v. Mercer*, 5 S. C. R. 538 ; 8 App. Cas. 767, p. 307.

See *Simpson v. Corbett*, 10 A. R. 32 ; *Attorney-General of Ontario v. Attorney-General of Canada*, 14 S. C. R. 730.

**ESCROW.**

See *Confederation Life Association v. O'Donnell*, 10 S. C. R. 92 ; S. C., 13 S. C. R. 218.

**ESTATE.**

I. ESTATE AT WILL—See LIMITATION OF ACTIONS.

II. FOR YEARS—See LANDLORD AND TENANT.

III. ESTATE FOR LIFE.

1. Generally, 587.

2. By *Courtesy*, 589.3. *Dower*—See DOWER.4. *Improvements effected by Tenant*—See IMPROVEMENTS ON LAND.5. *Lands taken for Railway purposes*—See RAILWAYS AND RAILWAY COMPANIES.

IV. ESTATE TAIL, 590.

V. ESTATE IN FEE, 590.

VI. ESTATE BY ENTIRETIES, 591.

VII. JOINT TENANTS, 591.

VIII. TENANTS IN COMMON, 592.

IX. EQUITABLE ESTATES—See EQUITABLE ESTATE.

X. RULE IN *SHELLEY'S CASE*, 593.

XI. HEIR-AT-LAW, 593.

XII. CONVEYANCE OF—See DEED.

XIII. TRUST ESTATES—See TRUSTS AND TRUSTEES—USES AND TRUSTS.

XIV. ADMINISTRATION OF—See EXECUTORS AND ADMINISTRATORS.

XV. CONVERSION OF REALTY INTO PERSONALTY—See CONVERSION—WILL.

XVI. DEVOLUTION OF ESTATES ACT—See DEVOLUTION OF ESTATES ACT.

XVII. DISTRIBUTION OF—See DISTRIBUTION OF ESTATE.

XVIII. PARTITION OF—See PARTITION.

XIX. DEVISE OF—See WILL.

XX. OF PARTICULAR PERSONS.

1. Married Woman—See DOWER—HUSBAND AND WIFE.
2. Infants—See INFANT.
3. Lunatics—See LUNATIC.
4. Tenants for Years—See LANDLORD AND TENANT.

III. ESTATE FOR LIFE.

1. Generally.

The general rule as between a tenant for life and the remainderman in respect of a charge upon an estate, is, that the tenant for life must keep down the interest on such charge, and the duty of the remainderman is to pay the principal. *Reid v. Reid*, 29 Chy. 372.—Spragge.

The word "demise" is an effective word to convey an estate of freehold, and is of like import with, and equivalent to the word "grant." An estate for life was therefore held to be validly created by the words "demise and lease" to E. M. for life; and livery of seisin was held unnecessary. *Spears v. Miller*, 32 C. P. 661.—Armour.

The defendant leased to his father the lands in question in this action for life, to work and enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry, then and in such case the defendant was to be at liberty to govern the lands as seemed best to him. And in the event of the father becoming incapable of manual labour he was to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant re-entered and worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment. The jury having found the facts as above stated:—Held (reversing the judgment of the court below, 31 C. P. 417), that the defendant had, according to the terms of the lease, the right to possession, and that the plaintiff must therefore fail in his action. *Turley v. Benedict*, 7 A. R. 300.

Held, following *Drake v. Wigle*, 22 C. P. 405, that a tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but that he cannot cut down timber even for the same purpose, and sell it. *Saunders v. Breakie*, 5 O. R. 603.—Ferguson.

Mrs. H. the owner of lot 13, built a house thereon, out which on a survey made by a surveyor, B., was found to have encroached on lot

12, owned by R., seven and a-half inches, whereupon the following agreement was entered into; "It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry street, by Mr. B. is correct, but that the said Mrs. H. be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R.; but that after the death of the said Mrs. H., said R. may claim the whole of his said lot; and that in the meantime said R. shall occupy his said lot up to the said line in the rear of the said house." The defendant had purchased from M. to whom Mrs. H. had sold some twelve years prior to the trial, which took place in the spring of 1886, M. at the time being aware of the agreement, but of which defendant when he bought had no notice. The defendant moved a fence, which plaintiff had erected in rear of the house in accordance with B.'s survey, in a line with the house, and also veneered the house with brick so as to cause it to encroach one and a-half inches further on plaintiff's lot. Mrs. H. died within ten years before action commenced, which was brought to recover that part of lot 12 encroached on by defendant:—Held, that the plaintiff was entitled to recover, for that the agreement must be construed as a demise to Mrs. H. for life of that portion of lot 12 covered by the house, and not merely a license to occupy the same, so that the right of entry of the plaintiff, who claimed under R. did not accrue until Mrs. H.'s death, and therefore plaintiff having brought his action within ten years of Mrs. H.'s death, was not barred by the Statute of Limitations. It was objected that the plaintiff must fail under the registry laws, because the grant to Mrs. H. it appeared had not been registered, and defendant bought in ignorance of plaintiff's rights; but:—Held, that the registry laws did not affect the matter, for as defendant bought lot 13 and not 12, the instrument relating to lot 12 would not properly be registered on lot 13:—Held, also, that the agreement signed by Mrs. H. recognizing the line run by B. as the true boundary between the lots, relieved the plaintiff from doing more than shewing where that line ran, and imposed on defendant, who claimed by mesne conveyance from Mrs. H., the burden of shewing that such line was incorrect. Per Rose J. The plaintiff was clearly entitled to recover as to the one and a-half inches; but as to the seven and a-half inches, though in doubt, he concurred in the judgment of the court. *Roan v. Kronsbein*, 12 O. R. 197.—C. P. D.

A deed made by C. G. (mother) to J. H. G. (daughter) just after the latter's marriage, contained the following provision: "It being hereby declared and agreed that it is intended by this deed to vest in the said J. H. G. life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said J. H. G., and to be held by them, their heirs and assigns in equal shares," and was executed by both grantor and grantees. No issue were in existence at the date of the deed. Subsequently J. H. G. and her children, with the exception of two, executed a mortgage in fee of the property; of these two, one died in the lifetime of J. H. G. leaving infant children. In an application under the Vendor and Purchaser Act, R. S. O. (1877), c. 109, on a sale by the mortgagee it was:—

Held, that H. G. the deed, was be given to remainder each child have a ves and that s died before could not and *Risbri*

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Held, that the real design of the grantor and J. H. G. the grantee, appearing on the face of the deed, was that only a beneficial life estate should be given to the grantee, and that the beneficial remainder in fee should go to her children: that each child born while the grantee lived would have a vested right to share in the property, and that such share would descend to those who died before the grantee; and that such a title could not be forced on a purchaser. *Re Morice and Risbridger*, 13 O. R. 640.—Boyd.

A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death to sell and divide the proceeds among his children equally:—Held, that the wife had the right to leave the farm and deal herself directly with the tenant during her life. *Hefferman v. Taylor*, 15 O. R. 670.—Boyd.

In this case, those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will on the trustees during the continuance of the life estate, and such being the case, the court would give effect to the usual incidents of an estate for life by which the tenant can occupy it or let it, or otherwise dispose of it as seems best to that tenant:—Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of mala fides on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee. *Id.*

The plaintiff's testatrix, who had a life estate in certain lands, made a lease of them for ten years to one of the defendants, who was entitled to the reversion in fee. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the lessor, her heirs and assigns," for payment to "the said lessor, her heirs and assigns." The lessor died before the expiration of the ten years, and this action was brought by the executrix of her will to recover (inter alia) the instalments of rent which became payable, as it was alleged, upon the lease after her death:—Held, that, as the interest of the lessor was a freehold interest, the plaintiff could not recover either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant:—Held, also, that there was no estoppel to prevent the lessor from shewing that the title of the lessor had come to an end, and that he himself became the owner upon her death. *Thatcher v. Lownan*, 18 O. R. 265.—Street.

See *in re Treleven and Horner*, 28 Chy. 624; *Wilson v. Gilmer*, 46 Q. B. 545, p. 491.

## 2. By Curtesy.

A testator devised his property to trustees, in trust to pay the rents and profits to his wife durante viduitate, and if she married again she was to have an annuity, and the property was to be applied as directed for the benefit of the children, and divided among them when the youngest came of age. One daughter married, and died before the period of division, leaving a husband and two children. The testator's widow

married again before the death of the daughter:—Held, that the husband of the daughter was tenant by the curtesy of her share. *Jones v. Dawson*, 8 P. R. 481.—Proudfoot.

Deed in fee made by tenant by the curtesy.—Effect of. See *McGregor v. McGregor*, 27 Chy. 470.

In 1869 L. married G., his deceased wife's sister. G., having had a son by L., died, in 1871, seized of certain lands of which L. remained in continuous possession until 1883, the time of action brought:—Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not to work tortiously against the heir-at-law of the wife. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

It is not necessary to entitle to tenancy by the curtesy that the marriage should have been canonical. *Id.*

See *Merchants' Bank v. Bell*, 29 Chy. 413; *Wylie v. Frampton*, 17 O. R. 515; *Anderson v. Hanna*, 19 O. R. 58; *Cameron v. Walker*, 19 O. R. 212.

## IV. ESTATE TAIL.

Held, reversing the judgment of the Court of Appeal, 6 A. R. 312, Henry, J., diss., that the execution and registration in accordance with the revised statutes of Ontario, (1877), c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail. *Lawlor v. Lawlor*, 10 S. C. R. 194.

## V. ESTATE IN FEE.

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular," the mortgaged land, habendum "as and for all the estate and interest" of the grantors "in and to the same":—Held, sufficient to pass the fee to the grantees. *Bright v. McMurray*, 1 O. R. 172.—Boyd.

A husband and wife were the parties of the third part in a conveyance, whereby the wife's father, did "grant unto the said party of the third part his heirs and assigns forever," etc., habendum "unto the said party of the third part, his heirs and assigns, to and for his and their sole and only use forever":—Held, that by the operation of the Statute of Uses, the husband took an estate in fee simple. *Re Young*, 9 P. R. 521.—Boyd.

A. by deed sold and assigned certain lands to B. his heirs, executors, administrators, and assigns, "to have and to hold the same unto B. his heirs, executors, administrators, and assigns in trust, for the sole and separate use of A. for life, and after A.'s decease, in trust for C. for her life; and after C.'s decease, in trust for the heirs of A., and in the event of A. surviving C., then in trust to convey and vest the said premises in A., his heirs, executors, administrators, and assigns, for their own proper use and benefit for ever. But should C. survive A., then and in that event, and in the further event of the

decease of C., in trust to convey the said premises to such persons and in such manner as A. shall by his last will and testament order, designate, and appoint. But in the event of A. dying intestate, then in trust to sell and convey the said premises for A.'s heirs, executors, administrators, and assigns."—Held, that A. took an estate in fee simple, subject to the intervening life estate of C.; for no such special trust was created as took the case out of the Statute of Uses. *Re Bingham and Wrigglesworth*, 5 O. R. 611.—Ferguson.

Certain owners of the equity of redemption in lands by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto and to the use of B., his heirs and assigns." This was dated July 17th, 1875, and registered July 21st, 1875:—Held, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

See *Re Morse*, 8 P. R. 475, *infra*; *Re Morice and Risbridge*, 13 O. R. 640, p. 589; *Adamson v. Adamson*, 17 O. R. 407, p. 592.

#### VI. ESTATE BY ENTIRETIES.

Per Armour, J. Quære, whether the effect of the Married Woman's Acts may not be to do away with the estate by entireties, and make husband and wife, when devisees, tenants in common. *Griffin v. Patterson*, 45 Q. B. 536.

Where a deed in a chain of title had been made to a husband and wife as joint tenants:—Held, following *Shaver v. Hart*, 31 Q. B. 603, that notwithstanding the terms of the deed the husband and wife took by entireties. And where the husband made a conveyance of the same land in the lifetime of his wife, she merely joining to bar her dower, and she predeceased her husband:—Held, that the husband's deed conveyed the fee. *Re Morse*, 8 P. R. 475.—Blake.

Held that a lease for life to a husband and wife makes them tenants by entireties, so that the whole accrues to the survivor. *Leitch v. McLellan*, 2 O. R. 587.—Osler.—C. P. D.

#### VII. JOINT TENANTS.

Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. Union Fire Ins. Co.—McPhee's Claim*, 6 O. R. 635.—Proudfoot.

Two several lots were conveyed, by the deed in trust set out in the report, to C. and A. respectively to the use of C. and A., their heirs and assigns, as joint tenants, and not as tenants in common:—Held, that under the provisions of such deed, the grantees took the respective lots in severalty. *Adamson v. Adamson*, 7 A. R. 592; 12 S. C. R. 563.

By a settlement certain lands were conveyed to trustees, upon trust to hold the said land \* \* situated \* \* being lot No. 2 \* \* to G.

A.; and also lot No. 1, situated \* \* to A. A., sons of (the settlor) \* \* to the use of them, their heirs and assigns as joint tenants, and not as tenants in common \* \* and, lastly, upon trust, that the said trustees \* \* shall, well, and sufficiently convey and assure, absolutely in fee to the said parties respectively, etc.:—Held, that this trust was an executed trust, in which the limitations were expressly declared, and that neither a difficulty in ascertaining the true construction and legal meaning of the words used, nor the final trust directing the trustees to make the conveyances of the legal estate made any difference: and that the words must receive the same construction as if they were found in a common law conveyance:—Held, also, that an estate in fee in lot 2 passed to G. A., and that the words, "as joint tenants, and not as tenants in common," were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV. c. 1, s. 48, and that they were needlessly used:—Held, also, that as G. A. died intestate and unmarried, after January 1st, 1852, the defendants, as the children of a deceased brother of the plaintiff, took an equal share in the lands as cotenants in common with the plaintiff A. A.: that they were as much entitled to the possession of the lands as the plaintiff, and that the plaintiff having obtained the legal estate from the trustees should hold the same as a trustee for all the tenants in common:—Held, also, that there being no proof of ouster of the plaintiff he could not recover from the defendants any mesne profits in this action. *Adamson v. Adamson*, 17 O. R. 407.—Ferguson.

See *Lapointe v. Lafleur*, 46 Q. B. 16, p. 490; *Re Morse*, 8 P. R. 475, p. 591.

#### VIII. TENANTS IN COMMON.

The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The court, on a bill filed by the other tenants in common, asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, reversed such charges, and dismissed the bill, *th* costs. *Kennedy v. Bateman*, 27 Chy. 38.—Blake.

One of two executors and co-residuary legatees got in portions of the residuary estate, and as to such his estate was held liable as for a legacy to the other residuary legatee, 19 C. L. J. 95. Some of the residuary estate consisted of lands, which the co-residuary legatee as tenant in common occupied, or got in the rents and profits of:—Held, (1) that the account extended only to whatever had been paid or given by tenants or occupants of the joint property more than the co-tenant's just share or proportion. (2) That such co-tenant was not liable for the profits or produce taken by him from the common property, nor for his enjoyment of such property when there was no exclusion or ouster. (3) That the six years' bar of the Statute of Limitations applied to such claim. *Re Kirkpatrick—Kirkpa-*

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*trick v. Stevenson*, 10 P. R. 4.—*Hodgins, Master in Ordinary*.

A tenant in common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupation. *Munsie v. Lindsay*, 10 P. R. 173.—*Hodgins, Master in Ordinary*.

See *Griffin v. Patterson*, 45 Q. B. 536, p. 591; *Adamson v. Adamson*, 17 O. R. 407, p. 592.

#### X. RULE IN SHELLEY'S CASE.

By ante-nuptial settlement, reciting that F. intended to make provision for his future wife, F. agreed with her and K. to transfer and convey to K. certain property he expected to acquire, to hold unto K. for the joint use and benefit of him, F., and his intended wife during their joint lives, and after the decease of either of them to the use of the survivor during his or her natural life, and after the decease of the survivor, to the use of the heirs of F. as he might by will direct: and it was further agreed that articles of settlement should be executed in pursuance of this document. After the marriage, F., pursuant to the said ante-nuptial settlement, conveyed, in 1879, certain land to K. and his heirs, upon trust, with the consent of F. and his wife, or the survivor, to sell, lease or otherwise convey the same, and to hold the moneys thereon arising upon the trusts and subject to the powers contained in the ante-nuptial settlement. F.'s wife having died:—Held, that, though there were children of the marriage still surviving, F. was entitled to a conveyance of the lands from K. to himself in fee simple, for that the trusts of the ante-nuptial settlement were executed and not executory, and under them F. had an equitable estate in fee simple under the rule in Shelley's Case. *Ferris v. Ferris*, 9 O. R. 324.—*Ferguson*.

See *Re Casner*, 6 O. R. 282; *Smith v. Smith*, 8 O. R. 677.

#### XI. HEIR-AT-LAW.

A. W. B. by his will dated August 14th, 1850, after giving a life estate to his wife, provided as follows: "After the death of my said wife, I devise the lands \* \* known as 'Russell Hill' to my nephews, the Hon. R. B. & W. A. B., sons of my brother, the late Hon. W. W. B. deceased, their heirs and assigns forever, or in case of the death of them or either of them, in my own lifetime; then I devise the share of such deceased, to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns," and died January 15th, 1866, leaving W. A. B. and two sons and two daughters of the Hon. R. B. (who predeceased him) him surviving. One of the daughters died 10th July, 1866, unmarried and intestate, during the lifetime of the life-tenant, who was in possession until her death, which happened on April 19th, 1870. On her death the two sons and surviving daughter entered into possession, collected rents, and parts thereof, dividing the proceeds in equal shares amongst themselves; and partitioned part of the unsold balance thereof by deed, dated 31st January, 1885, and in all respects dealt with the said lands and the proceeds thereof as if they were all equally interested therein; their father, the Hon. R. B., having

by his will divided his estate equally between them. In May, 1886, the plaintiff, the eldest son of the said Hon. R. B., was advised he was entitled to the whole as "heir-at-law" of his father. In an action for the construction of the said will and recovery back of the moneys paid over, and the partitioned lands remaining unsold, and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned land. It was:—Held, following *Tylee v. Deal*, 19 Chy. 601, that the Act 14 & 15 Vict. c. 6 (C. S. U. C. c. 82, abolishing primogeniture) which came into force 1st January, 1852, does not apply except in cases of intestacy, and that the plaintiff was heir-at-law:—Held, also, that the several divisions of property and money did not come under the head of "Family arrangements." But:—Held, also, that the moneys paid over more than six years before action, could not be recovered; and following *Rogers v. Ingham*, 3 Ch. D. 351, that as to the moneys paid over within six years, an action for money had and received, would not lie for moneys paid by one party to another under a mistake of law common to both, when both had a full knowledge of all the facts:—Held, lastly, that moneys not paid over, being proceeds of lately sold land, could not be recovered by the plaintiff, as the lands of which they were the proceeds had become vested in the different parties claiming them by possession as tenants in common and by the partition deed. *Baldwin v. Kingstone*, 16 O. R. 341.—*Robertson*. But see *S. C.*, 18 A. R. 63. This case has been carried to the Privy Council.

#### ESTOPPEL.

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##### II. IN PARS.

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2. *Bills of Exchange and Promissory Notes*, 598.
3. *Creditors*, 599.
4. *Companies*, 600.
5. *Fraud*, 600.
6. *Accepting Dividends*, 601.
7. *Transfer of Stock*, 601.
8. *Payments*, 601.
9. *Receipts*, 602.
10. *Assignment and Use of Patents of Invention*, 602.
11. *Negligence*, 602.
12. *Municipal Matters*, 603.
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##### V. BETWEEN LANDLORD AND TENANT—See **LANDLORD AND TENANT**.

##### VI. IN MATTERS OF PRACTICE—See **PRACTICE**.



## I. BY DEED.

G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P. of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F. conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land:—Held (Hagarty, C. J., dissenting), that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.: that this land was subject to the trusts of the previous conveyance to them: that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover. *Foot v. Rice*, 4 O. R. 94.—Q. B. D. Affirmed, see *Foot v. McGeorge*, 12 A. R. 351.

M. C. made a voluntary deed of certain land to L. C. At that time M. C. had no title to the land, it having been previously sold for taxes and conveyed by sheriff's deed to B. There were no recitals or covenants for title in the deed to L. C., and by it M. C. did "assign, transfer, demise, release, convey, and forever quit claim" to L. C., his heirs and assigns, all his estate in the land. Subsequently B. sold and conveyed the land to M. C.:—Held, that the deed from M. C. to L. C. did not operate by estoppel to vest the estate in the land subsequently acquired from B. in L. C., for (1) there was no recital or covenants for title; (2) it did not purport to grant any estate in the land, but merely to assign or release and quit claim to L. C.'s interest therein; (3) it never had any operation, for L. C. never paid anything for the land, never went into possession, never claimed to be owner of it, or paid the taxes, and from the first repudiated the gift. *Casselman v. Casselman*, 9 O. R. 442.—Proudfoot.

It is a firmly established rule of property in Ontario that covenants for title are sufficient to work an estoppel, though it is otherwise held in England. *Id.*

T. to whom the patent of the land in question issued, by deed poll made prior thereto, bargained, sold, aliened, and confirmed the land to L. habendum to L. and his heirs; with a cove-

nant of warranty:—Held, that on obtaining the patent T. was estopped by the deed from setting up title in himself under the patent. *Robertson v. Daley*, 11 O. R. 352.—C. F. D.

McM., in building a house, by mistake built part of it on the land of the adjoining owner B. On discovering this he applied to B. with a view of purchasing a portion of B.'s lot, and B. on 29th July, 1880, wrote: "I hereby offer to sell you twenty-five feet frontage for the sum of \$250, to be paid six months from this date, otherwise this offer to be null" \* \* \* and B. accepted such offer at the foot in the words, "I hereby accept the above offer." McM. seven days after registered a plan as No. 327, alleged to be of his own property, but which included the twenty-five feet as part of lot M., and the next day executed a mortgage on lot M. with a description, which included the twenty-five feet, and which was assigned to the defendants the O. S. Co. B.'s offer to sell to McM. was not acted on within the six months limited, and B. afterwards, in January, 1883, sold and conveyed the twenty-five feet (which was called lot 40 on his (B.'s) plan No. 306, registered 26th January, 1883) to McM. for \$400, payable \$100 cash and mortgage for \$300, and which mortgage was at the instance of B. taken to his daughter N., the plaintiff. The O. S. Co. subsequently sold under the power of sale in their mortgage to the defendant W. In an action by N. to realise her mortgage, it was:—Held (reversing the judgment of Proudfoot, J.), that the original dealing between B. and McM. created no binding contract on the latter, it being merely an option given him; and he not having completed the purchase within six months the subsequent sale and conveyance by B. to McM. was upon a new and distinct contract. No interest in the twenty-five feet (lot 40) passed to the O. S. Co. under McM.'s mortgage, and the subsequent conveyance to him "fed the estoppel" created by his prior mortgage to the extent only of McM.'s interest which was that of owner of the equity of redemption, or owner of the twenty-five feet (lot 40) charged with \$300, and it made no difference that the \$300 mortgage was taken to the plaintiff instead of to B., the effect of the whole transaction being that W. was the owner of lot 40 subject to a first mortgage of \$300 in favour of the plaintiff and to a second mortgage of the O. S. Co. B. having by his dealing with McM. created in him the status of owner, and in the plaintiff that of mortgagee, was not, nor was the plaintiff in a position to complain of the registration of plan 327. *Doe Irvine v. Webster*, 2 Q. B. 234; *Doe Hennessey v. Meyers*, 2 O. S. 424 observed upon. *Nevitt v. McMurray*, 14 A. R. 126.

See *Pierce v. Canavan*, 29 Chy. 32; *In re Laplante and the Town of Peterborough*, 5 O. R. 634; *Pratt v. Grand Trunk R. W. Co.*, 8 O. R. 499; *Moffatt v. Merchants' Bank of Canada*, 11 S. C. R. 46; *Mitchell v. Holland*, 16 S. C. R. 687; *Lawrence v. Anderson*, 17 S. C. R. 349.

## II. IN PAIS.

## 1. Title to Land.

L., a married woman, about the year 1830 assumed to devise certain land to her daughter

P. and her after to the went into of O., about in undisturbed years. The under the brought and sold, and session:—(Ferguson, J.) from deny topped the title to the claimed under made in 18 and so void must succeed 48, and distinguished D.

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P. and her husband O. for their lives, and thereafter to their children. T. (one of the children) went into possession of part of it, at the instance of O., about 1853, and built thereon and remained in undisturbed possession for over twenty-eight years. Those who were entitled in remainder under the will (the life estate having expired) brought an action to have the land partitioned or sold, and T. claimed his part by length of possession:—Held (reversing the judgment of Ferguson, J.), that although T. might be estopped from denying the title of L., still he was not estopped from denying that L. had transferred her title to those now claiming, and that as they claimed under the will of L. (a married woman), made in 1828, before there was power to devise, and so void on its face, they had no title, and T. must succeed. *Board v. Board*, L. R. 9 Q. B. 48, and *Taine v. Jones*, L. R. 18 Eq. 320, distinguished. *Smith v. Smith*, 5 O. R. 690.—Chy. D.

A mortgagee having commenced proceedings under a mortgage, one H. C. S. professed to have a claim to some of the property as an alleged partner of the mortgagor, H. H. S. It appeared, however, that H. C. S. was present when the mortgage was given, and knew all about the transaction: that the money which the mortgage was given to secure was partly for the purposes of a printing office, in which he claimed to be interested as such partner; and that he had, at the time of the transaction, made no objection and asserted no claim:—Held, that, under these circumstances, H. C. S. was estopped from setting up any right or title as against the mortgagees, whose title was the same as if he had joined in the mortgage. *Robinson v. Cook*, 6 O. R. 590.—Ferguson.

T. was the owner of lot 9, and C. was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T. being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed his northern boundary was. C. pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, C. not objecting. A few days afterwards T., with his architect and builder, went on the ground and, in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof and considerable money had been expended in building:—Held, that C. was estopped from disputing that the line run by the surveyor, was the true line. *Grasett v. Carter*, 10 S. C. R. 105.

The Island of Anticosti, held in joint ownership by a number of people, was sold by licitation for \$101,000. The report of distribution allotted to G. B. (plaintiff) \$16,578.66, for his share, as

owner of one-sixth of the island acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth. The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by her through her attorney, W. L. F., of the one-sixth to the Anticosti Company was a nullity, because the Act incorporating the company was ultra vires the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself, as representing the Anticosti Company, was not valid. The Anticosti Company was one of the defendants in the action for licitation, and the appellant an intervening party; no proceedings were taken by the appellant prior to judgment, attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff, now respondent:—Held, affirming the judgment of the court below, Ritchie, C. J., and Gwynne, J., dissenting, that as Dame C. Langan had herself recognized the existence of the company, and as the appellant, her legal representative, was a party to the suit ordering the licitation of the property, she, the appellant, could not now on a report of distribution, raise the constitutional question as to the validity of the Act of the Dominion Parliament constituting the company, and was now estopped from claiming the right of setting aside the deed of sale, for which her mother had received good and valuable consideration. *Forsyth v. Bury*, 15 S. C. R. 543.

By an arrangement made within ten years before this action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyances, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability:—Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party. *McDiarmid v. Hughes*, 16 O. R. 570.—Q. B. D.

See *Miller v. Hamlin*, 2 O. R. 103; *Mulholland v. Harman*, 6 O. R. 546; *Seabrook v. Young*, 14 A. R. 97.

## 2. Bills of Exchange and Promissory Notes.

Held, in this case, that although plaintiff, by acceptance and payment, was estopped from disputing the signature of the company, the drawers, yet he was not estopped from denying their signature as endorers, even though it was on the bill at the time of acceptance and payment. *Ryan v. Bank of Montreal*, 12 O. R. 39.—Q. B. D.; 14 A. R. 533.

H. Y., after having for some time carried on business as "The Hamilton Cotton Co." in partnership with the defendants, retired from the company and entered their employ as general manager, blank drafts, etc., signed by the company being placed in his hands for the financial purposes of the company. In June, 1883, H. Y.,

for his own purposes, drew in the name of the defendants on M. at Montreal for \$2,760, which was discounted by the plaintiffs, and the draft sent by them to Montreal for acceptance, the proceeds being first credited to defendants but subsequently to H. Y. The draft was duly honoured by the drawee, and would have matured on the 28th of September. About a month before the maturing thereof H. Y. waited on the bank authorities, and requested them to recall the draft, alleging that the company were settling with the acceptor. On the same day the solicitor for the company obtained from H. Y. an order or letter addressed to the defendants, informing them of his having so used a draft made in their name, and requesting them to retire and oblige at same to his account, and as it had been discounted for his accommodation and proceeds applied to his own use, they (defendants) should not pay any part of it. Shortly afterwards the defendant, separately and on distinct occasions, called at the bank, defendant L. asking to be shown the draft, which was handed to and closely examined by him, and when asked why he was so critical in his examination answered that the "signature of J. M. Y. was usually not so shaky"; that he would call in a day or two and see if the draft was taken up. Defendant J. M. Y. on visiting the bank after examining the draft very carefully, when he was asked by one of the officers of the institution if he would send a cheque for it, answered that it was too late that day, but that he would send a cheque the following day. No cheque was sent, however, and on or about the 13th of September the manager of the bank and the bank solicitor called to see J. M. Y., and asked why the cheque had not been sent by him, when he admitted having promised to send the same; that at the time he had thought he would send it, and could not say why it had not been sent. He declined to say whether or not the signature to the draft was his. H. Y. subsequently left the country. The trial judge found that the draft was a forgery, but the judgment was reversed by the Divisional Court on the ground of estoppel by conduct on the part of the defendants:—Held, (reversing the judgment of the C. P. D., 13 O. R. 520) that the conduct of the defendants was not such as to preclude them from setting up the defence of forgery: Held, also, that the act of forgery in this transaction not being an act professing to have been done for or under the authority of the persons sought to be charged was incapable of ratification. —Hagarty C. J. O., dissenting. *Merchants' Bank v. Lucas*, 15 A. R. 573.

### 3. Creditors.

A creditor who had proved his claim in a creditors' suit held in this case not estopped from prosecuting an action for the same debt. See *Lee v. Credit Valley R. W. Co.*, 29 Chy. 480.

The plaintiff filed his bill on the 14th March, 1874. On the 31st of the same month, an attachment in insolvency was issued by the defendant against the plaintiff. The decree dismissed the plaintiff's bill, with costs, in October, 1874. Defendant proved against the estate for the costs of the Chancery suit, but did not take his dividend from the assignee in insolvency, and took

no further steps for the recovery of his claim until after the order for discharge of the plaintiff (25th May, 1877), when he issued execution. On the application of the plaintiff, Spragge, C., refused to set aside the execution, holding that defendant was entitled to issue it, and that the proving against the estate for the costs of the suit when it was not legally provable, did not operate as an estoppel in pais between the plaintiff and defendant. *Stevenson v. Scamith*, 8 P. R. 286.

After the execution of a deed of assignment for creditors the assignee called a meeting of the creditors, at which the defendant, a creditor, attended and assented to a resolution appointing him one of the trustees to aid the assignee in winding up the estate; and a resolution was also passed to pay certain arrears of wages; and he examined and reported on the amount and condition of the stock. A few days afterwards he brought an action on his claim against the debtors, recovered judgment by default, and issued execution, contending that the assignment was invalid:—Held, that the defendant had assented to the assignment and was estopped from denying its validity. *Gardner v. Kleopfer*, 7 O. R. 603.—Osler.

A creditor is not debarred from participating in the benefits of an assignment in trust for the general benefit of creditors by an unsuccessful attempt to have such deed set aside as defective. *Gardner v. Kleopfer*, 15 S. C. R. 390.

### 4. Companies.

Under the authority of the Act, 39 Vict. c. 47, the C. P. & M. R. Co. issued debentures in blank, which were handed to the managing director who subsequently handed them to the plaintiffs as security for a debt of the railway. In an action for an account of what was due under the debentures and payment, or in default a sale, it was:—Held, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and that the company would be estopped from relying on the fact that the name was not filled in until delivery to the plaintiffs. *Bank of Toronto v. Coboury, Peterborough and Marmora R. W. Co.*, 7 O. R. 1.—Boyd.

### 5. Fraud.

An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts which such deceased person had given to his creditors during his lifetime. *Merchants' Bank v. Monteith*, 10 P. R. 467.—Hodgins, Master-in-Ordinary.

Fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been made with the knowledge of the facts, and the representation must be plain and not a matter of mere inference or opinion;

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and certainty is essential to all estoppels. *McGee v. Kane*, 14 O. R. 226.—Ferguson.

#### 6. Accepting Dividends.

F, being about to indorse notes for the accommodation of B, conveyed his real estate to O, who then conveyed to the wife of F. Afterwards F became an insolvent under the Insolvent Act of 1875, and the assignee took proceedings to impeach the transaction, the result of which was, that it was declared fraudulent and void as against the assignee, who thereupon advertised the property for sale, and sold it as part of the estate of F to the defendants. Pending these proceedings the plaintiff had obtained execution on a judgment against F's wife, on promissory notes made by her and F, under which the sheriff, after the sale by the assignee, sold all her right, title and interest in the same property to the plaintiff. The plaintiff proved his claim on the notes and received a dividend in the insolvency proceedings against F:—Held, (1) reversing (3 O. R. 523), that he was not estopped by the receipt of the dividend nor by the decree obtained in the suit of the assignee (to which he had not been made a party) from asserting that the property belonged to F's wife and was exgible under his execution against her: but (2), that the conveyance to her being in fact shewn to be fraudulent and void against the assignee in insolvency, the plaintiff had acquired no title by the sheriff's sale to himself under the execution, and that the title of the defendants who were in possession under the assignee could not be impeached by the plaintiff. *Miller v. Hamlin*, 2 O. R. 103, as to the effect of a receipt of a dividend, distinguished. *Beemer v. Oliver*, 10 A. R. 656.

See *Côté v. Stadacona Ins. Co.*, 6 S. C. R. 193, p. 243; *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1, p. 459; *In re Central Bank of Canada—Baines' Case*, 16 A. R. 237, p. 249.

#### 7. Transfer of Stock.

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. Per Strong and Henry, JJ. (Gwynne, J. contra), that although A, a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer was by way of mortgage. 27-28 Vict. c. 23 (sub-s. 19 of s. 5). *Page v. Austin*, 10 S. C. R. 132.

See *In re Central Bank of Canada—Baines' Case*, 16 A. R. 237, p. 256.

#### 8. Payments.

The chamberlain of the city of Saint John is authorized, without any previous proceedings, to issue execution for taxes if not paid within a certain time after notice. In order to avoid such execution the bank of New Brunswick paid their taxes under protest:—Held, that such pay-

ment did not preclude them from afterwards taking proceedings to have the assessment qualified. *Ex parte James D. Lewin*, 11 S. C. R. 484.

#### 9. Receipts.

Held, that defendants were not under the circumstances of this case bound by their admission on the policy of the receipt of the premium. See *Western Ass. Co. v. Provincial Ins. Co.*, 5 A. R. 190.

The acknowledgment of the plaintiffs of the correctness of the account in their bank book at the end of the month, although a number of cheques drawn by them had been paid by the defendants on forged endorsements of the payees thereof, was at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties. *Agricultural Savings & Loan Association v. Federal Bank*, 6 A. R. 192; *S. C.*, sub nom. *Agricultural Investment Co. v. Federal Bank*, 45 Q. B. 214.

See *Manitoba Mortgage Co. v. Bank of Montreal*, 17 S. C. R. 692.

#### 10. Assignment and Use of Patents of Invention.

One C. assigned an undivided interest in a patent to B, with whom he entered into partnership. During the partnership B. retained the interest so assigned, and upon a dissolution re-assigned simply what he had received without giving any covenant and without asserting by recital or otherwise the validity of the patent:—Held, that B. was not estopped from disputing the validity of the patent. *Grip Printing and Publishing Co. of Toronto v. Butterfield*, 11 A. R. 145.

#### 11. Negligence.

The plaintiff's valuator, one H., filled in the blanks in an application for a loan on statements of one S. who forged the names of J. T. B. and I. B. as applicants, and although H. had never seen the property or the applicants, he certified a valuation to the plaintiffs, who accepted the loan, and signed his name as witness to the signatures of the applicants. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the name of the payees, endorsed his own name, and received payment of the cheques, which were drawn upon the defendants, through other banks, who presented them to the defendants and received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, and the usual acknowledgment of the correctness of the account was duly signed:—Held, that the plaintiffs were not estopped from recovering the amount paid on the forged endorsements from the defendants by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of their loss. *Agricultural Savings and Loan Ass. v. Federal Bank*, 6 A. R. 192; 45 Q. B. 214.

See *Saderquist v. Ontario Bank*, 14 O. R. 586; 15 A. R. 609, p. 136.

12. *Municipal Matters.*

A corporation may be bound by acquiescence as an individual may. *Township of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 593.—Osler.

On a motion for injunction by W., a ratepayer, against a town corporation to restrain them from paying for a site for a post office, it was shewn that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by one McA.) should be chosen, that W. had taken an active part in support of the one owned by the corporation and the majority of ratepayers had voted for the other. It was contended that W. was estopped by his conduct from maintaining the suit, and that McA. and the individual members of the corporation should have been made parties. W. having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given:—Held, that he was not estopped, and for the purposes of the motion, that although McA. and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties, and the injunction was granted. *Wallace v. Town of Orangeville*, 5 O. R. 37.—Ferguson.

The persons applying to quash a by-law incorporating a portion of a township as a village had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law, or had any part in the taking of the census objected to:—Held, that the applicants were not estopped from moving to quash the by-law. *Re Fenton v. County of Simcoe*, 10 O. R. 27.—Wilson.

Held, that the applicant in this case was not precluded from moving against a by-law by reason of his having expressed an opinion in its favour before its passage. *In re Peck v. Town of Galt*, 46 Q. B. 211.—Osler.

Held, that the applicant had not by voting against the by-law disentitled himself to apply to the court to quash it, or to the costs of his motion. *Re Armstrong and Township of Toronto*, 17 O. R. 766.—Falconbridge.

A ratepayer of a municipality cannot maintain an action, on behalf of himself and the other ratepayers, against the municipality for the improper construction of a drain authorized by by-law, when such ratepayer has himself been a contractor for a portion of the work, and has received his share of the money voted for the work in excess of the amount expended. *Dillon v. Township of Raleigh*, 14 S. C. R. 739; 13 A. R. 53.

13. *School Trustees.*

Where certain persons were elected school trustees, and at a meeting of the board held subsequently to the election, were declared duly elected, but, proceedings having been meanwhile commenced to question the validity of the election, at a subsequent meeting of the board, they acquiesced in the conclusion of the board to hold a new election, and became candidates again, and

canvassed as such, until the twenty days allowed for disputing the first election had elapsed (the proceedings formerly commenced for that purpose having been meanwhile dropped), and were not elected at the second election:—Held, they could not afterwards maintain a suit to have it declared they were the duly elected trustees. *Poster v. Stokes*, 2 O. R. 590.—Ferguson.

A trustee of a public school board is not precluded from becoming a relator in a quo warranto proceeding against another member of the board because he acquiesced in the payment of an account rendered for services which disqualified the member rendering the same from holding the office of trustee. See *Regina ex rel. Stewart v. Standish*, 6 O. R. 408.—C. P. D.

14. *Criminal Matters.*

The defendant in this case having had the certiorari directed to the magistrate who convicted was held to be estopped from objecting that the conviction was in reality made by three as appeared from the memorandum of conviction which was signed by them. *Regina v. Smith*, 46 Q. B. 442.—Osler.

Held, that where an adjournment of the proceedings before the magistrate for more than one week had been made at the request of the defendant, who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, and urging that on the evidence it ought to be dismissed, defendant had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal. *Regina v. Heffernan*, 13 O. R. 616.—Robertson.

15. *Other Cases.*

Semble, upon the facts stated in the report of this case, that the plaintiff, one of the directors, should be estopped from alleging that M. was not properly qualified as a director, the effect of which would have been to injuriously affect the value of bonds of the company, to the issue of which the plaintiff was a party. *Kiely v. Smyth*, 27 Chy. 220.—Spragge.

The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the council, did not preclude him from afterwards filing a bill impeaching the proceedings as irregular and invalid. *Marsh v. Huron College*, 27 Chy. 605.—Spragge.

Held, in a suit against a registrar by a municipal corporation for the proportion of fees to which the corporation was entitled under R. S. O. (1877) c. 111, that having received the money in question under the above Act he could not deny that he received it for the purposes therein provided. *County of Hastings v. Ponton*, 5 A. R. 543.

The plaintiff in this case sought to have his name removed from the list of shareholders:—Held, that though as against the company the plaintiff, had he come before the court in good time, might perhaps have had his contract rescinded, yet his having, as the fact was, acted at

a meeting of what he... him from as... bill must b... *Guelph Lun*... 11 S. C. R.

It was pr... sent at the... lot which w... question, a... the list; b... sent when... Held, that... complaining... fact that th... months afte... when he m... prive him... *Shibley*, 9 C.

J. McA... leased a cer... ing purpos... bounds wit... dit acquie... bornes du... les bornes... dans ce cas... de quartz... cet endro... prospecté l... certain line... containing... fendant's)... same lot... parties the... fix the bou... rate report... veyor Leg... adopted an... affirming... Gwynne, J... having loc... the terms... from claim... bounded a... vein of qu... gating the... survey wa... *Arthur v.*

In 1870... therefor w... went into... and remai... exact nat... but it poi... the portio... cuted a m... L. & C. L... fendant, v... which the... dant swor... tents of t... portion of... the father... of the wh... brought a... portion o... evidence... exclusive... for the st... thereto b... being a v...



a meeting of the shareholders after knowledge of what he now charged against them, precluded him from asserting any such right now, and his bill must be dismissed with costs. *Petrie v. Guelph Lumber Co.*, 2 O. R. 218; 11 A. R. 336; 11 S. C. R. 450.

It was proved that the owner was himself present at the sale in question, and purchased one lot which was ten or eleven ahead of the lot in question, and also another lot three below it on the list; but it was not shewn that he was present when the actual lot in question was sold:—Held, that he was not estopped by conduct from complaining of the sale:—Held, also, that the fact that the owner was informed within three months after the sale of the lot having been sold, when he might have redeemed it, would not deprive him of his right of action. *Claxton v. Shibley*, 9 O. R. 451.—Proudfoot.

J. McA. et al.'s, (plaintiffs) auteurs having leased a certain portion of a lot of land for mining purposes described in the deed by metes and bounds with the following option: "Pourra le dit acquereur changer la course des lignes et bornes du dit lopin de terre sans en augmenter les bornes, l'étendue ou superficie en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit, après que lui, le dit bailleur, aura prospecté le dit lopin de terre susbailé," adopted certain lines of a survey made by one Proulx, as containing the vein of quartz. B. et al.'s (defendants) auteurs leased another portion of the same lot. In an action en bornage between the parties the court appointed three surveyors to fix the boundaries. Each surveyor made a separate report, and the report and plan of the surveyor Legendre, adopting Proulx's lines, was adopted and homologated by the court:—Held, affirming the judgment of the court below, Gwynne, J. dissenting, that plaintiff's auteurs having located their claim in accordance with the terms of their deed they were now estopped from claiming that their property should be bounded according to the true course of the vein of quartz, and that the judgment homologating the survey adopting Proulx's lines and survey was right and should be affirmed. *McArthur v. Brown*, 17 S. C. R. 61.

In 1870, the defendant, under agreement therefor with his father, the owner of a farm, went into possession of a certain portion thereof, and remained in possession sixteen years. The exact nature of the agreement did not appear, but it pointed to the ownership in defendant of the portion occupied. In 1876, the father executed a mortgage of the whole of the farm to the L. & C. Loan Co., which was witnessed by defendant, who made the affidavit of execution on which the mortgage was registered. The defendant swore that he was not aware of the contents of the mortgage, nor that it included the portion of which he was in possession. In 1882 the father made a mortgage to the plaintiffs also of the whole lot, and on default the plaintiffs brought an action to recover possession of the portion occupied by defendant:—Held, that the evidence shewed that the defendant had been in exclusive possession of the land occupied by him for the statutory period so as to acquire a title thereto by possession; and that the fact of his being a witness to the mortgage to the L. & C.

Co., and its subsequent registration, under the circumstances, did not by virtue of section 78 of the Registry Act R. S. O. (1877), c. 111, create an estoppel. *Western Canada Loan Co. v. Garrison*, 16 O. R. 81.—C. P. D.

Held, that a ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of separate schools, who through inadvertence or other cause does not appeal therefrom, is not estopped (nor are other ratepayers) from claiming with reference to the assessment of the following or future years, that he is not a Roman Catholic. *In re Roman Catholic Separate Schools*, 18 O. R. 606.—Boyd.

Held, that a ratepayer, being a Roman Catholic, and appearing in the assessment roll as such and as a supporter of separate schools, who has not given the notice required by R. S. O. (1887), c. 227, s. 40, is not (nor are other ratepayers) estopped from claiming, in the following or future year, that he should not be placed as a supporter of separate schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in R. S. O. (1887), c. 227, s. 47. *Id.*

See *National Ins. Co. v. Egleson*, 29 Chy. 406; *Re Martin v. English*, 5 A. R. 647; *Christopher v. Noxon*, 4 O. R. 672; *Western Bank of Canada v. Greey*, 12 O. R. 68; *Duffus v. Creighton*, 14 S. C. R. 740; *Forsyth v. Bury*, 15 S. C. R. 543; *Wickens v. McMeekin*, 15 O. R. 408; *Blackley v. Kenny*, 16 A. R. 522; *O'Keefe v. Curran*, 17 S. C. R. 596.

### III. BY PLEADING.

The plaintiffs having filed their bill in Ontario, must be taken to admit that the court has jurisdiction in respect of the matters therein embraced; and the practice of the court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice if the objection were taken. *Exchange Bank v. Springer*, *Exchange Bank v. Barnes*, 29 Chy. 270.—Chy. D.

The note upon which this action was brought had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal:—Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note. *Baillie v. Dickson*, 7 A. R. 759.

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I. MATTERS JUDICIALLY NOTICED.

Held, that a magistrate cannot take judicial notice of orders in council, or their publication, without proof thereof by production of the official Gazette, and therefore that a conviction was bad which was made without such evidence that the Canada Temperance Act, 1878, was in force in the county pursuant to the terms of section 96 thereof. *Regina v. Bennett*, 1 O. R. 445.—Cameron.

See *Regina v. Atkinson*, 15 O. R. 110, p. 614.

II. ADMISSIONS.

1. By Parties.

See *Court v. Holland*; *Ex parte Holland and Walsh*, 8 P. R. 219, p. 647; *In re Briton Medical and General Life Ass'n (Limited)*, 11 O. R. 478, p. 294; *Rogers v. Wilson*, 12 P. R. 322, 545; *Carroll v. Penberthy Injector Co.*, 16 A. R. 446, p. 513; *Hinds v. Law Society of Upper Canada*, 17 A. R. 41.

2. By Pleadings.

A bill was filed by D. D. against I. and B., "trading as partners," and J. D. alleging a wrongful conversion by I. and B. of certain timber, the property of the plaintiff, and further alleging that J. D. was a party to an agreement set forth therein respecting the sale of the said timber as a surety only, and claiming the return of the timber, an account and damages. I. and B. in their answer admitted that the timber had been removed by them, but alleged that it had been in accordance with an agreement entered into by them with J. D., and with A., his assignee, who had a proper authority for that purpose.—Held, reversing the decision of Ferguson, J., that the whole of the admission was to be looked at, and it was not such as entitled the plaintiff to a decree because it did not admit a conversion of timber of which the plaintiff was sole owner, as alleged in the bill; but under it I. and B. might shew that J. D. had an interest in the timber and authority to act for and represent D. D. in the transaction in question. *Dovey v. Irwin*, 4 O. R. 8.—Chy. D.

Per Armour, J. When a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue; therefore, it was, in this case, competent for C., a co-defendant, to deny the execution of the bond, his pleading not expressly admitting it. *Waterloo Mutual Ins. Co. v. Robinson*, 4 O. R. 295.

The plaintiffs, sought to support their case by reference to a certain statement in the defendant's pleading, in which, besides denying their right to recover, she herself also claimed title

under a deed from the executors of S. :—Held that they could not take that part of the pleading which suited their purpose and reject the rest: they could not use a scrap of it to eke out the insufficiency of their own evidence. *Harber v. McKay*, 17 O. R. 562.—Chy. D.

See *Cleaver v. North of Scotland Canadian Mortgage Co.*, 27 Chy. 508.

3. Admissions without Prejudice.

Overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly, made "without prejudice," are inadmissible in evidence on grounds of public policy, although the pendency of such negotiations as a matter of fact may be looked at. *County of York v. Toronto Gravel Road and Concrete Co.*, 3 O. R. 584.—Proudfoot.

Where negotiations with a view to settlement are carried on between the parties and a settlement of a suit concluded by means of a marked "without prejudice" the letters given in evidence to prove the binding notwithstanding the restrictive words. *Vardon v. Vardon*, 8 O. R. 719.—Wilson.

A letter containing an offer written "without prejudice," means "I make you an offer, if you do not accept it, this letter is not to be used against me." But when the offer is accepted, the privilege is removed. *Omnium Securities Co. v. Richardson*, 7 O. R. 182.—Boyd.

All communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and wrong motives, are not admissible in evidence. Where therefore a letter written without prejudice and coming within the above rule was admitted at the trial; the court not being able to say that defendant was not prejudiced thereby, a new trial was directed. *Pirie v. Wyld*, 11 O. R. 422.—C. P. D.

In answer to plaintiff's letter enclosing statement of his loss under a policy of insurance, defendants replied that they thought the loss in place of \$13,005, the amount claimed by plaintiff, should be \$11,734.90; adding: "This sum, we consider, not only reasonable, but liberal, and which we are liable for, without any prejudice to or waiver of, any condition of the policy." Some further correspondence took place, but no arrangement was arrived at, and an action was brought.—Held, that the letter was properly admitted in evidence, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants by the letter merely claiming that it should not be deemed a waiver of any condition of the policy, and both parties acted on this view. *Hartney v. North British Fire Insurance Co.*, 13 O. R. 581.—C. P. D.

4. Other Cases.

The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership binds all

the partner of some of the statements they objected to. *Dalton, M.*

Admission of a course of conduct and signed letter v. *Allison*

A defence items in a reference, former solicitor's admissions properly charged shewn that change had parties by *McBean*, 1

Admission of a fact. See

Quare, whether a privilege against self-incrimination or O. R. 22.—

Where an deed was signed which was signed Held, that it had been delivered per Bank 467.—Ferguson

See Wells 594.

2. F.

Held, that might be as the report to the goods to the list, and at the trial, produce, that it state necessary for that the effect to the plaintiff approval ex *Uckley v. M.*

3. Arising.

Held, that officer of a such officer assumed and although not of his appointment of *Hartley v. M.*

the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to. *Taylor v. Cook*, 11 P. R. 60.—*Dalton, Master*.

Admissions made before the master in the course of a reference should be put into writing and signed by the party making the same. *Forster v. Allison*, 11 P. R. 233.—*Boyd*.

A defendant was allowed to attack certain items in an account, which, in the course of a reference, had been admitted to be correct by his former solicitor, since deceased, where the defendant swore that he had not authorized the admissions, and that the items were not properly chargeable against him, and where it was shown that no report had been made and no change had taken place in the position of the parties by reason of the admissions. *McBean v. McBean*, 11 P. R. 429.—*Proudfoot*.

Admissions of defendant in action of seduction. See *Palmy v. McCleary*, 12 O. R. 192.

Quere, whether the refusal to answer the direct question as to authorship, or the claim of privilege against criminal proceedings, affords any evidence thereof, by way of admission or estoppel or otherwise. *Harkins v. Doney*, 17 O. R. 22.—*Rose*.

### III. PRESUMPTIONS.

#### 1. As to Deeds.

Where an equity of redemption conveyed by deed was subject to a mortgage a discharge of which was registered the same day as the deed:—Held, that the deed must be assumed to have been delivered before it was registered. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—*Ferguson*.

See *Wells v. Northern R. W. Co.*, 14 O. R. 594.

#### 2. From Non-Production of Papers.

Held, that the letter from K. to the defendants might be assumed upon the evidence set out in the report to state that he had made a sale of the goods to the plaintiffs at the prices named in the list, and that as such letter was not produced at the trial, though called for by the notice to produce, the court might, if necessary, presume that it stated anything further which might be necessary for the plaintiff's case:—Held, also, that the effect of the letter from the defendants to the plaintiffs was not impaired by the disapproval expressed therein of part of the order. *Ockley v. Masson*, 6 A. R. 108.

#### 3. Arising from Official Appointments and Acts.

Held, that if a person acts notoriously as the officer of a corporation and is recognized by it as such officer a regular appointment will be presumed and his acts will bind the corporation, although no written proof is or can be adduced of his appointment. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.—*Proudfoot*.

The defendant was convicted of perjury alleged to have been committed in a cause tried at a Division Court held by one H. under a commission issued by the Governor-General in Council appointing him deputy judge of the County Court of the county of Victoria, during pleasure and the absence of the county judge under the leave of absence granted to him by an order in council:—Held, it was not necessary for the Crown to prove the order in council granting the leave of absence, for its existence, and that the commission was not effete by the lapse of time, would be presumed, in accordance with the general presumption of law that a person acting in a public capacity was duly appointed and authorized to act, the onus of shewing the contrary being on the defendant. *Regina v. Fee*, 3 O. R. 107.—*C. P. D.*

An information was laid before K., who described himself as "one of Her Majesty's police magistrates in and for the county of Oxford;" and he was similarly described in the summons and conviction. K.'s commission was issued on the 12th January, and appointed him police magistrate in and for the county of Oxford. It was urged that Woodstock and Ingersoll were two towns in the county, and that each had, at the time of information laid, a population of more than 5,000 inhabitants, so as to have, by law, each a police magistrate, which it must be presumed was the case here; and therefore K. could not be police magistrate for the county which included these towns, as there could not be more than one police magistrate for the same county. On motion to quash the conviction:—Held, that the application must be refused; that there was no judicial knowledge of the fact of such towns containing such population, and no knowledge of it by affidavit or otherwise; that even if there was more than one police magistrate, the other might have been appointed subsequently to K.; and the appointment of such other, and not K., would be void; and under R. S. C. c. 106, s. 17, the conviction must be deemed sufficient. *Regina v. Atkinson*, 15 O. R. 110.—*Wilson*.

#### 4. As to Death.

Held, that the presumption of death arising from continued absence of the defendant's husband, unheard of for seven years, is sufficient to sustain an action for dower as against the objection that he is still living. *Giles v. Morrow*, 10 R. 527.—*Osler*.

#### 5. Other Cases.

When one to whom a devise prima facie beneficial to him is made neither accepts or rejects the same, but remains passive, he will be presumed to accept. *Re Defoe*, 2 O. R. 623.—*Boyd*.

J. and R. living at P., had dealings extending over several years with D. & Co., who lived at K., and borrowed money from him from time to time. To secure the money borrowed they executed a mortgage to D. & Co., purporting to be for \$4,000, but really intended as security for whatever should be due to them from time to time on the loan account. On taking the accounts in the master's office some years afterwards, and after J. and R. had made an assignment in insolvency, it appeared that shortly after executing this mortgage,





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court should hold that the production was not compellable, any verdict recovered would go for nothing. The letter was then produced and read. The judge told the jury that the letter was not evidence of libel as it was privileged, but that it could be looked at as evidence of malice on the slander count. The jury found for the plaintiff:—Held, that the question whether the production of such a document was injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper, and the production of the document ought not to have been compelled. Under the circumstances a new trial without costs was granted. *Bradley v. McIntosh*, 5 O. R. 227.—C. P. D.

### 3. Withholding Documents on the Ground of Privilege.

Among the grounds of defence set up in an action to recover the amount of the policy of insurance were, that the plaintiff's books had been falsified; and that the fire had occurred through the wilful negligence of the plaintiff. The defendants employed two experts to investigate the plaintiff's books and his conduct with respect to the fire, and these experts made reports. The defendants' affidavit on production set out as documents which they objected to produce: "Report of adjuster, for Norwich Union Fire Insurance Society for counsel's opinion thereon," "Various memoranda taken by adjuster for preparation of report, and for information of counsel." It was further stated in the affidavit that these documents were "privileged, being part of the defendants' case and prepared for the instruction of counsel, and prepared specially for this litigation and in contemplation thereof:—Held, on appeal, reversing the decision of the master in chambers, that these documents were privileged from production. *Macdonald v. Norwich Union Fire Ins. Co.*, 10 P. R. 501.—Rose.

G. was general solicitor for the bank, and was actively engaged in negotiating the transaction impeached in the action, not only on behalf of the bank but on behalf of himself and of other persons:—Held, that letters written to the bank by G. in reference to the transaction in question were not privileged from production. *Parson v. Merchants' Bank*, 11 P. R. 18.—Boyd.

Letters written to the defendant company by a clerk, who was specially instructed to investigate the plaintiff's accounts and take the advice of the company's solicitors, and which contained reference to their advice, were held privileged from production. *Boughton v. Citizens Ins. Co.*, 11 P. R. 110.—Dalton, Master.

In an action to recover payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiff's line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent:—Held, that documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation were privileged from production, even if they were procured for the purpose of another action between the same parties; but:—Held, that information obtained by means of the measurements and examination of the company's surveyors was not per se privileged; and the

plaintiffs were therefore ordered to give particulars of the errors in the certificates on which they relied, although this might involve the disclosing of matters of fact derived from privileged communications. *Canadian Pacific R. W. Co. v. Conmee*, 11 P. R. 297.—Boyd—C. of A.

The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD. No order to produce had at the time of the application been taken out as against F. McD., nor had she been served with notice of the application:—Held, that D. M. McD. should not have been ordered to produce these documents without F. McD. being called upon to shew cause why they should not be produced. *MacGregor v. McDonald*, 11 P. R. 386.—C. P. D.

To obtain privilege for a document mentioned in an affidavit on production, the grounds upon which it is claimed must be stated. A statement that according to plaintiff's contention a document contains a libel, and therefore exposes the defendant to a criminal charge, is not sufficient to protect the document; the defendant must go further and express his belief that the production of the document will expose him to a criminal charge. *Bromley v. Graham*, 11 P. R. 451.—Dalton, Master.

In an action to restrain the infringement of a patent, in which the defence set up that the supposed invention had been previously patented in the United States and England, copies of American patents material to the defendant's case, were procured by his solicitors of their own motion for the purposes of the action:—Held, that such documents were privileged from production. *Guelph C. Co. v. Whitehead*, 9 P. R. 509.—Dalton, Master.

In an action on a promissory note given by the defendant to the plaintiffs in payment of a quantity of pads made by the plaintiffs, and said to possess curative properties when applied to the body, the defence was, that the note was obtained by fraud and that the pads purchased were useless and possessed no healing properties. The defendant demanded production and discovery of the formula or recipe from which the pads were made, in order to shew that they were valueless, which the plaintiffs refused on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business:—Held, that the defendant was not entitled to the discovery. *Star Kidney Pad Co. v. Greenwood*, 3 O. R. 280.—Cameron.

The plaintiff in an action for damages for injuries sustained in a railway accident, sought to compel the defendants to produce a certain report of an investigation held by the defendants immediately after the accident, and the notes of evidence taken at the investigation. These documents according to the evidence of H., an officer of the defendants, who was examined for discovery in the action, were not obtained for the solicitor of the defendants, nor for the purpose of being laid before him for advice, nor in view of any impending or threatened litigation, nor after litigation commenced; but, "for the purpose of the management of the line; for our



own purposes; it was not intended for a purpose of this kind" (i. e., for use in legal proceedings). In answer to the question whether the defendants' solicitor was present at the investigation, H. said, "No, it would be entirely between the officers of the company." The affidavit of the solicitor stated that the information was obtained that he might advise the defendants as to their liability for damages arising from the accident, and that it had been used for that purpose and no other. The defendants' affidavit of documents did not claim privilege for these documents, but denied the possession of any documents relating to the matters in question; but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts, and that these documents were in the possession of the defendants.—Held, that the court need not under these circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out and privilege claimed for them; and that upon the statements of H. and the solicitor the documents were not privileged and should be produced. *Wheeler v. Marchant*, 17 Chy. D. 675, and *Westinghouse v. Midland R. W. Co.*, 48 L. T. Rep. N. S. 462, followed. *Betta v. Grand Trunk R. W. Co.*, 12 P. R. 86.—C. P. D. Affirmed on appeal, *ib.* 634.

Held, that no privilege attaches to telegrams in the possession of a telegraph company. 45 Vict. c. 93, s. 18 (Dom.), should not be read as giving an absolute privilege. *Re Dwight and Macklam*, 15 O. R. 148.—Boyd—Osler.

See *Merchants' Bank v. Pierson*, 8 P. R. 123, p. 637; *Bradley v. McIntosh*, 5 O. R. 227, p. 617.

#### V. ATTENDANCE OF WITNESSES.

##### 1. Service of Subpoena.

When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment and subpoena, as in the case of resident litigants, is sufficient to compel his attendance; and it lies upon the party so served to object at the time to the payment of conduct money. *Comstock v. Harris*, 12 P. R. 17.—Boyd.

##### 2. Other Cases.

Postponement of trial where party unable to attend owing to ill health and swears that he is a material witness in his own behalf. See *Schultz v. Wood*, 6 S. C. R. 585.

Held that the operator was the proper person to subpoena to produce telegrams, as he had the control of them and the ability to produce them. *Re Dwight and Macklam*, 15 O. R. 148.—Boyd.—Osler.

See *George T. Smith Co. v. Greey*, 11 P. R. 345, p. 636.

#### VI. COMPETENT AND COMPELLABLE WITNESSES.

##### 1. Generally.

Since the passing of 45 Vict. c. 10, s. 3 (Ont.), the parties to an action for breach of promise of

marriage are both competent and compellable witnesses, and may therefore be examined under the C. L. P. Act. *McLaughlin v. Moore*, 10 P. R. 326.—Osler. *Superseding Woodman v. Blair*, 8 P. R. 179; *Jones v. Gallon*, 9 P. R. 296.

Mental capacity. See *Udy v. Stewart*, 10 O. R. 591.

#### VII. EXAMINATION UNDER COMMISSION.

##### 1. Application for, and Issue of Commission.

Where a witness who had been previously examined under a commission, stated on affidavit that he had further evidence to give to explain or correct his former evidence:—Held, a new commission should issue to further examine him, and that in such case he should be considered as a witness for the party who desires to re-examine him:—Held, also, that strong suspicion of a depraved motive in the witness for desiring to be re-examined, was not a sufficient ground upon which to resist the application. *Rogers v. Manning*, 8 P. R. 2.—Hagarty.

The referee made an order striking out as impertinent certain interrogatories to be administered to a witness under commission:—Held, on appeal, that the referee has no jurisdiction to strike out interrogatories for impertinence. The proper course is, for the witness to demur to the impertinent question. *Williams v. Corby*, 8 P. R. 83.—Proudfoot.

Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken on viva voce questions, instead of upon interrogatories. *Watson v. McDonald*, 8 P. R. 354.—Osler.

On an application for a foreign commission to examine a witness who is travelling, it should be shewn that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution. *Singer v. C. W. Williams Manufacturing Co.*, 8 P. R. 483.—Blake.

A commission to examine witnesses in a foreign country may be issued in the case of the trial of an election petition. *Cornwall Election* (3) (Dom.).—*MacLennan v. Bergin*, 1 H. E. C. 803.

Where an application for a commission to examine a witness in New York, was made before an official referee, and referred by him to a judge, it was—Held that matters coming within the jurisdiction of any officer of the court should be disposed of by him in the usual way, and the parties might then appeal from such decision. *Hughes v. Rees*, 9 P. R. 86.—Boyd.

Where an order was made for a commissioner to examine one M. viva voce and other witnesses on interrogatories:—Held, that the commission could not issue to examine M. only, without amending the order. *Smith v. Babcock*, 9 P. R. 175.—Proudfoot.

A commission will issue to examine a witness, notwithstanding that his character for veracity is impeached. The proper course in such a case is to call witnesses at the trial for that purpose. *Nordheimer v. McKillop*, 10 P. R. 246.—Galt.

In an action to restrain an alleged nuisance, caused by the defendants' cattle byres in the city

of Toronto, defendants for cities in the half concerned. It was admitted witnesses in the case, as taken by the testimony of business. examined were sworn that attend persons state of fact must be relevant, 10 P.

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of Toronto, an application was made by the defendants for the issue of a commission to certain cities in the U. S., to take evidence in their behalf concerning the cattle byres in those cities. It was admitted that the only point on which witnesses in the States could be usefully examined was, as to whether proper means had been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named in the application, nor was it sworn that such persons could not be ready to attend personally at the trial:—Held, upon this state of facts, that the order for the commission must be refused. *Attorney-General v. Gooderham*, 10 P. R. 253.—Boyd.

A commission to take evidence out of the jurisdiction will not be ordered till after issue joined, nor then unless the applicant shews by affidavit what evidence he expects to obtain. *Smith v. Greey*, 10 P. R. 531.—Cny. D.

Upon an application for a foreign commission it is not necessary to shew that the action is technically at issue: it is sufficient that it be shewn that some issue is raised on the pleadings which must be tried in the action. *Smith v. Greey*, 11 P. R. 38.—Boyd.

Commission to take evidence abroad on the return to a writ of habeas corpus. See *Re Smart Infants*, 12 P. R. 2.

There is no hard and fast rule as to the granting or refusing of a foreign commission; it is a matter of discretion; but in the case of the examination of a party being sought the court will be more circumspect than in the case of an ordinary witness. *Mills v. Mills*, 12 P. R. 473.—Boyd.

In an action of alimony where there were allegations of cruelty, and the plaintiff had also instituted criminal proceedings for bigamy against the defendant, who had left the jurisdiction and applied to be examined abroad:—Held, that the defendant was a necessary witness and that the reason given by him for not being able to attend the trial, viz., that he was afraid to return to the jurisdiction on account of the criminal proceedings, was sufficient; and a commission was ordered. *Ib.*

The court will not hesitate to make an order for a foreign commission for the examination of a witness who is abroad, and whose presence cannot be procured for the purpose of giving evidence in court, because such witness is a co-plaintiff or co-defendant of the person applying. *Wilson v. McDonald*, 13 P. R. 6.—C. P. D.

The Divisional Court, on appeal, admitted evidence which was not formally before the master or judge in Chambers below, and being satisfied that the defendant McD. could not be induced to return from abroad to give evidence, and that his evidence was important to the defendant C., were of the opinion that the latter was entitled to a commission to examine McD. abroad; but gave no costs of the appeal. *Ib.*

The plaintiff was seeking damages for breach of a contract made with persons whom he alleged to be agents of the defendant. Before delivering a statement of claim, and after many months had elapsed since appearance, the plaintiff obtained an order to examine the defendant under a

foreign commission at Chicago, in the United States of America for the purpose, as he alleged, of obtaining information for the purpose of framing his statement of claim, and also for convenience, as the defendant was continually travelling about in the course of her career as a public singer, and it might not be possible to take her evidence later if it were not taken at Chicago, where she was shortly to be:—Held, that the circumstances were not such as justified the order, and it was set aside. *Thomson v. Gye*, 13 P. R. 273.—Street.

See *Lockwood v. Bew*, 10 P. R. 655, *infra*.

## 2. Cross Interrogatories.

When a foreign commission issues on the master's certificate, under G. O. 221, (Con. Rules 53, 590), cross interrogatories should be filed in the office of the clerk of records and writs; and where they were filed by a defendant in the master's office instead, and notice of filing given, but by accident the commission was forwarded without them, an application made on the return of the commission executed to suppress the depositions was refused, with costs. *Darling v. Darling*, 8 P. R. 391.—Taylor, Master.—Proudfoot.

## 3. Taking Evidence and Production of Documents.

Books and documents produced in an action may, when a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission. But documents produced in another action, which is sub judice, will not be taken from the office for such a purpose. *Clarke v. Union Fire Ins. Co.—Chabot's Case*, 10 P. R. 413.—Hodgins, Master-in-Ordinary.

The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the master's office. A party to the suit who, in bringing in his account into the master's office, files an affidavit verifying it, may be asked: "Is the account in the schedule to your affidavit correct?" thus leaving it to the other side to cross-examine, instead of beating about the bush as to each particular item in order to avoid leading questions. *Lockwood v. Bew*, 10 P. R. 655.—Hodgins, Master-in-Ordinary.—Proudfoot.

An application to strike out objectionable interrogatories may be made before the issue of the commission to take evidence. *Ib.*

See *McDonald v. Murray*, 5 O. R. 559, p. 646; *Williams v. Corby*, 8 P. R. 83, p. 620; *Darling v. Darling*, 8 P. R. 391, p. 623; *Milville Mutual Marine Fire Ins. Co. v. Driscoll*, 11 S. C. R. 183, p. 623.

## 4. Return of Commission.

Where the instructions directed that the depositions must be subscribed by the witness, and a witness could not write, the commissioner certified to that fact, and the interpreter and commissioner signed their names:—Held, sufficient. *Darling v. Darling*, 8 P. R. 391.—Taylor, Master.—Proudfoot.

On the facts stated in the judgment:—Held, that the interpreter was not such an agent or correspondent of the complainant as would justify the suppression of the depositions on that ground. *Ib.*

The commissioner was an Italian, and the instructions to him were in English:—Held, no objection, as it did not appear that the commissioner was unacquainted with the English language. *Ib.*

It did not appear that the commissioner took down the evidence:—Held, immaterial, under the instructions set out in the report. *Ib.*

The depositions of the claimant were taken by one commissioner, and those of a witness by another:—Held immaterial. *Ib.*

The time for the return of a foreign commission was extended from the 1st February, by an order of the master-in-ordinary, in the following terms: "I extend the time for the return of the commission peremptorily to the 24th February." The witnesses were examined viva voce on the 24th February, all parties being represented:—Held, that the master was wrong in excluding this evidence, as the commission being executed on the 24th February, there was no irregularity because of the necessary delay occasioned by its transmission from a foreign country, and in any event, the effect of the plaintiffs being represented at the examination was to waive any objection that the evidence was not returned to the master's office by the 24th February. *Darling v. Darling*, 9 P. R. 560.—Boyd.

Held, that where a foreign commission had been opened before trial for the convenience of parties, it was too late at the trial to object to the mode of its execution. *Walton v. Appjohn*, 5 O. R. 65.—Q. B. D.

A commission was issued out of the Supreme Court of New Brunswick directed to two commissioners—one named by each of the parties to the suit—to take evidence at St. Thomas, W. I., with liberty to plaintiff's commissioner to proceed ex parte if the other neglected or refused to attend. Both commissioners attended the examination, and defendant's nominee cross-examined the witness but refused to certify to the return, which was sent back to the court signed by one commissioner only. Some of the interrogatories and cross-interrogatories were put to the witnesses by the commissioners:—Held, that the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received. Per Ritchie, C. J., and Strong, Fournier and Henry, JJ., that the refusal of one commissioner to sign the return was merely directory and did not vitiate it. Per Gwynne, J., that the return should have been signed by both commissioners, and not having been so signed was void, and the evidence under it should not have been read. *Millville Mutual Marine and Fire Ins. Co. v. Driscoll*, 11 S. C. R. 183.

Held, that the court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening.

*Smith v. Greey*, 11 P. R. 238.—Dalton, Master.—Boyd.

#### 5. Costs.

The plaintiff obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs be costs in the cause. The evidence was taken, but neither the plaintiffs who succeeded in the suit, nor the defendant, put it in at the trial:—Held, that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiffs on the ground that the evidence had not been used. *Dominion, etc., Co. v. Stinson*, 9 P. R. 177.—Boyd.

### VIII. LETTERS ROGATORY.

Held, that the Act 31 Vict. c. 76 (Dom.), is not ultra vires the Dominion Parliament, for the taking of evidence in one of the provinces for use in foreign tribunals is not a subject which is assigned to the exclusive legislative authority of the province by section 92 of the British North America Act, inasmuch as such proceedings are of extra provincial pertinence, and do not relate to civil rights in the province. *Re Wetherell v. Jones*, 4 O. R. 713.—Chy. D.

### IX. EXAMINATION OF PARTIES AND WITNESSES BEFORE TRIAL.

#### 1. Application for—Time.

Where an order to examine a party to a suit has been granted before the trial, such examination cannot be had after the trial has taken place; and it was so held where the verdict rendered at the trial was a nominal verdict only, subject to a reference to arbitration. *Shelly v. Hussey*, 8 P. R. 250.—Dalton, Q. C.

The master-in-chambers has power under Rule 285, O. J. Act, (See Con. Rule 566), to direct evidence to be taken at any stage of the proceedings in a cause. In this case a witness about to leave the country was examined before a special examiner, under a chamber order, during a reference in the master's office, on which his evidence was to be used. *Re Dunsford—Dunsford v. Dunsford*, 9 P. R. 172.—Dalton, Master.

An action having been brought in the Chancery Division to set aside a judgment as fraudulent the plaintiff took out an appointment for the examination of the defendant after the delivery of the statement of defence, but before the close of the pleadings:—Held, that the former Chancery practice must apply to actions in the Chancery Division in the case of examinations for discovery. Rule 219 O. J. Act (Con. Rule 502), refers to an existing practice which is not repealed by the Act. *Davis v. Wickson*, 9 P. R. 219.—Dalton, Master.

If the issues between co-defendants are material to the case of the plaintiff or to the character of the relief which he seeks, he may examine a defendant upon them, though there is no issue between that defendant and himself. *Alexander v. Diamond*, 9 P. R. 274.—Ferguson.

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Rule 285, O. J. Act, (Con. Rule 566), applies to examinations for discovery before trial, and the examination of a defendant may be had under it before defence filed. An examination may be obtained under it at any stage of the cause and though no motion is pending. *Fisken v. Chamberlain*, 9 P. R. 283.—Boyd.

The former chancery practice as to the stage of the cause at which examination of parties may be had now governs in all divisions of the High Court. In this case an appointment to examine under section 159 of the C. L. P. Act was set aside because the affidavit required by that section had not been filed. *Tilsonburg Manufacturing Co. v. Goodrich*, 10 P. R. 327.—Dalton, Master.

In an action for libel against a newspaper, the defendants on a motion under Rule 285 O. J. Act (Con. Rule 566), were allowed to examine with certain restrictions the plaintiff before defence filed. *Tate v. Globe Printing Co.*, 11 P. R. 253.—Dalton, Master.

Parties allowed to examine each other for discovery before hearing after return to a writ of habeas corpus. See *Re Smart Infants*, 12 P. R. 2.

In an action by creditors of the defendant R. to set aside conveyances by him to the defendant G. as fraudulent, the plaintiff swore that it was necessary to have an examination of the defendants before delivering the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which they had no personal knowledge, and a local judge, upon the application of the plaintiff ex parte, made an order for such examination:—Held, that the order should not at any rate have been made ex parte; and that in this case the order should not have been made at all, the position of a defendant resisting a claim as to which he has no personal knowledge, and of a plaintiff advancing such a claim being vastly different. *Hooy v. Gilbert*, 12 P. R. 114.—Rose.

Immediately after appearance in an action a subpoena was issued and an appointment given for an examination of the defendant, and also of a person not a party, before a special examiner, to give evidence on behalf of the plaintiffs on a motion to be made by them under the rules respecting replevin for an order for replevying a certain guaranty, the subject of the action. The subpoena and appointment were moved against on the ground that there was no motion, petition, or other proceeding pending in the action, and the provisions of Con. Rule 578 were therefore not applicable:—Held that there must be a pending motion on which the examination is to be taken; and such was not the case here, as the subpoena spoke of a "motion to be made." *McMurray v. Grand Trunk R. W. Co.*, 3 Chy. Chamb. R. 130; *Stovel v. Coles*, 1b. 362, referred to:—Held, also, that the intended examination, being manifestly on the merits of the action, was improper at this stage, as it was too early in the action for the plaintiffs to obtain discovery except by a special order under Con. Rule 566. *Traders' Bank v. Kean*, 13 P. R. 60.—Dalton, Master.

After the plaintiff had signed interlocutory judgment against the defendant in an action of tort, the defendant sought to examine the plain-

tiff for discovery, the action being about to come on at the assizes for assessment of damages. Con. Rule 489 states that the examination of a plaintiff by a defendant may take place at any time after such defendant has delivered his statement of defence:—Held, that the defendant could not examine the plaintiff. *Ashley v. Brenton*, 13 P. R. 98.—Dalton, Master.

An order for examination before the delivery of pleadings, whether for discovery or evidence, should only be granted under exceptional circumstances, and where absolutely necessary in the interests of justice. *Thomson v. Gye*, 13 P. R. 273.—Street.

See *Leitch v. Grand Trunk R. W. Co.*, 12 P. R. 671, p. 629.

## 2. Service of Appointment.

Held, that service on the defendant's attorney at his home at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p.m. on the following Tuesday, was irregular, the notice not being sufficient:—Held, that Rule of Court 135 (See Con. Rule 480) applies to the service of orders and appointments to examine, and that this service must be treated as if made on the following Monday. *Senn v. Hewitt*, 8 P. R. 70.—Q. B. D.

An appointment was made ex parte by the master at Ottawa, for the examination of the defendant at his office in Ottawa. A copy of the appointment and of a subpoena were served on the defendant, who resided in Hull, P. Q., and a copy of the appointment was served on the defendant's solicitor:—Held, that the proceedings were regular, and warranted by G. O. Chy. 138, (See Con. Rule 487), following *Moffatt v. Prentice*, 6 P. R. 33, and that consequently relief might be had on the defendant's failure to attend under G. O. Chy. 144, (See Con. Rules 499, 520), and also that the appointment might be made ex parte. Semble, this mode of examination, and that provided for by R. S. O. (1877), c. 50, are not interfered with by the O. J. Act, s. 52. *Bank of British North America v. Eddy*, 9 P. R. 396.—Osler.

Upon a motion by the defendant to compel the plaintiff to attend again for examination, after his refusal to be sworn upon an appointment for his cross-examination upon an affidavit filed on a pending motion, the only material filed was a certificate of the examiner, which did not shew that due service of subpoena and appointment and payment of conduct money had been made: Semble, the certificate of the examiner as to these points would not have been sufficient; and:—Held, that, in the absence of evidence, it was not to be inferred from the fact that the plaintiff attended at the time and place appointed for his examination; that there was any right then to examine him; and the plaintiff did not by such attendance waive his right to have the service and payment proved. *McLean v. Bruce*, 12 P. R. 602.—Boyd.

## 3. Place of Examination.

A party out of the jurisdiction will be ordered to attend to be examined at that place within

the jurisdiction where, in the opinion of the court it is most expedient that the examination should be held, and not necessarily that nearest to his place of abode. *Smith v. Babcock*, 9 P. R. 97.—Proudfoot.

See *Bank of British North America v. Eddy*, 9 P. R. 396, p. 626.

#### 4. Persons who may be Examined.

##### (a) Plaintiff—Defendant.

A defendant whose interest is identical with that of the plaintiff, is a party adverse in interest to his co-defendant, and may be examined by his co-defendant under G. O. 139 (See Con. Rule 487). When the plaintiff's solicitor is present at such examination it may be read at the hearing against the plaintiff. The successful defendant will be allowed the costs of such examination. *Moore v. Boyd*, 8 P. R. 413.—Taylor, Master.

Discovery by means of oral examination under R. S. O. (1877), c. 50, s. 156, et seq., was limited to cases in which the party to be examined is compellable to give evidence by or on behalf of the opposite party. *Jones v. Gallon*, 9 P. R. 296.—Osler.

Upon a motion for judgment under Con. Rule 739 the defendant may satisfy the judge that there is a good defence otherwise than by affidavit; and one means of doing so is by cross-examination of the plaintiff on his affidavit filed in support of the motion. *Kingsley v. Dunn*, 13 P. R. 300.—MacMahon.

In action for breach of promise of marriage. See *Woodman v. Blair*, 8 P. R. 179; *Jones v. Gallon*, 9 P. R. 296; superseded by *McLaughlin v. Moore*, 10 P. R. 326.

See *Boulton v. Blake*, 11 P. R. 196, p. 631; *Hall v. Gowenlock*, 12 P. R. 604, p. 633.

##### (b) Persons for whose Immediate Benefit Action is Prosecuted.

In an action of replevin a party was added as a defendant at the instance of the defendant, who claimed indemnity against him on the ground of a warranty. After issue the plaintiff obtained from the judge of the County Court of Lambton an order to examine the third party:—Held, that though on the face of the pleadings there was no direct issue between the plaintiff and third party, yet as the latter had all the rights of the defendant, and virtually took his place, the case was within the spirit at all events, of Rule 224 O. J. Act, (Con. Rule 488), and that the examination should be allowed. *Bradley v. Clarke*, 9 P. R. 410.—Dalton, Master.—Cameron.

One M., having effected certain insurances in his favour, assigned one of the policies to the plaintiff, one of his creditors, and the other to one C., as trustee for the benefit of creditors. In actions on such policies:—Held, that M. was examinable under Rule 224 O. J. Act (Con. Rule 488), as "a person for whose immediate benefit" the suits were prosecuted. *Macdonald v. Norwich Union F. & Co.*; *Clarkson v. Fire Ins. Association*, 10 P. R. 462.—Rose.

An action against an endorser of a promissory note, was brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. and M., who had dissolved partnership, and the action was brought after the dissolution in the name of M. only. The master in chambers made an order under Rule 224 O. J. Act (Con. Rule 488) for the examination of, and the production of documents by B., as a person for whose immediate benefit the order was being prosecuted. On appeal, Rose, J., thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the master, varying it, however, by directing that the examination of B. and his affidavit on production should not be used except for the purpose of discovery. *Minkler v. McMillan*, 10 P. R. 506.—Dalton, Master.—Rose.

##### (c) Officers of Corporations.

Held, that the assistant or sub-editor of the defendants was an officer of the company examinable for the purpose of discovery under R. S. O. (1877) c. 50, s. 156. *Maitland v. Globe Printing Co.*, 9 P. R. 370.—Osler.

Seemingly, that a person who has ceased to be an officer of a corporation cannot be examined for discovery under 42 Vict. c. 15, s. 7, and Rule 227 O. J. Act (Con. Rule 487), unless the matters in respect of which he is sought to be examined occurred while he was such officer. *Id.*

Chy. G. O. 268 has been superseded by Rule 283 O. J. Act (Con. Rules 576, 577). A party to an action cannot now be examined upon his affidavit on production, with this exception that by Rule 226 O. J. Act (Con. Rule 511, part) an officer of a corporation may be so examined. *Frith v. Ryan*, 10 P. R. 235.—Dalton, Master.

In an action upon a fire insurance policy against a company:—Held, that the local agent of the company, who received the application and the premium and issued the interim receipt, and his successor, who had charge of the agency when the fire occurred, were properly examinable for discovery, before the trial, as officers of the company under the C. L. P. Act. *Goring v. London Mutual Fire Ins. Co.*, 10 P. R. 642.—Rose.

Quere, whether a person may be an officer examinable for the purposes of discovery, but not one whose evidence can bind the company. *Id.*

In an action upon a life insurance policy an order was made, at the instance of the plaintiff, for the examination of the local agent of the insurance company, who procured the application for insurance, for discovery only. *Hartnett v. Canada Mutual Aid Association*, 12 P. R. 401.—Robertson.

Where a corporation was sued for negligence resulting in an accident, an order was made for the examination for discovery of the driver of the traction engine which was the alleged cause of the accident. *Odell v. City of Ottawa*, 12 P. R. 446.—Armour.

A station agent of a railway company is an officer examinable under R. S. O. (1877), c. 50, s. 156. *Ramsay v. Midland R. W. Co.*, 10 P. R. 48.—Dalton, Master.—Wilson.

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Held, Henry, J., dissenting, that the locomotive superintendent and locomotive foreman of a railway company are "officers of the corporation" who may be examined as provided in R. S. O. (1877) c. 50, s. 156, and the evidence of such officers as to the conditions of the respective engines and the difference as to danger from fire between a wood-burning and a coal-burning engine, taken under said section, was properly admitted on the trial of this cause. *Canada Atlantic R. W. Co. v. Moxley*, 15 S. C. R. 145.

An order for the examination of a person as an officer of a corporation, under R. S. O. (1877) c. 50, s. 156, is properly made ex parte. The conductor of a train on which the plaintiff was a passenger when the accident out of which the action arose occurred was held examinable as an officer of the railway company, under section 156. *Leitch v. Grand Trunk R. W. Co.*, 12 P. R. 541.—MacMahon.

Held, (1) affirming the decision of MacMahon, J., 12 P. R. 541, that the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured was an officer of the defendants within the meaning of R. S. O. (1877) c. 50, s. 156, examinable for discovery in an action for damages for the injuries sustained. (2) Reversing the decision of MacMahon, J. (Falconbridge, J., dubitante) that such conductor could be examined by the plaintiff before a second trial, notwithstanding that he had been examined as a witness at the first trial, had been cross-examined by counsel for the plaintiff, and had then offered to produce a certain book in his possession. *S. C.*, 12 P. R. 671.—Q. B. D.

On appeal:—Held, per Hagarty, C. J. O., and Burton, J. A., that the conductor was not examinable as an officer under R. S. O. (1877) c. 50, s. 156, (Con. Rule 487); and per Osler and MacLennan, J. J. A., that he was examinable. *S. C.*, 13 P. R. 369.

Per Burton, J. A. The only officers intended by section 156 were such officers as might under the former system have been properly made defendants for discovery merely. The examination sought was not really for discovery; it was a fishing inquiry, to ascertain before the trial what precise evidence a particular witness would give. *Canada Atlantic R. W. Co. v. Moxley*, 15 S. C. R. 145, discussed. *Id.*

Per Osler, J. A. The test of the propriety of allowing an officer or servant of a corporation to be examined for discovery is his ability to give the necessary information. A person who is entrusted with the charge of a railway train in the course of its transit, the conductor of the train, is as to that particular occasion and for that particular purpose to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment, or how summary the corporation's power of dismissal. *Id.*

Semble, per Osler, J. A., that the depositions of an officer of a company upon examination for discovery can only be read against the company at the trial, if at all, when they have taken part in the examination. *Id.*

Held, that a track-foreman, a switch-foreman, and two engine-drivers in the employ of the de-

fendant company were not officers of the company examinable for discovery under Con. Rule 487, in an action for damages arising out of a railway accident. *Knight v. Grand Trunk R. W. Co.*, 13 P. R. 386.—MacMahon.

In an action to recover the value of horses killed by a train on the defendants' railway, it was alleged by the plaintiff and denied by the defendants that the latter had failed to erect and maintain proper fences on either side of the railway where it crossed the plaintiff's property:—Held, that the foreman who had charge of the fences on the railway in the section which included the locus in quo, subject to the orders of a road-master, was not an officer of the company who could be examined for discovery. *Knight v. Grand Trunk R. W. Co.*, 13 P. R. 386; *Leach v. Grand Trunk R. W. Co.*, 13 P. R. 388, followed. *Fowle v. Canadian Pacific R. W. Co.*, 13 P. R. 413.—Robertson.

A rule of defendant company provided that the driver of a "light engine" has all the responsibilities of a conductor in cases where a train of cars is attached to the engine:—Held, overruling Ferguson, J., 13 P. R. 388, that the driver of the light engine which knocked down and killed the man for whose death the action was brought, was an officer of the company who could be examined for discovery under Con. Rule 487. *Knight v. Grand Trunk R. W. Co.*, 13 P. R. 386, distinguished. *Leach v. Grand Trunk R. W. Co.*, (2) 13 P. R. 467.—Chy. D.

#### (d) Other Persons.

An order for the examination of a witness before trial under O. J. Act, Rule 285 (Con. Rule 566) will not be made where no greater necessity for it is shown than the convenience of the party who applies for it in preparing, and presenting his case for trial. *Carnegie v. Federal Bank*, 10 P. R. 69.—Ferguson.

Upon a motion pending, witnesses may still by G. O. Chy. 266 be examined under a subpoena and appointment. That order has not been superseded by Rule 285 O. J. Act (Con. Rule 566). *Township of Monaghan v. Dobbin*, 2 C. L. T. 260, overruled. *McMillan v. Wansborough*, 10 P. R. 377.—Ferguson.

A clerk in a Toronto warehouse accepted a bill of exchange on behalf of his employer, who resided in Philadelphia, U. S. In an action on the bill the employer denied the authority of his clerk to accept:—Held, reversing the decision of the master, that the clerk could not be examined under Rule 285, O. J. Act (Con. Rule 566). Semble, neither could the Toronto manager of the business be examined under the Rule. *Rosenheim v. Silliman*, 11 P. R. 7.—Dalton, Master.—Rose.

The powers of the special examiner under G. O. Chy. 147, as to directing the production of documents, extend to examinations under Rule 285, O. J. Act (Con. Rule 566). *Orpen v. Kerr*, 11 P. R. 128.—Boyd.

Upon an examination of a party under Rule 285 (Con. Rule 566), at a stage of the action earlier than an examination will be ordered as of



course, only material documents should be produced such as would be produced in the ordinary course at a later stage. *Ib.*

The right of extraordinary discovery must be jealously guarded, lest it be abused, and it should under Rule 285, O. J. Act (Con. Rule 566), be conceded only when it is clearly proved to be necessary for the furtherance of justice. *Boulton v. Blake*, 11 P. R. 196.—Boyd.

An application to examine under Rule 285 (Con. Rule 566) is in the discretion of the court, and that discretion cannot be said to have been wrongly exercised in allowing the defendant to examine the plaintiff and three witnesses before delivering the defence, in order to obtain for the purpose of pleading a knowledge of material facts, which the defendant could not otherwise get. *Ib.*

The defendants asserted as a counter claim in this action a claim against the plaintiff, which they had bought from the assignee for creditors of F. & L., stock brokers, who were not parties to the suit. This claim was the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that F. and L. had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they had done with it unless by examining them. Under these circumstances an order was made under Rule 285, O. J. Act (Con. Rule 566), for the examination of F. and L., for the purpose of discovery only. *Carnegie v. Cox*, 11 P. R. 311.—Dalton, Master.

The plaintiff, who was the father of A. S. M., an insolvent trader, sued the assignee and trustee for the benefit of creditors of A. S. M., claiming a declaration of right to rank on the estate for a large sum. The assignee was instructed by the creditors to resist the claim and had himself no personal knowledge of it, and could find no entry of it in the books or papers of A. S. M. Under these circumstances an order under Rule 285 (Con. Rule 566), for the examination of A. S. M. by the defendant, for the purposes of discovery before the trial, was affirmed. *Murray v. Warner*, 11 P. R. 440.—Ferguson.

Where the plaintiff had a good cause of action against the defendant, but was unable to frame his statement of claim unless he could examine the defendant and his employer, who was not a party to the suit:—Held, that he was entitled to such discovery under Rule 285, O. J. Act (Con. Rule 566), and that an order for such examination by a local judge of the High Court had been properly made. *Gordon v. Phillips*, 11 P. R. 540.—Q. B. D.

In an action against the trustees of an Orange Lodge for the price of work and materials in building a hall, the chairman of the board of trustees was examined, and could give no information as to the matters in dispute. His examination shewed that the architect employed by the defendants was the person from whom alone the information could be had. The defendants had successfully resisted production of the plans, as being in custody of the architect, and belonging to him. Under these circumstances an order for the examination of the architect, by the plaintiff for discovery only, was affirmed. *Smith v. Clarke*, 12 P. R. 217.—Rose.

In an action of ejectment, where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874, under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books, an order was made for examination of the father and production of his books for the purpose of discovery before the trial:—Held, by the master in chambers, that the father might have been made a party under Rule 109 (Con. Rule 330), on the ground of his having been a party to a fraud in conveying land to the plaintiffs after he had made an agreement with his son, and such being the case, there was no doubt of his liability to be examined under Rule 285 (Con. Rule 566). *McMaster v. Mason*, 12 P. R. 278.—Dalton, Master.—Galt.

In an action by a vendor for specific performance of a contract for sale of land, at the price of \$24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was \$5,000. The sisters were old and infirm, and being unmarried lived, and had for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavours to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant:—Held, that under these circumstances the defendant should be allowed, under Rule 285 (Con. Rule 566), to examine the two sisters before delivering his defence. *Brown v. Pears*, 12 P. R. 396.—Dalton, Master.

## 6. Conducting Examination.

### (a) Refusing to Answer.

The bill alleged that the defendant assisted in the fraud by which the plaintiff was induced to convey certain land to her husband, the other defendant. H., answered the bill denying all charges of fraud, disclaiming all interest in the subject matter of the suit, and asking for her costs:—Held, that it was competent for the plaintiff on cross-examining the defendant on her answer and disclaimer, to establish if possible the fraud out of her own mouth. *McFarland v. McFarland*, 9 P. R. 73.—Boyd.

In an action of libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and his wife as owner and publisher of the newspaper, on examination after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the editing of the newspaper, on the like grounds as to her husband:—Held, on appeal, that defendants were justified in their refusals. *Millette v. Little*, 10 P. R. 265.—Galt.

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Held, that the penal provisions of the statute 13 Eliz. c. 5, afford no excuse for a refusal by a defendant in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction. *Dunford v. Carstale*, 10 P. R. 449.—Boyd.

The O. J. Act has introduced a new intermediate practice, departing in some measure from the old rules of Chancery and Common Law, such new practice being indicated by Rule 235; (Con. Rule 519), that where a question has been substantially answered, a further answer ought not to be compelled, and when discovery would be oppressive, it is the duty of the court to exercise its discretion by refusing discovery, as also where the discovery cannot possibly help the plaintiff to obtain a decree. *Parker v. Wells*, 18 Chy. D. 477, considered and followed. *MacGregor v. McDonald*, 11 P. R. 386.—C. P. D.

In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and also a charge of obtaining a valuable security by false pretences, the defence averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase certain hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes:—Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J., fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill books, and all other books relating to such transactions. *Colter v. McPherson*, 12 P. R. 630.—Rose.

No man can be compelled to answer a question incriminating himself. And where the defendant upon his examination for discovery in an action of libel refused to answer questions as to the authorship of an alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him:—Held, that he was entitled to the privilege, and that it was not too late to claim it. The costs of the motion to commit were made costs to the plaintiff in the cause. *Hall v. Gowanlock*, 12 P. R. 604.

See *McLean v. Bruce*, 12 P. R. 602, p. 626.

See Subhead XI. 2, p. 643.

#### (b) Other Cases.

Upon the examination of two defendants before a master, he at the request of their solicitor, directed two other defendants present on behalf of the plaintiff, who was too ill to attend, to

withdraw, but they refused. The master thereupon declined to proceed with the examination:—Held, on appeal, that the master should have allowed one defendant to be present on behalf of the plaintiff, if he was satisfied that this was required for the proper representation of the plaintiff's interest, but by analogy to R. S. O. (1877) c. 50, s. 280, he might require such defendant to be examined first, if he was to be called as a witness. *Sivewright v. Sivewright*, 8 P. R. 81.—Spragge.

The general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the grounds of his attacking a plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses. *Smith v. Greey*, 10 P. R. 482.—Boyd.

A special examiner has authority to exclude one defendant from his office during the examination of the co-defendant, at the request of the plaintiff. *Culverwell v. Birney*, 10 P. R. 575.—Rose.

Upon an examination before a special examiner at his chambers:—(1) The examining counsel has no right to have a clerk present to assist him, if the opposite party objects. (2) If documents are produced by the party under examination, the opposite party is entitled to have them marked as exhibits. (3) It is within the discretion of the examiner to exclude from his chambers even the solicitor for the examining, if his presence interferes, in the examiner's opinion, with the due execution of his duty as examiner. *Handa v. Upper Canada Furniture Co.*, 12 P. R. 292.—Dalton, Master.

A special examiner or officer of the court taking an examination in a cause or proceeding pending in court has no power to authorize any other person to take down the depositions in shorthand; and a person cannot be compelled, in the face of his objection, to submit himself for examination where the examiner proposes to have the depositions so taken. R. S. O. (1887) c. 44, ss. 147, 148, and Con. Rules 501-3 considered. *Bradt v. Bradt*, 13 P. R. 271.—Street.

The examination of a witness who has refused to make an affidavit, conducted by one party without notice to his opponent, is irregular and inadmissible as evidence upon a motion. *Stephenson v. Dallas*, 13 P. R. 450.—Royd.

In an action against the maker and indorser of a promissory note judgment went by default against the indorser, but the maker appeared and upon the consent of the plaintiffs obtained an order under Con. Rule 566 for the examination before a special examiner of the indorser and his bookkeeper before delivery of defence, the object being to shew that the indorser alone was liable on the note, that he procured it by fraud from the maker, and that the plaintiffs held it with notice:—Held, that the interests of the indorser as a party might be affected by the examination, and that he was entitled to have counsel present upon the examination to protect his interests. *Dominion Bank v. Bell*, 13 P. R. 471.—Chy. D.

In answer to the defendant's application for a receiver to receive the interest of the plaintiff as residuary legatee under a will, of which he was also the surviving executor, the plaintiff filed an affidavit in which he stated that the estate was insufficient to pay the debts and specific legacies, and that there would be no sum coming to him as residuary legatee:—Held, that the plaintiff upon cross-examination upon his affidavit, must answer as to whether there were any and what debts and legacies unpaid. *McLean v. Bruce*, 13 P. R. 504.—Robertson.—C. P. D.

#### 7. Re-Examination.

A party having before judgment examined another party to the cause adverse in interest under R. S. O. (1877), c. 50, s. 156, is not entitled to a re-examination of the same party except under the most special circumstances. *Thorburn v. Brown*, 8 P. R. 114.—Dalton, Q. C.

See *Rogers v. Manning*, 8 P. R. 2, p. 620; *Russell v. Macdonald*, 12 P. R. 458, p. 641. *Leitch v. Grand Trunk R. W. Co.*, 12 P. R. 671, p. 629.

#### 8. Use of Examination at Trial.

Before delivery of his statement of defence one of the defendants obtained an order to examine an officer of the plaintiffs for discovery, and examined him thereunder, but he was not further examined by counsel for the plaintiffs:—Held, that such defendant could, under Con. Rule 508, read the depositions so taken, as evidence at the trial of the action. *Union Bank v. Starrs*, 13 P. R. 108.—Ferguson.

See *Moore v. Boyd*, 8 P. R. 413, p. 627; *Elliot v. Canadian Pacific R. W. Co.*, 12 P. R. 593, p. 637; *Carty v. City of London*, 13 P. R. 285, p. 636; *Leitch v. Grand Trunk R. W. Co.*, 12 P. R. 671; 13 P. R. 369, p. 629.

#### 9. Fees and Costs.

Where an examination of parties pursuant to R. S. O. (1877), c. 50, s. 161, takes place before a deputy-clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money. *Denmark v. McConaghy*, 8 P. R. 136.—Osler.

Where formerly the parties in an action for breach of promise of marriage, not being competent or compellable witnesses for each other, the plaintiff was not allowed the costs of the preliminary examination of the defendant, under R. S. O. (1877), c. 50, s. 156. But the plaintiff's costs of his own examination were allowed, as this took place at the instance of the defendant. *Woodman v. Blair*, 8 P. R. 179.—Dalton, Q. C.

The president of the plaintiffs lived in the U. S., but being in Toronto, he was there subpoenaed on the 22nd April, to attend on the 28th April, for examination for discovery before a special examiner at Toronto. He was paid \$1, and made no objection as to the amount, nor did he object that he was prevented by engagements from attending, but he failed to attend:—Held, that he should have attended on the day ap-

pointed, and that the fact that there were then pending against him, at the instance of a stranger to the action, proceedings for perjury, which might affect some point in controversy, though it might be a reason for his refusing to answer any question on this point, was not a reason for refusing to attend at all; and he was ordered to attend at his own expense. *Bolckow v. Foster*, 7 P. R. 388, distinguished. *George T. Smith Company v. Greey*, 11 P. R. 345.—Boyd.

An order was obtained by the plaintiff, who sued for damages for bodily injuries sustained, for his own examination de bene esse before the trial. The order provided that after the conclusion of the plaintiff's examination he should submit to a personal examination by medical men on behalf of the defendants, and that the defendants might afterwards continue their cross-examination of the plaintiff; and that the examination might be given in evidence at the trial "provided the defendants had been able to continue and complete their cross-examination." The plaintiff was examined and partly cross-examined under this order and was examined by the medical men, but his cross-examination owing to his ill-health was never completed. The plaintiff was not examined as a witness at the trial; the depositions taken were offered in evidence, but were rejected as inadmissible under the terms of the order. The plaintiff succeeded in the action:—Held, under the circumstances of the case, that the examination of the plaintiff de bene esse was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it should have been taxed to the plaintiff as part of the costs of the action. *Beaufort v. Ashburnham*, 13 C. B. N. S. 598; 32 L. J. N. S. C. P. 97; 7 L. T. N. S. 710; 11 W. R. 267; 9 Jur. 822, followed. *Carty v. City of London*, 13 P. R. 285.—Galt.—Q. B. D.

The plaintiff's own physician attended on him during the examination de bene esse, and was called as a witness at the trial, when he stated what his charges for attendance on the plaintiff amounted to:—Held, that, there being nothing to shew that he did not include in his statement the charges for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the action. *Id.*

#### 10. De Bene Esse.

Held, following the former chancery practice, that a local judge may make an ex parte order for the examination of a witness de bene esse, on the ground that he is dangerously ill, and not likely to recover. *Baker v. Jackson*, 10 P. R. 624.—Rose.

Semble, that an affidavit of the solicitor of his information and belief, with the grounds thereof, that the witness is dangerously ill is sufficient. *Id.*

The affidavit, and the circumstance that the order was not acted upon for thirteen days after it was issued, were regarded as unsatisfactory, and limitations were imposed upon the use at the trial of the evidence taken under the order. *Id.*

No order was made, except in dispute of a document, for a forgery, signature, from the examination witness or be made by the plaintiff, and jury. *Id.*

In an action order was made, trial de bene esse, the only witness to the death of the examinee, unless the attendance of *Pacific R. Master*.

See *Car* p. 636.

12. *Proce* for

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Where a duce book produce, R. S. O. (1877), c. 50, s. 161, to attend in or to answer order, prom must be tax judge in ch 8 P. R. 12

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No order of any moment should be made ex parte, except in a case of emergency. The point in dispute in the action was as to the genuineness of a document, which the plaintiff alleged to be a forgery, obtained either by imitation of his signature, or by personation:—Held, on appeal from the order of a local judge directing the examination of the plaintiff de bene esse as a witness on his own behalf that no order should be made which would have the effect of saving the plaintiff from personal attendance at the trial, and examination before the court and jury. *Thomas v. Storey*, 11 P. R. 417.—Rose.

In an action under Lord Campbell's Act, an order was made for the examination before the trial de bene esse, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of the deceased. It was provided that the examination should not be used at the trial unless the plaintiff was unable to procure the attendance of the witness. *Elliott v. Canadian Pacific R. W. Co.*, 12 P. R. 593.—Dalton, Master.

See *Carly v. City of London*, 13 P. R. 285, p. 636.

## 12. Proceedings for Non-compliance with Order for Discovery or Interrogatories.

### (a) Attachment and Motion to Commit.

Where a party to be examined refuses to produce books, etc., as required by the notice to produce, served with the order to examine under R. S. O. (1877) c. 50, s. 161, or refuses or neglects to attend for examination, or refuses to be sworn or to answer lawful questions, pursuant to such order, proceedings against him by attachment must be taken before the court, and not before a judge in chambers. *Merchants' Bank v. Pierson*, 8 P. R. 123.—Osler.

Seemingly, that the action could not be dismissed under R. S. O. (1877) c. 50, s. 170a, 41 Vict. c. 3, s. 9, for disobedience by the plaintiff of the notice to produce. *Ib.*

Held, that the refusal to produce the plaintiff's books, under the facts stated in the report of the case, was not warranted. *Ib.*

A certificate given by a master that certain accounts filed under his order are not sufficient in substance and form, comes within G. O. 642 (see Con. Rule 849), and cannot be enforced by attachment until confirmed by the lapse of a month. *Foster v. Morden*, 9 P. R. 70.—Proudfoot.

On motion for an order for the committal of one of the defendants for non-production of documents under Rule 420, O. J. Act (Con. Rule 30), which vests in the master in chambers the powers of the referee in chambers of the Court of Chancery, the master held that matters relating to the liberty of the subject having been excepted from the jurisdiction of the clerk of the Crown and pleas under the former practice, are still beyond his jurisdiction by Rule 420, O. J. Act (Con. Rule 30). *Keefe v. Ward*, 9 P. R. 220.

G. O. Chy. 201 and 206 (See Con. Rules 547, 521), are still in force in the Chancery Division. Upon a motion to commit the defendant (an administrator) for neglecting to bring in his accounts before a day named pursuant to the

direction of the master:—Held, that personal service upon the defendant of the master's direction and of the notice of motion to commit was not necessary. *Re Harnden, Harnden v. Harnden*, 11 P. R. 35.—Boyd.

A party who has been ordered by the court to attend for further examination after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal. *MacGregor v. McDonald*, 11 P. R. 518.—Dalton, Master.—Armour.

See *Lavery v. Wolfe*, 10 P. R. 488, p. 640; *McCl v. Gowanlock*, 12 P. R. 604, p. 633.

### (b) Dismissing Action or Striking out Defence for Failure to Attend.

A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was held to be regular. *Merchants' Bank v. Pierson*, 8 P. R. 129.—Dalton, Q. C. See *S. C.*, *Ib.* 123.

Upon failure of the plaintiff to attend for examination, the action should not be stayed till he does attend; it is sufficient to impose a stay for a definite time. *Comstock v. Harris*, 12 P. R. 17.—Boyd.

Upon a motion to dismiss the action for the plaintiff's non-attendance to be examined for discovery pursuant to appointment, the plaintiff offered to submit herself for examination at any time at her own expense. The master in chambers, nevertheless, dismissed the action with costs, the plaintiff's claim not being, in his opinion, an honest or fair one. *Denham v. Gooch*, 13 P. R. 344.—Dalton, Master.

There is no power to strike out the statement of defence of an incorporated company for the default of an officer of such company in not attending for examination for discovery. *Badgerow v. Grand Trunk R. W. Co.*, 13 P. R. 132.—Dalton, Master; *Central Press Association v. American Press Association*, 13 P. R. 353.—Falconbridge.

## X. PRODUCTION AND INSPECTION OF DOCUMENTS.

### 1. Order to Produce.

An action was brought upon the covenant contained in a chattel mortgage which covered goods in the United States, and which was not registered in Ontario:—Held, on an application for inspection of the mortgage, that the court had power, irrespective of the Common Law Procedure Act, to order inspection of the mortgage in question, or of any document sued upon. *Emmens v. Middlemas*, 8 P. R. 320.—Dalton, Q. C.

In an administration suit, where certain creditors produced promissory notes as vouchers for nearly all their claim, the master, as of course, ordered production of the books and accounts. On appeal, Proudfoot, V. C. held (8 P. R. 86), that in the first instance (no special cause for in-

investigating the accounts being made out), the master should have accepted as sufficient the offer of the creditors to allow an inspection of the books and accounts at their office.—Held, reversing this decision, that the executors were also entitled to an affidavit identifying the books and accounts as being all in their possession relating to the claim. *Re Ross Estate*, 5 A. R. 82.

Orders to produce under G. O. 134, are made for the purpose of the hearing only, and such orders will not be enforced for the purposes of a reference:—the proper course is an application to the master, to whom matters in dispute have been referred. *Hilderbroom v. McDonald*, 8 P. R. 389.—Stephens, *Referee*.

Where a person of unsound mind sues by a next friend, the usual precept order that the plaintiff do produce is proper, and is sufficiently obeyed by the affidavit of the next friend. *Travins v. Bell*, 8 P. R. 550.—Boyd.

The defendants had filed and delivered their statement of defence, but the pleadings had not been closed:—Held, that the plaintiff was entitled to the precept order for production. *Dale v. Hall*, 9 P. R. 106.—Proudfoot.

Where, after judgment in an action in the Common Pleas division, an issue of a garnishee application was directed to be tried under Rule 373, O. J. Act (Con. Rule 939), by a county judge and jury:—Held, that such judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochrane v. Morrison*, 10 P. R. 606.—Rose.

After delivery of an interpleader issue a party to it may take out a precept order for production by the opposite party. Such order should be issued and the record passed in the principal office of the court in Toronto, as no locality is pointed out by the usual proceedings in interpleader. *Dominion S. and I. Co. v. Kilroy*, 12 P. R. 19.—Dalton, *Master*.

In an action against the defendants, as executors and residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground that it was altered after execution, and for administration and partition:—Held, that the case came within Rule 235 (Con. Rule 519), and until the plaintiffs established the alteration charged, they were not entitled to discovery of instruments affecting the estate of the testator. *Hurst v. Barber*, 12 P. R. 467.—Boyd.

It is not necessary that an application by a plaintiff for inspection should be supported by a specific statement of merits, if from the material before the court it can be determined whether the claim is or is not based upon merits. *Maclean v. Barber & Ellis Co.*, 13 P. R. 500.—C. P. D.

See *MacGregor v. McDonald*, 11 P. R. 388, p. 618.

## 2. Production of Documents.

[By Con. Rule 512 the deponent in every affidavit on production is subject to cross-examination.]

The proper mode in examinations for discovery, where a witness neglects or refuses to produce, is for the examiner to direct what documents

shall be produced and have the examination adjourned for that purpose. The practice of enabling a party by means of a subpoena duces tecum to get production on a two-day notice of any documents he chooses to particularize is not to be encouraged, and a motion to commit for non-production was refused. It is desirable to postpone examinations for discovery until after production. *Lavery v. Wolfe*, 10 P. R. 488.—Boyd.

The plaintiff, in his affidavit of documents, mentioned "other letters and papers filed herein, the particulars of which I cannot now depose to," and stated "that such documents were filed in this court on the motion made by defendant for his discharge from custody, as I am informed and believe":—Held, that the plaintiff's affidavit was sufficient; and that the defendant must inspect the documents at the office where they were filed, or take the necessary steps to have them transmitted to the office of the court at his own place of abode:—Held, also, that an affidavit to show the incorrectness of the affidavit of documents could not be received, following *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556. *Lyon v. McKay*, 10 P. R. 557.—Rose.

The usual affidavit on production of documents made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books "as are relevant for inspection at the offices of the company"; and a further statement that the company "had sealed up such parts of the said books as do not relate to the matters in question in this action." At the trial the plaintiff called as witnesses, the train despatcher, locomotive engineer, and an engine driver of the defendants. The presiding judge refused, on the evidence then given, to direct the books to be unsealed:—Held, reversing the order of *Rose, J.*, 10 P. R. 553, that the facts of the case gave a right in the plaintiff to have the books of the company produced. *Monte v. Canada Atlantic R. W. Co.*, 11 P. R. 553.—Q. B. D.

Even against a party's affidavit, if the court is reasonably certain that he has erroneously represented or misrepresented the nature of documents, a further affidavit on production will be ordered. The rule laid down in *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556, may be accepted as the general rule on the subject of the production of documents, but it should be read in conjunction with The Attorney-General v. Emerson, 10 Q. B. D. 191. *Id.*

In an action to establish a will, which the defendants impeached for want of testamentary capacity, and set up a prior will, the defendant included in his affidavit on production, copies of letters from himself to the testatrix, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination. Their materiality and relevancy to the issues was not disputed:—Held, that all memoranda and writings, or pieces of paper with writing on which may throw light on the case, whether they would or would not be evidence per se, are subject to production, unless they can be protected; and the mere fact in the case of a letter that it was not forwarded to its destination, is no ground of exemption. These

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letters were therefore ordered to be produced. *Cameron v. Cameron*, 10 P. R. 522.—Boyd.

**Semble**—Per Spragge, C. J. O., and Patterson, J. A., although a party to a cause may be entitled to call for the production of documents, in order to obtain discovery, it does not follow that the contents of such documents are in themselves evidence. *Canada Central R. W. Co. v. McLaren*, 8 A. R. 504.

It is unreasonable that books in constant use should be required to be brought from without the jurisdiction for the purpose of an examination, unless the examiner in the course of the examination rules that they are necessary. *Comstock v. Harris*, 12 P. R. 17.—Boyd.

Upon a pending motion to restrain the defendant from receiving any moneys due under a certain contract, and to appoint the plaintiff receiver of such moneys, an affidavit of the defendant's partner was filed in answer, and he was cross-examined upon it by the plaintiff; he was unable to answer a number of questions with reference to the defendant's position in regard to the partnership, because he had not with him the books of the partnership, from which alone the facts could be ascertained, and he refused to produce such books:—Held, that he should be ordered to attend for further examination, and to produce the books required, at his own expense. In re *Emma Silver Mining Co.*, L. R. 10 Chy. 194, followed. *Russell v. Macdonald*, 12 P. R. 458.—MacMahon.

In an action to recover an amount alleged to be due by the defendants upon an advertising contract after crediting an amount admitted to be due by the plaintiff to the defendants for rent, and also to recover damages for illegal distress for rent, it appeared that the defendants had agreed to pay a certain sum to the plaintiff for advertising, and had also written a letter to the plaintiff agreeing that a certain part of the rent should be taken out in advertising. This letter purported to be in answer to a letter which was in the defendants' possession, written by the plaintiff but of which he had no copy, making a proposal which the defendants had agreed to:—Held, that the plaintiff was entitled to have his own letter produced by the defendants for his inspection before delivery of his statement of claim, in order to enable him to frame it properly. *Hooley v. Gilbert*, 12 P. R. 114, distinguished. *Maclean v. Barber & Ellis Co.*, 13 P. R. 500.—C. P. D.

See *Merchants' Bank v. Pierson*, 8 P. R. 123, p. 637; *Orpen v. Kerr*, 11 P. R. 128, p. 630.

#### 4. Better Affidavit of Documents.

Upon a motion for a better affidavit of documents from the defendants, the Merchants' Bank, the plaintiffs were allowed to read the depositions of an officer of the bank taken for use upon a previous motion in the action. *Pawson v. Merchants' Bank*, 11 P. R. 18.—Boyd.

**Semble**, a second application for a better affidavit of documents is improper, where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any materials which did not exist at the time of the first

motion. *Boughton v. Citizens' Ins. Co.*, 11 P. R. 110.—Dalton, Master.

The plaintiff sought to compel the defendant F. McD. to file a better affidavit of documents, and relied upon the affidavit of documents of a co-defendant D. M. McD., and also, upon an affidavit of F. McD., filed upon an interlocutory motion in the action, as shewing that she had in her possession a power of attorney and statements of account which were not set out or in any way alluded to in her affidavit of documents, wherein she stated that the documents set out were the only ones in her possession relating to the action. In the affidavit on the interlocutory motion F. McD. admitted that she had received the power of attorney and statements of account in question from D. M. McD., but not that she had them at the time of making her affidavit of documents:—Held, reversing the order of Wilson, C. J., in chambers, that the affidavit of D. M. McD. could not be received to contradict the affidavit of documents of F. McD., and that her admissions relied upon were not sufficiently explicit, for it was not to be inferred in the face of her affidavit of documents that at the time of making it she still had the documents which were at one time received by her; and, per Rose, J., upon a subsequent motion, the court having refused to order a better affidavit of documents, an application under Rule 234 (Con. Rule 518), made upon the same material, for inspection of the documents in question on the former application, could not succeed. *MacGregor v. McDonald*, 12 P. R. 81.—C. P. D.

See *Lyon v. McKay*, 10 P. R. 557, p. 640; *Moxley v. Canada Atlantic R. W. Co.*, 11 P. R. 39, p. 640.

#### 5. Returning Documents.

The object of the production of documents in actions, is to enable either party to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant to the case; and when that object is accomplished the documents will go back to the custody of the party producing them. *Larling v. Darling*, 10 P. R. 1.—Hodgins, Master-in-Ordinary.

The master has a discretion to direct parties to leave documents in his office so long as any useful purpose may be answered by their remaining there, and then to allow the party producing them to take them back. *Id.*

### XI. EXAMINATION OF WITNESSES AT TRIAL.

#### 1. Ordering Witnesses out of Court.

The attorney for the respondent may be ordered out of court when a witness is being examined on a charge of a corrupt bargain for his withdrawal from the election contest, when the evidence of such witness may refer to the sayings and doings of such attorney in respect of such withdrawal. *South Oxford Election (Unt.)—Hopkins v. Oliver*, 1 H. E. C. 243.—Draper.

At the beginning of a trial all witnesses were ordered out of court, except the parties to the action. Judgment having been given dismissing the action as against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in court and



heard the whole of the evidence adduced by the plaintiff, and his evidence was rejected on this ground:—Held, that the evidence of P. was improperly rejected, and a new trial was ordered. *Mahoney v. Macdonell*, 9 O. R. 137.—C. P. D.

At the trial of an action the witnesses were ordered out of court. Before the case was closed the defendant's counsel tendered a witness who had remained in court, but the presiding judge refused to allow him to be examined:—Held, that there must be a new trial. Per Proudfoot, J.—The practice is to receive such evidence, but with great care. *Black v. Besse*, 12 O. R. 522.—Chy. D.

See *Sivewright v. Sivewright*, 8 P. R. 81, p. 634; *Culverwell v. Burney*, 10 P. R. 575, p. 634.

## 2. Refusing to Answer.

Plaintiff (respondent) a teller in a bank in New York, absconded with funds of the bank, and came to St. John, N. B., where he was arrested by defendant (appellant), a detective residing in Halifax, N. S., and imprisoned in the police station for several hours. No charge having been made against him he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his wife, read to her a telegram, and demanded and obtained from her money she had in her possession, telling her that it belonged to the bank and that her husband was in custody. In an action for assault and false imprisonment, and for money had and received, the defendant pleaded *inter alia*, that the money had been fraudulently stolen by the plaintiff at the city of New York, from the bank, and was not the money of the plaintiff; that defendant, as agent of the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff being examined as a witness on his own behalf did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his so doing would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the question proposed. The learned judge then told the jury that there was no identification of the money, and directed them that, if they should be of opinion that the money was obtained by force or duress from plaintiff's wife, they should find for the plaintiff:—Held (Henry, J., dissenting), that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him. *Power v. Ellis*, 6 S. C. R. 1.

Held, that under section 123 of the Canada Temperance Act, 1878, a defendant is compellable, when called as a witness, to answer questions, even though tending to criminate himself. *Regina v. Halpin*, 12 O. R. 330, not followed. Review of legislation on the subject of such evidence. *Regina v. Fee*, 13 O. R. 590.—Chy. D.

Refusing to answer questions in an action of libel tending to criminate. See *Hall v. Gowanlock*, 12 P. R. 604, *infra*.

See *Regina v. McNicol*, 11 O. R. 659, p. 451; *McLean v. Bruce*, 13 P. R. 504, p. 635.

See also Subhead IX. 6 (a), p. 632.

## 3. Discrediting Witness.

At a coroner's inquest evidence is properly receivable under R. S. C. c. 174, s. 234, that a witness at such inquest has made at other times a statement inconsistent with his present testimony. *Regina v. Sanderson*, 15 O. R. 106.—MacMahon.

See *Bank of Hamilton v. Isaacs*, 16 O. R. 450, p. 677.

## 4. Cross-Examination.

The defendants appeared by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of one of the plaintiff's witnesses, both counsel claimed the right to cross-examine the witness:—Held, affirming the ruling of the judge at the trial, that the judge was right in allowing only one counsel to cross-examine the witness. *Walker v. McMillan*, 6 S. C. R. 241.

## 5. Other Cases.

Held, in this case, that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence, for the defendant had been examined, and had furnished sufficient ground for discrediting himself. *Moberly v. Brooks*, 27 Chy. 270.—Proudfoot.

Per Wilson, C. J.—A party calling the opposite party as a witness, makes him his witness to all intents and purposes. *Dunbar v. Meek*, 32 C. P. 195.

Per Wilson, C. J.—Where the materiality of certain enquiries is obvious, and is assumed at the trial, as e.g., in the present case with regard to the temperate habits or otherwise of the deceased, there is no need to submit it to the jury. *Russell v. Canada Life Assurance Co.*, 32 C. P. 256.

See *Macdonald v. Worthington*, 7 A. R. 531; *Murray v. Canada Central R. W. Co.*, 7 A. R. 646.

## XII. JUDICIAL, OFFICIAL, AND OTHER PUBLIC DOCUMENTS.

### 1. Judgments.

#### (a) Proof of.

In an action of damages for malicious arrest and imprisonment of plaintiff, under a *capias*, issued by a stipendiary magistrate in Nova Scotia, whose judgment, it was alleged, was reversed on appeal by the Supreme Court of Nova Scotia, oral evidence—that the decision of the magistrate was reversed, was deemed sufficient evidence by the judge at the trial of the determination of the suit below:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that such evidence was inadmissible, and was not proper evidence of a final judgment of the Supreme Court of Nova Scotia. *Gunn v. Cox*, 3 S. C. R. 296.

The defendant in an action on a judgment obtained in Iowa, U. S. A. pleaded denying tho

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recovery of the judgment. Upon a motion for judgment under Rule 322 (Con. Rule 756) upon the pleading verified by affidavit, and the production of an exemplification of a judgment:—Held, affirming the opinion of the master that judgment could not be ordered on these materials under Rule 322 (Con. Rule 756), the defendant having put the judgment distinctly in issue. *Henebery v. Turner*, 2 O. R. 284.—*Dalton, Master*.—Q. B. D.

A certified copy of the certificate of the Court of Appeal of the result of an appeal in an action is not evidence of the judgment therein in another action between different parties. *Blackley v. Kenney*, 19 O. R. 169.—Robertson.

See *Court v. Holland*.—*Ex parte Holland and Walsh*, 8 P. R. 219, p. 647.

## 2. Proof of other Judicial Proceedings.

Held, that the County Court judge's order to arrest was well proved, under R. S. O. (1877) c. 62, s. 28, by the production of a copy certified as such, under the hand of the clerk of the court; but that the affidavit on which the capias issued, filed in that court, was not duly proved by the production of a copy of the affidavit similarly certified, and with a seal attached, apparently that of the court, but not referred to or described in the certificate. *Timmins v. Wright*, 45 Q. B. 246.—Q. B. D.

Where a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit:—Held, under *Gunn v. Doble*, 15 Chy. 665, that in the absence of proof to the contrary, the order should be assumed to be regular, and that it was unnecessary to give evidence shewing title. *Re Morse*, 8 P. R. 475.—Blake.

Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the quarter sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill":—Held, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced. *McCaun v. Preneveau*, 10 O. R. 573.—C. P. D.

The defendant was convicted of having sold intoxicating liquor contrary to the provisions of the Canada Temperance Act, the conviction stating that the defendant was formerly convicted of a first and second offence against said Act, and that this was the third offence. The certificate produced to prove the prior convictions, simply stated that Elias Clark was convicted as for a first and second offence against the Canada Temperance Act, 1878, setting forth the dates of the convictions, but not stating the nature of the offences, or whether against the first or second part of the Act:—Held, that there is no power to punish as for a third offence unless there have been two prior convictions for offences of the same nature, and as neither the record of conviction nor the evidence shewed this, the conviction must be quashed:—Semble, that if the conviction were well drawn, the simi-

larity of name of the person mentioned in the certificate and the defendant would afford proof of identity. *Regina v. Clark*, 15 O. R. 49.—Rose.

The plaintiffs were tried, for bribery at an election, at the Haldimand assizes in the Spring of 1887 and acquitted. The information upon which the indictment was supposed to have been founded was laid against them by the defendant, and he was examined as a witness before the grand jury. At the conclusion of the trial the presiding judge, at the request of the counsel for the accused, endorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution, and brought this action to recover payment of these costs from the defendant. The information and indictment (there being no evidence connecting the latter with the former) with the endorsement and the fact that the defendant was examined as a witness before the grand jury were the only evidence that the defendant was the private prosecutor:—Held, that the endorsement on the indictment had no force as a judgment or finding of fact and could not be accepted as proof of the defendant's position:—Held, also, that the facts that the information was laid by the defendant and that he was examined as a witness before the grand jury were not sufficient evidence that he was the private prosecutor. Decision of the County Court of the county of Lincoln reversed. *May v. Reid*, 16 A. R. 150.

Lands were sold under a fi. fa. lands after the expiry of the year, and a deed executed to the grantor of the plaintiff by the sheriff which recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books shewed any such renewal:—Held, that no renewal was proved, and the sale was invalid. *Daby v. Gehl*, 18 O. R. 132.—C. P. D.

No certificate by a judicial officer of proceedings had before him can properly be settled where it is intended to be used as evidence, unless in the presence of, or at least on notice to, all the parties concerned. *Re Ryan v. Simonton*, 13 P. R. 290.—Street.

Foreign judicial proceedings, and documents on application for extradition. See *Regina v. Browne*, 31 C. P. 484; 6 A. R. 386; *In re H. L. Lee*, 5 O. R. 583; *In re Weir*, 14 O. R. 389.

## 3. Evidence and Shorthand Notes.

The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him:—Held, that the notes of evidence could not be objected to. *Megantic Election*—*Cote v. Goulet*, 9 S. C. R. 279.

Evidence given by one F., a witness, was taken before an examiner in shorthand, by question and answer. The evidence was duly certified by the examiner and an office copy put in at the trial:—Held, under R. S. O. (1877), c. 50, ss. 165, 166, as amended by 41 Vict. c. 8, s. 8 (Ont.), and O. J. Act, Rules 282, 285 (Con. Rules 564, 566), the evidence was properly received. *McDonald v. Murray*, 5 O. R. 559.—C. P. D.

Two partners in business (T. & R. O'Neill) executed two mortgages in favour of J. W., W.

assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neills became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees, in his stead. On the reference, H. claimed so much of the amount due on the original mortgages, as would satisfy his derivative mortgage, and P. claimed the remainder. Against their claims the plaintiff filed two similar surcharges, one against H. and the other against P. & P. In support of his surcharges, the plaintiff offered the following evidence: 1. A certified copy of the evidence taken in an action at law brought by the plaintiff against W., in which he recovered judgment, in the spring of 1879, for a considerable sum as the unpaid purchase money for goods sold by the O'Neills to W. A certified copy of the judgment of the Court of Common Pleas, a rule for a new trial, and an exemplification of the judgment roll. 2. A certified copy of the depositions of W. taken in this suit before the master at Cobourg, prior to the making of the decree:—Held, 1. That the evidence of the common law action could not be read as against either H. or P. & P., but that the evidence of W. himself might possibly be received against his assignees P. & P., as admissions made by him, and that the exemplification of the judgment might be used against his assignees to shew an indebtedness from W. to the plaintiff as assignee of the O'Neills on a particular account. 2. That the depositions of W. before the master at Cobourg, like his answer to the suit, could be read against himself, and under the later authorities against H. also. *Court v. Holland—ex parte Holland and Walsh*, 8 P. R. 219.—Taylor, Master.

In a mortgage action there was a reference to a master for sale, etc. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in court, which R. G. applied to the master to have paid out to her. Upon such application R. G. was examined before the master, who refused the application. An order was afterwards made by a judge referring to the master to ascertain who was entitled to the fund, and to settle priorities. Upon such reference the master ruled that the depositions of R. G. taken upon the former application could be read:—Held, reversing the decision of Robertson, J., in chambers, that the depositions could be read subject to the right of A., an opposing claimant of the fund to cross-examine R. G. upon them; R. G. to attend for such cross-examination upon payment of conduct money by A.:—Held, also, that A. was estopped from appealing from the master's ruling by reason of his not having objected to the evidence being referred to at a certain stage of the proceedings. *MacLennan v. Gray*, 12 P. R. 431.—Chy D.

#### 4. Other Documents.

Certain alleged copies of journals of parliament were tendered in evidence. It was not proved that originals of which the copies tendered were said to be copies ever existed, nor was it shewn that the copies tendered were copies of any original. They were, however,

shewn to have come from the parliamentary library at Ottawa, and most of them purported to have been printed by the Queen's printer:—Held, that, in the absence of a statute making them admissible, they could not be received. *Langtry v. Dumoulin*, 7 O. R. 499.—Ferguson.

On an application to set aside a nonsuit in an action brought by the plaintiff for damages for injuries occasioned by the defendants' negligence while in their employment. The court, on the argument, allowed the plaintiff, on terms, to give in evidence the proclamation bringing into force the Ontario Factory Act. *Dean v. Ontario Cotton Mills Co.*, 14 O. R. 119.—Q. B. D.

Held, that in construing a patent, reference may be had to papers in the Crown Lands Office, connected with the application for the patent. *Brady v. Sadler*, 13 O. R. 692.—Proudfoot. See S. C., 16 O. R. 49; 17 A. R. 365.

Registered Instruments. See *McDonald v. Murray*, 5 O. R. 559.

### XIII. PRIVATE DOCUMENTS.

#### 1. Plans.

Certain maps of the city of Toronto, made by city surveyors in 1857 and 1858, shewing thereon a square marked "Bellevue square," were offered in evidence to shew the boundaries of the square. It was shewn that the defendant knew of these maps, but they were not prepared under his instructions:—Held, that the maps could not be received in evidence to shew the boundaries of the square. Per Hagarty, C. J. O., and Osler, J. A.—The maps were admissible to shew that there was such a square known as Bellevue square, but not as evidence of title or boundary. Per Burton, J. A., and Patterson, J. A.—The maps were not admissible in evidence without its being shewn that they had been prepared under the instructions of the defendant, or on information given by him. Remarks on the serious consequences likely to arise from the constant changes in the names of streets in the city of Toronto. *Van Koughnet v. Denison*, 11 A. R. 699.

Held, in this case, that inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots conveyed. *Grasett v. Carter*, 10 S. C. R. 105.

As evidence of the formation of school sections in a township by the municipal council thereof a rough sketch or map designated "school section map township of B.," but without signature, seal, or date, having the appearance of being very old and there being no other map to be found, was produced from the proper custody. In 1888, before this action was commenced, but after the beginning of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct the map, etc.; and that when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map:—Held, that the map must be assumed to be drawn in pursuance of section 11 of the "Public Schools Act," and therefore afforded

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evidence of the original division of the township into school sections by the township council. *Trustees for School Section No. 24 of the Township of Burford v. Township of Burford*, 18 O. R. 546.—Ferguson.

2. Ancient Documents.

Held, that the production of an original mortgage, which was more than twenty years old, proved itself under R. S. O. (1877), c. 109, s. 1, sub-s. 1, which makes such a document evidence of the truth of the recitals contained therein until shewn to be untrue. *Allan v. McTavish*, 28 Chy. 539.—Spragge; 8 A. R. 440.

See *Imperial Bank of Canada v. Metcalf*, 11 O. R. 467; *McDonald v. McDougall*, 16 O. R. 401.

3. Church Canons.

Evidence offered of the contents of a canon of the church society or synod discussed. See *Langtry v. Dumoulin*, 7 O. R. 499.

4. Telegrams.

In an election trial the court ordered the agent of a telegraph company to produce all telegrams sent by the respondent and his alleged agent during his election, reserving to the respondent the right to move the Court of Appeal on the point. *South Oxford Election (Ont.)—Hopkins v. Oliver*, 1 H. E. C. 243.

Held, that the operator was the proper person to subpoena to produce the telegrams, as he had the control of them and the ability to produce them. *Re Dwight and Mackinnon*, 15 O. R. 148.—Boyd.—Osler. See *S. C., Ib.*, p. 61.

5. Receipts.

Held, that a mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money, does not of itself afford conclusive evidence of a debt so that the mortgagee or his assigns can maintain an action for its recovery. *London Loan Co. v. Smyth*, 32 C. P. 530.—C. P. D.

The acknowledgment of the correctness of a bank account at the end of a month was held to be at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties. *Agricultural Savings and Loan Association v. Federal Bank*, 6 A. R. 192.

See *Livingston v. Wood*, 27 Chy. 515, p. 662; *Steinhoff v. McCrae*, 13 O. R. 546, p. 656; *Mendelsohn Piano Co. v. Graham*, 19 O. R. 83.

6. Other Writings.

As to admissibility of solicitors' correspondence and requisitions of title in an action for specific performance. See *McClung v. McCracken*, 3 O. R. 596.

As to a note insufficiently stamped being admissible as evidence of a debt. See *Caughill v. Clarke*, 3 O. R. 269.

Held, that a document which has not been proved nor produced at the trial cannot be relied on or made part of a case in appeal. *Lionais v. Molson's Bank*, 10 S. C. R. 526.

See *Livingston v. Cook*, 27 Chy. 515, p. 662.

XIV. PAROL EXPLANATION OF DOCUMENTS.

1. To Vary or Explain Deeds.

(a) Generally.

To rectify mistake in amount of life assurance policy. See *Etna Life Ins. Co. v. Brodie*, 5 S. C. R. 1.

The plaintiff sought to restrain the defendant from cutting timber on lands demised to him, contrary to the covenants in the lease. At the trial defendant tendered parol evidence of an agreement between himself and the plaintiff, distinct from and prior to the lease, which, he contended, modified the restrictions in the lease, and gave him the right to cut the timber.—Held, affirming the decision of Ferguson, J., that evidence of the parol agreement could not be admitted. *Gilroy v. McMullan*, 60 R. 120.—Chy. D.

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not made part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, etc., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in.—Held, that the evidence of such agreement was not admissible as it would add to the written agreement, and was not collateral thereto; but even if admissible, if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also that the evidence failed to establish the alleged agreement, and that the plaintiff was notestopped from denying it. *McKenzie v. McGlaughlin*, 8 O. R. 111.—C. P. D.

A mortgage made by T. to W., was assigned to M. No money was actually advanced on the mortgage by W., but before the assignment to M., a parol agreement was come to between M. and T. that M. should hold the mortgage as security for the debt which T. owed to M. on a note.—Held, that M. was entitled to hold the mortgage as security for the amount due him from T. *McIntyre v. Thompson*, 60 O. R. 710.—Proudfoot.

The rule that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mort-

gagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle applies whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor as here. *Id.*

A conveyance was made by the plaintiff to the defendant for the expressed consideration of \$5,000. It was shewn by the evidence of the plaintiff and her two daughters, that the defendant in bargaining for the purchase of a lot of land, had agreed to give \$7,500 therefor, the defendant paying \$5,000 down and retaining in his hands \$2,500 to meet certain claims which he alleged were likely to be made against the property. This the defendant denied, but Proudfoot, J., before whom the evidence was taken, was of opinion that the bargain was as sworn to by the plaintiff, and pronounced judgment giving her a lien for the \$2,500 and interest. On appeal this judgment was affirmed, *Burton, J. A.*, dissenting, and *Patterson, J. A.*, dubitante. Remarks as to the admissibility of parol evidence in such a case. *Marsh v. Hunt*, 9 A. R. 595.

In an action of foreclosure of a certain mortgage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant: that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form) and give the mortgage: that as a matter of fact the land was at the time of such representations and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the same date: that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff in consideration that he would forbear the same, agreed with him that the times of payment under the mortgage should be postponed for a length of time equivalent to that during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage: which matters of defence being duly proved:—Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counter-claimed for damages, was entitled to the same, and to a reference to fix the amount thereof. *Keays v. Emard*, 10 O. R. 314.—Ferguson.

The plaintiff had under several leases been in occupation of a farm of the defendant's for about twenty-five years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor would put up a new house, the plaintiff agreeing to accept a new lease for six years and pay an increase in his rent of \$150 a year. Plaintiff also agreed to perform some work in connec-

tion with the building in the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up the house:—Held (affirming the judgment of the court below), that the circumstances attending the execution of the lease as also the corroboration afforded by the lease itself warranted the court in admitting parol evidence to shew that the first year of the term was the year in which the house was to be erected:—Held, also, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the plaintiff being to perform certain work on the building during the first summer of the term, and the increased rent being payable for the whole term then created, the first year must be considered reasonable. *Bulmer v. Brumwell*, 13 A. R. 411.

Action to recover royalties alleged to be payable on threshing machines manufactured by defendant under an indenture made between plaintiff B. and defendant, whereby the plaintiff B. sold and transferred to the defendant the right to manufacture and use a certain invention known as "Beam's Thresher;" and in consideration thereof the defendant agreed to pay a named royalty on all machines manufactured "upon or after" the principle of the invention. Parol evidence was admitted, subject to objection, that the plaintiff agreed to prevent any infringement of the patent, and, if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation:—Held, that the parol evidence was not admissible to vary the deed, following *McNeely v. McWilliams*, 13 A. R. 324. *Beam v. Merner*, 14 O. R. 412.—C. P. D.

A chattel mortgage of certain timber was expressed to be given in consideration of the payment of \$300 to the mortgagor; all the covenants and provisions being applicable to a money payment or default therein. At the trial it was endeavoured by parol evidence to shew that upon the delivery of certain pieces of timber sold by the father of the mortgagor to the mortgagee, the whole of the provisions of the mortgage were to become ineffective and the mortgagee be prevented from claiming payment of the sum stipulated for in the manner and at the time set forth:—Held, that the parol evidence was inadmissible. *Tyson v. Abercrombie*, 16 O. R. 98.—C. P. D.

As to the admission of extrinsic evidence to aid in the construction of a crown patent. See *Brady v. Sadler*, 13 O. R. 692; 16 O. R. 49; 17 A. R. 365.

See *Pilon v. Brunet*, 5 S. C. R. 318; *Mills v. Kerr*, 7 A. R. 789; *LaRoche v. O'Hagan*, 1 O. R. 300; *Cameron v. Wellington, Grey and Bruce R. W. Co.*, 27 Chy. 95; 28 Chy. 327.

### 3. To Vary or Explain other Writings.

#### (a) Parties to Contracts.

As to admissibility of extrinsic evidence to explain the capacity in which the maker signed

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a promissory note. See *Brown v. Howland*, 9 O. R. 48; 15 A. R. 750.

D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name:—Held, that the evidence of D.'s agency was receivable though not in writing, and that no subsequent dealing of D., as by acquiring the legal estate, could operate to the disadvantage of K.:—*Quære*, whether *Bartlett v. Pickersgill*, 1 Cox. 15, 4 East 577, n. is still to be regarded as good law. *Kitchen v. Dolan*, 9 O. R. 432.—Boyd.

Parol evidence is always admissible to shew the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties. *Christie v. Burnett*, 10 O. R. 609.—Q. B. D.

Although extrinsic parol evidence may be given to identify one of the parties, it cannot be given to supply information as to the person to whom an offer in a memorandum required to be in writing by the Statute of Frauds was made or for whom it was intended. *White v. Tomalin*, 19 O. R. 513.—Chy. D.

#### (b) Consideration.

The defendant, after a note payable to the plaintiff had become due, and while it remained unpaid, endorsed upon it the following words:—"I guarantee the payment of the within note to Messrs. T. D. & Co., (the plaintiffs) on demand." The evidence shewed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security:—Held, that the evidence that the giving of time to C. was the consideration for the guarantee, did not contradict the latter, though it was expressed to be "on demand;" for these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration. *Davies v. Funston*, 45 Q. B. 369.—Q. B. D.

#### (c) Particular Words.

Held, that the letters of the defendant, set out in the report and read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within the 17th section of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to. *Christie v. Burnett*, 10 O. R. 609.—Q. B. D.

The plaintiffs agreed to sell to the defendants a waterwheel, "and place the same in position" for \$150, but the defendants refused payment upon the ground that the wheel had not been properly placed, and did not in fact perform the work stipulated for. The jury found for the defendants, and the judge of the County Court granted a new trial—costs to abide the event. On appeal this court refused to interfere with the discretion of the judge of the court below, considering that the term "placed in position" was so indefinite that the defendant was at liberty to shew what was meant thereby; the writing, by such parol evidence not being added

to or varied, but only rendered intelligible. *Harris v. Moore*, 10 A. R. 10.

The plaintiff bought the office and plant of a newspaper, gave a chattel mortgage thereon to W., and placed P. in charge. The defendants made advances to P. for the purpose of carrying on the business. W. sold the property by auction for the amount of the mortgage debt to the defendants, who supposing that P. was the owner, wished to secure themselves for the advances made to him. The defendants then agreed to sell the property to the plaintiff; but a dispute arose as to the price, and this action was brought to obtain specific performance of the agreement. There was written evidence of the agreement in a document signed by the defendant Moore, part of which was as follows: "Price of this office to be what it has cost Mr. Horton (the other defendant) and myself." Specific performance was decreed by consent, and it was referred to the master at London to take the accounts, and to report what was the true agreement between the parties:—Held (reversing the decision of the master and of Ferguson, J.), that the defendants had the right to shew before the master what they meant by the reference to the cost of the office as fixing the price; and that, upon the evidence, the true agreement between the parties was, that the price was to be the amount paid to W. plus the advances to P. *Hughes v. Moore*, 11 A. R. 569.

The defendants carrying on business in manufacturing and upholstering goods, entered into an agreement in writing with plaintiff whereby he was to manufacture all the upholstered goods sold by them at an advance of eleven per cent. upon the actual first cost of goods made and shipped from Toronto, the percentage to pay cost of packing and shipping the goods, and material used as packing to be charged at actual cost price. Before the agreement was reduced to writing certain estimates were made as to what the actual first cost would be taking material and labour as constituting the cost, and the plaintiff in forwarding some of the manufactured goods adopted the estimates:—Held, that the parties by their agreement had precluded themselves from showing anything inconsistent with the natural meaning of the words "actual first cost," that such meaning must govern; and that the plaintiff was entitled to recover his percentage thereon. *Black v. Toronto Upholstering Co.*, 15 O. R. 642.—C. P. D.

#### (d) Reference to other Documents.

The defendants acting as a committee to superintend the reception of a large number of persons, and being desirous, in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for \$1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally by M., one of the committee, to know whether he would tender, and certain statements as to the number of persons to be present, were then made to him,



and other particulars of defendants' requirements were given to him, his attention being called to the above advertisement, which, however, he did not see. He subsequently saw one B. by whom the tenders were to be received, who had been sent to him by M., and who, in addition to the particulars already mentioned, stated that they would guarantee 1,500 persons a day, but would require the plaintiff to provide for 2,000. The plaintiff then wrote his tender by which he was to get 75 cents a day for every three meal tickets, and the committee were to charge \$1, which tender was accepted in writing. Very few persons took their meals from the plaintiff, who, in consequence, lost a large amount by the contract. At the trial, the advertisement and requirements were put in as evidence for the plaintiff, subject to objection. In an action to recover the amount of the plaintiff's loss from the defendants:—Held (MacMahon, J., dissenting), that the tender and acceptance constituted the whole contract; and there was nothing in them to render defendants liable. Per MacMahon, J.—The advertisement and requirements must, under the circumstances, be incorporated into the tender and acceptance, and so form part thereof so as to render the defendants liable. *McNeely v. McWilliams*, 13 A. R. 324, and *Lindley v. Lacey*, 17 C. B. N. S. 578, commented on. *Betts v. Smith*, 15 O. R. 413.—C. P. D. Reversed 16 A. R. 421.

In an action by the plaintiff, a passenger by defendants' railway, for the loss of her baggage, and in which the defence was that the defendants' liability was limited by a condition on the ticket to \$100, certain letters were admitted in evidence, one written by the defendants' baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the other the reply thereto, stating that the company's rules did not require unlimited first-class tickets to be signed, and that this ticket had been sold at full tariff rate:—Held, that the letters were properly admitted; but they were of no consequence as the ticket on its face shewed that it was not purchased subject to the condition. *Kirkstall Brewing Co. v. Furness R. W. Co.*, L. R. 9 Q. B. 468, followed. *Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747.—C. P. D.

#### (e) Subject Matter of Contract.

Where a contract was expressed to sell limits Nos. 1 and 3 for the sum of \$15,500; also all the plant used in connection with the shanty now in operation on limit No. 1, included in the list made out last summer and the material then not included which had been used in the winter's operations of 1880 and 1881, at the price of \$3,000:—Held, sufficiently definite to satisfy the Statute of Frauds, since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing which accompanied the above contract, and which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of \$15,500, and such parol evidence was admissible though the contract imported *prima facie*, etc., a down payment of the \$15,500. *Reid v. Smith*, 2 O. R. 69.—Chy. D.

J. S. F. and his two brothers were joint owners of a lot of land which the former, without any authority from his brothers, agreed to sell to the plaintiff, and for a portion of the purchase money, signed a receipt "Fowlds Brothers," the name in which J. S. F. and one of his brothers carried on business. A water-course ran through the lot which J. S. F. swore he expressly stipulated should remain open, this, however, was denied by the plaintiff and the receipt was silent in respect to it. The owners refused to execute any conveyance which did not reserve the use of the water, the brothers of J. S. F. swearing that they never would have sanctioned any sale that did not make such reservation, and that they had only approved of the sale effected by J. S. F. on his statement that it had been so reserved. In an action for specific performance as claimed by the purchaser, Proudfoot, J., at the trial, rejected the evidence of the brothers as to the nature of the bargain reported to them by J. S. F., (and which they had ratified), and gave judgment in favour of the plaintiff:—Held, reversing the judgment at the trial, that the evidence was improperly rejected, and there being no authority to J. S. F. either antecedent or subsequent to bind his co-owners, the plaintiff's case failed and the action was dismissed, with costs. At or about the time of the negotiations with the plaintiff it was alleged that other persons had been endeavouring to purchase the lot but failed on the ground that the owners insisted on the reservation of a right to use the water:—Quere, per Hagarty, C. J. O., whether the evidence on this point was so collateral in its nature as to justify its rejection by the judge at the trial. *Tracey v. Fowlds*, 13 A. R. 115.

A receipt, qua receipt, is not a contract, but a mere acknowledgment, and is open to explanation and contradiction by parol. S. sold all the elm and soft maple trees on a certain lot to T., and at the time of sale gave T. the following receipt: "Received from J. L. for T., the sum of \$500, on account of elm and soft maple," etc., on the said lot, describing it. Parol evidence was admitted to shew, and the jury found, that "one of the conditions of the sale was that the timber was to be removed by T. within two years":—Held, that the receipt was not the contract between the parties, but a mere acknowledgment of so much money; and therefore the parol evidence was properly admitted. Held, also that the effect of the condition was that T. was only to have the right to cut and remove the timber within the two years from the date of the agreement. *Johnston v. Shortreed*, 12 O. R. 633, followed. *Steinhoff v. McRae*, 13 O. R. 546.—C. P. D.

In an action for not delivering promissory notes for the price of a harvesting machine as stipulated for in a writing signed by the defendant, who swore at the trial that he never agreed to give such notes and that by the agreement verbally entered into by him with plaintiff's agent no such stipulation was made and that when the writing was read over by the agent no mention was made of such notes; and defendant sought to call witnesses present at the bargain to prove these facts, but the judge refused to permit such evidence to be given as fraud was not set up as a defence; and also re-

fused to a defence by tendered again to set aside pressing no if given, or opinion it and if ne amendment trial. The costs, and *McPherson*.

I., the promissory, nished his in of the conv in without given to s certain not renewal. to shew the expressed c pretended Held, that the indent given to sec and theref indebtedne count was it was given of Hamilton.

The plai dence of cer of the defe for the pu having beca cation made that the def in the poli one:—Held rejected. *Pa* 494.—Q. B.

See *Adan v. Russell*,

*Warrant* a piano ma by his sales instrument The plai which is set ment of the perty shoul was no me parol evide it was appa tended to b Quere, wh been left to A. R. 518.

A mortga the purcha toms, and a the same d defendants re terms of pa venience of ecuted for agreement

fused to allow an amendment setting up such defence by reason of which judgment was entered against defendant, which the judge refused to set aside. On appeal, this court, whilst expressing no opinion as to the effect the evidence, if given, ought to have with the jury, were of opinion it ought to have been submitted to them, and if necessary for that purpose that an amendment should have been permitted at the trial. The appeal was, therefore, allowed with costs, and a new trial ordered without costs. *McPherson v. Wilson*, 15 A. R. 294.

I., the maker, and F., the indorser, of a promissory note were sued upon it, and F. denied his indorsement. At the trial an indenture of the conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to shew that it was given for anything but the expressed consideration of \$1,500, and it was not pretended that such consideration was paid:—Held, that it was competent for F. to shew what the indenture was given for, that it was not given to secure him against such indorsement; and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness. *Bank of Hamilton v. Isaacs*, 16 O. R. 450.—Q. B. D.

The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff, for the purpose of shewing that the plaintiff having become aware of them before the application made by him was justified in believing that the defendants did not regard the condition in the policy as to occupation as a material one:—Held, that this evidence was properly rejected. *Park v. Agricultural Ins. Co.*, 19 O. R. 494.—Q. B. D.

See *Adamson v. Yeager*, 10 A. R. 477; *Foster v. Russell*, 12 O. R. 136.

#### (f) Terms and Incidents.

[*Warranty.*] The plaintiff sued the defendant, a piano maker, for a breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, which is set out in the report, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty:—Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract. Quere, whether this question should not have been left to the jury. *McMullen v. Williams*, 5 A. R. 518.

A mortgage on a vessel was executed to secure the purchase money and registered with the customs, and annexed to it was an instrument of the same date under seal executed by the defendants reciting the mortgage, and that the terms of payment were set forth therein for convenience of registry, and "this indenture is executed for the purpose of evidencing the true agreement between the parties which is herein-

after stated." The terms of payment were then stated, differing from those in the registered mortgage; and defendants covenanted to insure the vessel for \$1,400 and assign the policy to plaintiff. The alleged warranty was verbal and was not made out at the time of executing the writings, but defendants swore that they would not have bought without the warranty, and would not otherwise have given over one-third of the price for a vessel which could not be insured:—Held, that evidence of the verbal warranty was admissible; that it did not vary or alter the writings; and that the declaration that the instrument was made to evidence the true agreement referred merely to the terms of payment. *La Roche v. O'Hagan*, 1 O. R. 300.—Q. B. D.

On motion to a Divisional Court to enter judgment for defendant on the ground that the contract was in writing, and therefore parol evidence of warranty was inadmissible. The Common Pleas Division refused a rule; and the defendant appealed as to the principal question, viz., the admissibility of parol evidence:—Held, by Hagarty, C. J. O., and Rose, J., that parol evidence was properly admitted—that (as held in *Bennet v. Tregent*, 24 C. P. 565, approved of in *McMullen v. Williams*, 5 A. R. 518), it was a question of fact for the jury whether the written order embodied the whole contract, and therefore, their finding on this point was conclusive:—Held, by Burton, J. A., and Cameron, C. J., C. P., that parol evidence of a warranty was improperly admitted. Per Burton, J. A. (1) When a proposal is made in writing by one party and accepted ad idem by the other, either verbally or by acting upon it, the contract is a written one. (2) If the writing embodies the contract, the judge is bound to exclude all evidence to shew that the real intention of the parties was different from that which appears in the writing. (3) A warranty, though a collateral undertaking, is part of the contract of sale, and, if the contract is in writing, antecedent representations, not embodied in the written contract, are not warranties, and cannot be proved unless it is shewn that they were fraudulently made and the contract was so induced. (4) If the contract is not reduced to writing, or if, though there is a written document, the evidence leads the court to infer that the writing does not contain the whole agreement, it is for the jury to say whether antecedent representations did or did not amount to warranties. In this case there was no admissible evidence of a warranty, and the judgment should be for the defendant. *Ellis v. Abell*, 10 A. R. 226.

[*Other Cases.*] The respondent sued the appellants for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial a verbal contract between plaintiffs and defendants' alleged agent at L. was proved that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars and delayed in different places and in consequence a large quantity was lost. On the shipment of the oil a receipt note was given which said nothing about covered cars and which stated that the goods were subject to conditions

endorsed thereon, one of which was that the defendants would not be liable for leakage or delays and that the oil was carried at the owner's risk. Per Strong, Fournier, Henry, and Gwynne, J.J. The evidence was admissible to prove a verbal contract to carry in covered cars which contract the agent at L. was authorized to enter into and which must be incorporated with the writing so as to make the whole contract one for carriage in the covered cars and that non-compliance with the provisions as to carriage in covered cars prevented the appellants setting up the condition that "oil was carried at the owner's risk," as exempting them from liability. *Grand Trunk R. W. Co. of Canada v. Fitzgerald*, 5 S. C. R. 204.

Held, in this case that the policy was a general insurance of the property itself and not merely of the mortgagee's interest, and that parol evidence was not admissible to prove that the loan company and insurers had in affecting an insurance on mortgaged property, only the interest of the mortgagees under consideration. *Horns v. Dominion Fire and Marine Ins. Co.*, 2 O. R. 89.—Proudfoot. But see *S. C. 8 A. R. 644*.

Where certain shareholders of the G. L. Company sought to restrain a call on stock on the ground that it was being made in contravention of the terms of a certain unwritten agreement, alleged to have been entered into between all the promoters when the company was formed:—Held, that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made. *Christopher v. Noxon*, 4 O. R. 672.—Proudfoot.

The plaintiffs in the beginning of January, 1880, had purchased through C. & G. of Montreal, a quantity of rails, and requiring 2,000 tons more, negotiations were entered into between H., the plaintiff's agent, C. & G., and the defendant, which resulted in a note being signed on the 14th January, by C. & G. addressed to the defendant, advising him that they had sold to the plaintiff on the defendant's account 2,000 tons of rails (56 lbs. to the yard) at £8. 18s. 9d. stg. per ton, payment to be made in London against documents, and credit to be there opened with approved bankers in favour of defendant's agent. The defendant who was then in Montreal, signed a sale note in similar terms to the above. The sale was immediately communicated to the plaintiffs, who signed a confirmatory note, adding the words that the make should be either Ebbwvale or Moss Bay, and wrote across the face that the rails were to be 56 lbs. "ordinary section and specification." This confirmatory note was not communicated to the defendant until after action brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in, and not manufacturers of rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbwvale, for the manufacture of rails of a section known as "Hamilton and North Western," and which came within the terms, "ordinary section," by which a number of different kinds of sections were embraced; and these were the rails which the defendant inten-

ded delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary section," and when they discovered the defendant's rails were Hamilton and North-Western, they endeavoured to get defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and paid for under the credit, and it was not till afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had a right to name the section:—Held, that even if the confirmatory note were embraced in the contract, it did not give the plaintiffs the right of selection; that parol evidence was not admissible to add such a term to the contract; and that the evidence failed to establish any usage giving such right, especially as the parties were dealers and not manufacturers, and in view of the plaintiff's conduct in the matter, and that the contract was therefore performed by the section delivered. *Page v. Proctor*, 5 O. R. 238.—C. P. D.

Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible. Per Galt, J.—Even if the evidence was admissible, by the terms of the agreement, in this case, the time was to be suspended only on performance of certain conditions, which the defendant had failed to do, and therefore the plaintiff was entitled to enforce immediate payment. *Porteous v. Muir*, 8 O. R. 127.—C. P. D.

Defendant got from the plaintiff six different sums of money, amounting together to \$3,000 for which he gave receipts. Three of these stated that defendant received so much money from plaintiff, "loan on oil, usual rate of interest." The remaining three were similar to the others, but concluded "payable within one year from date, with interest at nine per cent. per annum." Defendant set up a parol agreement with plaintiff, by which defendant had the right at any time to require plaintiff to take in payment of the moneys so lent the oil which defendant had in plaintiff's tanks at the market price at the time when defendant so required plaintiff to take the oil:—Held, that such a parol agreement could not be set up to alter the terms of the receipts which shewed such loans were to be repaid in money; and although the jury found the parol agreement to have been made, the court having all the facts before them, set aside the verdict and judgment for the defendant and directed judgment to be entered for the amount of the plaintiff's claim. *Lancey v. Brake*, 10 O. R. 428.—Q. B. D.

The plaintiff's agent at Gravenhurst shipped two car loads of shingles on defendant's cars. The shipping bill was in the usual form, and requested defendants to receive the undermentioned property, etc., addressed to N. Dymont (the plaintiff), Wyoming, to be sent subject to their tariff, etc. Then, in the appropriate columns, followed the description of a car load of shingles, giving the number of the car, etc. Then under this were the words, "To Henry James, Mitchell," and then another car load of shingles was described. Parol evidence was admitted at the trial to shew that the meaning of the shipping bill was that the first named car load was to go to

the plaintiff James, at N. the defendant goods:—H. admitted. *ern R. W. C.*

The defendant to "furnish required for require their per cubic y accepted "Held, rever 9 O. R. 728 received to take place in river route ried, was c defendants scows. *Mc* 324.

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the plaintiff at Wyoming, and the other to Henry James, at Mitchell, and that the agent so told the defendants' station agent when shipping the goods.—Held, that the evidence was properly admitted. *Dymont v. Northern and North-Western R. W. Co.*, 11 O. R. 343.—C. P. D.

The defendants in writing offered the plaintiffs to "furnish scows and deliver all the stone required for the Onemee bridge as fast as you require them, for the sum of seventy-five cents per cubic yard," which the plaintiffs in writing accepted "at the price and conditions named":—Held, reversing the judgment of the C. P. D., 9 O. R. 728, that parol evidence could not be received to shew that the delivery was only to take place in case the water, along the lake and river route over which the stone had to be carried, was of such a height as would enable the defendants to use their steamers in towing the scows. *McNeeley v. McWilliams*, 13 A. R. 324.

A by-law to establish a road must, on its face, shew the boundaries of the road or refer to some document wherein they are defined; and the intention of the framers of the by-law cannot be ascertained by extrinsic evidence. *Township of St. Vincent v. Greenfield*, 12 O. R. 297.—C. P. D.

By an agreement in writing B. contracted to cut for A. a quantity of wood and haul and deliver the same at a time and to a place mentioned, B. to pay for the same on delivery. The agreement made no provision for securing to A. the payment of his labour, but when it was drawn up there was a verbal agreement between the parties that in default of payment by B. the wood could be held by A. as security and be sold for the amount of his claim:—Held, reversing the judgment of the court below, Henry J. dissenting, that evidence of this verbal agreement was admissible on the trial of an action of replevin for the wood by an assignee of A., and that its effect was to give B. a lien on the wood for the amount due him. *Byers v. McMillan*, 15 S. C. R. 194.

Although where land is sold subject to an outstanding mortgage, there arises a presumption or supposed intention in equity on the part of the purchaser, to indemnify the vendor against the mortgage (that is, if under the actual circumstances, the parties are to be considered to have really occupied the relation of vendor and purchaser), yet this presumption may be rebutted by parol evidence; and it was held to have been so rebutted in this case, in which it appeared to be contrary to the real intention of the parties to the transaction in question, who, moreover, were not strictly in the relation of vendor and purchaser. Parol evidence, however, could not have been given in support of or to strengthen the presumption or equity in the first place, though such evidence could be given in answer to the evidence advanced to rebut such presumption or equity. *Corby v. Gray*, 15 O. R. 1.—Ferguson.

At the trial evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement the defendants would be bound to

maintain the stations for all time:—Held, that this evidence was clearly inadmissible. *Township of Nottawasaga v. Hamilton and North-Western R. W. Co.*, 16 A. R. 52.

Parol evidence of trust. See *Bank of Montreal v. Stewart*, 14 O. R. 482.

See *County of York v. Toronto Gravel Road and Concrete Co.*, 3 O. R. 584; *Steinhoff v. McRae*, 13 O. R. 546, p. 656.

#### (h) Mistake.

Held, that the rule that the court will not interfere to rectify an instrument on parol evidence, on the ground of mutual mistake, when the defendant denies that there was such mutual mistake, only applies where the defendant so denying was a party to the instrument in question. *Ferguson v. Winsor*, 10 O. R. 13.—O'Connor. See *S. C.* in appeal, 11 O. R. 88.

See *Ætna Life Ins. Co. v. Brodie*, 5 S. C. R. 1; *Re Sturgis—Webb v. Van Every*, 17 O. R. 342.

### XV. PROOF OF HANDWRITING.

A cheque of the plaintiffs, when produced at the hearing, had written on it, "in full of all his (the defendant's) claims for notes or otherwise," and which words the plaintiff swore were on the cheque when sent to the defendant, which he denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of a clerk in the bank, whom he had requested to initial the words so introduced: The court (Spragge, C.) refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness. *Livingston v. Wood*, 27 Chy. 515.

That a document not in existence was written by a particular individual may be proved by a person who had had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed and could only say that from his recollection of the document it was written by the same person. *Gwynne, J.*, dissenting. In an action for a written libel the defendant was asked, on cross-examination, if he had not changed his signature since the action began, which he denied:—Held, *Gwynne and Patterson, JJ.*, dissenting, that documentary evidence was admissible to shew that the signature had been changed. Per *Patterson, J.*—The witness could properly be asked, on cross-examination, if he had not changed his signature, but the opposing party must be satisfied with his answer, and could not go further and give affirmative evidence of the fact. *Alexander v. Fye*, 16 S. C. R. 501.

### XVI. PROOF BY SUBSCRIBING WITNESS.

In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute:—Held, affirming the judgment of the

Supreme Court of Nova Scotia that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed. *Woodworth v. Dickie*, 14 S. C. R. 734.

See *Marshall v. Municipality of Shelburne*, 14 S. C. R. 737, p. 675.

## XVII. PROOF BY SECONDARY EVIDENCE.

### 1. When Documents must be Produced.

Under the circumstances shown in the evidence set out in the report:—Held, O'Connor, J., dissenting, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected. *Ross v. Machar*, 8 O. R. 417.—Q. B. D.

Per Fournier and Henry, JJ. That as there was evidence that a certificate or report had been given by the engineer in this case oral evidence of the contents of the certificate or report was inadmissible. *City of Quebec v. Quebec Central R. W. Co.*, 10 S. C. R. 563.

See *McDonald v. Murray*, 5 O. R. 559, p. 666.

### 2. Proof of Deeds and Wills by Memorials.

A memorial registered over sixty years, but executed by the grantee only:—Held, not sufficient secondary evidence of the deed to which it purported to relate, notwithstanding that conveyances had been made at early dates by persons claiming under the registered title, but who had not had actual possession of the land. *Vau-Velsor v. Hughson*, 9 A. R. 390; 45 Q. B. 252.

The land in question was one out of several lots mentioned in the memorial, which had been patented by the Crown to the grantor named in the memorial, and two others, as tenants in common. The memorial set out a grant of an undivided moiety of each lot described in it. Proceedings in partition had been taken in 1834 by the grantee against another tenant in common, in which the lot in question had been assigned in severalty to the grantee:—Held, that these proceedings did not, even in connection with the conveyances above mentioned, avail to make the memorial admissible as evidence of the deed:—Held, also, that it would not be made admissible by the fact that possession of some of the lands had gone in accordance with it, so long as there had been no such possession of the lands now in question; and that it was not aided in this respect by the Vendors and Purchasers' Act, R. S. O. (1877) c. 109. But Held that the plaintiffs, who claimed only an undivided moiety of the lot under the grantee named in the memorial, while they could not recover in respect of the title of the grantor in that memorial, could nevertheless make title, by virtue of the judgment in partition, to the undivided interest of the patentee against whom the partition was had; that judgment being evidence against the last mentioned patentee of title to the whole lot. One of three patentees was not accounted for by the evidence, and it was not shown that her title had devolved upon the others. The plaintiffs were therefore held entitled to recover only for one undivided third part of the land. *Ib.*

The production of a registered memorial executed by the grantee, where possession is not shown to follow the deed, is not sufficient evidence in proof of the deed. Evidence in proof of a paper title in the defendant commented on. *Mutholland v. Harman*, 6 O. R. 546.—C. P. D.

A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained. *Gough v. McBride*, 10 C. P. 106, specially referred to. *McDonald v. McDougall*, 16 O. R. 401.—Rose.

In an application under the Vendors and Purchasers' Act, R. S. O. (1887) c. 112, it appeared that a registered memorial of a deed poll or indorsement executed by the party assigning made on the back of a mortgage (describing it) habendum "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, etc., \* \* \* subject to the provisos and conditions in said mortgage, which said deed poll or indorsement by way of assignment, is witnessed," etc., was offered as evidence of the assignment:—Held, sufficient. *Re Mara*, 16 O. R. 391.—Ferguson.

A contract of sale of land provided that the vendors should not be bound to produce any deeds or evidence of title except such as they might have in their possession, but should shew a good title, etc. It appeared that A. P. by an indenture of January 16th, 1858, conveyed the lands in question to trustees on certain trusts, which deed was registered by memorial not containing the trusts. By deed of appointment dated July 4th, 1862, made in pursuance of the deed of 1858, also registered by memorial which purported to contain a full copy of the deed in which were recitals which set out what purported to be the trusts of the former deed and shewed a life estate in A. P., with a power of appointment in him, A. P. duly appointed to trustees who were represented by the vendors, with directions to sell after his death, which had recently occurred; neither of these deeds was in the possession or power of the vendors, the trustees. On an application under the Vendors and Purchasers' Act:—Held, that the vendors were not bound to produce these two deeds, and that the production of the memorial of the deed of appointment twenty years old, reciting the trusts of the trust deed, was sufficient evidence of what those trusts were; and as there was an absolute trust for sale the purchaser should take the title. A. P. in 1873 assumed to mortgage the lands in fee, and died in 1887. *Re Ponton and Swanston*, 16 O. R. 669.—Boyd.

### 3. Lost Documents.

Where a sale of lands for taxes had taken place, and a suit was subsequently instituted by the purchaser to set aside a conveyance to the defendant executed after the registration of his own deed and the defendant impeached the deed executed in pursuance of such sale, it was shewn that a warrant had been at one time in the court-house, a portion of which was destroyed by fire, and that on that occasion the warrant had been probably consumed:—Held, sufficient evidence to authorize the court in admitting secondary

evidence of established contents of such objection be at the original county clerk or negative warrant:—sary, affidavit fact should 27 Chy. 211

A copy of issued pursuant official in the filed testify the original lost. *Warra* 7 O. R. 321.

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evidence of its contents; which, on being taken established satisfactorily the existence and contents of such warrant: and, on rehearing, an objection being raised which had not been taken at the original hearing, that the township or county clerk should have been called to produce or negative the existence of a duplicate of such warrant:—Held, that if such proof were necessary, affidavit evidence to shew what was the fact should be received. *Ferguson v. Freeman*, 27 Chy. 211.—Chy. D.

A copy of an order and of a writ of execution issued pursuant thereto admitted in evidence, an official in the office where the same had been filed testifying that he had made the copies from the originals, which were proved to have been lost. *Wardrop v. Canadian Pacific R. W. Co.*, 7 O. R. 321.—Ferguson.

On a reference, H. sought to use a certain bill of costs as a voucher of moneys properly expended by him in legal proceedings, and it was shewn that the said bill had been properly brought into the master's office on a former reference and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office:—Held, that the master should have admitted secondary evidence of its contents; and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it. *Beatty v. Haldan*, 10 O. R. 278.—Ferguson.

Where a party endeavours to prove by oral testimony the contents of a written document, the court before giving effect to such testimony, should be convinced that all the terms have been proven. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole document so that the court may be able to give effect to all its provisions, and that by testimony of the clearest nature. The document need not be set forth in evidence in its very words, but its exact sense and effect must be shewn. *Ross v. Williamson*, 14 O. R. 184.—Rose.

#### (4) Other Cases.

Held, that a notarial copy of an assignment in insolvency may be received as evidence of such assignment under C. S. C. c. 80, s. 2. *Prescott Election (Ont.)—McKenzie v. Hamilton*, 1 H. E. C. 1.

In an action for calls on stock where shares held by a defendant as executrix and in her own right were transferred under powers of attorney which were not produced:—Held, that there was sufficient evidence to shew the existence of such powers, and to let in secondary evidence thereof, the defendant and the testator having fully admitted their liability as owners of the shares. *Provincial Ins. Co. v. Cameron*, 31 C. P. 523.—C. P. D.

In an action on an agreement for the sale of land in Winnipeg, Manitoba, the agreement, which was registered by defendants, was pro-

duced by the Registrar of Winnipeg, in whose official custody it was, on his examination under a commission. The registrar refused to part with it, but left a copy certified under his hand and official seal to be a true copy, which was attached to the commission, and produced at the trial. One M., who was examined under the commission, and also at the trial, proved that the agreement produced by the registrar was the original, and that it was signed by the defendants, and the copy attached to the commission was a true copy:—Held, that the registrar's certificate as to the copy was sufficient under O. J. Act, Rule 203, (Con. Rule 646), and that a certificate by the commissioner was not required; that the absence of the original was sufficiently accounted for to enable secondary evidence to be received by means of the copy. *McDonald v. Murray*, 5 O. R. 559.—C. P. D.

At a former trial a copy of an agreement between the parties was admitted in place of the original:—Held, that the admission so made was good for the subsequent trial. *Id.*

See *Alexander v. Vye*, 16 S. C. R. 501, p. 662.

### XVIII. PROOF AFTER NOTICE TO PRODUCE.

See *Ockley v. Masson*, 6 A. R. 108, p. 613.

### XIX. PROOF BY ENTRIES.

#### 1. As Against Sureties.

A loan and savings society appointed G. their treasurer; and the plaintiffs and defendant by two separate bonds became sureties for the due discharge of the duties of such officer. G. made default in his office, and a suit was instituted by the society against all the sureties, which was compromised by the plaintiffs paying about one-half of the sum claimed by the society:—Held, that in such a case the entries of G. in the books of the society were not evidence against the sureties during the lifetime of G. *Murray v. Gibson*, 28 Chy. 12.—Spragge.

The cases deciding that entries in the books of an officer are evidence in his lifetime against sureties questioned. See *Victoria Mutual Fire Ins. Co. v. Davidson*, 3 O. R. 378.

In an action against sureties for a town collector for his default in paying over the sum collected by him:—Held, that entries made by the collector on his roll, in the discharge of the duties of his office, of taxes paid to him were evidence against the sureties. *Town of Welland v. Brown*, 4 O. R. 217.—C. P. D.

#### 2. Other Cases.

Two partners in business (T. & R. O'Neill) executed two mortgages in favour of J. W. W. assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neills became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees in his stead. On the reference, H. claimed so much of the



amount due on the original mortgages as would satisfy his derivative mortgage, and P. claimed the remainder. Against their claims the plaintiff filed two similar surcharges, one against H., and the other against P. & P. In support of his surcharges the plaintiff offered in evidence: 1. the books of the firm of T. & R. O'Neill; 2. the books of W. —Held, that the books of T. & R. O'Neill, could not be used against either W.'s assignees or H. That the entries in the books of W. were evidence as admissions against his assignees, and as to transactions before the 21st March, 1877, against H., to shew the state of the account at the date of the assignment. *Court v. Holland—Ex parte Holland and Walsh*, 8 P. R. 219.—Taylor, Master.

After the occurrence of the accident which caused the destruction of the plaintiffs lumber, B. an engine-driver of the defendants, and who was in charge of the locomotive (No. 5) on the day the fire occurred, made an entry in what was termed the repairs book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight." Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of the plaintiff, and proved his having made such an entry in the usual course of his duties. Per Spragge, C.J.O., and Hagarty, C. J., such entry was properly produced and read to the jury. Per Burton and Patterson, JJ. A., such entry or report was merely a narrative of a past occurrence, or something in the opinion of B. requiring attention, and in any view could only be receivable as evidence against the company, if at all, upon the proof of B.'s death. *Canada Central R. W. Co. v. McLaren*, 8 A. R. 564.

Held, that a copied specification of the entry of a culler's measurements in the books of the supervisor, signed by the supervisor or his deputy under C. S. C. c. 46, s. 19, is receivable as evidence of such measurements. *Dobell v. Ontario Bank*, 9 A. R. 484.

A memorandum or entry in a book in the office of a sheriff, in the handwriting of the deputy sheriff, purporting to be an entry of the receipt of a certain writ by the sheriff, admitted in evidence, subject to objection, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting and the place from which the book was produced. *Wardrope v. Canadian Pacific R. W. Co.*, 7 O. R. 321.—Ferguson.

Held, that certain books of the company containing statements of repairs required, on the engines connected with the train, one of which was in a defective condition and likely to throw dangerous sparks among others, were also properly admitted in evidence without calling the persons by whom the entries were made. *Canada Atlantic R. W. Co. v. Mozley*, 15 S. C. R. 145; 14 A. R. 309.

To determine a disputed boundary line between two lots, the field notes of S., a land surveyor, were offered in evidence, but objected to on the ground that they were not made by S. in the execution of his duty as such surveyor:—Held, that the objection was good, and the evidence inadmissible. *McGregor v. Keiller*, 9 O. R. 677.—Proudfoot.

A claim by the next of kin of a deceased legatee cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books giving credit to such next of kin, for portions of such deceased legatee's share, such entries were held to be evidence of the relationship of debtor and creditor between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness. *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4.—Hodgins, Master-in-Ordinary.

In an action on a policy of life insurance which was not countersigned according to the terms of a memorandum on its margin the defence was that the premium was never paid and the policy was never delivered. On the trial the judge admitted in evidence an entry in the books of his father made by the deceased holder of the policy, shewing the payment to an agent of the company of an amount equal to the premium which the evidence shewed was paid by money given to deceased by his father. He also admitted the evidence of the agent who had since died, taken at a former trial of the cause to the effect that the premium was not paid and that he would not countersign the policy until it was paid, that the policy was only given to the deceased to enable him to examine it and not as a duly executed policy. The jury found a verdict for the plaintiff. Per Strong J. The evidence of the entry in the books of the deceased was improperly admitted. *Confederation Life Association of Canada v. O'Donnell*, 13 S. C. R. 218.

McK. was a member of two firms, C. McK. & Co. and McK. & M. In an action against McK. & M. for goods sold and delivered it appeared on the trial that the goods were ordered by McK. & M., and shipped to the place of business of McK. & M., but were charged in plaintiff's books to C. McK. & Co., which he said was done at McK.'s request. McK. called as a witness for plaintiff, corroborated this, and on cross-examination he produced, subject to objection, the books of C. McK. & Co., in which these goods were credited to that firm. A verdict was given for the defendant M.:—Held, reversing the judgment of the court below, that the books of C. McK. & Co. were properly in evidence on the cross-examination of McK. and the rule for a new trial should be discharged. *Miller v. White*, 16 S. C. R. 445.

## XXI. HEARSAY EVIDENCE.

### 1. In Questions of Pedigree.

Declarations made by the deceased mother of the plaintiff, in the hearing of the plaintiff and of the plaintiff's son, as to the marriage of the plaintiff's parents, received in evidence to prove the plaintiff's pedigree. *Walker v. Murray*, 5 O. R. 638.—Osler.

### 2. Evidence of Reputation.

The locality and extent of a square being in question. Semble, that this being a matter of a quasi public nature in which a class of the people in the neighbourhood would be concerned, evidence of reputation was admissible; and

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under the circumstances set out in the report, it was:—Held, that the square was sufficiently defined by such evidence. *VanKoughnet v. Denison*, 1 O. R. 349.—Boyd; 11 A. R. 699.

Certain persons were sued as incumbents of certain rectories belonging to the Church of England in this Province, and it was objected that the constitution of the said rectories had not been legally proved:—Held, that evidence as to the possession or occupancy by the plaintiffs of their respective churches, and as to their officiating according to the rules of the church by persons having the cure of souls, and of their recognition by the Church Society or Synod, was admissible as some evidence of their status as such rectors. *Langtry v. Damoulin*, 7 O. R. 499.—Ferguson.

### 3. Dying Declarations.

See *Regina v. McMahon*, 18 O. R. 502, p. 443.

## XXII. EXPERT EVIDENCE.

The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The court (Proudfoot, J.) appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained. *Hawkins v. Mahaffy*, 29 Chy. 326.

Remarks upon the impropriety of receiving the opinions of surveyors as experts as to the proper mode of making a survey under a statute. See *Township of Stafford v. Bell*, 6 A. R. 273.

Where the opinions of experts on foreign law are conflicting, the court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion. *Rice v. Gunn*, 4 O. R. 579.—Q. B. D.

As to costs incurred for expenses of surveys and other special work of that nature in order to qualify surveyors to give evidence. See *McGannon v. Clarke*, 9 P. R. 555.

As a rule the courts discountenance professional or quasi-expert evidence from being brought before them in writing. *Attorney-General v. Gooderham*, 10 P. R. 259.—Boyd.

The evidence of professional draughtsmen was in this case held to have been properly admitted to shew what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plans were intended to indicate. *Atrill v. Platt*, 10 S. C. R. 425.

On the trial of an issue directed by the surrogate judge before a jury, evidence was given as to the mental capacity of the testator by persons acquainted with him, the grant of probate being opposed by the widow on the ground, amongst others, of mental incapacity. The judge at the trial being of opinion that the witnesses examined were not of a class qualified to give scientific evidence as experts, withdrew the case from the jury, and gave judgment in favour of the plaintiffs, granting probate of the will, which he afterwards refused to set aside. On appeal a new trial was directed, and the costs of appeal ordered to be paid by the plaintiffs, it being

held that the case should have gone to the jury, and that the opinion of such witnesses were clearly admissible, being of more or less value according to their skill, or experience or aptitude for judging of such matters, all which tests would be applied by the jury. *Regan v. Waters*, 10 A. R. 85.

In the course of a reference to make a partition of lands, a master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared:—Held, that the course adopted by the master was a reasonable one; that he had the power under G. O. Chy. 240 (Con. Rule 73) to take such course, and that the fees paid to the skilled persons by the defendant should be taxed to him. *McKay v. Keefer*, 12 P. R. 256.—Ferguson.

A witness was called at the trial to give evidence as a medical expert, and in answer to the crown prosecutor, he said "there are indicia in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired in the case before the court and on what he based his opinion as to it, giving the result of his examination of the body:—Held, (Strong and Fournier, JJ., dissenting), that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shewn by cross-examination or other testimony that there were no such indicia as stated, his evidence as to the distance at which the shot was fired was properly received. *Preep v. The Queen*, 15 S. C. R. 401.

The plaintiff, a riparian proprietor brought an action against one L. to compel him to demolish a dam which L. had erected on the river Mille Isles, and to pay damages for injury caused by said dam. In this action judgment was rendered ordering the demolition of the dam and payment of the damages. While this judgment was in appeal an agreement for settlement was arrived at between the parties by which it was agreed that the dam should be demolished by a certain day, failing which, the judgment for demolition should be carried out. The property was subsequently sold to the defendant who bought with the full knowledge of the agreement in question and agreed to be bound by said agreement and also by the judgment as if he had been a party thereto. The defendant, however, did not completely demolish the dam, but used a portion at one end and the foundation of it throughout for a new dam. The plaintiff then brought the present action against the defendant for the demolition of this second dam and for damages. In this action the Superior Court, after hearing a number of witnesses, appointed as expert an engineer who reported that the dam caused no injury to plaintiff's property. This report the court gave effect to, refusing a motion made by plaintiff asking leave to examine the expert and other witnesses for the purpose of shewing the incorrectness of the report, and dismissed the action with costs on the ground that the defendant had only exercised the rights

given him by chapter 51 of the C. S. L. C., and the plaintiff had suffered no damage:—Held (per Fournier, Gwynne and Patterson, J.J.), that chapter 51 of the C. S. L. C. had no application, the rights of the parties being regulated by the agreement for settlement arising out of the first action, which was a "transaction" within the meaning of articles 1918 and 1920 of the Civil Code. Per Fournier and Gwynne, J.J.—On the whole evidence the plaintiff was entitled to judgment and the appeal should be allowed. Per Ritchie, C. J., and Taschereau, J.—The appeal should be dismissed, but in any event all the plaintiff could ask was to have the case remitted to the court of first instance to take further evidence, which was the principal ground of his appeal to the Court of Queen's Bench as stated in his factum. Patterson, J., while of opinion the law and evidence would have warranted a judgment for the plaintiff concurred in the view that under the circumstances all the plaintiff could ask was to have the case remitted. *Hardy v. Filiatrault*, 17 S. C. R. 292.

See *Moser v. Snarr*, 45 Q. B. 428; *Regina v. Brierty*, 14 O. R. 525, p. 433.

## XXVI. PRODUCTION AND ADMISSION OF EVIDENCE.

### 1. Onus Probandi.

When defendants in a redemption suit on proving their claim in the master's office produced their mortgages and filed an affidavit verifying their claims, and stating that \$20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages:—Held, that their claim was *prima facie* proven, and the onus of reducing the amount rested with the plaintiff. *Court v. Holland*.—*Ex parte Doran*, 8 P. R. 213. Taylor, Master.—Blake.

The plaintiffs held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. Defendant conveyed his equity of redemption to A., who subsequently released to the plaintiffs for a nominal consideration, after striving for a substantial one. The defendant, as part of the arrangement, gave the plaintiffs his note for some interest. The plaintiffs having sued on the covenant for payment, the jury were directed that if the release and note were taken by the plaintiffs in satisfaction of the liability on the covenant, to find for the defendant; if taken under a stipulation that it should not have that effect, to find for the plaintiffs; and that in the absence of evidence upon these points, the inference would be that it was taken in satisfaction of plaintiffs' claim, the charge being thereby merged. The jury found for the defendant:—Held, that there was no misdirection, the onus of proving that there is no merger being upon the plaintiff in such a case; and the verdict was sustained. *North of Scotland Mortgage Co. v. Uddell*, 46 Q. B. 511.—Q. B. D.

In actions against solicitors for negligence, See *O'Donohoe v. Whitty*, 2 O. R. 424, *Re Kerr—Akers and Bull*, 29 Chy. 188.

As to proving malice in an action of slander against a public officer. See *Dewe v. Waterbury*, 6 S. C. R. 143.

In a "débats de comptes" between A. G. (appellant) in his quality of tutor to M. L. H. C. R. a minor, and Dame H. P. (respondent), universal legatee of her late husband L. R., who had had possession of the minor's property (his grand-child) as tutor, the following items, viz., \$5,466.63 (for stock of goods sold by L. R. to his son), and \$451.07, and \$90.76, for "cash received at the counter," charged by the respondent in her account, were contested. In 1871, L. L. R., the minor's father, married one M. C. G., and by contract of marriage obtained from his father, L. R., two immovable properties, en avancement d'hoirie. At the same time L. R., the father, retired from business and left to L. L. R., his son, the whole of his stock-in-trade, which was valued at \$5,466.63, making an inventory thereof. L. L. R. died in 1872, leaving one child, said M. L. H. C. R., and L. R., her grandfather, was appointed her tutor. There was no evidence that the stock-in-trade had been sold by the father and purchased by the son, or that the father gave it to his son. However, when L. R., in his capacity of tutor to his grandchild, made an inventory of his son's succession, he charged his son with this amount of \$5,466.63:—Held (reversing the judgment of the court below), that it was for the respondent to prove that there had been a sale of the stock-in-trade by L. R. to his son L. L. R., the minor's father, and that there being no evidence of such a sale, the respondent could not legally charge the minor with that amount. As to the other two items, these were granted to the respondent by the Court of Queen's Bench, on the ground that, although they had been entered as cash received at the counter, there was evidence that they had been already entered in the ledger. The only evidence to support this fact, was the affidavit of one Hebert, the bookkeeper of L. R. filed with the reddition de comptes before notary, prior to the institution of this action:—Held, reversing the judgment of the court below, that the affidavit of Hebert was inadmissible evidence, and therefore these two items could not be charged against the minor. *Gagnon v. Prince*, 7 S. C. R. 386. Special leave to appeal to Her Majesty in Council in this case, was refused. See S. C., 8 App. Cas. 103.

In proceeding to impeach a conveyance executed in pursuance of a power of sale in a mortgage the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the deed. *Bartlett v. Jull*, 28 Chy. 140.—Sprague.

Semble, that R. S. O. (1877), c. 109, s. 2, is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment. *Sanders v. Malsburg*, 1 O. R. 178.—Boyd.

The power of a municipal council to close up a road under section 504 of the Municipal Act, (1877), whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed. The onus of shewing that another convenient road is open

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In an election petition :—Held, by Fournier, Henry and Gwynne, J.J., that the onus probandi was on the appellant, who by his preliminary objections had affirmed the disqualification of the petitioner. *Contra—Ritchie, C.J., Strong, and Taschereau, J.J. Megantic Election (Dom.)—Fréchette v. Goulet, 8 S. C. R. 169.*

Per Hagarty, C. J. O.—Where a corrupt practice is proved at an election trial, the onus is at once shifted to the respondent to bring himself within the saving clause, R. S. O. (1877) c. 10, s. 162. *Prescott Election—Alexander v. Hagar, 1 E. C. 88, followed. Muskoka and Parry Sound Election (Ont.)—Payet v. Fauquier, 1 E. C. 197.*

Where the defendant, being sued on a promissory note, alleged that the said note was not duly stamped before the repeal of the Stamp Act nor until after action brought, although he had communicated the fact of that omission to the plaintiffs before he was sued, and the plaintiffs denied that the defendant had so notified them, and alleged that they double-stamped the note as soon as they had knowledge of the omission to stamp, which was not till after action brought, and after the repeal of the Stamp Act; and the evidence shewed that when the note came to the plaintiffs' hands it appeared to be properly stamped :—Held, that the defendant could not be allowed upon his own unsupported testimony, in such a case, to escape liability. The onus was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was so intelligibly communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by him. *Bank of Ottawa v. McMorison, 4 O. R. 345.—Boyd.*

Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money for which they sued. Defendants having refused to settle for losses sustained :—Held, reversing the judgment of Patterson, J.A., that, assuming the State law to be that if the contract was to deal in such a way that only the differences in price should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing and this defence not having been clearly proved, judgment was given for the plaintiffs. *Rice v. Gunn, 4 O. R. 579.—Q. B. D.*

Action to set aside a conveyance obtained from an old woman who was deaf and unable to write, and who had no relatives or friends, by the reeve of the township in which she lived, and who was well known as a justice of the peace, and an active, shrewd business man engaged in many enterprises. The plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him; she however having sworn in her evidence that she never placed any dependence on him. The plaintiff's case was

closed, and it was contended that the onus was now on the defendant to shew that the transaction was a righteous one. The defendant declined to call any witnesses, and plaintiffs' action was dismissed :—Held, on motion for a new trial, sustaining the judgment of Proudfoot, J., that the onus was not on the defendant, and that the plaintiff must prove her case. Semble, the mere existence of confidence is not enough; influence must be proved, and is not to be presumed from the existence of confidence. *Wallis v. Andrews, 16 Chy. 637, followed. McKean v. Milne, 5 O. R. 100.—Chy. D.*

Where one brought an action to restrain the diversion of the water which supplied his mill from the channel in which it had flowed for more than twenty years, and it appeared that the channel was an artificial cut, diverting the water from its natural outlet, and had been made originally at the instance and by the permission of the then owner of the creek in which the water naturally flowed partly for the benefit of the owner who had, however, on many occasions, blocked up the cut, and so turned the water to its natural outlet :—Held, that such an occupation would not give a statutory right to the licensee, and that the onus was on the plaintiff to make out his right and shew that there had been a change in the mode of user after the origination by permission. *Malcolm v. Hunter, 6 O. R. 102.—Boyd.*

It is not sufficient for a party to any litigation on whom the onus is to say that he could furnish the necessary proof if he had certain papers. It is his duty to have these papers, or to have them produced, the means of causing their production being what the law deems ample. *Exchange Bank of Canada v. Springer—Same Plaintiffs v. Barnes, 7 O. R. 309.—Ferguson.*

In June, 1874, the plaintiff and defendant, by writing, entered into an agreement for supplying together the iron for the Grand Junction Railway, and providing for the division of the surplus or profits. No division of the profits was made and the defendant went on investing the receipts from that enterprise in other contracts, and the plaintiff claimed a like interest in them also, which the defendant denied his right to :—Held, that the onus of negating such right of the plaintiff rested on the defendant; and having failed to negative his right to such share, the court declared him entitled thereto and directed a reference to take the accounts between the parties. *Cameron v. Bickford, 11 A. R. 52.* This case was reversed by the Privy Council.

In an interpleader action to try the right to the proceeds of the goods sold by the sheriff one of the plaintiffs was a mortgagee of the goods. He put in and proved the chattel mortgage, but gave no evidence of a debt or of pressure used. On this the judge charged the jury that there was no evidence of a debt or of pressure, and he refused to allow the consideration to be proved after the plaintiffs closed their case. The jury brought in a verdict for the defendant. On a motion to enter a judgment for plaintiffs or for a new trial, it was held that there must be a new trial. *Per Boyd, C.*—The mortgagee plaintiff proved enough to cast the burthen of attack on the defendant. Proof of the mortgage duly executed shewed that the property and title to the

goods passed from the judgment debtor to the mortgagee before the seizure. The execution creditor should displace this ownership by shewing want of consideration or other reason. Suspicion would not justify the conclusion that the mortgage was a voluntary instrument contrary to its purport. There was no evidence that the wife knew of the husband's insolvency, and concurred with him in an attempt to gain a preference at the expense of the other creditors. Per Proudfoot, J.—The mortgage might be valid if given for a present advance of money for carrying on the business or other proper purpose, and insolvency would not be a circumstance shifting the onus of proof, and the production of the mortgage would be prima facie evidence; as the plaintiff, the mortgagee, appeared to have been misled, and was refused leave to supplement his evidence; a new trial should be granted to him. *Furlong v. Reid*, 12 O. R. 607.—Chy. D.

In action of libel. See *Jackson v. Staley*, 9 O. R. 334.

On 21st October, 1880, land was sold for taxes for the years 1877 and 1878, and on 15th November 1881, a tax deed executed. The patent from the Crown issued in 1878. There was no evidence as to the right of the patentee of the land previous to the issuing of the patent, nor that the Crown Lands Commissioner had made any returns to the treasurer of the land having been treated as a free grant, sold or agreed to be sold by the Crown, under section 106 of R. S. O. (1877) c. 180, so as to render it liable to be assessed prior to the year 1878:—Held, there not being any taxes proved to be in arrear for three years as required, the sale and tax deed were invalid. At the trial the plaintiff produced his patent. The defendant, in answer thereto, put in the tax deed:—Held, that the plaintiff by production of his patent made out a prima facie case, and the defendant, relying on his tax deed, was bound to prove the sale and arrears for three years, that is, that some portion thereof was in arrear for three years. *Stevenson v. Traynor*, 12 O. R. 804.—C. P. D.

In an action by a municipal corporation to restrain the owner of land from obstructing an alleged public highway over his land, the onus of proving the existence of such highway rests on the plaintiffs. *St. Vincent v. Greenfield*, 15 A. R. 567.

In an action on a bond against the sureties of the defaulting clerk of the municipality of Shelburne, the defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it:—Held, affirming the judgment of the Supreme Court of Nova Scotia, Henry J. dubitante, that the plaintiffs had proved a prima facie case of a bond properly executed on its face, and as the defendant had not negatived the due execution of the bond, it being consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off the defendant, and as neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendant, plaintiffs were entitled to recover. *Marshall v. Municipality of Shelburne*, 14 S. C. R. 737.

Onus of disproving marriage of parties. See *O'Connor v. Kennedy*, 15 O. R. 20.

Where, in administration proceedings, the widow of the deceased claimed from the executor repayment of certain moneys paid by her, at her husband's request, out of her separate property, on premiums payable on policies on his life, which she swore were to be repaid to her; and it appeared that the moneys were paid by a third person who held them to the use of the claimant; that she acquiesced in the payment of them with great reluctance; and that she had no claim to any part of the policy moneys, which were wholly at the disposition of the deceased:—Held, that under these circumstances the onus was on the executor to prove that the moneys were a gift to the deceased, and it was not necessary for the claimant to produce corroborative evidence that the moneys were to be repaid in order to recover. In order to make out that money paid by a wife to her husband was a gift, it is necessary to prove it either by direct evidence or by such a course of dealing between the husband and wife as shews that the money was so paid to him as a gift. *Elliott v. Busnell*, 19 O. R. 413.—Robertson.

In action by workman against his employers for damages under the Factories Act, R. S. O. (1887) c. 208. See *Black v. Ontario Wheel Co.*, 19 O. R. 578.

The fact of bank shares being purchased in trust at a time when the trustee was solvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available to satisfy the demand of his creditors. *Sweeney v. Bank of Montreal*, 12 App. Cas. 617, followed. *Muir v. Carter—Holmes v. Carter*, 16 S. C. R. 473.

A municipal corporation, under the authority of a by-law, issued and handed to the Treasurer of the Province of Quebec \$50,000 of its debentures as subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the government provincial subsidy was payable under 44 and 45 Vict. c. 2, s. 19, viz., "when the road was completed and in good running order to the satisfaction of the Lieutenant-Governor in council." The debentures were signed by S. M. who was elected warden and took and held possession of the office after the former warden had verbally resigned the position. In an action brought by the railway company to recover from the treasurer of the province the \$50,000 debentures after the government bonus had been paid and in which action the municipal corporation was mise en cause as a co-defendant, the Provincial Treasurer pleaded by demurrer only, which was overruled, and the county of Pontiac pleaded general denial and that the debentures were illegally signed:—Held, that the provincial treasurer having admitted by his pleadings that the railway had been completed to the satisfaction of the Lieutenant-Governor in council, the onus was on the municipal corporation, mise en cause, to prove that the government had not acted in conformity with the statute. *Strong, J.*, dissenting. *County of Pontiac v. Ross*, 17 S. C. R. 406.

See *Regina v. Fee*, 2 Q. R. 107; *Morton v. Nihan*, 5 A. R. 20; *Vinden v. Fraser*, 28 Chy. 502; *Burke v. Taylor*, 48 Q. B. D. 371; *Johnston v. Christie*, 31 C. P. 358; *Roan v. Kronsbein*, 12 O. R. 107; *Connec v. Canadian Pacific R.*

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*W. Co.—Canadian Pacific R. W. Co. v. Conmee*, 11 P. R. 149; *McKenzie v. Dancey*, 12 A. R. 317.

## 2. Relevancy.

Where the right of a company to use a traction engine on certain highways under an agreement with a municipality was disputed:—Held, that the fact that the company for several years after the agreement used horse power only, was not to be overlooked as evidencing the true agreement of the parties. *County of York v. Toronto Gravel Road and Concrete Co.*, 3 O. R. 584.—Proudfoot.

In an action against a railway company for loss occasioned by fire alleged to have arisen from one of their engines (No. 5), with a view of shewing that the engine was defectively constructed, evidence was given that on previous occasions when it was in the same or an improved condition, it had thrown out sparks causing fires. Per Spragge, C. J. O., and Hagarty, C. J., such evidence was properly receivable. *Canada Central R. W. Co., v. McLaren*, 8 A. R. 564.

The plaintiff rented to the defendant a field for the purpose of growing flax at an agreed rental of \$10 an acre. In answer to the claim for rent, the defendant attempted to shew that he had sustained damage by reason of the ground being full of thistles, and that it had been stipulated that an allowance was to be made in such case for the loss to the defendant:—Held, that evidence was properly admitted for the guidance of the jury, in adjusting such allowance, as to how the defendant had himself settled with other persons who had thistles in their fields rented by him. *Weinhold v. Klein*, 10 A. R. 20.

S. was an assignee for the benefit of creditors of J. E., and G. was similarly assignee of E. H. E. Before the assignments J. was a creditor of E. H. E. for money lent and as holder of certain notes. After the assignment S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment, S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for the payment of the judgment:—Held, that the judgment recovered against E. H. E. after his assignment in an action to which G. was not a party was not even prima facie evidence against G. *Eccles v. Lowry*, 23 Chy. 167, considered. *Stewart v. Gage*, 13 O. R. 458.—Proudfoot.

I. was asked whether F. did not say to him when he asked him to indorse one of the series of notes of which the one in question was a renewal, that he, F., "never backed anybody's note":—Held, this question was irrelevant, and I.'s answer to it conclusive; and evidence contradicting such answer was inadmissible. *Bank of Hamilton v. Isaacs*, 13 O. R. 450.—Q. B. D.

See *Tracy v. Fowlds*, 13 A. R. 115, p. 656; *Hickry v. Stover*, 11 O. R. 106; *Sconyall v. Stapleton*, 12 O. R. 206; *Moxley v. Canada Atlantic R. W. Co.*, 11 P. R. 39, p. 640.

## 3. Evidence in Former Action.

A former suit had been instituted by the plaintiff which had been dismissed, as the plain-

tiff had not acquired the legal estate until after the bill was filed:—Held, that under such circumstances the question was not res judicata, and that the evidence taken in the former suit and the examination of defendant by the plaintiff therein were admissible in the present one, the issue being practically the same. *Adamson v. Adamson*, 23 Chy. 221.—Spragge.

## 4. In Reply.

The judge at the trial nonsuited, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The defendant's counsel cross-examined one of the plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination:—Held, that such re-examination did not deprive the plaintiff of his right to call witnesses in reply to the defendant's evidence of fraud, at all events this was a matter for the judge at the trial, and the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply. *McDonald v. Murray*, 5 O. R. 559.—C. P. D.

A medical man called by the defendant stated, from the evidence given by the defendant and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery:—Held, inadmissible. *VanMere v. Farewell*, 12 O. R. 285.—C. P. D.

## 5. Exhibits.

If documents are produced by the party under examination, the opposite party is entitled to have them marked as exhibits. *Hinds v. Upper Canada Furniture Co.*, 12 P. R. 292.—Dalton, Master.

An order for a ca. sa. was granted upon two affidavits; one that of the Toronto agent for the plaintiff's solicitors exhibiting a copy of an affidavit made by one of such solicitors, stating that he believed it to be a true copy, and that the original was stated to have been enclosed in a letter received by him that day, but was not so enclosed, but not stating that such an affidavit ever existed. The copy of affidavit marked as an exhibit to the affidavit of the Toronto agent was not filed as an exhibit, and was subsequently produced to the court as an original affidavit, a new jurat having been added:—Held, per Falconbridge, J., that the exhibit, even though it was not actually in the hands of the officer of the court, was part of the record of the case, and should not have been so dealt with. *Gilbert v. Stiles*, 13 P. R. 121.

## 6. Other Cases.

After judgment, at the trial, but before the argument in banc, the defendants put in the report of a case bearing upon the question, decided

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in the Supreme Court of the United States, verified by affidavit:—Held, admissible. *Rice v. Gunn*, 4 O. R. 579.—Q. B. D.

At the close of the defence, the plaintiff's counsel, without objection, put in the defendant's examination before trial. The plaintiff's counsel, in addressing the jury, read a portion thereof; and the judge, in his charge, read other portions:—Held, there could be no objection to the judge reading such other portions, as they were properly in evidence. *Scougall v. Stapleton*, 12 O. R. 206.—C. P. D.

See *Canada Central R. W. Co. v. McLaren*, 8 A. R. 564; *Clarke v. Union Fire Ins. Co.*—*Chabot's Case*, 10 P. R. 413, p. 622; *Moxley v. Canada Atlantic R. W. Co.*, 11 P. R. 39, p. 640.

## XXVII. CORROBORATIVE EVIDENCE.

### 1. Corroborating Accomplices.

The plaintiffs claimed that a sum of money had been stolen from them by defendant, and brought an action to recover the money or land in which it had been invested. The evidence in proof of the charge was that of accomplices, and in corroboration, the evidence of detectives who stated that defendant admitted the charge. The judge charged the jury that if it was a criminal trial he should be compelled to tell them that, though they might convict on the evidence of accomplices, it was never safe to do so, and there should be some corroborative evidence to turn the scale against the presumption of innocence. He further said that this was not a criminal case, but yet he could not say the rule ought not to be applied, perhaps not precisely in the same way, but they were to exercise their common sense as to how far they would credit or discredit the evidence of accomplices. He also stated that when he said that corroborative evidence was necessary when accusations were sworn to by accomplices, he desired them to understand that the more particular point of corroboration should be the identity of the person accused, and unless the corroborative evidence identified the defendant with the stealing on the occasion and under the circumstances detailed in the evidence, it would not be corroborative. His identity should be contained in the evidence of corroboration:—Held, (Galt, J., dissenting) that the effect of the charge and the impression it was calculated to leave on the minds of the jury, fairly considered, was that the evidence of accomplices in crime, which crime gave rise to the civil action, ought not to be credited or relied on, unless corroborated, and was misdirection; and there was also misdirection in charging that the corroboration must be as to the identity of the party charged with the criminal act. It was urged that the misdirection, if any, was immaterial, because the defendant could not have been present taking part in the stealing of the money, because an alibi was proved; but:—Held, that the effect that the evidence as to the alibi had upon the jury depended much upon the credit to be attached to the accomplices' evidence, and as it could not be ascertained on what ground the jury found for the defendant, it was impossible to say that the jury may not have discredited the accomplices' evidence because of the

alleged want of corroboration. The judge also in his charge, after stating that the plaintiff in an action had to make out his case, added, that is, he has to satisfy them that the evidence is sufficient to cause them to believe "without any reasonable doubt" that the claim the plaintiff makes is correct, and, if he fails to do so, there should be a verdict against him. Per Cameron, C. J.—While of opinion that this was putting the plaintiffs' obligation more burdensomely than the law required, he could not say the learned judge was without the warrant of authority for so charging. *Thurtell v. Beaumont*, 1 Bing. 339, and *Richardson v. Canada West Farmers' Ins. Co.*, 17 C. P. 341, commented on. Per Rose, J.—The charge on this point was quite correct. *United States Express Co. v. Donohoe*, 14 O. R. 333.—C. P. D.

Remarks as to the application to civil causes of the practice in criminal cases regarding the corroboration of accomplices. See *Re Monteith—Merchants' Bank v. Monteith*, 10 O. R. 529.

### 2. In Actions by or against Representatives of Deceased.

K. had assigned the moneys due to him by S.:—Held, that K., who was a witness, was not "an opposite or interested party to the suit," within the meaning of the Evidence Act, R. S. O. (1877) c. 62, s. 10, and his evidence therefore did not require corroboration as against the executors of S. *Watson v. Seevern*, 6 A. R. 559.

Held, that under section 10 of the Evidence Act, R. S. O. (1877) c. 62, any evidence adduced by a party interested against an executor corroborating the evidence of the interested party in any particular, must be submitted to the jury, as sufficient in point of law, the weight to be attached to it in point of fact being a matter for their consideration. *Orr v. Orr*, 21 Chy. 397, and *McDonald v. McKinnon*, 26 Chy. 12, commented upon. *Parker v. Parker*, 32 C. P. 113.—Armour.

In this case, which was an action on the common counts against the defendant as executrix, etc., for money paid to the use of the defendant's testator, the transaction arose out of some promissory notes made by the testator and the plaintiff, but which the plaintiff alleged he signed for the testator's accommodation, and had subsequently paid for the testator:—Held, on the evidence set out in the report, that the plaintiff's evidence was sufficiently corroborated within the meaning of the Act: and that the count for money paid was supported. *Id.*

When each item in an account against the estate of a deceased person is an independent transaction, and constitutes a separate and independent cause of action, to satisfy the statute R. S. O. (1877) c. 62, s. 10, some essential corroboration of the interested party's evidence must be adduced as to each item. *Cook v. Grant*, 32 C. P. 511.—C. P. D. *Re Ross*, 29 Chy. 385.—Boyd.

The plaintiff claimed to recover against the defendant as administrator of his deceased brother, W. G., two sums, one of \$800, which she alleged W. G. received for her from another brother, S. G., also deceased; and the other of

\$1,500, which she alleged W. G. promised to leave her in consideration of her remaining with him, taking care of and managing his house, as long as he lived. As to the \$800, the plaintiff's evidence was held to be sufficiently corroborated by the evidence set out in the report, within the meaning of the statute, but otherwise as to the \$1,500. *Cook v. Grant*, 32 C. P. 511.—C. P. D.

The widow of the intestate claimed against his estate a sum of \$700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock-in-trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C. c. 73. Evidence was given in corroboration of the claimant to the effect that—"He (Laws) told me he had got \$600 or \$700 from his wife. She had got a little money. He said he had paid that money for the things he had in the store. This was after he had bought L. out. \* \* \* He said his wife had helped him to \$600 or \$700. \* \* \* I understood he had used the money to buy out the business"—Held, affirming the order of the chancellor, reversing the finding of the master at Hamilton, that she could not recover. Per Spragge, C., and Blake, V. C. The evidence of the widow was not sufficiently corroborated. Per Proudfoot, V. C. The evidence that she chose in action was originally hers, and that she gave it to her husband, was corroborated, and this corroboration was sufficient to support her own evidence that it was a loan; but the C. S. U. C. c. 73, gave her the right to assert her proprietorship as against her husband, and as incident thereto the right to bring a suit against him; to which proceedings however the Statute of Limitations was a bar, and therefore her remedy was gone. *Re Laws—Laws v. Laws*, 28 Chy. 382.—Chy. D.

The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was subject to a mortgage, saying that if he would do so, and have the property conveyed to his (plaintiff's) wife, he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the instalments on the mortgage and the plaintiff was compelled to pay it himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for them; that he would pay plaintiff \$150 a year for ten years, and bequeath to his wife \$1,000. By the will, however, only \$100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement, or for payment of damages by reason of the breach thereof. The only direct evidence was that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for \$200 and \$200 respectively, expressed to be on account of money left her by her father's will; and witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in his wife's name, and that he was making the payments as the plaintiff had so taken the deed:—Held, that there was sufficient corroboration of the evidence of the plaintiff as required by the

statute (R. S. O. (1877) c. 62). *Halloran v. Moon*, 28 Chy. 319.—Spragge.

W. D. B. alleged that in 1872, D. B. transferred to him as a gift 100 shares of a certain stock, part of the assets of the firm, and as corroborative evidence thereof proved the transfer of the stock to him, and a retransfer afterwards on January 30th, 1873; which retransfer, he said, was to prevent the surplus of the savings bank appearing to be less, and also produced the printed statement of the savings bank of December 31st, 1872, shewing this stock:—Held, that this was not such corroborative evidence of the gift as satisfied the statute R. S. O. (1877) c. 62, s. 10. *Burn v. Burn*, 8 O. R. 237.—Ferguson.

Plaintiff, after her husband's death, and about twenty-five years before action brought, went to live with testator, her son-in-law, and resided with him up to the time of his wife's death, about twelve years before action. She alleged that after her daughter's death, testator agreed to pay her wages if she would continue to live with him and take care of his family. She accordingly did so till his death in 1855, up to which date she had received nothing from him. In an action against his estate for wages plaintiff relied on the evidence of a witness to the effect that testator, about two years before his death, told witness plaintiff should be handsomely paid for her services; and also on the evidence of another son-in-law, that two or three years before his death testator told witness that he would pay her well. It also appeared that by his will testator directed all his property to be converted into money and invested in mortgage security, and the whole income paid to plaintiff during her lifetime; but there was no evidence as to the value of this bequest, and it was suggested that after payment of debts the residue would be very small:—Held, that there was no sufficient corroborative evidence within R. S. O. (1877) c. 62, s. 10. *Tucker v. McMahon*, 11 O. R. 718.—Q. B. D.

See *Re Murray—Purdum v. Murray*, 29 Chy. 443; *Watson v. Bradshaw*, 6 A. R. 666; *Elliott v. Bussell*, 19 O. R. 413, p. 676.

### 3. To Establish Wills.

The evidence of various witnesses for the defence was conflicting as to the incidents which happened shortly before the testator's decease; and while they all spoke of the testator's unwillingness to give the plaintiff more than \$10, there was no evidence, other than that of the defendant, of his desire to give her the bulk of his property or to make any disposition of it:—Held, reversing the judgment of Proudfoot, J., that the second will could not be established on the uncorroborated evidence of the defendant, and the prior will was declared to be the testator's last will. *Hogg v. Maguire*, 11 A. R. 507.

### 4. Other Cases.

In cases where there is suspicion of fraud. See *McKay v. McKay*, 31 C. P. 1; *Morton v. Nihan*, 5 A. R. 20.

In extradition proceedings. See *Le re H. E. Lee*, 5 O. R. 583.

In an action for breach of promise of marriage. See *Costello v. Hunter*, 12 O. R. 333; *Yarwood v. Hart*, 16 O. R. 23, 16 A. R. 532.

### XXVIII. CONTRADICTORY EVIDENCE.

#### 1. Generally.

One C. entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being *prima facie* payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid; although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *MERCHANTS' BANK v. GRAHAM*, 27 Chy. 524.—Proudfoot.

Held, on the evidence in this case as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory, the fair inference was that the parties' minds were never ad idem, and the recovery could only be on the quantum meruit. *HOENER v. MERNER*, 7 O. R. 629.—C. P. D.

Where the evidence is contradictory the court will not interfere with the findings of the judge who tried the case. *COOK v. PATTERSON*, 10 A. R. 645.

Where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *FRASSELL v. CARTER*, 10 S. C. R. 105.

The judge who tried the case, in which the evidence was conflicting and irreconcilable, rectified his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. This court, while not differing from the judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence, allowed the appeal, and reversed the decision of the court below. *COMERON v. BICKFORD*, 11 A. R. 69. This case was reversed by the Privy Council.

It is not as a general thing the best rule, in cases of varying opinion as to value, to reject one set of witnesses in toto and to adopt the figures of an opposing set. It is rather to be supposed that neither is exactly to be followed, and that truth lies somewhere between the extremes. *MUNSEE v. LINDSAY*, 11 O. R. 520.—Boyd.

See *Mitchell v. Strathy*, 28 Chy. 80; *Murray v. Hutchinson*, 14 A. R. 489. *Bank of Hamilton v. Isaacs*, 16 O. R. 450.

### EXAMINATION OF JUDGMENT DEBTOR.

#### I. WHO MAY BE EXAMINED, 684.

#### II. ORDER FOR EXAMINATION AND SERVICE, 685.

#### III. APPEAL FROM ORDER, 686.

#### IV. CONDUCT OF EXAMINATION, 686.

#### V. NON-ATTENDANCE, 686.

#### VI. UNSATISFACTORY ANSWERS, 687.

#### VII. COSTS, 688.

#### VIII. IN DIVISION COURTS. See DIVISION COURTS.

#### I. WHO MAY BE EXAMINED.

Held, that a judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O. (1877) c. 50, s. 304, nor garnish debts due to him. *Ghent v. McColl*, 8 P. R. 428.—Dalton, Q. C.

A judgment creditor in such a case may examine his judgment debtor under R. S. O. (1877) c. 49, s. 17. *Id.*

The defendant recovered judgment against the plaintiff in the action for his costs of defence, on a judgment of nonsuit:—Held, that the plaintiff was not a judgment debtor, examinable under s. 17 R. S. O. (1877), c. 49, or s. 304, R. S. O. (1877), c. 50, or Rule 366 O. J. Act (Con. Rule 926). *McLachlin v. Blackburn*, 7 P. R. 287, dissented from; *Lovell v. Gibson*, 6 P. R. 132, commented upon. *Meyers v. Kendrick*, 9 P. R. 363.—Osler.

A person against whom a judgment has been recovered for costs only, cannot be examined as a judgment debtor. Con. Rules 926 and 934 considered. *Meyers v. Kendrick*, 9 P. R. 363, has not been affected by the introduction of Con. Rule 934, and is still the law. *Troutman v. Fiske*, 13 P. R. 153.—C. P. D.

The solicitor of a judgment debtor who had absconded, transferred property of the judgment debtor to a purchaser, under power of attorney, and received the consideration money, \$4,000. Upon an application to examine the solicitor under 49 Vict. c. 16, s. 12, (Ont.):—Held, that this provision being remedial and for the purpose of enabling the judgment creditor the better to discover property of his debtor, it should be construed so as to advance the remedy, so far as the fair meaning of the words will permit. The word "transfer" in the expression, "any person to whom the debtor has made a transfer of his property or effects," should not be limited to the transfer of the title to the property or effects, but should be regarded as equally applicable to the transfer of the possession; and therefore the solicitor was a person to whom a transfer of the debtor's property and effects to the extent of \$4,000 had been made, for the possession of that sum had been transferred to him by his debtor. Per *Armour*, C. J.—The solicitor was also an employee of the judgment debtor within the meaning of the section. *Govans v. Barnet*, 12 P. R. 330.—Dalton, Master.—Rose.—Q. B. D.

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"Transfer" used in Con. Rule 928 is not intended to cover an "assignment" for the general benefit of creditors, valid and sufficient under R. S. O. (1887) c. 124, and an assignee under that Act is not one of the persons to be subjected to examination under that Rule. *British Canadian Loan and Investment Co. v. Britnell*, 13 P. R. 310.—Boyd.

Notwithstanding changes made in the practice as to examining judgment debtors, embodied in Con. Rule 928, a judgment debtor is not under the new, any more than under the old practice, examinable until the judgment creditor has placed a fl. fa. in the sheriff's hands, and it has been returned nulla bona, and the sheriff has notified the judgment creditor that, if called upon to make a return, it would be nulla bona. *Ontario Bank v. Trowern*, 13 P. R. 422.—MacMahon.

See *Blackley v. Blaase*, 12 P. R. 565, *infra*.

## II. ORDER FOR EXAMINATION AND SERVICE.

When serving a defendant with an order to examine him as a judgment debtor, it is not necessary to exhibit the original order, unless demanded, in order to entitle the plaintiff to move for a ca. sa. against him, under R. S. O. (1877) c. 50, s. 305. *Imperial Bank v. Dickey*, 8 P. R. 246.—Galt.

Held, that under Rule 369, O. J. Act, (Con. Rule 930), an appointment signed by the examiner, and not a copy, must be served on the person to be examined. *Meyers v. Kendrick*, 9 P. R. 363.—Osler.

An examination under A. J. Act, ss. 17, 18 or C. L. P. Act, s. 304, can only be taken under a rule of court or judge's order. *Ib.*

A married woman, a judgment debtor, who refuses to attend and be examined as to her estate and effects, or refuses to disclose her property, or to give satisfactory answers to questions under R. S. O. (1877) c. 50, ss. 304, 305, may be committed for disobedience of the statute, notwithstanding the R. S. O. (1877) c. 67, s. 3. *Metropolitan Loan and Savings Co. v. Mara*, 8 P. R. 355.—Wilson.

The order for commitment in such case is not mesne or final process, but punishment for disobedience of the statute. *Ib.*

Quere, as to the liability of a married woman to arrest. *Ib.*

An order under 49 Vict. c. 16, s. 12 (Ont.), for examination of the transferee of a judgment debtor, should not be made without notice to the transferee; nor should an order under that section be made without proof that the transfer was made since the date when the liability of the judgment debtor was incurred. *Blackley v. Blaase*, 12 P. R. 565.—MacMahon.

A chattel mortgage is a transfer of property and effects within the meaning of 49 Vict. c. 16, s. 12. *Ib.*

See *Re Chatham Harvester Co. v. Campbell*, 12 P. R. 668, p. 687.

## III. APPEAL FROM ORDER.

A transferee was allowed to appeal from an order for his examination after the time for appealing had expired, his delay being satisfactorily explained. *Blakeley v. Blaase*, 12 P. R. 565.—MacMahon.

## IV. CONDUCT OF EXAMINATION.

In examination of a judgment debtor under R. S. O. (1877), c. 50, s. 304, the object of the enquiry is to shew what property or means the debtor has at the time of the examination which can be made available to the creditor, and the enquiry is not restricted to the period of the contracting of the debt, but it may be shewn that at some anterior time, no matter how far back, the debtor had property, as to which he may be required to give an account; and it is not a sufficient answer to the enquiry merely to say that it has all been disposed of before the debt was incurred. *Ontario Bank v. Mitchell*, 32 C. P. 73.—C. P. D.

Upon a motion to commit the defendant for unsatisfactory answers upon his examination as a judgment debtor:—Held, that the examination should not be so conducted as to try to entrap the debtor, but it should be full, fair, and searching. 2. That the broad test to be applied in gauging the character of the answers, in order to determine whether they are satisfactory, is: Having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that full and true disclosure has been made. 3. That where the particulars wherein dissatisfaction is felt have been pointed out, an opportunity should be given to the debtor of reconciling what may be conceived to be contradictions or supplying what may appear to be omissions. 4. That the ordinary rules for dealing with evidence in litigated matters, where money or money's worth only is involved, are not to be applied, without more, to cases where the liberty of the person is at stake. And in the present case, where the examination was protracted and ranged over a period of more than two years, during which the defendant had had two lines of business going on, he was allowed an opportunity to protect himself by explanations, upon various parts of his examination, relied upon as shewing that a considerable sum of money had not been accounted for, being brought to his notice; and having been thus further examined, and it not having been shewn that he had any means available to satisfy the judgment, and his answers as a whole being reasonably satisfactory, in view of the rules above laid down, a motion to commit was refused. History of the enactments contained in Con. Rules 928 and 932. *Graham v. Devlin*, 13 P. R. 245.—Boyd.

See *Foster v. Van Wormer*, 12 P. R. 597, p. 688.

## V. NON-ATTENDANCE.

Held, that the defendant was liable to committal for contempt in not attending to be examined as a judgment debtor, although she was a married woman and the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for nonpayment

of costs. *Pearson v. Essery*, 12 P. R. 466.—*Ferguson*.

If the original order is not shown at the time of service of a copy, the person served cannot be brought into contempt for disobedience to it: *Meyers v. Kendrick*, 9 P. R. at p. 366, followed. *Blakeley v. Blinase*, 12 P. R. 565.—*MacMahon*.

Upon the return of a habeas corpus, an order was made by a judge of the High Court for the discharge of the defendant from custody under a writ of attachment issued by order of a county judge in an action in a County Court:—Held, that an order to examine the defendant as a judgment debtor, and an appointment under it together were equivalent to an order that the debtor should attend upon the day mentioned in the appointment, and when he obeyed the order by attending and offering to be examined, its force was spent and the power of the examiner under it at an end; to obtain a fresh appointment, a fresh order was necessary. *Jarvis v. Jones*, 4 P. R. 341; *McGregor v. Stuart*, 5 P. R. 56 referred to. *Re Chatham Harvester Co. v. Campbell*, 12 P. R. 668.—*Street*.

If an order for substituted service of a summons or notice of motion to commit can be made at all, even under the wide language of Con. Rule 467, it should not be made except in a case where no doubt exists that the notice has come to the knowledge of the person against whom the application is made. *Ib.*

The order asked for by the summons, viz., for the committal of the defendant to the common gaol was the appropriate punishment authorized by R. S. O. (1877) c. 50, s. 305, for disobedience to an order to attend for examination; and an order for the issue of a writ of attachment requiring the sheriff to hold the debtor in custody for an indefinite period was improper. At any rate a different order from that indicated in the summons should not have been made in the absence of the debtor. The writ of attachment under which the debtor was held was improperly issued without notice to him, as required by Con. Rule 879; and it made no difference that it was in lieu of one which had expired. *Ib.*

#### VI. UNSATISFACTORY ANSWERS.

A satisfactory answer, upon examination as a judgment debtor, according to the statute R. S. O. (1877), c. 50, s. 305, means more than that the answer shall be a full, appropriate and pertinent answer to the question: it means that the answer shall shew a satisfactory disposition of the property. *Crooks v. Stroud*, 10 P. R. 131.—*Wilson*.

The defendant in his examination said he had no real estate nor any personal estate. In the fall of 1882 he had about \$300 in money; he paid his bills with it, and lost the balance at the horse-races at Buffalo. Since the fall of 1882 he had been in his father's employ; he got nothing but his board and clothing. When asked as to the conveyance of the tannery lot to his father, which he held in trust for him, he said: "I could not say what the consideration was, or whether I was paid anything or not; I forget; I can't think of it, I forget whether I received any money for that then or since; it was before judgment. \* \* My father wanted

me to get it fixed";—Held, that the defendant, in his examination, had disclosed his property and his transactions respecting the same; and had not concealed or made away with his property in order to defeat or defraud his creditors. Held, however, that the defendant had not answered fully or truthfully with respect to the fact of receiving or not receiving money or other consideration; and that the answers he had given respecting his transactions with his property were not satisfactory by reason of the illegal and wrongful disposition of it by gambling or horse-racing and otherwise. Defendant was allowed to appear for further examination; and ordered to pay the costs of the first examination and this application forthwith. *Ib.*

The defendant, a widow, upon her examination as a judgment debtor admitted having lent her brother \$300, and having in her house at the time of the examination \$100, which she refused to hand over to apply on the judgment, because she had no other property with which to support herself and three children. The judge to whom an application to commit the defendant for unsatisfactory answers was made, held that the facts of the case did not bring it within the decisions in *Metropolitan L. & S. Co. v. Mara*, 8 P. R. 355, and *Crooks v. Stroud*, 10 P. R. 131, and without laying down any rule, declined, in the exercise of his discretion, to order a committal without further information than was afforded by the examination. *McKay v. Atherton*, 12 P. R. 464.—*Rose*.

It is the duty of a party who is examined as a judgment debtor to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out, as best they may, what it is the business of the debtor to make clear. Nor is it enough for the debtor to say, touching any particular transaction, that he does not know or does not remember, if he have the means at hand to qualify himself to explain. *Foster v. Van Wormer*, 12 P. R. 597.—*Boyd*.

A notice of motion seeking relief against a party for giving unsatisfactory answers on his examination should particularize the answers complained of. *Ib.*

Precision should be used on the examination in ascertaining the exact state of facts, as shewn in books or accounts, and care exercised that there is no uncertainty as to any dates or amounts in question, as the judge can only look at what is proved or admitted. *Ib.*

On the state of facts referred to in the judgment, the defendant was ordered to attend and be further examined at his own expense and to pay the costs of a motion to commit him for unsatisfactory answers. *Ex parte Bradbury*, 14 C. B. 15, and *Ex parte Moir*, 21 Ch. D. 61, followed. *Crooks v. Stroud*, 10 P. R. 131; *Lemon v. Lemon*, 6 P. R. 184; and *Hobbs v. Scott*, 23 Q. B. 619, discussed. *Ib.*

See *Ontario Bank v. Mitchell*, 32 C. P. 73, p. 686; *Graham v. Devlin*, 13 P. R. 245, p. 686.

#### VII. COSTS.

Where a judgment debtor disobeyed an order for his examination, he was directed to pay the

costs of the motion sufficient.  
*Bank v.*

See *Crooks v. Foster*.

#### EXAMINATION

Where plaintiff certain money to pay of and to produce  
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See *Crooks v. Stroud*, 10 P. R. 131, p. 688;  
*Foster v. Van Wormer*, 12 P. R. 597, p. 688.

## EXAMINATION OF PARTIES AND WITNESSES.

See EVIDENCE.

## EXCHANGE.

Where lands were exchanged between the plaintiff and defendant which were subject to certain mortgages, the defendant was held bound to pay off those on the lands conveyed to him, and to protect the plaintiff from liability thereon. *Boyd v. Johnston*, 19 O. R. 598.—Boyd.

See *White v. Tomalin*, 19 O. R. 513.

## EXCHEQUER COURT.

See PETITION OF RIGHT.

Semble, per Strong, J., there is nothing in section 63 of the Supreme and Exchequer Court Act, confining appeals from the Exchequer Court to a recourse against final judgments only, the word used being "decision," which is applicable as well to rules and orders not final as to final decisions. *Danjou v. Marquis*, 3 S. C. R. 251.

Where, by a letter addressed to the suppliant, the secretary of the public works department stated, that he was desired by the minister of public works to offer the sum of \$3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the crown for security for costs was refused, on the ground that the power of ordering a party to give security for costs, being a matter of discretion and not of absolute right, the crown in this case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. Application for security for costs in this court must be made within the time allowed for filing statement in defence, except under special circumstances. *Wood v. The Queen*, 7 S. C. R. 631.

A statement of claim was filed by the Attorney-General for the province of Ontario in the Exchequer Court of Canada, praying "that it may be declared that the personal property of persons domiciled within the province of Ontario, dying intestate and leaving no next of kin or other person entitled thereto other than Her Majesty, belongs to the province or to Her Majesty in trust for the province." The Attorney-General for the Dominion of Canada in answer to the statement of claim made, prayed that "it be declared the personal property of persons who have died intestate in Ontario since confederation, leaving no next of

kin or other person entitled thereto except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada." No reply was filed, and on an application to Mr. Justice Gwynne in chambers for a summons for an order to fix the time and place of trial or hearing, the summons was discharged on the ground that the case did not present a proper case for the decision of the court. A motion was then made before the Exchequer Court, Sir W. J. Ritchie, presiding, by way of appeal from the order of Mr. Justice Gwynne, for an order to fix the time and place of trial. The motion was dismissed without costs, on the ground that he was not prepared to interfere with the order of another judge of the same court. On appeal to the full court:—Held, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect. *Attorney-General of Ontario v. Attorney-General of Canada*, 14 S. C. R. 736.

## EXECUTION.

### I. IMMEDIATE EXECUTION, 691.

### II. TIME OF ISSUING, 691.

### III. FIERI FACIAS (GOODS).

1. *Time of Operation*, 692.
2. *What Amounts to a Seizure*, 692.
3. *Property Liable to Seizure*, 692.
4. *Partnership Property*, 693.
5. *Sale of Stock*, 693.
6. *Return of*, 693.
7. *Liability of Execution Creditor*, 694.
8. *Conflicting Claims* — See INTERPLEADER.

### IV. FIERI FACIAS (LANDS).

1. *Issue of*, 694.
2. *Property Liable to Seizure*.  
(a) *Equitable Interests*, 694.  
(b) *Other Cases*, 695.
3. *What Amounts to a Seizure*, 697.
4. *Sale Under*.  
(a) *Advertisement*, 697.  
(b) *Other Cases*, 697.

### V. VENDITIONI EXPOSAS, 698.

### VI. EQUITABLE EXECUTION—RECEIVER, 698.

### VII. SEQUESTRATION, 700.

### VIII. OTHER WRITS OF EXECUTION.

1. *Attachment*—See ABSCONDDING DEBTOR.
2. *Capias*—See ARREST.
3. *Distress*—See DISTRESS.
4. *Writ of Assistance*—See EJECTMENT.
5. *In Division Courts* — See DIVISION COURTS.

### IX. AMENDMENT, 701.

### X. RENEWING WRITS, 702.

### XI. SETTING ASIDE EXECUTIONS, 702.



## XII. STAYING EXECUTION, 703.

## XIII. ABANDONMENT, 703.

## XIV. PRIORITY OF EXECUTIONS.

1. *Generally*, 703.
2. *Creditors' Relief Act*, 705.
3. *Against Assignments* — See BANKRUPTCY AND INSOLVENCY.
4. *Landlord's Claim for Rent* — See SHERIFF.

XV. EXECUTIONS AGAINST MARRIED WOMEN  
— See DOWER — HUSBAND AND WIFE.

## XVI. CHARGING IN EXECUTION — See PRISONER.

## XVII. SHERIFF'S DUTY AND LIABILITY — See SHERIFF.

## I. IMMEDIATE EXECUTION.

Where it appears the defendant has no defence, and has made, or is intending to make a fraudulent disposition of his property, or is so dealing with it as to embarrass the plaintiff in reaching it by execution, the court will, on motion, under Rule 324, (Con. Rule 744), upon a proper case being made, order judgment and immediate execution. In the event of other executions being obtained against the debtor's property before the time at which the plaintiff would be entitled to issue executions as on a judgment in default of appearance, and the amount realized being insufficient to satisfy all parties, a ratable division should be made. *Kinloch v. Morton*, 9 P. R. 38. — Osler.

## II. TIME OF ISSUING.

When a decree ordered payment forthwith after the making of a report, an execution issued before the report had been filed was set aside with costs: — *Semble*, the report did not require confirmation under the decree. *Jellett v. Anderson*, 8 P. R. 387. — *Hodgins, Referee*.

An execution issued on the same day that a judgment in default of appearance, contrary to Order 9, Rule 4, (Con. Rule 705), is signed, is an irregularity only, and not a nullity. *Macdonald v. Crombie*, 2 O. R. 243. — Q. B. D.

As to the time of issuing execution against Mutual Insurance Companies. See *Lowson v. Canada Farmers' Mutual Ins. Co.*, 8 A. R. 613. Reversing *S. C.*, 9 P. R. 185, and overruling *Lount v. Canada Farmers' Ins. Co.*, 8 P. R. 433.

*Quere per Rose J.*, whether there is any period fixed by the statute beyond which the court may not have the power to allow execution to be issued. *McCullough v. Sykes*, 11 P. R. 337.

The plaintiffs recovered judgment against the defendants, sued as a partnership firm, by default of appearance, after service of the writ of summons upon M., a member of the firm, and then moved under Con. Rule 876 for leave to issue execution upon such judgment against D., as a member of the firm, who had appeared. D. disputed his liability, but upon his cross-examination upon an affidavit filed on the motion, such facts appeared as convinced the master in chambers that he was a general partner, and he

made the order asked for. The master: — Held, that the admissions of D. in his cross-examination justified the order under Con. Rule 756, and avoided the necessity of sending an issue to be tried under Con. Rule 876: — Held, also, that Con. Rule 756 was applicable at this stage of the cause, i. e., after judgment obtained without pleadings. *Tennant & Co. v. Manhard & Co.*, 12 P. R. 619. — *Dalton, Master*.

## III. FIERI FACIAS (GOODS).

1. *Time of Operation*.

A sheriff received two executions against one M.'s goods, on the 18th January, and 15th February, respectively. He made a formal seizure on the delivery of the first writ, but left no one in possession, and the execution debtor remained in possession, and carried on his business as before the seizure. There had been a stay on this writ by the solicitor for the execution creditor, but on the delivery of the second writ the sheriff was directed to proceed on both. On the 6th of March, the goods, consisting of the whole of the execution debtor's stock-in-trade, were sold by the execution debtor to the plaintiffs, who removed them to their own place of business. On 22nd March, the sheriff seized all the goods then in the plaintiffs' possession, which he had received from the execution debtor, as also certain goods of the plaintiffs' which he claimed to take in lieu of goods received from the execution debtor and sold by plaintiffs. The sale to the plaintiffs was found to be bona fide, and for value, and without notice of the executions. In replevin for the goods: — Held (Wilson, C. J., dissenting), that the sheriff was entitled to the goods of the execution debtor then in plaintiffs' possession; but not to the goods taken by the sheriff in lieu of those sold by the plaintiffs: that there was no abandonment of the executions, nor any such conduct on the part of the sheriff or the execution creditor as to estop them from asserting that the executions were in force. On the sheriff making his seizure on the 22nd March, the plaintiff gave him an undertaking to answer for all goods sold by him thereafter, if the sheriff should be held entitled to the goods: — Held, under a counter-claim setting up this undertaking the sheriff was entitled to recover the value of the goods sold by the plaintiffs after the 22nd March, and before the issue of the writ of replevin. *Patterson v. McKellar*, 4 O. R. 407. — C. P. D.

2. *What Amounts to a Seizure*.

As to what constitutes a valid seizure under a condition in a policy of insurance, providing that if the insured property should be levied upon or taken into possession or custody under any legal process the policy should cease to be binding. See *May v. Standard Fire Ins. Co.*, 5 A. R. 605.

See *Pardee v. Glass*, 11 O. R. 275, p. 343.

3. *Property Liable to Seizure*.

Shares in ship. See *Trerice v. Burkett*, 1 O. R. 80.

Indivisible chattel. See *Gunn v. Burgess*, 5 O. R. 685; *Re McDonagh v. Jephson*, 16 A. R. 107.

Shares of company may be sold by Act, R. S. O. s. fa. good pleader under R. S. O. (18) the stock is R. 421. — D.

A trader, in the hands of creditors of the plaintiff, the realty and the assignor joined in the writ to or knowledge Held, affirming the Court, that the execution debtor was a trustee for the plaintiffs, and that the sheriff was entitled to the goods of the execution debtor, his assent was not necessary. *Cook*.

In a suit by a partner against a partner, the taking of the goods for a continuing account for that purpose obtained judgment against the partner of these proceeds and was a partnership property, that the plaintiff in the province and that the plaintiff also, that the parties for *Young v. H.*

Sale of antique by a co-owner.

Execution against a member of Toronto v.

See *Lond. Co. v. Morp.* *Re McDonagh*.

Where a sale of goods were seized neither the sale required separately, amount far which the such sale is collusion with and *Passum* S. C. R. 31.

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Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. (1877), c. 86, by a sheriff under a f. fa. goods, and he is entitled to an interpleader under section 10 of the Interpleader Act R. S. O. (1877), c. 54, where an adverse claim to the stock is advanced. *Brown v. Nelson*, 10 P. R. 421.—*Dalton, Master*—Cameron.

A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shewn:—Held, affirming the judgment of the County Court, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor; but—*Semble* (per Patterson, J. A.), that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable. *Cooper v. Dixon*, 10 A. R. 50.

#### 4. Partnership Property.

In a suit by an infant partner against his co-partner praying for dissolution, receiver, reference, etc., after a decree pro confesso, and during the taking of the accounts under an agreement for a continuance of the partnership business for that purpose—certain creditors of the firm obtained judgments and executions at law against the partner of the infant who was not informed of these proceedings until the sheriff had seized, and was about to sell, the whole of the partnership property:—Held, on motion for injunction, that the proceedings at law were not within the provisions of R. S. O. (1877) c. 123, s. 8, and that the sale should be restrained:—Held, also, that the execution creditors might be made parties for that purpose on motion simply. *Young v. Huber*, 29 Chy. 49.—Ferguson.

Sale of an indivisible chattel on execution against a co-owner. See *Gunn v. Burgess*, 5 O. R. 685.

Execution against the firm and against individual members of the firm. Priority. See *Bank of Toronto v. Hall*, 6 O. R. 653.

See *London and Canadian Loan and Agency Co. v. Morphy*, 10 O. R. 86, 14 A. R. 577, p. 701; *Re McDonagh v. Jephson*, 16 A. R. 107, p. 708.

#### 5. Sale of Stock.

Where a number of shares of railway stock were seized and advertised to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken into execution, such sale in the absence of proof of fraud or collusion was held good and valid. *Connecticut and Passumpsic Rivers R. W. Co. v. Morris*, 14 S. C. R. 318.

#### 6. Return of.

See *Molson's Bank v. McMeeken, Ex parte Sloan*, 15 A. R. 535, p. 545.

#### 7. Liability of Execution Creditor.

For maliciously issuing execution. See *Tuckett v. Eaton*, 6 O. R. 486.

The mortgagee of the chattels seized the mortgaged goods under an execution in a suit for the debt secured by the mortgage. The execution was set aside as being against good faith. In an action for the wrongful seizure and conversion of the goods:—Held, that the mortgagee could not justify the seizure under the mortgage. *Dedrick v. Ashdown*, 15 S. C. R. 227.

The defendants, who lived in Hamilton, had a claim against W. at Ingersoll, and thinking he was carrying on business on his own account issued a writ therefor through their solicitors C. & B. which was served by C. who went to Ingersoll under special instructions from defendants to do so, and to take such steps as they might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff who accordingly notified C. & B. C. & B. refused to accept this, and wrote the sheriff in effect that he had acted improperly in not seizing the goods, on ex parte statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods and applied for an interpleader order. The goods were proved to be the plaintiffs. In an action to recover damages occasioned by the seizure:—Held, that the sheriff must be assumed to have acted under the circumstances, under instructions from the defendants' solicitors, and as the solicitors were acting under special instructions from the defendants to take such proceedings as they might think best, the latter were liable to the plaintiff. *Smith v. Keal*, 9 Q. B. D. 340, distinguished. *Wilkinson v. Harvey*, 15 O. R. 346.—Rose.

#### IV. FIERI FACIAS (LANDS.)

##### 1. Issue of.

Held, (affirming the judgment of Ferguson, J., 7 O. R. 215) following *Doe d. Spafford v. Brown*, 3 O. S. 95, and *Ontario Bank v. Kirby*, 16 C. P. 35, decided under 43 Geo. III. c. 1, that the issue of an execution against lands before the return of an execution against goods is, under R. S. O. (1877), c. 66, an irregularity only, and not a void proceeding, the provision of both statutes being in effect the same. *Ross v. Malone*, 7 O. R. 397.—Chy. D.

See *Hillyard v. Swan*, 12 P. R. 226.

##### 2. Property liable to Seizure.

###### (a) Equitable Interests.

Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:—Held, that the sale was inoperative; that the owner of the equity of redemption had a right to redeem; and that the purchaser at the sheriff's sale, who was also the mortgagee, having gone into possession of the mortgage

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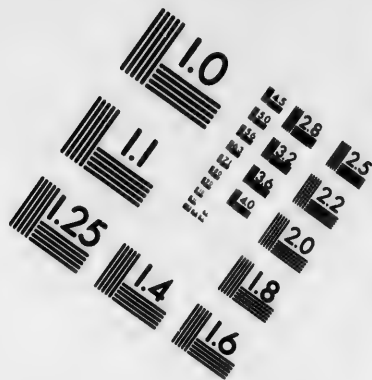
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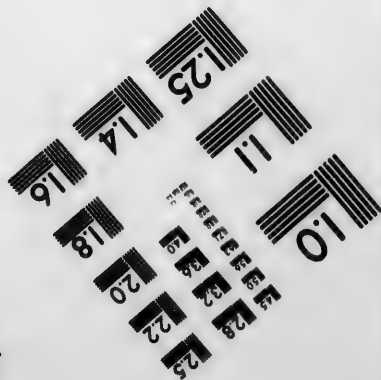
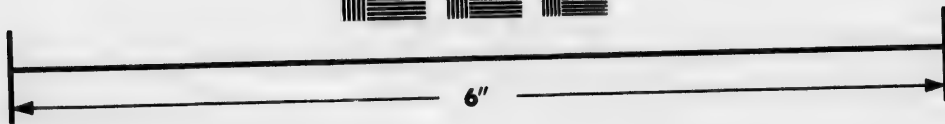
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estate, was bound to account for the rents and profits. *Cronn v. Chamberlin*, 27 Chy. 551.—Sprague. See *Wood v. Hurl*, 28 Chy. 146.

Where R. assigned a mortgage to M. to secure payment of two notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a re-assignment thereof to R. until not only the amount due on the notes, but also the balance due on the mortgage was paid:—Held, that R. was entitled to a re-assignment on payment of what was due on the notes only, for the plaintiff's interest in the mortgage was not properly exigible by the sheriff under R. S. O. (1877), c. 66. *Ross v. Simpson*, 23 Chy. 552, distinguished. *Rumohr v. Marx*, 3 O. R. 167.—Ferguson.

Trustees under the will of F. S., holding certain lands by virtue thereof on trust to sell as soon as conveniently might be after her decease, and distribute the proceeds among her children, one of whom was D. V. L., contracted to sell the said lands to one H. T. There were at the time writs of fieri facias in the sheriff's hands against the lands of D. V. L., some of which had been placed therein before the date of the said contract:—Held, nevertheless, that the said writs did not form any incumbrance on the lands in the hands of the trustees so as to prevent them conveying the same to a purchaser indefectibly, and that any share of the purchase money which D. V. L. was entitled to he would get as personal, not as real estate:—Held, also, that the purchaser was not bound to see to the application of the purchase money. *Re Lewis and Thorne*, 14 O. R. 133.—Boyd.

Held, that Con. Rule 1008, notwithstanding the heading "Summary Inquiries into Fraudulent Conveyances," is not limited to cases of equitable interests arising under fraudulent conveyances, but applies to a case where a judgment creditor is seeking to make available the interest of his debtor under an agreement for the purchase of land. A reference was directed to ascertain what interest the debtor had in the land in question. *Wood v. Hurl*, 28 Gr. 146, not followed owing to the change in the law by Con. Rule 5. *Peters v. Stoness*, 13 P. R. 235.—Galt.

#### (b) Other Cases.

Execution against husband and wife.—Separate Estate.—Tenancy by entireties. See *Griffin v. Patterson*, 45 Q. B. 536.

The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported. *Freed v. Orr*, 6 A. R. 690.

G. obtained a loan of \$3,700 through R., from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for \$7,500, and had paid \$4,000 cash, and wanted the loan to pay the balance with, and on the receipt of the loan paid W. the \$3,000, which was the total

purchase money for the 220 acres; and another parcel of about fifty acres, and was the full value of both parcels. G. got the conveyance from W. of both parcels, and conveyed the 220 acres to R. to carry out the scheme, and retained the fifty acres himself. In an action by the plaintiffs it was:—Held, that on the conveyance of the fifty acres being executed to G., the land immediately became the property in equity of the plaintiffs. That the land was not subject to the claims of certain execution creditors of G., whose fi. fas. were in the sheriff's hands. But that a mortgage on the fifty acres made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage money was paid,) as the mortgagee was no party to the action. *Hamilton Provident and Loan Society v. Gilbert*, 6 O. R. 434.—Ferguson.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was before the Married Woman's Property Act, 1884, was passed:—Held, reversing the judgment of Osler, J. A. (6 O. R. 581), that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but was property falling within R. S. O. (1877), c. 125, s. 3, and she not having the jus disponendi without her husband's concurrence, her interest was not liable to be sold under execution against her. *Douglas v. Hutchison*, 12 A. R. 110.

Quere, per Patterson, J. A., whether a writ of fieri facias is the appropriate remedy for reaching the separate property of a married woman. *Id.* See, however, *Beemer v. Oliver*, 10 A. R. 656, 661, per Osler, J. A. See 50 Vict. c. 8.

The defendant was locatee of certain lands under the Free Grants and Homesteads' Act, R. S. O. (1877), c. 25, and duly obtained patents therefor. Afterwards he and his wife sold and conveyed parts of the land, he taking back mortgages to secure the purchase money:—Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of section 20, sub-section 2. The exemption extends to the land or any part thereof or interest therein so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him qua locatee. The word "interest" used in the sub-section does not extend to the chattel interest of a mortgagee. *Cann v. Knott*, 19 O. R. 422.—Boyd.

D. (respondent) proprietor of a lot in Montreal sold it to C. et al. In 1879 C., who had acquired the interest of his co-owners retroceded the lot in question to D. In July, 1884, the sheriff of the district at the instance of J. M. D. et al. (appellants) judgment creditors of C. seized, sold and adjudicated the lot in question to G. et al., who paid the adjudication and obtained a sheriff's title to the lot in question. D. did not register her deed of retrocession until 3rd October, 1884, being a date subsequent to the seizure and sale by the sheriff, but prior to the registration of the deed from the sheriff. Thereupon D. by a petition en nullité en décret prayed that the seizure, sale, adjudication and sheriff's title be set aside and declared null as having been made super non domino. At the

trial it was proved of retrocession in question and was in possession the time of the sale and in the made super non sheriff's title was Taschereau J. 2091 C. C. referred cannot be involved of retrocession *freane v. Dixon*

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See Robinson

Where an action by a sheriff under the sheriff had title, and that the judgment of sale:—Held, that was not necessary fine more parties or interest to R. 226.—Ferguson

See Daby v.

P. created the portions of his estimated as valances amount of the mortgage M., who subscribed the other two of these mortgages the whole property title set up to made in payment of judgment, under it the sale so acquired to a sale of the distinct parcels purchaser of a to \$20. The bill to redeem been at a gross the same set as the relief asked that the deed the price real was a sheriff Chy. 521.—Boyd

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trial it was proven that from the date of the deed of retrocession D. had been assessed for the lot in question and paid taxes thereon, and that it was in possession of one McA. as her tenant at the time of the seizure:—Held, that the seizure and sale in the present instance having been made super non domino et non possidente, the sheriff's title was null. Art. 632 C. C. P. Per Taschereau J.: The provisions of Arts. 2090 and 2091 C. C. refer to a valid seizure and sale and cannot be invoked against the registration of the deed of retrocession by the respondent. *Dufresne v. Dixon*, 16 S. S. R. 596.

### 3. What Amounts to a Seizure.

See *Robinson v. Bergin*, 10 P. R. 127, p. 5.

### 4. Sale Under.

#### (a) Advertisement.

Where an advertisement of the sale of lands by a sheriff under writs of execution, stated that the sheriff had seized and taken them in execution, and that they or the right and interest of the judgment debtor therein would be offered for sale:—Held, that this was sufficient, and that it was not necessary for the advertisement to define more particularly the nature of the estate or interest to be sold. *McGee v. Kane*, 14 O. R. 226.—Ferguson.

See *Daby v. Gehl*, 18 O. R. 132, p. 698.

#### (b) Other Cases.

P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth \$6,000, subject to incumbrances amounting to \$3,500 and interest. One of the mortgages was in favour of the defendant M., who subsequently acquired the interests of the other two mortgagees. After the creation of these mortgages, P. executed a deed of trust of the whole property in order to defeat a claim of title set up to ten acres by one S. Default was made in payment of M.'s mortgage, who recovered judgment, on which he sued out execution, and under it the sheriff (after the defendant M. had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and M. bid for and became the purchaser of all at sums amounting in the whole to \$20. The cestui que trust thereupon filed a bill to redeem, alleging that the sale to M. had been at a gross undervalue, and praying to have the same set aside; the court, however, refused the relief asked with costs, being of opinion that the deed of trust was fraudulent, and that the price realized was large, considering that it was a sheriff's sale. *Parr v. Montgomery*, 27 Chy. 521.—Blake.

Lands were sold under a fi. fa. lands after the expiry of the year, and a deed executed to the grantor of the plaintiff by the sheriff which recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books shewed any such renewal:—Held, that no renewal was proved, and the sale was invalid. Subsequently, an ordinary writ of fi. fa. lands was issued on the judgment, a sale was made

and a deed to the plaintiff executed by the sheriff:—Held, that the fact of an ordinary fi. fa. lands being issued instead of an alias fi. fa. and the advertisement being as if the proceedings were initiatory proceedings towards effecting a sale of the defendant's lands, would not of itself invalidate the sale. *Daby v. Gehl*, 18 O. R. 132.—C. P. D.

In 1886, one of the defendants commenced an action against the present plaintiff and others, to set aside the sheriff's first deed, which was dismissed for want of prosecution:—Held, that the said defendant was not thereby stopped from setting up the invalidity of the sheriff's sale. Held, also, that, under the circumstances, the defendants could not set up that the proceedings under the expired writ constituted a payment of the execution debt. Bank of Upper Canada v. Murphy, 7 Q. B. 328, distinguished. *Ib.*

### V. VENDITIONI EXPOS.

Sheriff's sale under ven. ex. Procès verbal, what it should contain. Art. 638, C. C. P. See *Montreal Loan and Mortgage Co. v. Fautenz*, 3 S. C. R. 411.

### VI. EQUITABLE EXECUTION—RECEIVER.

Plaintiff claimed a debt of \$200 from the defendant. Defendant did not appear. The only property the defendant owned was the equity of redemption in certain lands, on which there were two mortgages, one held by the plaintiff, the other outstanding in other hands. On application of plaintiff for judgment for \$200 and interest, and for a decree for sale of the equity of redemption:—Held, on the authority of *Karr v. Styles*, 26 Chy. 309, that the plaintiff could have judgment as asked, notwithstanding that in this case there were no fi. fas. in the sheriff's hands. *Johnson v. Bennett*, 9 P. R. 337.—Ferguson.

Held, that in the appointment of a receiver the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well established principles, and in that sense only can a receiver be said to be ex debito justitiæ whether the application be interlocutory or made at the hearing, whether the appointment of the receiver is the sole object of the action or only incidental to other relief, and whether the relief is sought at the instance of a judgment creditor, or of any one else, and the court will not appoint a receiver by way of equitable execution upon the ground that it will do no harm unless there is reason to suppose that there is something to receive in which the plaintiff can be interested. In this case the court affirmed the judgment of Ferguson, J. (8 O. R. 256), refusing the appointment of a receiver. *Smith v. Port Dover and Lake Huron R. W. Co.*, 12 A. R. 288.

The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of the sale of such estate when made by the trustees, is not attachable under Rule 370 O. J. A. (Con. Rule 935) relating to the attachment of debts. It is only a debt legally or equitably due or accruing due, that is to say, debitum in



presenti solvendum in futuro, which is capable of attachment; moneys which may or may not become payable by a trustee to his cestui que trust are not debts. The case of *Leaming v. Woon*, 7 A. R. 42 is not to be followed, being founded on *Re Cowan's Estate*, 18 Ch. D. 638, which is now overruled by *Webb v. Stenton*, 11 Q. B. D. 530. Judgment of *Ferguson, J.* (15 O. R. 66), reversed. The proper course in such a case is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of fi. fa. against goods or lands. *Stuart v. Grough*, 15 A. R. 299.

After an order to pay over had been made upon a garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this the garnishees subsequently without further compulsion or threat of execution paid the money to the attaching creditor without moving against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so:—Held, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over and the garnishees from disposing of the money when received by them (otherwise than by paying it to the receiver), without leave of the court. *Ib.*

The effect of the appointment of a receiver upon the rights of an attaching creditor considered *Hawkins v. Gathercole*, 1 Drew. 12; *Ames v. Birkenhead Dock Co.*, 20 Beav. 332, acted on. *Ib.*

Under the Judicature Act the court has power to award equitable execution after judgment in any and every case where it is just and convenient to do so. Where writs of execution had issued, but had not become exigible against the lands (subject to mortgages) of a judgment debtor possessing no personality, and who was collecting the rents and paying other creditors, a receiver of the property was appointed by way of equitable execution to collect the rents subject to the rights of the mortgagees, and to apply them for the benefit of creditors under the Creditors' Relief Act. In such a case the receiver should be an officer of the Court. *Kirk v. Burgess*, 15 O. R. 608.—*Boyd*.

A motion for the appointment of a receiver by way of equitable execution is properly made in court, notwithstanding the language of the O. J. Act, section 17, sub-section 8, and Rule 399 (Con. Rule 1134), and the applicant will not be restricted to the costs of a chamber motion. *Kincaid v. Kincaid*, 12 P. R. 462.—*Ferguson*.

A judgment for \$212.60 is not too small to justify the judgment creditor in moving for a receiver. *Ib.*

It is no answer to such a motion that the judgment creditor could probably make the amount of his judgment out of the defendant by the sale under common law process of other property of the defendant than that sought to

be reached by the appointment of a receiver. *Ib.*

Judgment creditors on the 7th December, 1888, moved for a receiver by way of equitable execution to receive money which they alleged would be due to the judgment debtor on the 21st December, 1888, for salary as a schoolmaster:—Held, that if the debt was one which could be garnished, the judgment creditors should attach it; if it could not be garnished, it was because there was no debt at all. *Kincaid v. Kincaid*, 12 P. R. 462, distinguished. *Trust and Loan Co. v. Gorsline*, 12 P. R. 654.—*Street*.

#### VII. SEQUESTRATION.

On moving for a writ of sequestration for a breach of an injunction, two clear days' notice of motion is sufficient. *Cook v. Credit Valley R. W. Co.*, 8 P. R. 167.—*Blake*.

Held, that a writ of sequestration could not issue under Rule 339, (Con. Rule 862), on an ordinary common law judgment for a debt recovered before the passing of the Judicature Act, it not being an order for payment of a specific sum, and no day named for payment in it. *London and Canadian Loan and Agency Co. v. Merritt*, 32 C. P. 375.—*C. P. D.*

The property sought to be sequestered, was property in the hands of five trustees under a will. Two of the trustees, one of whom was the judgment debtor and took a life interest in part of the property, resided within the jurisdiction, the other trustees resided out of the jurisdiction in St. John, N. B.:—Held, that service of a notice of motion founded on such writ of sequestration on such non-resident trustees was sufficient, though a judgment or decree founded upon it would not avail the plaintiffs in the courts of New Brunswick. *Ib.*

Semble, that under a writ of sequestration a debtor's choses in action can be reached. *Ib.*

Where an injunction is ordered at the hearing of a cause and the parties enjoined give the security required by R. S. O. (1877), c. 38, s. 26, pending an appeal to the Court of Appeal, all proceedings to enforce the injunction are by virtue of section 27 of that Act thereupon stayed, and a writ of sequestration cannot therefore be obtained pending the appeal on the ground of non-compliance with the injunction. *Dundas v. Hamilton and Milton Road Company*, 19 Chy. 455 followed, and preferred to *McLaren v. Caldwell*, 29 Chy. 438. *McGarvey v. Town of Strathroy*, 6 O. R. 138.—*Proudfoot*.

The plaintiffs, having recovered a judgment against the defendants for a large sum, obtained an order from a judge in chambers ordering defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against defendants' goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made a writ of sequestration issued accordingly:—Held, that though the writ could not have issued to enforce the judgment, which was for the payment of money, without limiting a time certain, yet that the judge's order was a judgment for disobedience of which the writ

might issue, as issued. *London Co. v. Morphy*.

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An order wa bers amending executrix, so a her personally fi. fa. in the st

might issue, and that the writ was regularly issued. *London and Canadian Loan and Agency Co. v. Morphy*, 10 O. R. 86.—Wilson.

Defendants were members of the Toronto Stock Exchange (a corporation), and had seats at the stock board thereof, shown to be of considerable value, and to be saleable by the defendants on compliance by them with certain by-laws of the corporation, which, among other things, provided for a written application to the exchange by any member wishing to sell his seat, for leave to sell, submitting at the same time the name of the proposed purchaser, and if the purchaser was in such a case acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the Stock Exchange could not, under the by-laws, be admitted a member unless he had been previously a stock broker, resident, doing business publicly as such, in Toronto, for at least six months previously to his application, and had upon his own application been accepted by the exchange as a member, the vote for his acceptance to be by ballot, and one black ball in five, or a portion of five, to exclude. After being accepted he might purchase a seat from some one already a member, or pay an entrance fee of \$4,000 to the exchange, and by such payment create a seat for himself. The total number of seats on the board was limited to forty whereof thirty-three were taken up by the thirty-three members of the Exchange. The sequestrator having applied for an order under the writ of sequestration to sell the defendants' seat at the exchange:—Held, that although such seats were the property of the debtor and should be saleable under process, and the court could implement its execution by ordering the defendants to do any act necessary to effect, or to refrain from any act to obstruct, the sale of the seats; yet that inasmuch as the court could not control the exercise of the ballot by the members of the exchange, no effectual order for sale of the seats could be made: the application was, refused, without costs. Remarks on the desirability of legislation to extend the operation of the writ of sequestration to meet such cases. *Id.*

On the argument in appeal it was made to appear that M. had paid off the judgment of the plaintiffs, and was carrying on the appeal for the purpose of obtaining the seat owned by N. This court, under the circumstances, and aside from the fact that the ultimate completion of title to a purchaser could only be effected by the contingent co-operation and assent of the stock exchange, as provided by its by-laws, affirmed the judgment appealed from without prejudice to any right M. might have to procure himself to be substituted for the plaintiffs. *S. C.*, 14 A. R. 577.

Attachment not sequestration is the proper remedy for disobeying a mandamus. *Demorest v. Midland R. W. Co.*, 10 P. R. 82.—Wilson.

#### IX. AMENDMENT.

An order was made by the master in chambers amending a judgment entered against C. as executrix, so as to make it a judgment against her personally, and also amending the writs of *fi. fa.* in the sheriff's hands so as to be conform-

able with the judgment as amended. The order was made *nunc pro tunc* upon the allegation that all parties interested had consented, and that an execution at the suit of the M. Co. against C. personally had expired. On an application made by the M. Co. to set aside the order, on the ground that their writ had not expired, but was in full force; and that the effect of the amendment was to give plaintiffs' writ priority, the master made an order setting aside his previous order, and directing the amendments made thereunder to be struck out. On motion by way of appeal to the Divisional Court to rescind the last named order:—Held, Cameron, C.J., dissenting, that the motion must be refused; for that though the M. Co. were strangers to the action in which the amendments were made, they had a *locus standi* to apply to have same set aside. *Glass v. Cameron*, 9 O. R. 712.—C. P. D.

See *Hillyard v. Swan*, 12 P. R. 226.

#### X. RENEWING WRITS.

Writs of execution were issued on the 12th December, 1881, in Toronto, and forwarded to the sheriff of an outer county. On the 9th December, 1882, the plaintiff wrote to the sheriff to forward the writs for renewal, and on the 11th December telegraphed him to the like effect and he replied that he had just mailed them. On the same day the plaintiff filed a *precipe* requiring the renewal. The writs were received on the 12th December. On an application for an order for leave to renew *nunc pro tunc* it was held that the delay was not the fault of the sheriff or other officer of the court, and that there was no power to make the amendment. *Lowson v. Canada Farmers' Mutual Ins. Co.*, 9 P. R. 309.—Dalton, Master.

Con. Rule 894 providing for the renewal of writs of execution necessarily intends the removal in each case of the writ out of the actual possession of the sheriff for the purpose of such renewal. This is an exception to the general rule, and the time during which a writ may for the purposes of renewal be kept out of the hands of the sheriff without interference with the right of priority is commensurate with the time reasonably necessary to effect the renewal; but the exception cannot be made to extend so as to cover mistakes, never so honestly made, the consequence of which is a failure to replace the writ in the hands of the sheriff for so long a period as six or seven months. And where H. placed a writ of *fi. fa.* lands in the hands of a sheriff in November, 1883, and renewed it from year to year till October, 1886, when he removed it for the purposes of renewal only, and by mistake did not replace it till April, 1887:—Held, that he had lost his priority over L., a mortgagee, whose mortgage was registered against the land of the execution debtor in July, 1885; and it made no difference that no new rights had in the meantime intervened. *Re Hime and Ledley*, 13 P. R. 1.—Ferguson.

See *Daby v. Gehl*, 18 O. R. 132, p. 698.

#### XI. SETTING ASIDE EXECUTIONS.

The plaintiff filed his bill on the 14th March, 1874. On the 31st of the same month an attach-

ment in insolvency was issued by defendant against plaintiff. The decree dismissed the plaintiff's bill with costs, in October, 1874. The defendant proved against the estate for the costs of the suit, but did not take his dividend, and took no further steps to recover his claim until after the order for discharge of plaintiff (25th May, 1877), when he issued execution. On the application of the plaintiff, Spragge, C., refused to set aside the execution, holding that defendant was entitled to issue it, and that the proving against the estate for the costs when it was not legally provable, did not operate as an estoppel in pais between the plaintiff and defendant. *Stevenson v. Sexsmith*, 8 P. R. 286.

See *Jellett v. Anderson*, 8 P. R. 387, p. 691.

### XII. STAYING EXECUTION.

The plaintiff on the sale of certain lands to the defendant R., left in her hands a sum of \$200 of the purchase money as security against an execution in another action then in the hands of the sheriff against the plaintiff's lands. Subsequently the plaintiff appealed in that action, and on doing so gave a bond with sureties conditioned to pay the debt and costs:—Held, reversing the judgment of the court below, that the perfecting and allowance of such security operated as a supersedeas of the writ of execution, not as a stay thereof merely, and that the plaintiff was therefore entitled to recover the balance of the purchase money from R. *O'Donohoe v. Robinson*, 10 A. R. 622.

### XIII. ABANDONMENT.

When a sheriff, having seized goods of sufficient value to satisfy the plaintiff's execution, abandons them on being indemnified he should not get the benefit of any doubt which may be raised as to their realizing enough if sold. *Donnelly v. Hall*, 7 O. R. 581.—Q. B. D.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ, that he had seized the goods. The sheriff subsequently seized the goods under execution of the creditors. In an action against the sheriff:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it were the sheriff was estopped by his return to the writ from raising the question:—Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment. *Duffus v. Crichton*, 14 S. C. R. 740.—Spragge.

See *Patterson v. McKellar*, 4 O. R. 407, p. 692.

### XIV. PRIORITY OF EXECUTIONS.

#### 1. Generally.

The common law right as to the priority of an execution creditor of a lunatic, who has an exe-

cution in the hands of the sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ. *In re Grant*, 28 Chy. 457.—Spragge.

R. & E. were partners in business, and became financially involved. L., R. & Co. obtained a judgment against the firm for a firm debt, and placed the execution in the sheriff's hands, with a direction to levy of the goods of R. Subsequently the plaintiffs obtained a judgment against R. and E. individually and as members of the firm, and placed their execution in the sheriff's hands. The sheriff made the greater part of the amount of the plaintiff's execution out of the assets of the firm, and returned it "nulla bona" as to the residue, although, while the plaintiff's execution was in his hands, he had sold the furniture of R., being his individual property, and applied the proceeds upon the execution of L., R. & Co., which was first in his hands; and notwithstanding that the plaintiff's solicitor had notified him that the plaintiffs claimed the proceeds of the furniture as applicable to their execution only:—Held (reversing the judgment of Proudfoot, J., 6 O. R. 644), Proudfoot, J., dissenting, that the plaintiffs could not recover against the sheriff for a false return; that the property of the individual partners was liable on a judgment against the firm; and that the plaintiffs were not entitled to priority over the first execution, because their judgment was against the partners as individuals as well as members of the firm. Per Proudfoot, J., the rule that the joint estate is for joint creditors, and the separate estate for separate creditors, is not confined to cases of bankruptcy and the administration of assets on the decease of a partner, and there are various ways in which the question may be raised in equity. Although it may be proper enough to give a creditor the benefit of his diligence, where the contest is between several creditors of the same debtor, with no equity arising from the nature of the property taken in execution, or from the nature of the rights involved, no such preference should be given where it works the injustice of depriving the separate creditor of the benefit of the property of his debtor. By the effect of the Judicature Act all distinction between legal and equitable debts and legal and equitable remedies is abolished. Debts of every kind are now recoverable in one forum, and the same forum enables creditors to reach every kind of assets, whether formerly legal or equitable, and the necessary result is, that the distinction between legal and equitable assets is at an end, and upon this subject the rules of law and equity being at variance, the latter are to prevail. *Bank of Toronto v. Hall*, 6 O. R. 653.—Chy. D.

The plaintiff was tenant in common with the defendants, and was proved to have received more than his proper share of the rent. The defendants claimed against the plaintiff's share of the land for the excess of the rent received by the plaintiff. There were executions in the sheriff's hands, and the execution creditors had come in under the decree in the cause:—Held, that the defendant's claim being simply for a debt for which an action might be brought, there was no actual charge until a judgment was obtained. That the execution creditors did not

lose their priority and were not to be treated as if that the order of the defendants' priority was Pherson, 10

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lose their priority by coming in under the decree, and were entitled to have it maintained. And that the case was not varied by some of the defendants being infants. *McPherson v. McPherson*, 10 P. R. 140.—Proudfoot.

See *Kinloch v. Morton*, 9 P. R. 38, p. 691; *Darling v. Smith*, 10 P. R. 360, p. 6; *Robinson v. Bergin*, 10 P. R. 127, p. 5; *Coursolle v. Fookes*, 16 O. R. 691; *Re Hime and Ledley*, 13 P. R. 1, p. 702; *Cole v. Hall*, 12 P. R. 584; 13 P. R. 100.

## 2. Creditors' Relief Act.

The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario, on the 6th December, 1884. The sheriff seized the defendant's goods on the 8th December. The defendant made a mortgage of his goods to D. on the 9th December. B. placed a second execution against the defendant in the hands of the sheriff on the 22nd December. On the 31st December the mortgagee D. paid to the sheriff the whole amount of the first execution, \$115, specially appropriating the payment to that execution:—Held, that the money paid to the sheriff was not levied by him within the meaning of the Creditors' Relief Act, 43 Vict. c. 10 (Ont.), and that the first execution creditor was entitled to the whole of it. *Davies Brewing and Malting Co. v. Smith*, 10 P. R. 627.—Dalton, Master.—Rose.

Since the coming into force of the Creditors' Relief Act of 1880, March 25th, 1884, execution creditors who obtain stop orders on funds in court, do not obtain any priority thereby, but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors, they must have the same right with regard to funds in court as they would have with regard to funds in the sheriff's hands, and in any case where an execution creditor obtains a stop order, there must be a reference to the master to ascertain if any other creditors desire to ask a share of the fund. *Davison v. Moffatt*, 11 O. R. 484.—Chy. D.

Held, affirming the judgment of the county court of Perth, that the creditor under whose execution an amount in the hands of a sheriff for distribution under the Creditors' Relief Act, 1880, was levied, and which was insufficient to pay all claims in full, was not entitled to priority of payment of the costs of obtaining a judgment and execution. *Porteous v. Myers*, 12 A. R. 85. See R. S. O. (1887), c. 65, s. 26.

The plaintiffs obtained execution against one D., under which a seizure was made, when the defendant and another party made claim to the goods under a chattel mortgage, in consequence of which the usual interpleader order was issued, and default having been made in payment into court, or giving security for the appraised value of the goods, the same were sold and the proceeds paid into court. The trial of the issue resulted in favour of the claimants, but on appeal the claim of the defendants was disallowed, and the demand of the other claimant was paid. Before the trial took place, the defendants placed an execution for the amount of their demand in the sheriff's hands against the goods of D. When

finally disposing of the matter, the judge of the County Court directed that the money in court should, after payment of certain costs, be paid out to the plaintiffs and defendants ratably, according to their respective claims under the Creditors' Relief Act, 43 Vict. c. 10 (Ont.). The plaintiffs thereupon appealed, and on the hearing, the court being equally divided the appeal was dismissed, with costs. Per Patterson and Osler, J.J.A. The moneys were properly distributable under the statute. Per Hagarty, C. J. O., and Burton, J. A. These moneys were not moneys "made or levied under execution," and therefore did not come within the provisions of the Act. *Reid v. Gowans*, 13 A. R. 501.

A sheriff had seized goods under writs of fi. fa. in his hands, when the goods were claimed by a chattel mortgagee. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into court, which was done. After the claim of the chattel mortgagee had been barred, a question arose as to the distribution of the money in court:—Held, that the seizure under the writs, together with the conversion into money by the sheriff under the order of the court, and the final barring of the claim of the chattel mortgagee, constituted a levying of the money under the writs by the sheriff, in the sense of section 5 of the Creditors' Relief Act, 1880, and therefore that the money in court should be distributed ratably, according to the provisions of that Act; but:—Held, also, upon a liberal construction of section 35 of 49 Vict. c. 16 (Ont.), that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to their costs of the interpleader as "costs of the execution" if they failed to recover them from the claimant. *Levy v. Davies*, 12 P. R. 93.—Dalton, Master.

One creditor cannot attack the judgment of another, and object to his sharing, pursuant to the Creditors' Relief Act, in the distribution of moneys levied by the sheriff under executions in his hands, on the ground that the note on which such judgment was recovered was misdescribed, and the date of its maturity was misstated in the writ of summons, in order to obtain judgment earlier than could otherwise have been done; the debtor not consenting or objecting to the recovery. *Bowerman v. Phillips*, 15 A. R. 679.

When the debt is bonâ fide, another creditor cannot object to the judgment merely because there was a defence which the debtor might have set up to the particular action. *Glass v. Cameron*, 9 O. R. 712; *Macdonald v. Boice*, 12 Chy. 48, distinguished. *Id.*

Whatever powers the Creditors' Relief Act may give to a creditor to contest the claim of another, it does not extend to the impeaching of a judgment by a summary proceeding before the county judge. *Id.*

Under an execution issued by the plaintiffs, the sheriff, whilst such execution was the only one in his hands, seized certain goods of the debtor, which were claimed by D., whereupon an interpleader summons was obtained by the sheriff which was argued before the chief justice of the Queen's Bench Division, who made an order barring the claimant, without any issue

being directed. This order did not state that the parties consented to a summary disposal of the matter, and the facts did not clearly appear. The sheriff proceeded and sold the property, and made an entry under the Creditors' Relief Act. The appellants and several other creditors delivered certificates to the sheriff within the proper time, who framed a scheme for the distribution of the money as if no interpleader proceedings had been had. On appeal from him, the County Court judge gave the whole fund to the plaintiffs, under sub-section 4 section 3 of the Creditors' Relief Act. On appeal from such order to this court, the appeal was dismissed, the court being equally divided. Per Burton and Pattinson, J.J.A.—As there was a contest between the execution creditor and claimant, and an adjudication in favour of the former, the proceedings which took place upon the interpleader summons came within sub-section 4 section 3 of the Act, and entitled the plaintiffs to the whole proceeds of the property, and the order appealed from was correct. Per Hagarty, C. J. O.—The circumstances of this case do not bring it within that section, and the appeal should be allowed and the moneys distributed as if no interpleader proceedings had been taken. Per Osler, J. A.—The order disposing of the interpleader summons was not a proceeding under the Interpleader Act, because it did not shew on its face the consent of parties to the summary disposition of the claim: but even if it was an interpleader proceeding, it was not within the mischief of the Act, which intended to provide only for the case where an issue had been directed. *Bank of Hamilton v. Durrell*, 15 A. R. 500.

The Creditors' Relief Act applies to execution creditors against lands in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale, after payment of the mortgage debt, interest, and costs. *Harvey v. McNeil*, 12 P. R. 362.—Boyd.

Semble, in the case of foreclosure, the old form of decree giving execution creditors as subsequent encumbrancers liberty to redeem according to their priorities, is no longer applicable. *Ib.*

The Creditors' Relief Act is merely intended to abolish priority among execution creditors of the same class, and not to alter the legal effect of the executions themselves, or to effect a distribution of separate and partnership assets in the manner in which such assets are administered in bankruptcy. There were in the sheriff's hands executions: (1) against R. alone; (2) against R., J. J., and G. J., on a joint note given by them for the price of a horse, J. J. being merely a surety for R. and G. J., who bought the horse as partnership property; (3) against G. J. and R. on a joint note given by them for the price of a threshing machine, purchased for the purpose of being used in another partnership business, carried on by them quite distinct from that partnership to which the horse belonged; and (4) against G. J. and R., on a joint note in which R. was surety for G. J. The horse was seized and sold:—Held, Burton, J. A., dissenting, that under an execution against three, the joint or partnership property of two may be levied, and the proceeds of this sale were dis-

tributable ratably among the executions (2), (3), and (4). Per Burton, J. A.—The proceeds of the sale should be applied in satisfaction of execution (3) alone, the property sold being the joint property of the persons liable under that execution. Proceedings against partnership property under a separate execution against one of the partners considered. *Re McDonagh v. Jephson*, 16 A. R. 107.

Held, that the word "forthwith," contained in section 4 of the Creditors' Relief Act, R. S. O. c. 65, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, and means "without any delay." Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was held to be not reasonable. *Maxwell v. Scarfe*, 18 O. R. 529.—Armour.

See *Macfie v. Pearson*, 8 O. R. 745, p. 6; *Dominion Bank v. Heffernan*, 11 P. R. 504, p. 371.

## EXECUTORS AND ADMINISTRATORS.

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## I. PROBATE AND LETTERS OF ADMINISTRATION.

One D. dying domiciled abroad, R., a creditor of her estate, obtained letters of administration there. Subsequently S., as appointee of R. and with his consent, applied here for letters of administration to be granted to him by the Surrogate Court. E., however, residing at Toronto, and as next of kin to B., also applied here for administration to B.'s estate. S. now applied to have the matter transferred into this court, or for a writ of prohibition to the Surrogate judge preventing him granting letters to E., and a mandamus ordering him to grant them to S. — Held, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the court in Maine, the status of the creditor who obtained administration there, or of his appointee, was not such as to compel the Surrogate judge here to pass over the next of kin. The appointment of a creditor as administrator is not as of right, but rests in the discretion of the judge who appoints, and that cannot be interfered with by any peremptory writ; and R. S. O. (1877), c. 46, ss. 32, 36, do not better the claim of a creditor. *Browne v. Phillips*, Amb. 416, followed. *Re Hill*, L. R. 2 P. & D. 89, distinguished. *Re O'Brien*, 3 O. R. 326.—Boyd.

The 6th section of 38 Geo. III. c. 87 (Imperial), prohibiting the grant of probate to infants under the age of twenty-one is in force in Ontario, either as a rule of decision in matters relating to executors and administrators, (F. S. O. (1877), c. 40, ss. 34 and 35) or as a rule of practice in the Probate Court in England, (R. S. O. (1877), c. 48, s. 32). *Merchants' Bank v. Monteith*, 10 P. R. 334.—*Hodgins, Master-in-Ordinary*.

An infant cannot lawfully be appointed administrator of an estate, and therefore a grant of probate or of letters of administration to an infant is void, and confers no office on, and vests no estate in such infant. *Id.*

The deceased was a resident of Buffalo, N. Y., being at the time of his death, which occurred in the county of Lincoln, Ontario, not possessed of any real or personal property in this province; the plaintiff (his widow) obtained letters of administration from the Surrogate Court of York:

—Held, the grant of letters by the Surrogate Court of York was valid and effectual, and, Semble, that even if the deceased had left real or personal estate in some other county, the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked. *Jennings v. Grand Trunk R. W. Co.*, 15 A. R. 477.

A mandamus was directed to issue to compel the judge of the Surrogate Court of the county of Wellington, to grant administration with the will annexed of a certain testator to G. D., one of the next of kin (who had filed all necessary papers), notwithstanding that in an issue directed out of the said Surrogate Court a jury had found against the will. It appeared that the present applicant was no party to that issue, and that since the trial of it this court had held in favour of the will:—Held, that this was not a case for an appeal from the refusal to grant administration under section 31 of the Surrogate Court Act, because an appeal under that section would appear to be granted only when some one contests the grant of administration, which no one was doing here:—Semble, that this court has jurisdiction to declare a will valid. *Dickson v. Monteith*, 14 O. R. 719.—Proudfoot.

The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court. The defendant denied the validity of the probate by reason of the mode of proof and invalidity of the will. Held, on demurrer, that the defence was bad: that when it is desired to attack the validity of a probate, issued by a Surrogate Court having jurisdiction, and when the person on whose death the administration was issued is really dead, it must be done in an independent proceeding with the proper parties before the court. *Irwin v. Bank of Montreal*, 38 Q. B. 375 followed. *Quere*, whether the application must be to the Surrogate Court or not. *Book v. Book*, 15 O. R. 119.—Rose.

Since the Ontario Judicature Act the rule in equity prevails as opposed to that at law, that letters of administration when obtained relate back to the death, and it is sufficient if a plaintiff suing as administrator qualifies before the trial. *Trice v. Robinson*, 16 O. R. 433.—Chy. D.

The personality of a person who died since the Devolution of Estates Act was less than \$2,000, but her whole estate, including land was more than that sum:—Held, that a contest as to the grant of probate of her will could not be removed from a Surrogate Court to the High Court; for the words "personal estate" in section 31, subsection 2, of the Surrogate Courts Act, R. S. O. (1877) c. 50, mean personal estate proper, notwithstanding that by the Devolution of Estates Act, R. S. O. (1877) c. 108, the whole estate is now to be administered as personality. *Re Nixon*, 13 P. R. 314.—Boyd.

Executors having defended an action on a note as executors and judgment having been recovered against them as such, they were held to have accepted office; want of probate was immaterial and the sheriff's sale on such judgment was valid. *McDonald v. McDonald*, 17 A. R. 192.

See *Chard v. Rae*, 18 O. R. 371, p. 722.



## II. RIGHTS, AUTHORITY, AND DUTY.

## 1. Remuneration.

A testator gave to each of his executors a sum of \$40 "in remuneration for their trouble." In carrying on the affairs of the estate one of the executors, with the knowledge of his co-executor, and without any remonstrance from him, used in his business \$200 of the estate, and the other had taken a mortgage, in his own name, for \$900 belonging to the estate, without executing any declaration of trust in respect thereof. Under these circumstances the court refused to the surviving executor, and to the executor of the deceased executor, their costs of the suit; the court, however, being satisfied that neither of them had been guilty of any wilful misconduct, did not charge them with costs, and allowed them the amount of their commission; but refused to allow them to receive the legacies given by the will, which were expressed to be in remuneration for their trouble. *Kennedy v. Pingle*, 27 Chy. 305.—Spragge.

The fact that, on an account being taken in the master's office pursuant to a decree in an administration suit, a balance has been found against an executor, some of the items of which are the result of a surcharge, is not alone sufficient to disentitle him to compensation under R. S. O. (1877), c. 107, s. 41. *Sievwright v. Leys*, 1 O. R. 375.—Proudfoot.

Executors were charged by the master in taking the accounts in an administration suit with the sum of \$9,404.42, and allowed as disbursements the sum of \$8,228.77. These amounts included on both sides a sum of \$3,238.25, representing securities either in the possession of the plaintiff at the time of the testator's death, or handed over to the plaintiff immediately afterwards. The master allowed the executors a commission of \$400 on the total receipts, including the said sum of \$3,238.25:—Held, that the executors were entitled to compensation in respect of the said sum of \$3,238.25:—Held, also, that the commission allowed was not excessive. *Re Batt—Wright v. White*, 9 P. R. 447.—Proudfoot.

Where there is a bequest of a share of the residuary estate to executors it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum, but it is nevertheless one of the elements to be considered in dealing with the question of compensation:—Held, that in this case, the executors were entitled to compensation, notwithstanding a bequest to them of a share of the residue, because the amount of the residue was, when the will was made and after the testator's death, a matter of extreme uncertainty; nevertheless, no percentages should be allowed on the share of the residue, which the executors took under the residuary clause in the will. *Boys' Home of the City of Hamilton v. Lewis*, 4 O. R. 18.—Boyd.

G. W. by will directed his executors to retain for their own use and benefit the sum of \$200 each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will:—Held, that under no circumstances could the executors who had accepted probate claim a larger sum than the amount specified as compensation for their ser-

vices. *Denison v. Denison*, 17 Chy. 306, doubted. *Williams v. Roy*, 9 O. R. 534.—Boyd.

Seem, that if an executor refused otherwise to act, and if it was found impracticable to deal with those entitled to the assets, the court would have jurisdiction to permit the compensation given by the statute to be awarded to him on condition of his relinquishing what was given to him by the will. *Id.*

The taking of administration proceedings does not deprive executors of their functions or even suspend them, and a reasonable allowance should be made for moneys received pendente lite. *In re Honsberger, Honsberger v. Kratz*, 10 O. R. 521.—Boyd.

The right of an executor to compensation depends entirely upon R. S. O. (1877) c. 107, ss. 37, 41, and as that statute has fixed no standard, each case is to be dealt with on its merits, according to the discretion of the judge. The courts have laid down no inflexible rule in this regard and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute. The order of *Ferguson, J.*, 11 P. R. 272, reversed, and the master's report restored. *Re Fleming*, 11 P. R. 426.—Chy. D.

Held, that there was no duty cast upon the petitioner in this case which required him to act against the interests of his co-executor, nor did he incur any appreciable additional risk or responsibility, and he was therefore not entitled to a larger share of the commission awarded. *Id.*

Executors claimed compensation in respect of receipts amounting to \$29,000, and of disbursements amounting to \$5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the direction of the master. An item introduced on each side of the account was a transfer of mortgage to the plaintiff, amounting to \$4,684.47, which was carried out in pursuance of an agreement made by the solicitors and sanctioned by the master. It also appeared that the plaintiff's solicitor collected and handed over to the executors \$2,400, and also made a payment to them of \$10,000 for which he was personally liable:—Held, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced from \$1,193 to \$440, nothing being allowed in respect of the item of \$4,684.47, one per cent. in respect of the items of \$2,400 and \$10,000, two and a-half per cent. on the balance of the collections, and five per cent. on the disbursements except the transfer. *Thompson v. Fairbairn*, 11 P. R. 333.—Boyd.

Where the personal estate not specifically bequeathed came to the hands of certain executors and trustees, was \$41,818.99, of which they expended \$25,100.93, and the rents and profits of real estate that came to their hands were \$4,051.90 of which they expended \$3,816.91, and there appeared a large number of items on each side of the account, over 300 on one side, and over 400 on the other, and it appeared that there

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had been a good deal of labour, care and trouble in the management of the estate:—Held, that five per cent. on the total sum thus come to their hands was not excessive to be allowed as compensation, although \$16,953.05 of the estate moneys remained in their hands with which they were chargeable. *Archer v. Severn*, 13 O. R. 316.—Ferguson.

See *Burn v. Burn*, 8 O. R. 237.

See also TRUSTS AND TRUSTEES.

## 2. Debts Due to Executors and Administrators by Deceased.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross*, 29 Chy. 385.—Boyd.

## 3. Managing Real Estate.

### (a) Valuing.

A testator provided in his will that on the death of his widow his executors should have his farm valued, and gave permission to his son E. to take it at their valuation, after which the proceeds were to be divided amongst all his children, of whom the executors were two. E. having made up his mind to take the farm, the executors called in his aid in nominating three valuers, and proceeded to value the farm, he being present, without notifying the other children. There was no evidence that he had attempted to influence the valuers, or that they had reached their conclusion in other than a legitimate and upright way, but certain of the children had impeached the valuation as being too low and asked for administration:—Held, that the executors who were exercising in some sense, judicial functions, should either have excluded all interested, or should have invited all interested to take part in appointing valuers; that there should therefore be another valuation of the farm, and if the parties desired, it might be referred to the master, or the executors might, on notice to all interested, proceed to do what was needful in that behalf. *Re Kerr*, *Kerr v. Kerr*, 8 O. R. 484.—Boyd.

### (b) Selling.

Where a testator devised to his wife for life a parcel of land "with the power of sale at any time during her life subject to the consent of my executors," Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient:—Held, that in the conflicting state of the authorities upon the question the title was not one which the court could force upon a purchaser. *Re MacNabb*, 1 O. R., 94.—Proudfoot.

After default made in a mortgage, the mortgagee took proceedings under the power of sale and brought an action of ejectment and an action on the covenant. He died during the progress

of these proceedings. In the two actions judgments were recovered against the mortgagor and the lands were sold under the power of sale; the purchase money being paid partly in cash and partly by a mortgage for the balance. This mortgage was subsequently turned into cash at a less amount than its face value, and in addition solicitor's costs for doing so were charged. In an action for an account by the mortgagor against the mortgagee's executors, who had continued the proceedings. It was:—Held, reversing the judgment of Proudfoot, J., that the defendants were entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but that they must account for the purchase money as cash at the time of the sale, and that they could not charge the mortgagor with the discount on the mortgage or the costs of turning it into cash; and that they were entitled to all three sets of costs; those of the two actions being given to them by the judgments they had obtained; and those of exercising the power of sale under the statutory form of mortgage as a matter of contract, they being made a first charge upon the proceeds of the sale, *R. S. O. (1877) c. 103. Beatty v. O'Connor*, 5 O. R. 731.—Chy. D.

Under a certain will the executors were directed to sell and dispose of a farm "either at public or private sale as to them may seem best, for the best price, and on the most advantageous terms that reasonably can be obtained for the same":—Held, that the power to sell involved a power to secure part of the price by means of a mortgage on the property sold, the manner of sale being left to the discretion of the trustees. *Re Graham Contract*, 17 O. R. 570.—Boyd.

See *Sea v. McLean*, 14 S. C. R. 632.

### (d) Discharging Mortgages.

About 1837, Andrew McMinn devised his lands to his wife Mary McMinn, for life, with remainder to Maria Kearney. Letters of administration with the will annexed were granted to the widow. At the time of the testator's death the lands were mortgaged for £150. A suit to foreclose this mortgage was instituted after the testator's death, and it was alleged that under it a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. There was evidence that the administratrix received personal assets of the testator sufficient to pay off the mortgage had she chosen so to apply them. The sum of £725 was lent to the administratrix by Ann Kean, her daughter by a former marriage. The administratrix then sold the property to the public authorities for £1,750, out of which she paid her daughter £400. From 1858 the daughter, with the leave of the administratrix, occupied about one quarter of an acre of the land, until, in 1873, under the authority of an expropriation Act, she was ejected from it, the commissioner taking in all three acres and three tenths of this property, the balance being in the occupation of Maria Kearney and her husband, Francis Kearney (the appellants). These three acres and three-tenths were appraised at \$2,310, and that sum was paid into court to abide a decision as to the legal or equitable rights of the parties respectively. Ann Kean claimed a title to the whole of the land taken, under an alleged

parol agreement with her mother, that she should have the land in satisfaction of £325, the residue unpaid of the loan of £725, and obtained a rule nisi for the payment to her of the sum of \$2,310, the amount awarded as compensation for the land. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to the appellants in the whole property, reserving a rental of \$80 a year and liberty to occupy two rooms in a dwelling-house then occupied by her. On a motion to make this rule absolute, several affidavits were filed, including those of the appellants. On the 18th January, 1875, the matter was referred to the master, to take evidence and report thereon, subject to such report being modified by the court or a judge. The master reported that the appellants had the sole legal and equitable rights in the property. On motion to confirm that report, the court made an order apportioning the \$2,310 between Ann Kean and the appellants, the former being declared entitled to be paid \$1,015.61, and the latter, on filing the written consent of Mrs. McMinn, the residue of the \$2,310:—Held, on appeal, that the administratrix, having personal assets of the testator sufficient to discharge the mortgage, was bound in the due course of her administration to discharge said incumbrance, and that the parol agreement made by her with her daughter was null and void. *Kearney v. Kean*, 3 S. C. R. 332.

A testator by his will directed his executors to cancel and entirely release the indebtedness of his son W. S. upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately on and from the said testator's death. In an action for the administration of the testator's estate, W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate. The master found in favour of the executors. On appeal from the master it was:—Held, that the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage. *Archer v. Severn*, 12 O. R. 615.—Proudfoot. 14 A. R. 723.

Per Burton, J. A., dissenting from the other members of the court. The bequest of the mortgage was not a specific bequest; and without reference as to what the original purpose of filing the bill was, W. S. had claimed to have his mortgage released and had obtained an order for its unconditional discharge so that he stood in the same position as if he had brought an action for that purpose expressly, and had thus brought himself within the rule, that he who seeks equity must do equity: whereas the effect of the judgment appealed from by reason of the operation of the Statute of Limitations was to leave the legatee free from the debt due by him to the estate and to expose the executors to a liability to make good that loss. *S. C.*, 14 A. R. 723.

Held, following *Northey v. Northey*, 2 Atk. 77, that although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the execu-

tors' refusal was without cause. *S. C.*, 12 O. R. 615.—Proudfoot.

H. by his will appointed F. and W. executors and trustees of his estate. F. for the purpose of securing a debt due by him to the estate, executed a mortgage to W. W. died intestate, and F., five years subsequently having agreed to sell the mortgaged premises to M., executed a statutory discharge of the mortgage, which he expressed to do as sole surviving executor, and then conveyed the estate to M.:—Held (affirming the judgment of Boyd, C., 13 O. R. 21), that the act of F., in executing such discharge, had not the effect of releasing the land from the mortgage. *Beaty v. Shaw*, 14 A. R. 600.

#### (e) Repairs.

M. H. (the executrix under a will which was subsequently set aside, having expended \$536.35 in repairs to the real estate, and the testator's will having given her a life estate in all the real estate, and having also given her "the income of all investments of which I may be possessed for her own use, and also the principal of such investments as she may require to use for her own benefit":—Held, that the \$536.35 was properly allowed to her. *Hill v. Hill*, 6 O. R. 244.—Ferguson.

#### 4. Payment of Money into Court.

Payment of legacies to infants into Court. See *Re Parr*, 11 P. R. 301.

See *Re Curry*—*Wright v. Curry*; *Curry v. Curry*, 8 P. R. 340, p. 724.

#### 5. Other Cases.

By the third clause of her will, H. M. the testatrix, disposed of all her property, movables, and immovables, in favour of her children as universal legatees. The legacy was subject to the extended powers of administration conferred by the fifth clause of the will (referred to in the statement of the case), and also the power to alter the disposition in favour of the testatrix's children given by the same clause to her husband H. L., the executor, and also by the will the executor was exonerated from the obligation of making an inventory and rendering an account. H. L., in his quality of testamentary executor and administrator to the estate of the said H. M., endorsed accommodation promissory notes signed by C. L., one of his children, and "The M. Bk." (respondent), as holder thereof for value, obtained judgment against both the maker and endorser. An execution was subsequently issued against H. L., *es qualité*, and certain real estate of the late H. M., which he detained in his said capacity was seized and advertised for sale. J. D. L. et al. (the appellants), who were the only children of the defendant H. L., and his wife, opposed the sale of the property seized on the ground that the said property was insaisissable:—Held, reversing the judgment of the court below, Taschereau and Gwynne, JJ., dissenting, that the endorsements were not authorized by the will, and that the clause in the will, exempting the property of the testatrix from execution, was

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valid, and must be given effect to. Art. 972, C. C. *Lionais v. Molson's Bank*, 10 S. C. R. 526.

Where a testator provided for the erection "of a suitable tablet" over his grave, "not to exceed \$1,500," and also of monumental tablets or stones, etc., and the erection thereof over the graves of his deceased wives, and died worth \$200,000, and the executors spent \$3,000 on a monument to him and his wives, removing the remains of the deceased wives to the same burial place as the testator:—Held, that they might properly be allowed the said sum of \$3,000 in their accounts. *Archer v. Severn*, 13 O. R. 316.—Ferguson.

See *Merchants' Bank v. Monteith—Ex parte Standard Life Assurance Co.* 10 P. R. 588; *Re McDougall Trusts*, 11 P. R. 494.

### III. LIABILITIES.

#### 1. Devastavit.

An infant, whether executor or executor de son tort is not liable for a devastavit. Legacies directed to be paid out of a mixed residue are a charge on land. *Young v. Parves*, 11 O. R. 597.—Proudfoot.

See *Re Gabourie—Casey v. Gabourie*, 13 O. R. 635.

#### 2. For Interest.

It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office. *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4.—Hodgins, Master-in-Ordinary.

The English rules regulating the award of interest against executors and trustees may be approximated in this province, (1) by charging an executor who negligently retains funds which he should have paid over or made productive for the estate, at the statutory rate of six per cent.; (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) By charging him who makes gain out of his trust by embarking the money in speculative or trading adventures with the profits or with compound interest, as the case may be. The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during that period was; but the notes and mortgages held by the executors bore interest for the most part at six per cent. The master charged the executors with interest at six per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the master, it was:—Held, that the interest should be charged at six per cent.; but that the awarding of compound interest was opposed to the spirit of the decision in *Inglis v. Beatty*, 2 A. R. 453,

and could only be upheld as being in the nature of a penalty imposed on the executors. *In re Honsberger—Honsberger v. Kratz*, 10 O. R. 521.—Boyd.

The executors retained in their hands a sum of \$1,100 to meet claims against the estate, and were not called upon to pay it into court:—Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it. *Thompson v. Fairbairn*, 11 P. R. 333.—Boyd.

Held, that the executors in this case should be charged with interest upon the residue in their hands after the time when it was distributable and the annual rate of interest charged accordingly upon it from the time when it might properly have been distributed, or appropriated, down to the time of its actual payment, or if not yet paid down to the present time. *Boys' Home of the City of Hamilton v. Lewis*, 4 O. R. 18.—Boyd.

Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court:—Held, that an executor and trustee who deposited funds so left in trust for infants, at three and a-half or four per cent. interest, in a savings bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infant not being for their benefit, did not relieve him:—Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs. *Spratt v. Wilson*, 19 O. R. 28.—Boyd.

See *McCardle v. Moore*, 2 O. R. 229, p. 735; *Re Croxter—Croxter v. Hinman*, 10 O. R. 159, p. 720; *Archer v. Severn*, 13 O. R. 316, p. 720; *Re Gabourie—Casey v. Gabourie*, 13 O. R. 635, p. 721.

#### 3. For Acts of Each Other.

J. B., sr., and S. D., of Montreal, had been executors of C. B., who died in Montreal about 1844. S. D. proved the will in Ontario. The plaintiffs (two infants) were solely entitled under this will. J. B., sr., died in Montreal in 1869. T. B. and J. B., jr., were his executors, and both proved the will in Ontario, but T. B. alone acted as executor, J. B., jr., having given him a power of attorney to act for him in all matters relating to the estate. The plaintiffs and T. B. and J. B., jr., were each entitled to a one-third share under the will of J. B., sr. A suit was brought for the administration of both estates, and a receiver appointed. In taking the accounts before the master S. D.'s attendance was dispensed with, as it appeared that none of the assets of C. B.'s estate in Ontario had come to his hands. The master found T. B. and J. B., jr., who did not appear or file any accounts, indebted to the estates in about \$51,000. In default of evidence to shew that any of the assets come to their hands formed part of C. B.'s estate, the master further found that the whole formed part of J. B., sr.'s estate. The decree ordered the executors to distinguish the assets of each estate, and notified them that in default

the whole would be taken to belong to the estate of J. B., sr. T. B. having died, the suit was revived. J. B., jr., applied to the court for leave to open and retake the accounts, on the ground that he had been kept in ignorance of the proceedings by his co-executors. Leave was given him to surcharge and falsify. J. B., jr., now distinguished the assets of the two estates, and sought to be relieved from liability as to the estate of C. B., on the ground that he was not executor of that estate: as to the J. B., sr., estate, he also sought to be relieved in several respects. The master's judgment was upon these points:—Held, that T. B. and J. B., jr., did not, by proving the will of J. B., sr., become executors of C. B., as J. B., sr., was not the sole or surviving executor of C. B.:—Held, that J. B., jr., was liable for the moneys of J. B., sr.'s estate, come to the hands of T. B., whether before or after the proving of the will, or before or after the power of attorney. *Bloomfield v. Brooke*, 8 P. R. 266.—Taylor, Master.

A testator who, by his will, expressed the fullest confidence in C. (one of his trustees), directed them to be guided entirely by the judgment of C. as to the sale, disposal, and investment of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. C. having made unauthorized investments of these moneys which proved worthless, the master charged his co-trustee B. with the amount thereof:—Held, that even if at the suit of creditors B. might have been chargeable, yet as against legatees he was exonerated. *Burritt v. Burritt*, 29 Chy. 321.—Proudfoot.

H. & C. were appointed executors. H. took upon himself the actual management of the estate, with the knowledge and consent of, but not under any express agreement with C. H. applied a sum of money to his own use, but of this C. was not aware. The will contained the usual indemnity clause exonerating each from liability for the other:—Held, that C. was not liable for the sum appropriated by H. *King v. Hilton*, 29 Chy. 381.—Proudfoot.

A., B. & C., the three executors under a will, sold certain real estate of the testator. C., who was entitled to the annual income of the proceeds thereof, took the most active part in the management of the estate, as the others lived at a distance, and employed a solicitor who received two sums \$980 and \$1,580, part of the proceeds of said sale, the former in January, 1876, and the latter in February, 1882. Both the other executors were aware of his employment and that these sums were in his hands. In February, 1884, the solicitor absconded causing a loss to the estate of \$1,960, the balance then in his hands. In the will there was a clause "that each (of the executors) should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default":—Held, that all three were equally liable and must make good the amount to the estate, the rule being when one or more of several trustees act in getting in and dealing with the trust funds, an inactive trustee is accountable therefor equally with the others, if having the means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on. *McCarter v. McCarter*, 7 O. R. 243.—Boyd.

By his will, P. S. C. empowered his executors, if required, to sell a parcel of his lands to pay off "debts or encumbrances" against his estate. The land was sold by the executors, all of whom in some degree acted in their executorial capacity or as trustees, but by tacit consent, one of them took the actual management of the estate and received the moneys arising from it, including the proceeds of the said sale, which he misappropriated. H. A. C., an executrix, joined in the conveyance to the purchaser for the sake of conformity, but did not receive any of the purchase money, nor was there any evidence that she knew a balance remained in the hands of her co-trustees after satisfying the "debts or encumbrances," or that he was misapplying it:—Held, that under these circumstances, H. A. C. was not responsible to the estate for the misappropriation by her co-trustee:—Held, also, that even if she had been liable for the principal money so misappropriated, she would not have been for the interest, inasmuch as the principal never came into her hands. *McCarter v. McCarter*, 7 O. R. 243; *Burrows v. Walls*, 5 Ded. M. & G. 233; *Rodbard v. Cooke*, 25 W. R. 556, and *Cowell v. Gatecombe*, 27 Beav. 568, distinguished. *Re Crowter—Crowter v. Hinman*, 10 O. R. 159.—Ferguson.

When one of two executors who was entitled under the will of his testator to a large sum charged on the real estate, but which could not be considered a legacy or a debt in such a sense that the personal property was the primary fund for the payment of it, had applied in his own business a portion of the personal estate, which was by the will directed to be invested, and which, although large, was not equal in amount to the charge in his favour on the realty, and his co-executor, though aware of such application, had not taken any steps to prevent the same:—Held, that they were both equally liable to account for the whole of the principal sum and interest with rests. *Re Crowter, Crowter v. Hinman*, 10 O. R. 159, distinguished. *Archer v. Severn*, 13 O. R. 316.—Ferguson.

#### 4. Other Cases.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor then becomes liable for them to the person entitled in remainder. *In re Mousie*, 10 P. R. 98.—Hodgins, Master-in-Ordinary.

The 57th and 58th sections of the Surrogate Act (R. S. O. (1877), c. 46), protect parties bona fide making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. *Merchants' Bank v. Monteith*, 10 P. R. 334.—Hodgins, Master-in-Ordinary.

G. lent money to W. on his promissory note, and when he died held such note as security. By his will he directed his executors to get in the moneys outstanding and invest the same in such stocks as they might deem advisable. C., the executor, who proved the will, left the loan outstanding on the note, and at a subsequent

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Moneys l and which the executo and receive who had ol appointment sequently n Held (rever 11 O. R. 56 that the def Law, 14 A.

See *Hughes v. Burv*.

#### IV. A.

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To an act of W. M., W. M., wh in Montrea defendants pl their office moneys we had no off moneys by obtained le had no rig Held, on de v. Standard Rose.

The plai April, 1877 against Pe poses of his fault. No After the d the judge



time renewed it and took a new note made by the firm of W. Bros., of which W. was a member. The reason this was done, as stated by C., was because he could get seven and a-half per cent. interest for the estate, which was more than he could have done if he had invested in stocks. W. Bros. afterwards became insolvent and the amount of the note was lost to the estate. It was shown that the executor was advised not to invest in stocks. In taking the accounts in the master's office, it was held that the amount of the note should not be charged against him personally; but on appeal it was held:—That it was a very obvious case of breach of trust which could not be excused whatever might be the hardship resulting to the executor. Interest was allowed to him, however, at the increased rate from the date at which he was charged with the note, and it was directed that interest should not be charged against him at six per cent., if it was proved that he could not have invested in stocks to realize that rate. *Re Gabourie—Casey v. Gabourie*, 13 O. R. 635.—Boyd. See S. C., 12 P. R. 252.

Moneys bequeathed directly to infant legatees and which had been invested by the defendants, the executors of the testatrix, were demanded of and received from them by one F., a solicitor who had obtained from the Surrogate Court his appointment as guardian of the infants. F. subsequently misapplied the moneys and absconded. Held (reversing the judgment of Ferguson, J., 11 O. R. 565, Hagarty, C. J. O., dissenting), that the defendants were not liable. *Huggins v. Law*, 14 A. R. 383.

See *Huyck v. Proctor*, 10 P. R. 25, p. 724; *Burn v. Burn*, 8 O. R. 237.

#### IV. ACTIONS AND PROCEEDINGS BY.

In an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff was the administrator) after his death and taking and converting the goods therein, the defendant set off a debt due by deceased to him. An administration order had been made of which the defendant had notice before defence. The set-off was held bad under 27 Vict. c. 28, s. 28, and also because of the administration order. *Monteith v. Walsh*, 10 P. R. 162.—Dalton, Master.

To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which by the terms thereof, was payable in Montreal, in the province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys:—Held, on demurrer, a good defence. *Pritchard v. Standard Life Assurance Co.*, 7 O. R., 188.—Rose.

The plaintiffs by their agent, Patrick R., in April, 1877, procured a judgment to be signed against Peter R., the defendant who, for purpose of his own, suffered judgment to go by default. No execution was ever issued thereon. After the death of Peter the plaintiffs assigned the judgment to the wife of Patrick, who paid

them \$50 therefor; and on her application Armour, J., made an order allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment as having been fraudulently obtained, and to be allowed to defend the action or for such other order as would seem just and upon such application Wilson, C. J., made an order setting aside the judgment and all proceedings in the action and directing the plaintiffs to pay the \$50. This order was affirmed on appeal to the Common Pleas Division:—Upon appeal from this order of the Common Pleas Division the court were all of opinion but for different reasons that the order was wrong, but did not agree as to the extent to which it should be modified. Per Hagarty, C. J. O., and Osler, J. A.—The judgment should merely be set aside and the executors allowed in to defend. Per Burton, J. A.—The executors cannot be heard to allege their testator's fraudulent purpose; they are estopped from confining the operation of the judgment within the limit of his intended fraud, and the judgment should be allowed to stand. Per Patterson, J. A.—The judgment should not be set aside, but the order of Armour, J., should be rescinded, and it should be declared that Patrick's wife as assignee of the judgment, was not entitled to issue execution, because the judgment was procured by Patrick, her husband, and suffered by Peter, for a fraudulent purpose, of which she had notice, when she took the assignment. *Schroeder v. Rooney*, 11 A. R. 673.

The rule in equity is, that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action. *Trice v. Robinson*, 16 O. R. 433, distinguished. *Chard v. Rae*, 18 O. R. 371.—Boyd.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the court to ascertain whether an action was begun in time by a properly constituted plaintiff. *Ib.*

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At that time the plaintiff's father was dead and no personal representative of his estate had been appointed. On the 4th November, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R. by his statement of defence put the plaintiff to the proof of his position and title to sue on the judgment, and set up, amongst other defences, the Statute of Limitations, R. S. O. (1887) c. 60, s. 1:—Held, that the widow was the person primarily entitled to administer, and as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a



bond or other specialty shall be commenced; and therefore the action failed. Semble, that an objection raised at the trial that L. was not before the court was a valid one; for an action on a joint judgment is not different in principle from an action of contract against joint contractors. *Ib.*

See *Beatty v. O'Connor*, 5 O. R. 731, p. 714; *Trice v. Robinson*, 16 O. R. 433, p. 710.

## V. ACTIONS AND PROCEEDINGS AGAINST.

### 1. Removal of Executor.

An executor cannot be removed from his position, where anything remains to be done appertaining to his office, even although the will provides for his continuance as a trustee thereunder after his duties as executor have ceased, and he has acted as trustee by investing part of the trust moneys. In re *Moore*, *McAlpine v. Moore*, 21 Ch. D. 778, distinguished. *Re Bush*, 19 O. R. 1.—Robertson.

Held, affirming the judgment of the Queen's Bench for Lower Canada (appeal side) (*M. L. R. 3 Q. B. 191*) that Art. 282 C. C. does not apply to executors chosen by the testator, and that in an action for the removal of one executor when there are several executors, the existence of a law-suit between such executor and the estate he represents, and the evidence of irregularities in his administration but not exhibiting any incapacity or dishonesty, are not a sufficient cause for his removal. Arts. 285, 917 C. C. (*Strong, J.*, dissenting). *Mitchell v. Mitchell*, 16 S. C. R. 722.

### 2. Parties.

An action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another. Therefore where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment... being made by the company to the executors... of money, to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs." *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 431.—Spragge.

Making executors parties to an action for the rectification of deeds. See *Ferguson v. Winsor*, 10 O. R. 13.

See *Burn v. Burn*, 8 O. R. 237.

See also Subhead VI. 2, p. 728.

### 3. Pleading.

In an action on two promissory notes against the executors of the maker they pleaded, 1. That they never were executors. 2. Plene administravit. The plaintiff obtained a verdict, and judgment was entered for the debt and costs to be levied of the goods of the testator in the hands of the defendants, his executors, if they had so much thereof, and if not, then to be levied of the proper goods and chattels of the defendants. A motion to amend the judgment by relieving the defendants from personal liability was refused with costs, for as they had denied their representative character, the plaintiffs were entitled to such judgment. *Huyck v. Proctor*, 10 P. R. 25.—Dalton, Master.

See *Gaughan v. Sharpe*, 6 A. R. 417, p. 726; *Leslie v. Calvin*, 9 O. R. 207, p. 725.

### 4. Other Cases.

An order for partition or sale was made under G. O. 640, (Con. Rule 989), by the master at London, of the estate of one M., deceased. In proceeding under that order the master advertised for creditors, and M. & M. sent in a claim for obtaining letters of administration, and for defending an action in the court of C. P., brought by W. M., a defendant in this suit, and entitled to a share of the estate, against the administratrix. The master allowed the claim, and W. M. appealed, on the ground that neither the deceased nor his estate was indebted to M. & M. and that they were not entitled to prove as creditors in this cause:—Held, that she was justified in defending the suit, and the appeal was dismissed. *McKay v. McKay*, 8 P. R. 334.—Proudfoot.

The referee in chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry—Wright v. Curry—Curry v. Curry*, 8 P. R. 340.—Stephens, Referee.

An agreement to make a will in favour of an adopted child may be enforced against the personal representatives of the obligor. See *Roberts v. Hall*, 1 O. R. 388.

G. having dissolved partnership with M., by the terms of the dissolution held certain land subject to a lien of \$525, to be paid by M., M. then arranged a sale to C. for \$2,250, intending to defraud any company who would lend \$1,125, on the security of the land (it being really worth about \$600), and drew up a receipt of \$1,150, representing that sum as being part payment of the consideration money, which G. signed. G. subsequently executed a conveyance with \$2,250 inserted as the consideration, and deposited it with his solicitor as an escrow, to be delivered up on payment of his \$525 lien. It appeared G. had since died, and S. was appointed his administrator. M. and C. by means of an overvaluation and certain misrepresentations, one of

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## VI.

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which was the production of G.'s receipt, obtained a loan of \$1,125 from the plaintiffs to C., and out of the proceeds paid S. the \$525, and took up the deed. At the trial it was shewn that the plaintiffs were aware of the death of G. before they acted on or even knew of the existence of his receipt, and that S. knew nothing of the transaction except that he was entitled to the lien for \$525:—Held (reversing the judgment of Proudfoot, J.), that the plaintiffs could not recover against S. as representative of G., for no cause of action existed against G. at the time of his death, and S. had done no wrong. *Hamilton, Provident & Loan Society v. Cornell*, 4 O. R. 623.—Chy. D.

In the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud unless profit has accrued to the wrongdoer's estate. *Ib.*

The plaintiff sued the executors of D. D. C. for an account of all profit accrued to the estate of D. D. C., by reason of the use by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to D. D. C.:—Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of D. D. C. in respect of such profit accrued to him prior to his death. *Phillips v. Homfray*, 24 Ch. D. 439, discussed, and regarded as decisive in the present case. Semble, that if the statement of claim could be read to mean that by reason of the wrongful act complained of, property of a tangible character, passed from the plaintiff's estate to that of D. D. C., as distinct from the saving of expense, the conclusion might be different. *Leslie v. Calvin*, 9 O. R. 207.—Ferguson.

A judgment obtained against an executor upon a debt of the deceased, is conclusive evidence of the indebtedness to the plaintiff as against all other creditors of the deceased, and is so in administration proceedings, though the administration is of goods and lands. Therefore where a judgment had been obtained against the executor of H. on certain promissory notes endorsed by him and maturing after his death, and upon H.'s estate afterwards being administered by the court, the judgment creditor brought the judgment into the master's office and claimed upon it, and other creditors of H. thereupon asked to be allowed to adduce evidence as against the claim, on the ground that no proper notice of dishonour had been sent by the holder of the promissory notes, upon which judgment had been obtained:—Held, reversing the decision of the master in ordinary, that they could not be permitted to do so. Semble, such a judgment is only prima facie evidence against heirs-at-law and devisees of the deceased. *Eccles v. Lowry*, 23 Chy. 167, commented on. *Re Hague, Truders' Bank v. Murray*, 13 O. R. 727.—Ferguson.

See *Re Gabourie—Casey v. Gabourie*, 12 P. R. 252, p. 30; *McDonald v. McDonald*, 17 A. R. 192.

## VI. ADMINISTRATION PROCEEDINGS.

### 1. Administration Actions and Orders.

Where one of several persons beneficially interested under the will of a testator, without

making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby unnecessary costs and trouble, the court being satisfied with the conduct of the executors, refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit. *Rosebatch v. Parry*, 27 Chy. 193.—Spragge.

If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill alio intuitu, a relief entirely foreign to the scope of the bill. The bill, which was filed against the executors of C. S., his widow and children, prayed that the proceeds of an insurance policy which had been effected by the deceased for his wife and children should be subjected in the hands of the executors, to the payment of moneys lent by the plaintiff to the deceased, and applied by him to the support of his children, and that the executors might be restrained from paying over the money. *Blake, V. C.*, overruled a demurrer thereto, and under the prayer for general relief granted administration:—Held, reversing this decision, that under the circumstances the plaintiff was not entitled to the administration decree. *Gaughan v. Sharpe*, 6 A. R. 417.

An administration order was granted by the master at Chatham under G. O. 638 (Con. Rule 972), while a suit was pending for the construction of the will of the testator, in which administration was asked, and in which the executors were charged with misconduct, and before a year had elapsed since the death of the testator. Upon appeal proceedings before the master were stayed, and special directions given as to the administration as set forth in the order on appeal. *Heywood v. Sweeney*, 8 P. R. 79.—Spragge.

A creditor of an intestate served notice of motion for an administration order under G. O. 638 (Con. Rule 972), on D.'s widow and administratrix. The widow then served a similar notice upon the heirs of her husband, and filed affidavits alleging a deficiency of the personality to pay debts: that creditors were suing, and also filed a consent of the adult heirs to an order in her favour. The master at Chatham granted an administration order to the widow, and, on appeal, Proudfoot, V. C., held that he was right. *Re Dragoon—Draggon v. Dragoon*; *Re Dragoon—Abell v. Dragoon*, 8 P. R. 330.

When a claim against a deceased's person's estate is one arising out of a contract of suretyship, the court will not, unless by consent of all parties, make an administration decree except on a bill filed. *Re Colton—Fisher v. Colton*, 8 P. R. 542.—Proudfoot.

Semble, that administration of an estate will not be ordered by the court where no legal personal representative has been appointed or dispensed with, though an executrix de son tort is before the court. *Ib.*

An order may be obtained under the general orders for the administration of the personal estate of the testator by the personal representative of a legatee as well as by the legatee himself. *Simpson v. Horne*, 28 Chy. 1.—Spragge.

An administration of an estate in which infants were interested, was made on the mere suggestion of their next friend that it would be for their benefit, without going into the merits of the case between the plaintiff and the defendant, the executor. *Re Wilson—Lloyd v. Tichborne*, 9 P. R. 89.—Proudfoot.

An order for the administration of an estate of a deceased person was refused, on the ground that twelve months had not elapsed from the death of the deceased, no special circumstances being shewn. *Grant v. Grant*, 9 P. R. 211.—Boyd.

In an administration matter under G. O. Chy. 648, 649 (Con. Rule 718), the plaintiff claimed to be a creditor of the estate, by reason of the support and maintenance by him of the testator's wife (in England) during the testator's lifetime:—Held, that the plaintiff's claim should be supported by viva voce evidence, and an action was directed to be entered. *Groom v. Darlington*, 9 P. R. 298.—Boyd.

C. M. died in 1869 entitled to real and personal estate, which by will he devised and bequeathed to his two illegitimate children D. & E., in the event of either dying, his share to go to the survivor, and he appointed C. executor and guardian of D. & E. who were infants. C. forthwith took possession of the estate and managed the same for the benefit of the infants. Both D. & E. died in 1871, D. surviving E. C. afterwards, also in 1871, paid off a mortgage outstanding upon the realty, and took a conveyance of the land from the mortgagee to himself in fee. On July 24th, 1880, the plaintiffs procured a grant from the Crown under the seal of this province, of real and personal estate of which D. died entitled, upon certain trusts therein set forth, and as such grantee, on October 20th, 1880, procured letters of administration to D.'s estate:—Held, that the plaintiffs as such administrators were entitled to an account of the defendant's dealings with the real and personal estate of C. M.:—Held, also, that although the original mortgagee might, under the circumstances, have become entitled to hold the mortgaged lands freed from the equity of redemption, yet that the defendant, standing in a fiduciary relation to the lands in question, could not set up the title acquired from the mortgagee adversely to the plaintiffs, but was a trustee thereof for the plaintiffs:—Held, also, that notwithstanding Attorney-General v. Mercer, 5 S. C. R. 538, the plaintiffs' right to an account as administrator of D.'s estate was not affected by the alleged invalidity of the grant to them of the escheated estate, and neither the cestui que trust named in the grant from the Crown, nor the Attorney-General for the Dominion were necessary parties:—Held, also, that the Statute of Limitations was no bar to the action. *Simpson v. Corbett*, 5 O. R. 377.—Ferguson. Affirmed on appeal, S. C. 10 A. R. 32.

The jurisdiction in chambers to grant administration orders, applies only to simple cases of

accounts, and the judge or master in chambers, may take the administration accounts in chambers without referring them to the master's office. But to all such references Chancery Order 220 (Con. Rule 57) applies. *In re Munsie*, 10 P. R. 98.—Hodgins, Master-in-Ordinary.

Where on an application for an administration order, it appears that there is a substantial and preliminary question to be decided, such question should be decided before the reference is ordered; and the court may limit a time within which the parties may try the issue. But if the issue is not tried, or the order is made in chambers without first directing such issue, the parties are held to have waived such preliminary question, and cannot raise it in taking the accounts under such order in the master's office. *Id.*

Where a testator dies out of the jurisdiction of the court an administration order will not be granted, unless it is clearly shewn that there are no personal assets here in respect of which ancillary letters probate could be obtained. *Re Armour—Moore v. Armour*, 10 P. R. 448.—Boyd.

An administration of the real estate may only be had in a very special case, but should be sought by action and not summary application. *Id.*

See *Davidson v. Oliver*, 29 Chy. 433; *Re Morphy—Morphy v. Niven*, 11 P. R. 321, p. 731; *Burn v. Burn*, 8 O. R. 237; *Re Cannon*, *Oates v. Cannon*, 13 O. R. 705, p. 732.

## 2. Parties.

The bill shewed that the testator had appointed four executors, three of whom died, but stated that those so dying had never received any portion of the assets. In a suit for the administration of the estate, a demurrer ore tenus on the ground that the representatives of such deceased executors should be parties, was overruled with costs. *Webster v. Leys*, 28 Chy. 471.—Proudfoot.

The bill for the administration of the estate of G. E. alleged that G. had appointed his brother J. E. his executor, and devised to him all his estate upon trust for the benefit of the testator's wife and children as to J. would seem best; the will giving J. power to sell the realty. J. E. proved the will of G., and shortly after his death made his own will by which he purported to dispose of G.'s estate, the validity of which the bill impugned, and C. S. D., a married daughter of G., was made a defendant, the bill alleging her to be the wife of S. H. D. J. E. made an appointment under G.'s will, whereby C. S. D. became entitled to a portion of the estate. The defendant demurred on the ground that S. H. D. should have been a party:—Held, that the interest of C. S. D. was merely a chose in action not reduced into possession by her husband, in respect of which she might be sued as a feme sole, and therefore the demurrer was overruled with costs, following *Lawson v. Laidlaw*, 3 A. R. 77. *See Wright v. Leys*, 28 Chy. 498.—Proudfoot.

The bill in this case distinctly charged that the defendant had misapplied the moneys of the estate of G. mixing them with his own, and em-

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playing them for his own purposes, a demurrer on tenus that G.'s estate was not properly represented, on the ground that one executor could not represent the estates of both G. and J. was also overruled with costs; for although during the progress of the cause it might become necessary to have different persons represent the two estates that did not constitute a ground of demurrer. *Ib.*

The plaintiff filed his bill against his two brothers seeking administration of his father's estate, of which he alleged they had possessed themselves on his death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not proved that any fraud or concealment had been practised upon him:—Held, that the suit was improperly constituted, as the father's personal representative was not before the court. *Hughes v. Hughes*, 6 A. R. 373.

See *Hopper v. Harrison*, 28 Chy. 22.

### 3. Practice.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the court to determine on the propriety of his decision. Quere, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case. *Sievwright v. Leys*, 1 O. R. 375.—Proudfoot.

Held, that the jurisdiction of local masters in administration suits, under G. O. Chy. 638, (Con. Rule 972) is not interfered with by rule 422, O. J. Act, (See Con. Rules 41, 138) the practice in such matters is preserved intact by Rule 3, O. J. Act. In such matters there is power to direct service to be made out of the jurisdiction. *Re Allan—Pocock v. Allan*, 9 P. R. 277.—Chy. D.

The plaintiff was an executor as well as a creditor, and was charged with wilful default:—Held, that enquiry as to such default could be made under the order of reference (Form No. 171, O. J. Act). *Ib.*

The principal and surety being here the plaintiff and defendant respectively, *Re Collins*, 8 P. R. 543, which decides that in a case of principal and surety a summary application to administer under G. O. Chy. 638 (Con. Rule 972) is improper, was held not to apply. *Ib.*

An application to consolidate two motions for administration and partition pending before a local master should be made to him and not to a judge in chambers. *Lambier v. Lambier*, 9 P. R. 422.—Boyd.

Under an administration order granted by a local master pursuant to G. O. Chy. 638, 639, (Con. Rules 972-974) he may investigate questions of wilful default and misconduct arising upon the accounts, and if he refuses, the plaintiff should appeal. If an action is commenced the extra costs must be borne by the plaintiff. When the misconduct is such as would entitle a plaintiff at

the outset to apply for an injunction or receiver, an action should be brought. *Sullivan v. Harty*, 9 P. R. 500.—Boyd.

A claim by the next of kin of a deceased legatee, cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books giving credit to such next of kin, for portions of such deceased legatee's share, such entries were held to be evidence of the relationship between debtor and creditor, between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness. *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4.—Hodgins, *Master-in-Ordinary*.

The jurisdiction of the master's office is not co-extensive with that of the court in enquiring into and adjudicating upon the validity of documents; and there is no authority to support any implied or assumed delegation of the functions of the court to the master. Nor is there any practice in the master's office which allows parties to obtain a reference to the master so as to evade the ordinary judicial functions of the courts, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction. The plaintiffs when taking accounts before the master under the ordinary chamber order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was valid:—Held, 1. That the master had no jurisdiction under such order and on oral pleadings to adjudicate upon the validity of the will; 2. That even if there was such jurisdiction, it could not be exercised in the absence of a personal representative of R.'s estate:—Quere, whether since *Ryan v. Devereux*, 16 Q. B. 100, such a bequest would be held to be invalid. *In re Munroe*, 10 P. R. 98.—Hodgins, *Master-in-Ordinary*.

In proceeding to take the accounts under an ordinary chamber order administration, certain unsecured creditors and the administrator sought to impeach the validity of certain warehouse receipts assigned to the plaintiffs by the testator in his lifetime, and on which he had received advances. On appeal from the master's ruling, it was held by Boyd, C., that as the court takes possession of the estate for the purposes of administration, the master's office possesses all the powers requisite for the administration of the assets, and had therefore jurisdiction to try the question. And that in the case of a creditor's administration reference, any creditor had a right to resist or attack the claims of any other creditor sought to be proved in the master's office. *Merchants' Bank v. Monteith*, 10 P. R. 458.

An appeal from the order of the master in chambers, changing the place of reference in an administration suit from Brantford to Walkerton, and giving the conduct of reference to the defendants, the executors, instead of the plaintiff, was dismissed with costs:—Held, that the reference in administration actions should prima facie be to the place where the person whose estate is to be administered resided. G. O. Chy. 638, (Con. Rule 972) governs the case, and the practice laid down in *Macara v. Gwynne*, 3 Chy. 310 is inapplicable. *Thompson v. Fairbairn*, 10 P. R. 533.—Boyd.





realized by the sale—that is, upon the actual value of the interest of the intestate in the property in question, not upon the whole purchase money. *Re McColl—McColl v. McColl*, 8 P. R. 480.—Blake.

On a motion for distribution under the report of the master, an application was made on behalf of the plaintiff for the allowance of a lump sum for the costs and disbursements of the motion. *Boyd, C.* made the usual order, and declined to allow any sums for costs and disbursements, over and above the amount found in the report. *Re Fleury—Fleury v. Fleury*, 9 P. R. 87.

In an administration suit in which the estate was insolvent, the total assets being \$72,000, the liabilities \$138,475, and the creditors 180 in number, and in which the commission of the solicitor who acted for all parties, was allowed by the master, under G. O. Chy. 643 (Con. Rule 1187), at \$995, eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive:—Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling. *In re Stuebing—Athens v. Dewar*, 10 P. R. 236.—Boyd.

The scope of the G. O. Chy. 643 (Con. Rule 1187), is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation. *Ib.*

A very liberal compensation in such cases is not per se a reason for reducing the commission, or directing the taxation of a bill in its stead, nor per contra is a low and inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill. *Ib.*

Semble, that, in cases affected by this order, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the master note it in his book, at the earliest stage possible in the proceedings; but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party. *Ib.*

Bills of costs for services rendered to an estate after a testator's death, down to the date of an order for the administration of the estate, were paid by the executor after the order and pending administration proceedings:—Held, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned the payment by the executor was to be regarded as payment of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors. Practically the moderation might be so conducted, if warranted by special circumstances, as to differ but little from a taxation. *Re Hogue, Traders' Bank v. Murray*, 12 P. R. 119.—Boyd.

Held, that a local master has no jurisdiction to make an order under Con. Rule 1187 allowing the parties to an action or proceeding for administration and partition taxed costs instead of the commission provided for by the Rule, "unless otherwise ordered by the court or a judge." This was an action in which a judgment for partition and administration was pronounced by *Boyd, C.*:—Held, that more especially in this case a local master had no power to interfere, for by ordering taxed costs instead of commission he was vying the judgment. *Hendricks v. Hendricks*, 13 P. R. 79.—Boyd.

*Wilson v. Beatty—In re Donovan*, 29 Chy. 280; 9 A. R. 149; *Clark v. Clark*, 8 P. R. 156; *Cameron v. Leroux*, 9 P. R. 304; *Re Allenby and Weir, Solicitors*, 13 P. R. 403.

#### (b) Other Cases.

Executors may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct; and this rule was acted on where the personal representative of one of the executors was a party to the suit, though he had not acted in the management of the estate; his testator's estate being ample. *Kennedy v. Pingle*, 27 Chy. 305.—Spragge.

Where an executor, by his misconduct in the management of the estate, causes a suit, and but for the fact of the suit having been brought the assets would have been dissipated, the court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; and where in such a case, the party interested filed a bill without calling upon the executor for an account, or affording him any opportunity of shewing that his dealings were correct, the court (Spragge, C.) refused the costs of the suit to either party up to the taking of the accounts, but directed the executor to pay the subsequent costs. *Simpson v. Horne*, 28 Chy. 1.

In a suit for administration it appeared that the personal representative had kept very imperfect accounts of the estate, and that those brought into the master's office had been made up partly from scattered entries and partly from memory:—Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs from the defendant up to the hearing, although no loss had occurred to the estate. *Killins v. Killins*, 29 Chy. 472.—Proudfoot.

It was shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers:—Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree. *Ib.*

The plaintiff being a lunatic, and entitled to maintenance out of the income of a fund in the hands of executors, brought an action for the income, and for administration. The master reported a balance of income in the hands of the executors, being an amount charged against them for interest upon moneys retained by them and not invested according to the terms of the will; but the conduct of the executors was otherwise



proper:—Held, that if the question of the liability of the executors for the interest had been the only one in the action, the executors should have been ordered to pay the costs; but inasmuch as a general administration was unnecessarily sought by bill and granted, no costs should be awarded for or against the executors. *McCardle v. Moore*, 2 O. R. 229.—Boyd.

When it appeared that the administration proceedings had been instituted without any shew of reason, or proper foundation for the benefit of the estate, and that they had not, in their results, conduced to that benefit, the decision of Proudfoot, J., ordering the plaintiff to pay the costs of all parties, was affirmed. *Re Woodhau—Garbutt v. Hewson*, 2 O. R. 456.—Chy. D.

In an action for an account by a mortgagor, against the executors of a mortgages who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of \$10 was found in his favour. Plaintiff having made certain charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him; and certain special matter pleaded by the defendants being found against them:—Held, neither party entitled to costs. *Beatty v. O'Connor*, 5 O. R. 747.—Boyd.

Parties residing out of the jurisdiction who come into the master's office in an administration action pursuant to a notice to creditors, and claim to be creditors of an estate administered there, will be required to give security for costs. *Re Rees—Urquhart v. Toronto Trusts Co.*, 10 P. R. 425.—Hodgins, Master-in-Ordinary.

Held, that the executors in this case were entitled to their costs, because the action was not occasioned by their misconduct; but they were disallowed the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate. *In re Honsberger—Honsbergerv. Kratz*, 10 O. R. 521.—Boyd.

The administrator is a necessary party to an administration suit, and as such, should get his general bill of costs incurred in the ordinary proceedings in which he took part; but where an estate is insolvent, the creditors are the persons really interested in the litigation, and it is for them, and not for the administrator, to take active steps by way of appeal to reduce the claims of secured creditors. The administrator is entitled to attend upon such appeals, and to tax a watching brief, but not such costs as if he were the principal litigant. *Re Monteith—Merchants' Bank v. Monteith*, 11 P. R. 361.—Boyd.

See *Re Monteith—Merchants' Bank v. Monteith*, 12 P. R. 288, p. 731.

#### VII. COSTS.

M. H. proved a will as executrix, afterwards a subsequent will was found dated about a time when the testator was in a weak state of health, both physical and mental. A suit was brought by S. H., the executor in the later will against M. H. to set aside the first and establish the second will, which was successful, and in which M. H. was ordered to pay costs:—Held, that

M. H., in an action for an account of her dealings with the estate, having a fair question for litigation in endeavouring to uphold the first will, was entitled to the costs thereof out of the estate. *Hill v. Hill*, 6 O. R. 244.—Ferguson.

Held, that an infant is incapable of bringing suits in his own name, or of making himself or the estate he assumed to represent liable for the costs of such suits. *Merchants' Bank v. Monteith*, 10 P. R. 334.—Hodgins, Master-in-Ordinary.

The plaintiff wished to administer to the estate of his brother in the county of Westmoreland and province of New Brunswick, but was unable to give the necessary administration bond until the defendant W. and one J., agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock which the defendants wished to convert into money, but the plaintiff would not assist them in doing so. In passing the accounts of the estate in the Probate Court of Westmoreland county, it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due the several claimants were settled by the court. Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally the plaintiff filed a bill to compel the defendants to pay him his portion of the estate, with \$1,000 which he claimed as commission, and also to hand over to him the shares of the next of kin. At the hearing, a decree was made directing the estate to be disposed of by the defendants, and that they were entitled to their costs, as between solicitor and client, which could be retained out of the plaintiff's share of the estate. On appeal, Proudfoot, J., reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendants' costs; but the Court of Appeal (10 A. R. 76) restored the original judgment. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the court below, that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other of the next of kin to bear the burden of the costs. *O'Sullivan v. Harty*, 11 S. C. R. 322.

A trustee or executor stands in the same position as any other litigant with respect to costs. *Smith v. Williamson*, 13 P. R. 126.—Rose.

Where an action of ejectment was brought by the administrator of a deceased person in whom the legal estate in certain land was vested, and by the holder of a mortgage created by the deceased person upon such land, and it appeared that the deceased purchased the land with the moneys of the defendant, and took the conveyance in his own name, and that the defendant was the true owner of the land:—Held, that the fact that there was no declaration of trust in favour of the defendant, and that the evidence in the hands of the administrator tended to shew that the deceased was in his lifetime owner and not trustee, did not relieve the administrator from liability for costs; which were given to the defendant against both plaintiffs. *Id.*

See *Kennedy v. Pingle*, 27 Chy. 305, p. 711; *Re Donovan—Wilson v. Beatty* 20 Chy. 280;

9 A. R. 724; *Beatty v. Spratt v.*  
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9 A. R. 149; *McKay v. McKay*, 8 P. R. 334, p. 724; *Beatty v. O'Connor*, 5 O. R. 731, p. 714; *Spratt v. Wilson*, 19 O. R. 28, p. 718.

See also Subhead VI. 5, (b), p. 734.

#### VIII. ADMINISTRATOR AD LITEM.

A motion made under R. S. O. (1877) c. 49, s. 9, to appoint an administrator ad litem of the estate of a deceased person may be made before the referee, as this section merely extends a jurisdiction already possessed by him under G. O. 56 (See Con. Rule 210). *Collier v. Swayzie*, 8 P. R. 42.—*Stephens, Referee*.—*Spraggs*.

It is competent to the court, on a proper case being made, to appoint or dispense with an administrator ad litem, and then to direct an account, but to justify such an order it should appear not only in general terms that the estate was small, but a statement shewing the nature and amount of the personal estate ought to be produced and verified. *Re Colton—Fisher v. Colton*, 8 P. R. 542.—*Proudfoot*.

Held, that the court has no power, where the administration of an intestate's estate forms the subject of the suit, to appoint a representative under R. S. O. (1877) c. 49, s. 9, as the intestate is not a party interested in the matters in question in the suit within the meaning of that section. *Hughes v. Hughes*, 6 A. R. 373.

The original plaintiff having died pendente lite and an order having been obtained to continue the proceedings in the name of an administrator ad litem:—Held, that the plaintiff's costs, between solicitor and client, should be paid out of the interest recovered:—Held, also, that the administrator ad litem was not entitled to be paid the residue of the fund; but as to this liberty to apply was granted. *McCardle v. Moore*, 2 O. R. 229.—*Boyd*.

C. joined his wife in executing a mortgage on her land to a company, covenanting for payment, and then died intestate. The company, being about to begin an action to realize their claim on the mortgage, desired to have C.'s estate represented for the purpose of claiming against it for any deficiency. No letters of administration having been taken out:—Held, that it was proper to appoint an administrator ad litem under Con. Rule 311. *Re Chambliss and Canada Life Assurance Co.*, 12 P. R. 649.—*Ferguson*.

It is not intended by Con. Rule 311 that the business of the Surrogate Court should in a large measure be transferred to the High Court; the intention is, to provide for necessities arising in the progress of an action, where representation of an estate is required in the action, and there has not been carelessness or negligence on the part of the party who may require the appointment to be made. Under the circumstances of this case an application for the appointment of an administrator ad litem was refused. *Re Chambliss*, 12 P. R. 649, distinguished. *Meir v. Wilson*, 13 P. R. 33.—*Ferguson*.

In a mortgage action in which foreclosure only was sought, it was stated that the lands were not equal in value to the mortgage debt. The mortgagee being dead and having left no estate whatever except the equity of redemption sought to be foreclosed, the executor named in the will

of the mortgagor, which had not been offered for probate, was appointed administrator ad litem without security, under Con. Rule 311. *Cameron v. Phillips*, 13 P. R. 78.—*Ferguson*.

In framing an order under Con. Rule 311 appointing an administrator ad litem it is not sufficient that the order state "it is ordered that A. be and he is hereby appointed administrator ad litem to the estate of B."; the order is really a grant of administration, and should contain the particulars mentioned in Rule 48 of the Surrogate Rules: and if such is the fact, should also, in view of R. S. O. (1877) c. 50, s. 58, state that the administration is of the real and personal estate. *Cameron v. Phillips* (No. 2), 13 P. R. 141.—*Ferguson*.

The plaintiff claimed from the defendants a sum of money, part of which had been deposited by E. P., and part by the plaintiff herself, but all in the name of E. B., who was a non-existent person. E. P. died intestate before this action was brought, and no letters of administration to his estate having issued, the plaintiff applied under Con. Rule 311 for the appointment of an administrator ad litem. The Court refused to make an appointment. *Meir v. Wilson*, 13 P. R. 33, approved of and followed. *Ford v. Landed Banking and Loan Co.*, 13 P. R. 210.—*Q. B. D.*

See *Re Donovan—Wilson v. Beatty*, 29 Chy. 280; 9 A. R. 149.

#### IX. EXECUTOR DE SON TORT.

The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an executor de son tort. The rule that where an executor takes the testator's goods on a claim of property in them himself, although it afterwards appear he had no right, such claim being expressive of a different purpose from that of administration as executor, is also applicable to the case of a person taking the goods of a deceased person under a fair claim of title, such person, though he may not be able to establish his claim of title completely in every respect, is not liable to be charged as an executor de son tort. *Merchants' Bank v. Monteith*, 10 P. R. 467.—*Hodgins, Master-in-Ordinary*.

See *Re Colton—Fisher v. Colton*, 8 P. R. 542, p. 726; *Young v. Purvis*, 11 O. R. 597, p. 717.

#### X. DEFICIENCY OF ASSETS.

The effect of section 30 of R. S. O. (1877), c. 107, is to disable an executor from giving preference to one creditor over another, so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; and if, upon a final adjustment of the accounts of the estate, it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, and that there is a deficiency of assets, such creditor will be ordered to refund at the instance of the other creditors, the statute thus placing creditors and legatees in this respect upon the same footing. *Chamberlen v. Clark*, 9 A. R. 273; 1 O. R. 135.

I. R. endorsed notes for the accommodation of J. R. The holders received out of the estate

of J. R. after his death sixty cents in the dollar, leaving \$3,500 unpaid. B., the executor of I. R., paid this. I. R., who died 1st January, 1884, left all the residue of her estate, real and personal, to be equally divided, share and share alike, between J. R., J. F. and J. B. Shortly before her death I. R. had another will prepared, but died without executing it. There was a residuary clause in this latter will of all her property, directing a division of it into four equal parts, one share of which was to be given to J. R. On 4th January, 1884, all persons interested in the residuary devises in the will and in the intended will signed a written agreement on the back of the latter, that they accepted the distribution of the estate of I. R. provided for in the latter, in lieu of that contained in any other will though duly executed. By his own will, executed on 13th February, 1884, J. R. directed that the estate of I. R. so far as he was interested therein should be divided according to the agreement signed by him on 4th January, 1884: Held (1) that B., the executor of I. R., had the right to pay or retain out of J. R.'s share of her residuary estate the full balance which he had been obliged to pay on said accommodation notes, although J. R.'s estate was insolvent, and although the accommodation paper in question fell due after I. R.'s death. R. S. O. (1887), c. 107, s. 30, abolishing the right of retainer in case of a deficiency of assets, has reference to the debtor's estate, not to the creditor's, and where a legatee is indebted to the testator, the executor may retain the legacy either in part or full satisfaction of the debt by way of set-off, and this is not affected by that statute. (2) The agreement of January 4th, 1884, was binding on J. R. and was binding on his executor and could not be impeached by his creditors. The only possible ground of complaint by creditors was that this agreement violated 13 Eliz. c. 5, but that statute is directed against fraudulent alienations of property, whereby the debtor diminishes the estate, and does not touch the case of his neglecting or refusing to enrich himself. *Bain v. Malcolm*, L. O. R. 444.—Proudfoot.

#### XI. LANDS AS ASSETS.

The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported. *Freed v. Orr*, 6 A. R. 690.

#### EXECUTOR DE SON TORT.

See EXECUTORS AND ADMINISTRATORS.

#### EXECUTORY DEVISE.

See WILL.

#### EXHIBITS.

See EVIDENCE.

#### EXPERT EVIDENCE.

See EVIDENCE.

#### EXPLOSION.

See INSURANCE.

#### EXPRESS COMPANY.

Right to the facilities afforded by railways in the conduct of their business. See *The Vickers Express Co. v. Canadian Pacific R. W. Co.*, 9 O. R. 251, 13 A. R. 210.

#### EXPROPRIATION OF LAND.

I. BY CROWN.—See CROWN.

II. BY MUNICIPALITIES.—See MUNICIPAL CORPORATIONS.

III. BY RAILWAYS.—See RAILWAYS AND RAILWAY COMPANIES.

#### EXPULSION.

I. OF MEMBERS OF COMPANIES.—See COMPANY.

II. OF PUPILS FROM SCHOOLS.—See PUBLIC SCHOOLS.

#### EXTENT (WRIT OF.)

See *Clarkson v. Attorney-General of Canada*, 16 A. R. 202, p. 110.

#### EXTORTION.

A magistrate acting under 32-33 Vict. c. 20, s. 37 (Dom.), convicted four persons for creating a disturbance thereunder, and imposed upon each a fine of \$5.00, but instead of severing the costs which he had charged, imposed the full amount thereof against each defendant, and received it from each:—Held, that under the circumstances, more fully set out in the report of the case, the overcharge must be deemed to have been wilfully made, so as to render the defendant liable to the penalty imposed in such cases by R. S. O. (1877) c. 77, s. 4. *Parsons qui tam v. Crabbe*, 31 C. P. 151.—C. P. D.

#### EXTRADITION.

I. ASHBURTON TREATY AND STATUTES.

1. Generally, 741.

2. Evidence, 741.

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## 1. ASHBURTON TREATY AND STATUTES.

## 1. Generally.

An accessory before the fact is liable to extradition, but an accessory after the fact is not. *Regina v. Browne*, 6 A. R. 386; 31 C. P. 484.

Per Spragge, C. J. O.—The forgery which is the subject of the treaty, cannot be confined to the statutory felony of forgery. *In re Phipps*, 8 A. R. 77.

Held, that 40 Vict. c. 25 (Dom.), is not in force, but that the law and practice relating to the extradition of fugitive criminals between the United States and Canada, is to be found in the Ashburton Treaty, Art. X., the 31 Vict. c. 94 (Dom.), 33 Vict. c. 25 (Dom.), and the Imp. Acts, 33 and 34 Vict. c. 52, and 36-37 Vict. c. 60. *Re Williams*, 7 P. R. 275, approved of. *Regina v. Browne*, 31 C. P. 484; *S. C.* on appeal, 6 A. R. 386.

Semble, per Proudfoot, J.—It is not necessary for purposes of extradition that the crime charged should have been such an act as would have constituted that crime at the date of the Ashburton Treaty. It is sufficient if it constituted the crime in question at the date of its alleged commission. *In re Hall*, 3 O. R. 331.

Held that under the Extradition Act, 1877 (40 Vict. c. 25 Dom.), it is essential that the offence charged should be such as if committed here would be an offence against the laws of this country. The offence in this case was proved to be forgery by the laws of New Jersey. *In re Jarrard*, 4 O. R. 265.—C. P. D.

In extradition proceedings the information charged that the informant "hath just cause to suspect and believe, and doth suspect and believe that H. L. Lee," the prisoner, "is accused of the crime of forgery," etc., "for that the said H. L. Lee," etc., "did feloniously forge" some seventy-eight orders for the payment of money. The 79th charge was, that the said H. L. Lee, at the aforesaid several times, etc., did feloniously utter, knowing the same to be forged, the said several orders, etc.:—Held, sufficient, for that the information charged that the prisoner "did feloniously forge," etc.; and the allegation that the informant believed that the prisoner "is accused," etc., might be treated as surplusage; but even if objectionable at common law, it was good under s. 11 of 32 & 33 Vict. c. 30 (Dom.), and 32 & 33 Vict. c. 27 (Dom.); and moreover the 79th charge was free from objection:—Held, also, that in these proceedings, a plea to the information is not required. *In re H. L. Lee*, 5 O. R. 533.—C. P. D.

The expression "all judges, etc., of the County Court," contained in section 5 of the Extradition Act, R. S. O. ch. 142, includes the junior judge of said court. *In re Parker*, 19 O. R. 612.—Rose.

## 2. Evidence.

On an application for the discharge of a prisoner committed for extradition under an order of the county judge of Kent, on a charge of murder. Per Wilson, C. J., that under The Ashburton Treaty Art. X.; 31 Vict. c. 94 (Dom.), 33 Vict. c. 25 (Dom.), 33 Vict. c. 30 ss. 4, 5

(Dom.), and the Imp. Acts 33-34 Vict. c. 52, and 36-37 Vict. c. 60, a certified copy of an indictment for murder found by the grand jury of Erie county, State of New York, U. S., was of itself sufficient evidence to justify the committal of such prisoner for extradition. Per Osler, J., that such indictment was not evidence for any purpose. Per Wilson, C. J., and Osler, J., that the other evidence taken before the county judge, documentary and viva voce, set out in the report, was insufficient, as it shewed at most that the prisoner was an accessory after the fact, which did not come within the treaty. Per Galt, J., that if the case had turned on the indictment alone, he would have hesitated to accept it as conclusive against the accused; but that the other evidence together with the indictment, was sufficient to warrant his extradition. *Regina v. Browne*, 31 C. P. 484. See next case.

Upon an application to the county judge of Kent for extradition of the defendant, who was under indictment in the State of New York for murder, the coroner who had held the inquest there, proved by oral testimony before the county judge here, the original depositions taken on oath before him, and also copies of the depositions certified by him to be true copies:—Held, that under section 14 of the Imperial Extradition Act of 1870, the original depositions were properly received, as the power given therein to use the original depositions is not qualified by 31 Vict. c. 94, s. 2 (Dom.); and that the evidence disclosed therein was sufficient to warrant the extradition of the prisoner as an accessory before the fact:—Held, also, that the foreign indictment was not admissible as evidence against the accused. It was shewn that the only warrant issued in this case was the warrant issued by the district attorney, after the grand jury had found a true bill for murder, which did not profess to be issued upon the depositions, nor was it proved upon what evidence the bill was found:—Semble, per Patterson, J. A., that the right given by section 14 above referred to, to use copies of depositions is confined by the effect of section 2 of 31 Vict. c. 94, to those cases in which a warrant has been issued in the United States upon the depositions. *S. C.* 6 A. R. 386.

A prisoner was committed for extradition to the United States, on a charge of having forged a resolution of a city council relating to the issue of bonds, of having forged a bond of said city, and of uttering the same:—Held, on an application for his discharge, that the resolution being an essential preliminary to the issue of the bond, and the bond being an instrument which might be the subject of forgery, although not executed in strict accordance with the code of the state in which the bond was issued, there was a prima facie case made out against the prisoner, and that he should be remanded as to the charge of forgery. *Regina v. Hovey*, 8 P. R. 345.—Osler.

Held, that the evidence against the prisoner of having uttered a forged instrument not being otherwise sufficient, the court could not look at an indictment against him found by the grand jury of an American criminal court. *Id.*

Held, that the original warrant, within the meaning of 31 Vict. c. 94, s. 2 (Dom.), is not the first of two or more consecutive warrants, but

is any warrant issued in the United States of America. *Re Phipps*, 1 O. R. 586.—Q. B. D. See *S. C. 8 A. R. 77*.

Per Patterson, J. A., remarks upon the general right of a person charged before a magistrate with an indictable offence to call witnesses for his defence, and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime:—Semble, that the evidence offered in this case, as stated in the report, was improperly rejected. *S. C. 8 A. R. 77*.

Where the facts in evidence, though sufficient to warrant extradition if deposed to by witnesses who could really testify to their occurrence, were sworn to from information only, the prisoner was discharged. *In re Parker*, 9 P. R. 332.—Osler.

Certain foreign depositions used were sworn to before E. G., a justice of the peace for Cincinnati township, Hamilton county, Ohio. A certificate was attached, commencing, "I, Daniel J. Dalton, clerk of the Court of Common Pleas for said Hamilton county," certifying as to the signature of E. G., and that he was a duly qualified justice of the peace for said county, and entitled to take depositions of witnesses, etc., and concluded, "In testimony whereof I have hereunto set my hand and affixed the seal of the said court at Cincinnati, etc. D. J. Dalton, by Richard C. Rohner, deputy." To this was attached the certificate of the governor of the State of Ohio, under the great seal of the State, certifying that D. J. Dalton, "whose genuine signature and seal are affixed to the annexed attestation, was at the date thereof clerk of the said court," etc.: that "he is the proper person to make such attestation, which is in due form, and that his official acts are entitled to full faith and credit." The court, without specially pronouncing on the question, refused to allow an objection, which as a matter of fact was not taken, to the sufficiency of the depositions under 45 Vict. c. 25, s. 9, sub-s. 2 (a) (Dom.), for the official seal of D. J. Dalton was attached, and the governor certified that he was the proper person to make such attestation; and also there was viva voce evidence given in proof thereof, so that the "papers were authenticated by the oath of some witness" under sub-s. (b). *In re H. E. Lee*, 5 O. R. 583.—C. P. D.

Per Wilson, C. J. In these proceedings the evidence of interested parties need not be corroborated. *Ib.*

In extradition proceedings the information, warrant and depositions were certified under the hand and seal of a justice of the peace of Oscoda township, in the county of Josio, in the State of Michigan. There was also a certificate under the hand of the clerk of the county of Josio and the clerk of the Circuit Court for the said county and the official seal of the said Circuit Court, certifying that the said justice of the peace was, at the time of signing his certificate, a duly qualified justice of the peace, in the active discharge of the duties of his said office, and that his official seals were entitled to full credit. At the hearing before the county judge, before whom the extradition proceedings were had, S. stated he was the prosecuting attorney for Josio county, and all criminal prosecutions therein came under his care. He identified the papers,

and that they were the depositions and copies of depositions relating to the charge; and that the justices who took the depositions were justices of the peace as alleged, and had jurisdiction on the premises:—Held, that the documents were sufficiently authenticated. "Authenticated," as used in section 9 of 40 Vict., c. 25 (Dom.), is in effect the same as "attested" in section 2 of 31 Vict., c. 94 (Dom.). *In re Weir*, 14 O. R. 389.—C. P. D.

Held, that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant issued. *Ib.*

Held, that the depositions, etc., before the County Court judge disclosed sufficient evidence to warrant the defendant being placed on his trial for murder caused, as was alleged, by the defendant having feloniously ravished the deceased while in such a state of health as to hasten her death. *Ib.*

Per Cameron, C. J. The Divisional Court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence. *Ib.*

On a charge of forgery of a promissory note, alleged to have been committed in the State of Kansas, the justice before whom the depositions were made was certified to be a justice of the peace, with power to administer oaths:—Held, that he was a magistrate or officer of a foreign state within section 10 of the Extradition Act; and also that it was not necessary that he should be a federal and not a state officer: and further that the depositions need not be taken in the presence of the accused. *In re Parker*, 10 O. R. 612.—Rose.

The depositions produced and acted upon before the committing judge failed to show that the note, alleged to be forged, was produced and identified by the deponents or any of them:—Held, that this constituted a valid ground for refusing extradition; and that there was no power to remand the accused to have further evidence taken before the extradition judge as to such identification. *Ib.*

## EXTRAS.

See WORK AND LABOUR.

## FACTOR.

S., a manufacturer, desiring to borrow money from M., agreed with M. in writing, that M. should have the selling of the goods manufactured at his, S.'s, factory; that S. should give M. a mortgage on the factory, and premises to secure \$5,000, and interest, to be advanced by M., and should furnish to M. all the goods manufactured at the factory, and manufacture the same to the satisfaction of M., and ship the same to M., as M. directed, at such times, and in such reasonable quantities as he from time to time should direct, and should pay M. a del credere commission of seven and a-half per cent. for selling the same, and interest at eight per cent. on all moneys advanced by M. over the

\$5,000 filled cash to trade the value to advantage by or to ment co he had fault in trade:— was interest nature and M. to him, to keep twenty-trade vi protect could no customer bound to It appeared b defendan advance goods w goods se the same received v. Sykes,

F., a n to K. & named J. ing them ject to th in case of he, F., s not havi F.'s lett Chicago, shipped their ov payment received acknowl shipped there to of R., a assumed to cover charges senting the sale to his c replevie of the p property F. was 1 Factors' so as to per Ros the pos O. R. 1

\$5,000; and M. covenanted, as his orders were filled and the goods received, to advance in cash to S. seventy-five per cent. of the wholesale trade value of such goods, and for that purpose the said goods were to be invoiced to M. at such value that he, M., could sell them to the best advantage. It was agreed also, that all goods manufactured at the factory should be sold only by or through M.:—Held, that the above agreement constituted M. a factor, not a pledgee, for he had power to sell without regard to any default in payment, in the ordinary course of trade:—Held, also, that M.'s authority to sell was irrevocable:—Held, further, that, under the interest that M. had in the goods, and from the nature of the dealings, and arrangements of S., and M., if S. did not repay the advances made to him, or did not deliver to M. goods sufficient to keep his advances protected by a surplus of twenty-five per cent. of goods at the wholesale trade value, and it became necessary for M. to protect himself against such default, and he could not within a reasonable time have sold to customers, he could sell by auction, and was not bound to delay until private sales could be made. It appeared that certain goods not specially ordered by the plaintiff were sent to him by the defendant on some arrangement, on which he advanced seventy-five per cent., and which goods were sold by him in the same manner as goods sent to fill his orders:—Held, that he had the same right to sell these goods as the goods received under the written agreement. *Mitchell v. Sykes*, 4 O. R. 501.—Wilson.

F., a music teacher at Beardstown, Ill., wrote to K. & Co., at Chicago, that he had a customer named J., to whom he could sell a piano, and desiring them to ship one in their own name, to be subject to their order, but F. to pay freight charges in case of no sale, and return piano to plaintiffs, he, F., simply to act as their agent. K. & Co. not having the style of piano required, handed F.'s letter to plaintiffs, piano manufacturers in Chicago, who after communicating with F., shipped a piano to Beardstown, consigned to their own order, but to be delivered to F., on payment of freight charges. The piano was received by F. at Beardstown, and its receipt acknowledged in a letter to plaintiffs. It was shipped by F. to Virginia City, Ill., and from there to F., at Toronto, under the assumed name of R., and was there pledged by F. under such assumed name, with defendant D., a pawnbroker, to cover an amount loaned by D. to pay the charges as well as a further advance, F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises, where it remained until replevied:—Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him:—Held, also, that F. was not an agent within the meaning of the Factors' Act, R. S. O. (1887), c. 121, ss. 2, 4, 5, so as to enable him to pledge the piano; nor, per *Rose, J.*, was he an agent "entrusted with the possession of goods." *Bush v. Fry*, 15 O. R. 122.—C. P. D.

### FACTORIES' ACT.

See MASTER AND SERVANT.

### FACTUM.

See SUPREME COURT OF CANADA.

### FALSE IMPRISONMENT.

See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS—TRESPASS.

### FALSE PRETENCES.

See CRIMINAL LAW.

### FALSE REPRESENTATION.

See FRAUD AND MISREPRESENTATION.

### FARM CROSSINGS.

See RAILWAYS AND RAILWAY COMPANIES.

### FATHER AND SON.

See PARENT AND CHILD.

### FELONY.

- I. GENERALLY—See CRIMINAL LAW.
- II. SUSPENSION OF ACTION IN CASES OF FELONY—See ACTION.

### FEME COVERT.

See HUSBAND AND WIFE.

### FENCES.

- I. COVENANT TO KEEP UP FENCES—See LANDLORD AND TENANT.
- II. RAILWAY FENCES—See RAILWAYS AND RAILWAY COMPANIES.

Obligation of municipal corporation to fence ditches on highways in a dangerous condition. See *Walton v. County of York*, 6 A. R. 181.

Cattle straying from highway on land not fenced as required by municipal by-law.—Requisites of by-law. See *Crowe v. Steeper*, 46 Q. B. 87.

The plaintiff's predecessor in title had granted to defendant's predecessor in title a right of way over land afterwards conveyed to plaintiff, such right of way being conditioned upon the grantees thereof "fencing and keeping in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides



of the roadway, and put gates at each end of it, which, after remaining many years, rotted away:—Held, that on the proper construction of the instrument the right of way was dependent upon defendant's maintaining fences not merely at the sides of the way in question, but also at the ends of it, where they might have gates as part of the fences:—Held, also, that even if this was not the proper construction of the instrument, plaintiff, as owner of the soil, was entitled, himself to fence the ends of the way, putting gates therein of such width and construction as would reasonably admit of the right of way being conveniently used. *Clendenan v. Blatchford*, 15 O. R. 285.—Q. B. D.

### FERRY.

The Crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville to Ameliasburg":—Held, a sufficient grant of a right of ferryage to and from the two places named. *Anderson v. Jellett*, 9 S. C. R. 1.

Under the authority of this license the town of Belleville executed a lease to the plaintiff granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing only for one landing place on each side, and a ferry was established within the limits of the town of Belleville on the one side, to a point across the bay of Quinte, in the township of Ameliasburg, within an extension of the east and west limits of Belleville. The defendants established another ferry across another part of the bay of Quinte, between the township of Ameliasburg and a place in the township of Sidney, which adjoins the city of Belleville, the termini being on the one side two miles from the western limits of Belleville, and on the Ameliasburg shore, about two miles west from the landing place of the plaintiff's ferry:—Held (reversing the judgment of the courts below 27 Chy. 411; 7 A. R. 341), that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the said ferry, and that the defendants' ferry was no infringement of the plaintiff's right. *Id.*

Liability of municipal corporation for injuries caused by negligence of officers in the management of ferry boat. See *City of Saint John v. Macdonald*, 14 S. C. R. 1.

Constitutionality of Statute of Provincial Legislature authorizing a municipality to impose an annual tax on "ferry-men or steamboat ferries." Construction of by-law made thereunder. See *Longueuil Navigation Co. v. City of Montreal*, 15 S. C. R. 566.

By 38 Vict., c. 97, the plaintiffs were authorized to build and maintain a toll bridge on the river L'Assomption at a place called "Portage," and if the said bridge should by accident or otherwise be destroyed, become unsafe or impassable, the said plaintiffs were bound to rebuild the said bridge within fifteen months next following the giving way of said bridge, under penalty of forfeiture of the advantages to them

by this Act granted; and during any time that the said bridge should be unsafe or impassable they were bound to maintain a ferry across the said river, for which they might recover the tolls." The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although plaintiffs maintained a ferry across the river, the defendant built a temporary bridge within the limits of the plaintiffs' franchise and allowed it to be used by parties crossing the river. In an action brought by the plaintiffs, claiming \$1,000 damages, and praying that defendant be condemned to demolish the temporary bridge, on appeal to the Supreme Court it was:—Held, 1st, that as rights in future might be bound, the case was appealable under R. S. C. c. 135, s. 29 (b). 2nd, Reversing the judgment of the court below, Ritchie, C.J., and Patterson, J., dissenting. That the exclusive statutory privilege extended to the ferry, and while maintained by the plaintiffs the defendant had no right to build the temporary bridge, but as the bridge had since been demolished the court would merely award nominal damages and costs. *Galarneau v. Guibault*, 16 S. C. R. 579.

### FIERI FACIAS.

See EXECUTION.

### FINES.

See PENAL ACTIONS AND PENALTIES.

### FIRE.

- I. LOSS BY FIRE AFTER CONTRACT OF SALE, 748.
- II. WHEN AN EXCUSE FOR NON-PERFORMANCE OF CONTRACT—See CONTRACT.
- III. CARRIAGE OF GOODS, 749.
- IV. CLEARING LAND, 749.
- V. FROM RAILWAY ENGINES—See RAILWAYS AND RAILWAY COMPANIES.
- VI. FROM STEAMBOATS—See SHIPS.
- VII. LIABILITY OF TENANT AFTER FIRE—See LANDLORD AND TENANT.
- VIII. INSURANCE AGAINST—See INSURANCE.

#### I. LOSS BY FIRE AFTER CONTRACT OF SALE.

A purchaser at a sale under decree signed the usual contract to purchase, and paid the deposit. The next day the buildings on the property were burned down:—Held, on appeal, reversing the decision of the referee, 8 P. R. 166, that the loss would not fall on the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed. *Stephenson v. Bain*, 8 P. R. 258.—Proudfoot.

See B.  
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## III. CARRIAGE OF GOODS.

See *Brodie v. Northern R. W. Co.*, 6 O. R. 180.

## IV. CLEARING LAND.

The defendant, for the purpose of clearing his land, set out fire on the same, but before doing so, consulted with the plaintiff, who had some lumber piled on an adjoining lot, and who agreed that the weather was favourable, the wind blowing in a direction away from the plaintiff's property, and to prevent its spreading thereto, the defendant burnt up the stubble, etc., around the plaintiff's property. The fire was set out on Monday, the wind continuing in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep watch over the fire. On Thursday morning there were indications of a change of wind, and the defendant sent his son to watch the fire, but when the latter arrived on the ground, the wind was blowing a heavy gale, at the rate of from thirty-five to forty miles an hour, and the fire communicated to the plaintiff's property, which was destroyed, and it appeared that even if the defendant had been watching he could not have prevented the fire spreading:—Held, that the defendant was not liable for the damage sustained by the plaintiff. *Murphy v. Dalton*, 5 O. R. 541.—C. P. D.

Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time and season, and managed with due care, he is not responsible for damage occasioned by it. But where the defendant, whilst harvesting in his own field, threw upon the ground a lighted match thinking he had extinguished it, which however set fire to combustible material, and the defendant on afterwards discovering it, though he could easily have put it out, after confining it to one spot left it, anticipating no danger, and after burning for four or five days, the fire spread to the plaintiff's premises, and destroyed his barn with a quantity of grain and hay, the court in reversing the decision of the Queen's Bench, considered that the principle and doctrine established in *Fletcher v. Rylands*, L. R. 3 H. L. 330, and *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, applied; and that the defendant was liable for the damage sustained by the plaintiff, even in the absence of actual negligence. *Gaston v. Wald*, 19 Q. B. 586, doubted. *Furlong v. Carroll*, 7 A. R. 145.

## FIRE INSURANCE.

See INSURANCE.

## FIRE LIMITS.

See MUNICIPAL CORPORATIONS.

## FISHERY.

Under the Imperial Statute, 14-15 Vict. c. 93, regulating the boundary line between old Can-

ada and New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of the Provinces of Quebec and New Brunswick and within the Dominion of Canada, and the operation of the Fisheries Act, 31 Vict. c. 60. Therefore the act of drifting for salmon in the Bay of Chaleurs, although that drifting may have been more than three miles from either shore of New Brunswick or of Quebec abutting on the bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act, and of the regulations made in virtue thereof. *Mowat v. McFee*, 5 S. C. R. 66.

The term "on view" in sub-section 4 of section 16 of the Fisheries Act is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act. *Id.*

Three several actions for trespass and assault were brought by A. B. & C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V., for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for salmon in front of their respective lots. The defendant was a fishery officer, appointed under the Fishery Act (31 Vict. c. 60, Dom.), and justified the seizure on the ground that the plaintiffs were fishing without licence in violation of an order-in-council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in these words,—"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the department of marine and fisheries, is hereby prohibited." The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance had been made. There was no actual injury. A. recovered \$3,000, afterwards reduced to \$1,500 damages; B. \$1,200; and C. \$1,000:—Held, that sections 2 and 19 of the Fisheries Act, and the order-in-council of the 11th of June, 1879, did not authorize the defendant in his capacity of inspector of fisheries, to interfere with A. B. & C.'s exclusive right as riparian proprietors of fishing at the locus in quo; but that the damages in all the cases were excessive, and therefore new trials should be granted:—Held, also (Gwynne, J., dissenting), that when the defendant committed the trespasses complained of, he was acting as a Dominion officer, under the instructions of the department of marine and fisheries, and was not entitled to notice of action under C. S. N. B., c. 89, s. 1, or c. 90, s. 8. *Venning v. Steadman*, 9 S. C. R. 206.

Liability of inspector's sureties for deputy's default.—Disputes within s. 11 of 37 Vict. c. 45 (Dom.). See *Verratt v. McAulay*, 5 O. R. 313.

See *Regina v. Robertson*, 6 S. C. R. 52, p. 308.

## FIXTURES.

The plaintiff owning land mortgaged it and afterwards built a house thereon which was placed on blocks of wood and was held by its own

weight on them. Per *Armour J.* the house was a mere chattel, not having become by annexation to the land or by the intention of its owner part of the land. Per *Cameron J.* the house was a fixture. *Phillips v. Grand River Farmers' Mutual Fire Ins. Co.* 46 Q. B. 334.—Q. B. D.

S. mortgaged land upon which was a sawmill, together with machinery, plant, trade and other fixtures, to the Dominion Bank. He afterwards erected a drying-kiln with the necessary iron piping for drying lumber, and subsequently released his equity of redemption in all the property mortgaged to the mortgagees. The latter sold to the plaintiff the iron piping, which was claimed by defendant under a sale from S. —Held, that *prima facie* the piping being part of a building erected for the purpose of improving the inheritance, was a fixture, and passed to the mortgagees, either under their mortgage or the release; that the burden of shewing that it was to continue chattel property, when put into the kiln, lay on the defendant; and that the plaintiff therefore must succeed. *Burke v. Taylor*, 46 Q. B. 371.—Q. B. D.

Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor (the defendant) had no interest in any of the machinery at the date of the mortgage to the plaintiffs, having previously sold out to one Abel; but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under decree obtained by plaintiffs the master made the lumber company parties as subsequent encumbrancers:—Held (assuming the machinery, or some portions of it, to be trade fixtures removable as between landlord and tenant), that the machinery (or such portion aforesaid), when acquired by the mortgagor, would go to increase the plaintiffs' security; and that therefore the master was right in making the lumber company parties as subsequent encumbrancers. Further, that there appeared no good reason why the plaintiffs having purchased and taken an assignment of a mortgage made by defendant in 1869, were not entitled under it to have the greater part if not all the machinery added to their security. *London & Canadian Loan etc. Co. v. Pulford*, 8 P. R. 150.—Proudfoot.

Mortgagors of vacant land, adjacent to their foundry, which was constructed of stone, erected thereon a frame building as a lean-to to the foundry, and placed in it three lathes, an iron planer, two drills, a crane and a shaper, all of which, with the exception of one drill, which was bolted to the frame work, the latter being bolted to the girders, were kept in their position by their own weight, without being fastened to any part of the building, and were capable of being removed without injury to either building or machinery. When the mortgage was given the land was not worth the money advanced, but the mortgagees relied upon a substantial building which the mortgagors intended to erect on it as an extension to their factory, and took a covenant to insure the building for \$4,000, but they did not bind the mortgagors to build or put in machinery:—Held, reversing the decree of Spragge, C., that the machines were not fixtures, as they were not put in the

building with the intention that they should become part of the realty:—Held, also, that the mere fact that such machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty. Per *Patterson, J. A.*, the weight of authority is against construing as fixtures anything which is not annexed in fact to the realty, except where the articles form part of the fabric as an integral portion of the architectural design, or as in the case of a millstone, which is an essential part of the mill. *McDonald v. Weeks*, 8 Chy. 297, dissented from. *Keefe v. Merrill*, 6 A. R. 121.

The plaintiffs were registered mortgagees of a large tract of land. M. desiring to build a mill in a village where part of the land lay, took a deed of a small portion thereof from one of the owners of the equity of redemption, in order that he (M.) should erect a flouring mill thereon. M., without searching the title, and without actual notice of the plaintiffs' mortgage, erected the mill with the intention of establishing a business there. Before its completion, and before the machinery was put in, he discovered the mortgage, but proceeded to put in a boiler, engine, millstones, and several machines necessary for carrying on milling. On the plaintiffs attempting to sell under their mortgage, the machinery was removed by M. An injunction was granted to stay the removal, and an issue was directed to try the title to the mill and machinery. A number of the machines were not attached to the building, being kept in place by their own weight; but they were necessary for the working of the mill, and suited for that purpose only, and the whole structure—building, engine-house, boilers, engine, and machinery—was put up with the express purpose of establishing a flouring mill on land that M. believed to be his own:—Held, that the mill and its contents passed to the mortgagees; and an order was made for restitution of the machinery which had been removed, and the injunction extended to prevent its removal in future, with the liberty to M. to pay its value to the plaintiffs, which they ought to accept, if offered, and release the machinery. *Dickson v. Hunter*, 29 Chy. 73.—Ferguson.

Certain counters were embraced in the contract for the carpenter's work of a drug store, and nailed to a scantling, which was placed in the wall of the store. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected with the frame-work of the windows in such a way that the wainscoting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged:—Held, that the counters were part of the freehold and included in a mortgage thereof, and not chattel property. *Holland v. Hodgson*, L. R. 7 C. P. 328, and *Keefe v. Merrill*, 6 A. R. 121, approved of. *McCausland v. McCallum*, 3 O. R. 305.—Ferguson.

H. H. S. gave a mortgage to R. to secure a past debt and future advances, in which it was recited that security was to be given "by the lands hereinafter mentioned, and also by the machinery hereinafter mentioned," and which proceeded to mortgage the said lands, "together with the machinery and foundry apparatus now in use and that may in future be used in the

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brick and frame buildings situate on the said lots, used as a machine shop and a foundry downstairs and as a printing office upstairs, the machinery being composed of one printing press, etc. (describing various articles of machinery), together with all the machinery now in or that may hereafter be put in the said premises." In the proviso in the mortgage the property was described as "lands and chattels." The mortgage was registered, but was not filed as a chattel mortgage, nor was there change of possession:—Held, that the above was, in effect, a mortgage of the machine shop and foundry, and of the printing office, as going concerns, not of the land as such and chattels as such, and had the same force and effect as if these had been mortgaged, naming them:—Held, therefore, that certain articles in question in this action, which were at the time of the execution of the mortgage on the premises, and were essential parts of the going concerns, passed under the mortgage:—Held, also, following *Kitching v. Hicks*, 6 O. R. 739, that the mortgage was in any event good without registration as a chattel mortgage, so far as it was a mortgage upon property brought upon the premises after its date. *Robinson v. Cook*, 6 O. R. 590.—*Ferguson*.

T., being liquidator of a company which was being wound up sold the manufactory to H. for \$9,000, part in cash and the balance secured by a mortgage on the premises. At the time of the sale there was an engine, boiler, pulleys, etc., among the machinery on the premises, but no mention of them was made in the mortgage. H. afterwards undertook to sell the engine, boiler, and pulleys, but T. objected until assured that they would be replaced by better machinery. H. purchased from I. and H., the defendants, another engine, boiler, shafting, hangers, and pulleys to replace the old ones, paying part in cash, and securing the balance by notes, under a written agreement, which stipulated that the property should not pass to H., but was to remain in I. and H. until the full payment of the price, and of any obligations given therefor, but H. was to have possession at once, and to use the same until default in payment \* \* \* when I. and H. might resume possession. The engine and boiler were placed upon a stone foundation and bricked over in a building on the premises other than that from which the old ones had been removed. They could be removed by taking down a part of the wall of the buildings in which they were placed, and without injury to the old building; but were so affixed to the realty as under ordinary circumstances to become a part of it. H. failed, assigned his estate for the benefit of his creditors, and made default in payment, and I. and H. began to remove the machinery. In an action brought by T. for an injunction restraining the defendants I. and H. from such removal:—Held, that the express agreement between H. and the defendants that the property in the machinery should not pass from the defendants to H. until paid for, and the intention with which the articles were affixed, must govern; and that the machinery therefore did not become part of the realty or pass to the plaintiffs. *Thomas v. Inglis*, 7 O. R. 588.—*Proudfoot*.

Held, that under the statutory covenant to repair, the tenant was bound to keep in repair

not only the demised premises but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make; that the right to erect such fixtures is to this extent, viz., that they shall not be such as to diminish the value of the demised premises, nor to increase the burden upon them as against the landlord, nor to impair the evidence of title. The plaintiff's reversion not being injured by the acts complained of, there was no waste and no forfeiture. *Holderness v. Lang*, 11 O. R. 1—*Q. B. D.*

O. & K. under a verbal agreement with an agent of the Canada Company (which that company refused to adopt) entered into possession of land belonging to the latter, and erected a steam mill thereon. They procured from the plaintiffs an engine, boiler, etc., under an agreement that the property therein should not pass to the vendees till paid for. They exchanged the plaintiff's boiler for another made by one D., which they put up with the plaintiff's engine. This coming to the knowledge of the plaintiffs they seized their own boiler, in consequence of which O. & K. on the 27th November, 1883, executed to the plaintiffs a chattel mortgage on the "D." boiler. Prior to this date, however, and on the 12th of the same month O. & K. executed a mortgage on the said lands and premises to the defendant, to whom they were indebted, and three days later as a matter of precaution and as part of the same bargain they executed a chattel mortgage in his favour as further security for a debt due him (not naming any amount), and assigned all and singular certain goods, etc., viz.: "One mill and machinery, one frame house \* \* two bay horses," etc. This security by reason of defects under the Chattel Mortgage Act was void as against the plaintiff's claim. Prior to the commencement of this action the defendant obtained from the Canada Company a deed of the land in question. On appeal to this court it was:—Held (in this reversing the judgment of the court below, 9 O. R. 692), that although O. & K. had not any interest in the land on which they had so erected their mill, and placed their machinery, yet by their mortgage the "D." boiler and other fixtures not originally purchased from the plaintiffs passed to the defendant as part of the realty; such mortgage unlike that of the chattels not requiring registration to give it validity:—Held, also, that the defendant might support his title under the deed from the Canada Company; the boiler having been affixed to the land and passing under the deed as part of the realty. Per *Patterson, J. A.*—No difficulty existed in supporting the defendant's title under either of his own mortgages, or under the conveyance from the Canada Company. *Stevens v. Barfoot*, 13 A. R. 366.

Quere, whether the plaintiff the proprietor of a skating rink, was a person engaged in trade, so as to make fixtures used in his business exempt from distress. *Hovell v. Listowell Rink and Park Co.*, 13 O. R. 476.—*C. P. D.*

Under the particular circumstances herein, a hardwood flooring, put down specially for skating, and capable of removal, was held to be a tenant fixture, and exempt from distress. There was no finding by the jury that the flooring could be restored in the same plight as before

distress; but in view of the finding of the tender having been made, this was not now material. *Id.*

See *Dewar v. Mallory*, 27 Chy. 303; *Joseph Hall Manufacturing Co. v. Hazlett*, 8 O. R. 465; *Polson v. Dejeer*, 12 O. R. 275, p. 344; *Winfield v. Fowle*, 14 O. R. 102.

### FLOATING TIMBER.

See WATER AND WATER COURSES.

### FOLLOWING MONEY OR SECURITIES.

TRUST MONIES—See TRUSTS AND TRUSTEES.

Payment by a bank on forged endorsement of cheque. Right of the drawer to recover back. See *Agricultural Investment Co. v. Federal Bank*, 45 Q. B. 214; 6 A. R. 192.

The testator by his will left money to his children, which was to be paid to them on their coming of age, and be deposited by the executors in a savings bank in the meantime. One of the executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian:—Held that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet, under the circumstances, the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced, with costs; though against the surety the bill was dismissed, with costs. *Galbraith v. Duncombe*, 28 Chy. 27.—Blake.

G. obtained a loan of \$3,700 through R. from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for \$7,500, and had paid \$4,000 cash, and wanted the loan to pay the balance with, and on the receipt of the loan paid W. the \$3,000, which was the total purchase money for the 220 acres; and another parcel of about fifty acres, and was the full value of both parcels. G. got the conveyance from W. of both parcels, and conveyed the 220 acres to R. to carry out the scheme, and retained the fifty acres himself. In an action by the plaintiffs, it was:—Held, that on the conveyance of the fifty acres being executed to G., the land immediately became the property in equity of the plaintiffs. That the land was not subject to the claims of certain execution creditors of G., whose fi. fas. were in the sheriff's hands. But that a mortgage on the fifty acres, made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage

money was paid), as the mortgagee was no party to the action. *Hamilton Provident and Loan Society v. Gilbert*, 6 O. R. 434.—Ferguson.

D. J. endorsed a promissory note for the accommodation of W. J., who discounted it, and gave D. J. a mortgage on certain land to indemnify him against his liability as indorser on the note. W. J., during the currency of the note absconded, after obtaining from M. by false pretences a cheque for a large sum, which he cashed, and gave part of the proceeds to D. J. to take up the note, which D. J. did before maturity. W. J. told D. J. that he had got the money from M., with whom he had dealings, as D. J. knew, but D. J. had no notice of any wrongdoing in connection with the money:—Held, affirming the judgment of Boyd, C., (10 O. R. 1), that the mortgage ceased to be an incumbrance on the land when the note was retired; that M. could not follow the money into the note and was therefore not entitled to stand in the shoes of D. J., as to the security held by him, even if it had been a mortgage to secure the payment of the note. *Jack v. Jack*, 12 A. R. 476.

A miller gave a warehouse receipt to a bank on some wheat "and its product" stored in his mill for advances made to him and died insolvent about two months after. During this period wheat was constantly going out of and fresh wheat coming into the mill. Just before his death the bank took possession and found a large shortage in the wheat which had commenced shortly after the receipt had been given and had continued to a greater or less degree all the time. In the administration of his estate it appeared that during the period of shortage some of the wheat had been converted into flour which had been sold and the proceeds, which were less than the value of the shortage, paid to the administrator:—Held that the bank was entitled to the purchase money of the flour. *Re Goodfellow—Traders Bank v. Goodfellow*, 19 O. R. 299.—Boyd.

See *Bailey v. Jellett*, 9 A. R. 187, p. 134; *Girault v. La Banque Jacques Cartier*, 9 S. C. R. 597, p. 133; *Ryan v. Bank of Montreal*, 12 O. R. 39; 14 A. R. 553, p. 164.

### FORCIBLE ENTRY.

Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of the plaintiff must be considered, and the court will not generally investigate it upon an interlocutory proceeding, such as an application for an interlocutory injunction. *Toronto Breving and Maiting Co. v. Blake*, 2 O. R. 175.—Proudfoot.

Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time acting president, can bring an action to restrain him in the name of the company, although it is uncertain who is the rightful president. *Id.*

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**FORECLOSURE.**

See MORTGAGE.

**FOREIGN COMPANIES.**

See COMPANY.

**FOREIGN CONTRACT.**

See FOREIGN LAW.

**FOREIGN COUNTRY.**

See FOREIGN LAW.

Devise to. See *Parkhurst v. Roy*, 27 Chy. 361; 7 A. R. 614.

**FOREIGN COURTS.**

Jurisdiction of foreign courts in cases of divorce. See *Magurn v. Magurn*, 3 O. R. 579, 11 A. R. 178.

In the course of proceedings taken in Scotland for winding-up the plaintiffs' company, an order was made by a Scotch court for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant, who lived in Ontario, in any court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose:—Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish court. And an order striking out the defence in the action on the ground that it was res judicata by the order of the Scottish court was rescinded. *Reynolds v. Barnedo Banking Co.*, Cassel's Dig. p. 92, followed. Semble, that the order of the Scottish court should have been limited to such books and papers as were in the hands of the defendant at its date. *British Canadian Lumbering and Timber Co. v. Grant*, 12 P. R. 301.—Boyd.

Quære as to the power of a judge under the English Bankruptcy Act, 1883, to grant an injunction enjoining plaintiffs from proceeding with an action in the High Court of Justice for Ontario against defendants, who were subject to the proceedings in bankruptcy in England. See *Maritime Bank v. Stewart*, 13 P. R. 86.—Rose.

**FOREIGN DIVORCE.**

See HUSBAND AND WIFE.

**FOREIGN INDICTMENT.**

As evidence in extradition proceedings. See *Regina v. Hovey*, 8 P. R. 345.

**FOREIGN JUDGMENT.**

See JUDGMENT.

**FOREIGN LAW AND FOREIGNER.****I. FOREIGN LAW.**

1. *Operation of*, 758.
2. *Proof of*, 761.
3. *Other Cases*, 762.
4. *Domicile*—See DOMICILE.
5. *Foreign Courts*—See FOREIGN COURTS.
6. *Foreign Divorce*—See HUSBAND AND WIFE.
7. *Foreign Judgments*—See JUDGMENT.

**II. FOREIGNER—See ALIEN.****III. INTERNATIONAL LAW—See INTERNATIONAL LAW.****I. FOREIGN LAW.****1. Operation of.**

Per Ritchie, C. J. As the agreement in this case between the suppliant an advocate of the Province of Quebec and a Minister of the Crown at Ottawa, on behalf of Her Majesty, was made at Ottawa, in the province of Ontario, for services to be performed in Halifax, in the province of Nova Scotia, it was not subject to the law of the province of Quebec. *Regina v. Doutre*, 6 S. C. R. 342.

The plaintiff, at Kingston, Ontario, having on the 20th October, ascertained from the defendant in reply to his inquiry the price for forging a cross-head for an engine, wrote on the same day to the defendant at Montreal, Quebec, enclosing a drawing and asking him to ship the cross-head to him at Kingston as soon as finished, per G. T. R. In answer defendant wrote that the matter would have immediate attention, "and as soon as ready I will ship to your address." The cross-head was subsequently shipped to plaintiff at Kingston as directed, when a defect in the forging was discovered, and after being used on the plaintiff's steamer for some months it broke at the defective point. On a motion to set aside the service of the writ herein the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein, within the R. S. O. (1877) c. 50, s. 49:—Held, reversing the decision of the Common Pleas (31 C. P. 164), that the contract being to forge and deliver on the Grand Trunk Railway at Montreal, was a contract made in the province of Quebec, and the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existed when it left the workshop at Montreal, the breach also occurred in that province, and the plaintiff therefore must be non-suited. *Gildersleeve v. McDougall*, 6 A. R. 553.



Where the defendants in a suit reside in this country, and the principal office of the plaintiffs is in England, and a contract is entered into there between the parties which is to be executed in New York, a suit in respect thereof may be instituted in this province. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.—Blake.

A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. c. 57, s. 4, is payable at the place named therein, the C. S. U. C. c. 42, requiring the use of the restrictive words, "not otherwise or elsewhere," applying only to notes made and payable in Ontario. The note in this case was made in Toronto, payable at the Mechanics' Bank, Montreal, and was sent to Montreal, and there held until maturity, when it was presented for payment and dishonoured:—Held, that the contract being performable in Quebec, and the breach occurring there, the cause of action arose there, so as to bring the defendant within the operation of 22 Vict. c. 5, s. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only. Quere, whether the personal service referred to in R. S. O. (1877) c. 50, s. 145, refers to personal service in Quebec. *Ib.*

Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The domicile of the defendant was, at the time, in Ontario, and the drawees were also domiciled there. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York stock exchange, and that, as such, it was under the law of New York, an illegal contract, and invalid:—Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario and although the drawers were also domiciled in Ontario; for the contract of the drawer was to pay the money at the place where he entered into the contract, in default of the drawee paying, and the domicile of the drawer did not affect the rule as stated. *Story v. McKay*, 15 O. R. 169.—Falconbridge.

Partnership articles.—Ownership of plant—Law of Quebec. See *Macdonald v. Worthington*, 7 A. R. 531; 9 S. C. R. 327.

To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by the terms thereof, was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the money:—Held, on demurrer, a good defence. *Pritchard v. Standard Life Ass. Co.*, 7 O. R. 188.—Rose.

The defendants signed and sealed a number of policies in blank, and sent them to an agent in New York to be filled up and issued as insurances were effected. A., their agent there, filled up one for a risk of \$2,500 on a lumber yard, a risk greater than extra hazardous, although he had been instructed not to take any extra hazardous risk for more than \$1,500. He issued the policy without receiving the payment of the premium, although a condition was indorsed on it that no insurance proposed to the company was to be considered in force until the premium should be paid in cash. The policy was issued on the 8th August. The fire occurred on the 10th August. A cheque for the premium was sent to the company on the 11th August, which was immediately returned and the risk repudiated. Under the winding-up proceedings of the company, it was attempted to prove a claim for the loss in the master's office, when it was contended that the law of the State of New York, where the policy was issued, governed the contract, and under that law the agent had power to waive the payment of the premium. The master disallowed the claim, (10 P. R. 313), holding that the law of Ontario governed the contract. On an appeal from the master's certificate, it was:—Held, that the master was right. That the law of Ontario governed, as the place where the policy was signed and sealed was the place where the contract was made. *Clarke v. Union Fire Ins. Co.—Re Export Lumber Co.*, 6 O. R. 223.—Ferguson; 10 P. R. 313.

The locality of the forum of litigation determines whether a corporation is foreign or not. A contract executed in Ontario and delivered by an agent of the contractor to the contractee in New York is governed by the laws of Ontario. *S. C.*, 10 P. R. 313.—Hodgins, *Master-in-Ordinary*.

C. & Co. carrying on business in Chicago, in the State of Illinois, for the manufacture of mill machinery, etc., had certain machinery manufactured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & Co. being pressed by plaintiffs, their bankers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by the plaintiffs, endorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & Co., not being in a position to retire them, in pursuance of an arrangement to that effect, the warehouse receipts were cancelled and new ones dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee in Chicago for the benefit of creditors. On 22nd November, the defendant placed writs of execution in the sheriff's hands against C. & Co., under which these goods were seized. No fraudulent preference or intent was proved:—Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario; that C. & Co., being residents of the State of Illinois, the transfer must be governed by the law of that State, according to which the transfer was valid and effectual; that, even if dealt with as subject to the law of Ontario, when M. & T. gave the warehouse receipts direct to the bank, they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the

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Chicago, in the acture of mill chinery manu- Ont., which was Woodstock, Ont. iffs, their bank- ury for two of e accounted by the e plaintiffs the ls. At the ma- not being in a suance of an ar- ousehouse receipts ed 12th October, e plaintiffs. On o. had made an go for the benefi e, the defendant e sheriff's hands e these goods were ce or intent was tiffs, a foreign al property in residents of the ings to be governed ing to which the l; that, even if law of Ontario, e receipts direct ds for the plain- transfer of both e goods to the

plaintiffs, subject to the trustee's rights, if any; and the goods being in the hands of third parties and not of C. & Co., the Bills of Sale Act did not apply; and the Act as to banks and banking, and warehouse receipts did not apply to the plaintiffs, a foreign corporation. *Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527.—C. P. D.

A company incorporated in the State of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them:—Held, that, the property mortgaged being in Ontario, the transaction was governed by the laws of Ontario without regard to the laws of Michigan. *River Street Co. v. Sill*, 12 O. R. 557.—Q. B. D. See also *Marthinson v. Patterson*, 20 O. R. 125, 720.

The husband of the defendant, while a bachelor domiciled in this province, had, in the years 1871 and 1876, effected three policies of insurance on his life with companies whose head offices in Canada were at M., in the province of Quebec, where the insurance moneys were payable. After his marriage, and while still domiciled in this province, he endorsed declarations on the policies in favour of defendant, and handed them to her. After his death the insurance moneys were claimed by the defendant and by the plaintiffs as administrator of his estate, against which there were creditors:—Held, that the endorsements on the policies were governed by the law of this province. *Lee v. Abdy*, 17 Q. B. D. 309, followed. *Toronto General Trusts Co. v. Sewell*, 17 O. R. 442.—Ferguson.

See *Re O'Brien*, 3 O. R. 326, p. 709; *Hughes v. Rees*, 5 O. R. 654; *Langdon v. Robertson*, 13 O. R. 497, p. 177.

## 2. Proof of.

Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money for which they sued. Defendants having refused to settle for losses sustained:—Held, reversing the judgment of Patterson, J.A., that assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing and this defence not having been clearly proved, judgment was given for the plaintiffs. *Rice v. Gunn*, 4 O. R. 579.—Q. B. D.

After judgment, at the trial, but before the argument in banc, the defendants put in the report of a case bearing upon the question, decided in the Supreme Court of the United States, verified by affidavit:—Held, admissible. *Ib.*

Where the opinions of experts on foreign law are conflicting, the court will examine for itself the decisions and text books of the foreign

country, in order to arrive at a satisfactory conclusion. *Ib.*

See *Re O'Brien*, 3 O. R. 326, p. 709; *Langdon v. Robertson*, 13 O. R. 497, p. 177.

## 3. Other Cases.

Evidence of the custom of brokers at Toledo, U. S., the contract being made in Ontario was:—Held to have been properly rejected. *Williams v. Corbey*, 6 A. R. 626.

Difference between our insolvent law as to set-off and that in England and the United States remarked upon. See *Mason v. Macdonald*, 45 Q. B. 113.

Law of Ohio respecting property of married woman. See *Levine v. Clafin*, 31 C. P. 600.

Law of Michigan as to endorsement on note. See *Jenks v. Doran*, 5 A. R. 558.

Defence of foreign action pending. See *Direct United States Cable Co. (Limited) v. Dominion Telegraph Co. of Canada*, 8 A. R. 416.

Forgery by laws of New Jersey and Pennsylvania. See *In re Jarrard*, 4 O. R. 265; *Re Phipps*, 8 A. R. 77.

Held in this case that failing any information respecting the law in Maine, U. S., as to grants of administration, it must be assumed to agree with the law in this province. *Re O'Brien*, 3 O. R. 326.—Chy. D. See also *Langdon v. Robertson*, 13 O. R. 497.

## FORFEITURE.

I. OF COVENANT—See COVENANT.

II. OF DOWER—See DOWER.

III. OF INSURANCE—See INSURANCE.

IV. OF LEASE—See LANDLORD AND TENANT.

V. OF OFFICE—See MUNICIPAL CORPORATIONS—PUBLIC SCHOOLS.

VI. OF STOCK—See COMPANY.

Of condition in a bond and mortgage to carry on a factory in consideration of receiving municipal bonus. See *Village of Brussels v. Ronald*, 4 O. R. 1; 11 A. R. 605.

Of right to land of railway company owing to non-completion of work. See *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681.

Of land by company not selling within the time limited by their charter. See *London and Canadian Loan and Agency Co. v. Graham*, 16 O. R. 329.

As to the effect, on an annuity granted to a person so long as he should remain the owner and actually occupy certain land, of the Crown expropriating part of the land. See *In re Macklem and the Commissioners of the Niagara Falls Park*, 14 A. R. 20.

S. M. had become entitled under T. C. S's, will to certain property called "Clarke Hill."

of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common. He also became entitled to a legacy under the following clause of A. H. S.'s will: "I will and direct that so soon as S. M. \* \* \* can and does take actual possession of the real estate and property \* \* \* under the will of T. C. S. \* \* \* my executors \* \* \* shall \* \* \* no long as he remains the owner and actual occupant of the said real estate pay over to him \* \* \* the annual sum of \$2,000 to enable, etc.":—Held, that this clause, read in connection with the will of T. C. S., referred only to the land of which T. C. S., was absolute owner, and not to the land he owned in common:—Held, also, that actual possession and occupation of the land by S. M. was consonant with and satisfied by the possession of a servant or caretaker, or even a worker on shares, and that S. M.'s temporary absence from the mansion house on the property which was kept furnished and in charge of a servant, did not create a forfeiture. *Macklem v. Macklem*, 19 O. R. 482.—Boyd.

## FORGERY.

See CRIMINAL LAW—EXTRADITION.

Of bills of exchange and promissory notes. See *Moser v. Snarr*, 45 Q. B. 428; *Ryan v. Bank of Montreal*, 12 O. R. 39; 14 A. R. 533; *Merchants' Bank of Canada v. McKay*, 12 O. R. 498; *Merchants' Bank v. Lucas*, 13 O. R. 520; 15 A. R. 573, p. 599; *Reid v. Humphrey*, 6 A. R. 403, p. 159.

Payment by bank on forged endorsement of cheque. Right of the drawer to recover back. See *Agricultural Investment Co. v. Federal Bank*, 45 Q. B. 214; 6 A. R. 195, p. 136.

New trial when forgery is alleged. See *Moser v. Snarr*, 45 Q. B. 428.

## FORMER DISCOVERY.

See JUDGMENT.

## FORMER RECOVERY.

See JUDGMENT.

## FORMS.

SHORT FORMS ACTS—See DEED—LANDLORD AND TENANT—MORTGAGE.

General remarks by Boyd, C., on forms prescribed by Acts of Parliament. *Gemmil v. Garland*, 12 O. R. 139. See *S. C.*, *sub nom. Garland v. Gemmill*, 14 S. C. R. 321.

The question of the authority of schedules to Acts of Parliament discussed. *Truax v. Dixon*, 17 O. R. 366.—Q. B. D.

## FRAUD AND MISREPRESENTATION.

### I. IN SALE OR CONVEYANCE OF LAND.

1. *Improvidence*, 764.
2. *Undue Influence*.
  - (a) *Parent and Child*, 766.
  - (b) *Other Persons*, 767.
3. *As a ground of Action or Defence*, 769.
4. *Fraudulent Conveyances as Against Creditors*—See FRAUDULENT CONVEYANCES.
5. *Sales by Auction*—See AUCTION AND AUCTIONEER.
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### VIII. FRAUDULENT ASSIGNMENTS AND PREFERENCES—See BANKRUPTCY AND INSOLVENCY — FRAUDULENT CONVEYANCES.

### IX. FRAUD AND ILLEGAL CONSIDERATION IN BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

### X. FRAUDULENT JUDGMENT—See FRAUDULENT JUDGMENT.

### XI. IN INSURANCE—See INSURANCE.

### XII. IN ELECTIONS — See PARLIAMENTARY ELECTIONS.

### XIII. FOLLOWING MONEY — See FOLLOWING MONEY AND SECURITIES—TRUSTS AND TRUSTEES.

### XIV. FRAUDULENT DEPRIVING OF USE OF PROPERTY—See CRIMINAL LAW.

### XV. FRAUDULENT REMOVAL OF GOODS—See CRIMINAL LAW.

### I. IN SALE OR CONVEYANCE OF LAND.

#### 1. *Improvidence*.

In a suit to set aside a conveyance on the ground of want of consideration, it was alleged that the grantor was bodily and mentally infirm, but the evidence shewed that the only difference between the grantor and grantee was, that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money, had executed a mortgage thereon. In dismissing the bill the

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Court, (Ferguson, J.) directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the next friend of the plaintiff was worthless. *Travis v. Bell*, 29 Chy. 150.

On August 30th, 1875, the plaintiff, an illiterate man, over seventy-five years old, voluntarily conveyed his farm to the defendants, his sons. On the same day the defendants leased the farm to the plaintiff for the term of his natural life, reserving no rent. On 23rd September, 1875, the plaintiff leased to D., one of the defendants, but for the benefit of both, the said farm for the term of his, the plaintiff's life, reserving a rent of \$100 a year, and "the proper board, clothing, and lodging" of the plaintiff "so long as he remains on the premises," and by the same deed transferred to D. all the goods and chattels on the farm. The defendants, thereupon, went into possession of the farm, on which the plaintiff also continued to reside, and before action brought had built a house on it, and made sundry improvements:—Held, that upon the evidence set out in the case, the grant of 30th August, 1875, and the lease of 23rd September, 1875, must be set aside on grounds of improvidence, and want of proper professional advice:—Held, however, that though it appeared that the defendants had made serious default in regard to the lease of 23rd September, 1875, and had been guilty of violence and ill-treatment towards the plaintiff, yet the above relief could only be granted upon the terms of the defendants being repaid all sums expended in improvements and repairs of a permanent and substantial nature by which the present value of the farm was enhanced, with interest from the time these sums were actually disbursed; also the moneys paid by them to keep down the interest on a certain mortgage, which had existed on the farm ever since its original purchase by the plaintiff, and any principal moneys thereof paid by them; also of the defendant D. being repaid rents paid to the plaintiff, and the value of such maintenance as he had given to the plaintiff, but that on the other hand, the defendants must be charged with deterioration, to be set off against improvements, and with rents and profits of all kinds received by them, and with an occupation rent, and also with the value of the chattels mentioned in the lease, and given up to them by the plaintiff. *Shanayan v. Shanayan*, 7 O. R. 209.—Ferguson.

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully compos mentis, and no unfair advantage having been taken of her, the agreement could not be set aside. *Bryson v. Ontario and Quebec R. W. Co.*, 8 O. R. 380.—Ferguson.

If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the

other by reason of the circumstances mentioned, a transaction resting upon such unconscionable dealing, will not be allowed to stand:—Held, therefore, in the present case, affirming the decision of Osler, J.A., it appearing upon the evidence in the report, that the plaintiff being over-matched and overreached by the defendant, without information and without advice, had made a most improvident exchange of certain real and personal property of his own for certain real and personal property of the defendant—the plaintiff was entitled to have the transaction rescinded; that the plaintiff's general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect, were such as to require the court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected. *Waters v. Donnelly*, 9 O. R. 391.—Chy. D.

One of the plaintiffs was the owner of a farm valued at about \$4,500, and being, as was also his wife, old and feeble and incapable of doing much manual labour, and also illiterate, negotiated with the defendant, the wife's nephew, a young man, with the object of effecting an arrangement for their support and maintenance. The defendant without permitting the husband plaintiff to obtain independent advice induced him and his wife to execute a deed to defendant, the latter giving them back a life lease. The consideration in the deed was natural love and affection, \$1, and the life lease. The habendum and covenants for quiet enjoyment were made subject to the lease and the covenants therein. The annual rental in the lease was \$1 with a covenant for quiet enjoyment, and a special covenant by defendant to support and maintain the plaintiffs, on performance of which he was to have the proceeds of the land. The defendant was also to pay \$30 in cash yearly, and provide plaintiffs with a horse and vehicle and house room. On failure by defendant to perform such provisions plaintiffs were to have the proceeds of the land on giving defendant two months' notice in writing, and if the default still continued plaintiffs were to be at liberty to take steps to eject defendant. The deed did not contain any power of revocation in case of defendant's default:—Held, under the circumstances, the deed and life lease must be set aside. *Haggarty v. Bateman*, 19 O. R. 381.—C. P. D.

See *Hillock v. Button*, 29 Chy. 490; *Gough v. Bench*, 6 O. R. 699;

## 2. Undue Influence.

### (a) Parent and Child.

Semble, that the evidence more fully set out in the report of this case, shewed that the transaction in this case was one which a court of equity would set aside as having been entered into by the father improvidently, and by reason of undue influence practised upon him by the plaintiff. *McKay v. McKay*, 31 C. P. 1.—C. P. D.

A conveyance of land from a man ninety years old to his son was prepared on the instructions of the latter, and recited that the son had agreed to pay his father \$10 a month for his life, but no such agreement had in fact been made, and there was no other consideration. The deed was not

explained to the father, and the solicitor's clerk, who witnessed it, could not say that he had even read it over to him. There was no direct fraud, but the father who had become childish was under the influence of his son and had acted without advice:—Held, affirming the decision of the court below (27 Chy. 567) that the deed, having been executed without proper advice, should be set aside. *Lavin v. Lavin*, 7 A. R. 197.

In an action to restrain waste it was shown that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document that it was his will he was making, and the conveyance who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made as alleged by the plaintiff. The court reversed the decree pronounced by the court below (sub. nom. *Dunlap v. Dunlap*, 6 O. R. 141), directing the deed to be reformed; and ordered the bill to be dismissed, with costs, and the deed to be delivered up to be cancelled. *Dunlop v. Dunlop*, 10 A. R. 670.

The defendant had become liable as accommodation endorser for the husband of one of the plaintiffs, who, with his wife, became makers of a joint note to defendant as security, and which it was agreed should be paid out of the proceeds of certain lands that had been previously conveyed by the husband to his wife. Instead of doing so, however, the husband sold the lands, and absconded, leaving his wife behind. The defendant, on learning this, went to the wife in a state of excitement, threatened to aid in proceedings criminal as well as civil unless he obtained security, and urged her to procure her mother to give security on a piece of land belonging to the latter. Then, the mother, after persuasion by the daughter, agreed to give the defendant, advising the plaintiff's legal adviser should not be consulted, and on the evening of the following day, a deed absolute in form, was executed by both the mother and daughter, the latter having dower in the land, in favour of the defendant, who, at the mother's request, gave a separate memorandum of defeazance. There had been no direct communication between the defendant and the mother; nor were there any threats made or undue influence apparent at the time of execution of the deed, both grantors being aware that they were giving security. In an action impeaching this deed as having been obtained by threats and undue influence, the trial Judge (Armour, C. J.) dismissed the action with costs, which judgment was set aside by the Divisional Court of the Common Pleas Division, (15 O. R. 533). On appeal to this court, the judgment of the Common Pleas Division was reversed, and the judgment of the trial Judge restored with costs. *Sheard v. Laird*, 15 A. R. 339.

See *Shanagan v. Shanagan*, 7 O. R. 209, p. 765; *Burn v. Burn*, 8 O. R. 237.

#### (b) Other Persons.

Where it was shewn that a voluntary deed had been executed without independent advice,

the grantor standing in such a relation to the grantee, as that he was likely to be under her influence, the court (Spragge, C.), owing to the peculiar relationship of the parties, set the conveyance aside, although no fraud or moral wrong could be imputed to the grantee; and although it was probable, from all the circumstances of the case, that if the contents and legal effect of the instrument had been fully explained to the grantor by an independent legal adviser, the grantor would still have executed the deed though probably with some modifications in the details. The relief was granted without costs, however, as no case of actual fraud was established:—in this following *Lavin v. Lavin*, 7 A. R. 197. *Irwin v. Young*, 28 Chy. 511.

The defendant, a grandnephew of the plaintiff, who was of advanced age and feeble mind, obtained from the latter, a conveyance of certain land, her only property and means of maintenance, for a nominal consideration. He verbally promised to support her as a consideration for the grant. He brought a witness, who was a stranger, from a distance, to explain the deed and witness it, though other relatives in the neighbourhood were not consulted. It was explained to her that the defendant could not be legally bound to maintain her, as he was a minor. The deed contained no power of revocation:—Held, that the deed should be cancelled, on the ground that the plaintiff was not in a fit state of mind to understand its effect: but independently of this, that it had been made improvidently and under undue influence, and was wholly voluntary, and therefore could not stand. *Widdfield v. Simons*, 1 O. R. 483.—Hagarty.

Action to set aside a conveyance obtained from an old woman who was deaf and unable to write, and who had no relatives or friends, by the reeve of the township in which she lived, and who was well known as a justice of the peace, and an active, shrewd business man, engaged in many enterprises. The plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him; she, however, having sworn in her evidence that she never placed any dependence upon him. The plaintiff's case was closed, and it was contended that the onus was now on the defendant to shew that the transaction was a righteous one. The defendant declined to call any witnesses, and the plaintiff's action was dismissed:—Held, on motion for new trial (sustaining the judgment of Proudfoot, J.), that the onus was not on the defendant, and that the plaintiff must prove her case. *McEwan v. Milne*, 5 O. R. 100.—Chy. D.

Semble, the mere existence of confidence is not enough; influence must be proved and is not to be presumed from the existence of confidence. *Wallis v. Andrews*, 16 Chy. 637, followed. *Id.*

In an action by a vendor for specific performance of a contract for sale of land, at the price of \$24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was \$5,000. The sisters were old and infirm, and being unmarried lived, and had for a great many years lived, with the plaintiff, and were said to be

under his influence, that so great an explanation of the sisters, but the plaintiff join in the deed that under should be a (566), to explain his defence. *Dalton, Ma*

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under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavours to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant:—Held, that under these circumstances the defendant should be allowed, under Rule 285 (Con. Rule 566), to examine the two sisters before delivering his defence. *Brown v. Pears*, 12 P. R. 396.—*Dalton, Master*.

The execution of the will in this case under the circumstances of the testator's age and condition, and the absence of any explanation to him of the effect of his testamentary act was held to be a fraud on the part of those concerned in procuring its execution. See *Freeman v. Freeman*, 19 O. R. 141.

See *Kilbourn v. Arnold*, 6 A. R. 158.

### 3. As a Ground of Action or Defence.

Defendant was mortgagee of plaintiff's farm, and the latter, being unable to pay the mortgage, asked defendant to buy the farm, and defendant offered him therefor some cash and a mortgage for \$619, representing to him that the mortgage was a second mortgage; that the land was as good as defendant's own land, and that any money-lender would readily cash it at a small discount, thus inducing plaintiff, an ignorant man, to accept it, when in fact the defendant knew it was a fourth mortgage and almost worthless. After this an abstract of title was shewn to the plaintiff, but it did not appear that he read it or that it was read or explained to him. The jury having found for plaintiff in an action for deceit, on motion for a nonsuit:—Held, that there was no obligation on the plaintiff, as a matter of law, to examine the title or search the registry office, but that his omission to do so was matter for comment only; and that his having been furnished with the means of knowing, of which he did not avail himself, after the false statements had been made, was no answer to the action:—Sembles, that on sustaining the verdict a reconveyance of the mortgage to defendant might be ordered. Nothing was said as to the amount of the prior mortgage, but the jury having found that the representation was false to the knowledge of the defendant, and was made with intent to deceive, and did deceive the plaintiff:—Held, that taking the whole statement together the verdict was not unwarranted. *Barr v. Doan*, 45 Q. B. 491.—Q. B. D.

Where on the sale or conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances; and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the court will restrain an action to enforce payment of such mortgage brought at the instance of the mortgagee—or the voluntary transferee, unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. *Lovelace v. Harrington*, 27 Chy. 178.—*Spragge*.

This principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage by which he covenanted to pay the amount

secured thereby, although the covenant against incumbrances was to the wife and not to the husband the covenantor himself. *Ib*.

W. conveyed to his nephew, E., for an alleged consideration of \$1,200, fifty acres of land, and afterwards these parties applied to the plaintiff the appraiser of a loan company, for a loan of \$1,000 to pay, as was alleged, upon the purchase money, W. asserting that the property was well worth \$2,200 cash, or \$2,500 on a fair credit. The plaintiff, relying on the statements of W. certified the value accordingly and the loan was effected. The land was not worth the \$1,000 advanced, and sold for \$800, leaving a balance due the company of nearly \$500, which they required the plaintiff to pay, and which he did settle with the company for, considering himself liable, and obtained from the company an assignment of their securities. The court (Proudfoot, V.C.), being satisfied that the whole transaction was a fraudulent scheme to obtain the loan upon the certificate of the plaintiff, ordered both defendants to make good the deficiency, and pay the costs of the suit; holding that the plaintiff was entitled to take an assignment of the claim as against W. to indemnify himself; that he could sustain this suit though he had only secured the money without paying it; that he had an independent right of suit against W. for the misrepresentation, and that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence for the defendant had been examined, and had furnished sufficient ground for discrediting himself. *Moberly v. Brooks*, 27 Chy. 270.—Proudfoot.

The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. *Blake, V. C.*, on a bill filed by the other tenants in common, asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill, with costs. *Kennedy v. Bateman*, 27 Chy. 380.

A married woman, who could neither read nor write, and was possessed of real estate, was asked to join in a conveyance by way of mortgage in order to bar her dower in her husband's land. The mortgagee's solicitor knew that she had objected to mortgage her land, and it was not explained to her or her husband that, by her joining, her estate would be liable in any way. In fact the husband and wife were made joint grantors, and jointly covenanted for payment. After the death of the husband, proceedings were instituted against his widow to compel payment by the assignee of the security. The court (Boyd, C.) under the circumstances, declared the instrument invalid as against the separate estate of the widow, and dismissed the bill with costs. *Burrows v. Leavens*, 29 Chy. 475.

The plaintiffs, A. & J. filed a bill for the purpose of having a deed made to the defendant by J. declared void, as having been obtained by fraud and misrepresentation. The bill alleged that J. had subsequently made a deed of the same property to A., for the purpose of remedy-



ing, as far as he could, the wrong he had done by conveying to the defendant, the bill alleging that such deed to A. was made to him "as trustee for the heirs of A. M.," who had died seized. The bill in no place alleged that A. was trustee, but in the following paragraph it was stated that "before the execution of such last mentioned deed the heirs of the said A. M., who are the rightful owners of the said land," etc.—Held, that notwithstanding the absence of any express allegation of A. being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was over-ruled with costs. *McLean v. Bruce*, 29 Chy. 567.

A demurrer *ore tenus* for misjoinder of plaintiffs, it appearing by the bill that J. had no interest in the question raised was allowed, without costs. *Roche v. Jordan*, 20 Chy. 573, followed. *Ib.*

The defendant and his brother partitioned their lands, defendant taking the west half of a lot, on which was an hotel, and the brother, the east half, on which a store was erected, each supposing that the division line ran between the two buildings. The defendant sold his portion to the plaintiff, who had lived opposite for many years, the land being described as the west half according to a plan. The hotel encroached upon the east half at the rear end of the building about thirty-four inches, the value of the land encroached upon being very trifling. It appeared that the hotel could be moved for about \$40; and that defendant had offered to procure a lease of the portion encroached upon at a nominal rent, which was refused. The plaintiff charged that the defendant had falsely and fraudulently represented that the division line between the two lots ran between the two buildings, and brought an action therefor, praying for a rescission of the sale, for an account of her improvements made, and for damages. The deed was drawn after the alleged misrepresentation and after the plaintiff knew of the encroachment, and nothing was then said about the line. The learned judge at the trial found that there was no false representation, but he added defendant's brother as a party, and directed him to convey to the plaintiff the land encroached upon:—Held, that the action could not be maintained, for, among other reasons, the plaintiff knew of the encroachment when she took the conveyance, which made no provision respecting it; and she had so dealt with the property as to preclude her from claiming a rescission:—Held, also, that under the circumstances, more fully stated in the report of the case, the brother should not have been added; and the plaintiff, having based her action on the ground of fraud, should not be allowed to rely upon an entirely different ground. *Dunbar v. Meek*, 32 C. P. 195.—C. P. D.

The defendant was assignee of a land warrant issued to a constable of the North-West Mounted Police Force, for service in that body, which entitled him upon its face to locate 160 acres upon any of the Dominion lands, subject to sale at \$1 per acre. The defendant induced the plaintiff to purchase the warrant by representing to him that he would be entitled to obtain from the government 160 acres of land. There were lands subject to sale at \$1 per acre when the warrant

was issued and thereafter. By various statutes and orders in council the dominion lands were made subject to sale at higher prices than \$1 per acre, but these land warrants were to be accepted by the government in part payment of \$1 per acre. The plaintiff was refused lands at \$1 per acre by the Crown, and then brought this action to rescind the sale to him on the ground of the misrepresentation. The jury found that defendant represented to plaintiff, to induce him to purchase, that the warrant would entitle him to 160 acres of land; that the plaintiff purchased on the faith of this; that the representation was false; and that defendant made it without knowing whether it was true or false, intending it to be relied upon:—Held, Armour, J., dissenting, that the plaintiff must fail; for the construction of the warrant clearly expressed that the holder was entitled to 160 acres of land at \$1 per acre, and not simply to a credit of \$160 on a purchase and the representation was such as defendant might properly make. Per Armour, J. The representation that the warrant would entitle the plaintiff to 160 acres of land comprehended the affirmation of fact by the defendant that there were then Dominion lands subject to sale at \$1 per acre, and this not being so the plaintiff should succeed. *McKenzie v. Dwight*, 2 O. R. 366.—Q. B. D.; 11 A. R. 381.

The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the lands under the statute of limitations but was not aware of the effect of his possession. The defendant, who had purchased the interest of the heirs of the original owner and vendor and his solicitor, by representing to the plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years, at a nominal rent with a covenant to yield up possession at the end of the term :—Held, that under the circumstances the lease must be set aside, but even if allowed to stand it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance.

*Hillock v. Sutton*, 2 O. R. 548, C. P. D.

Semble, per Oiler, J., that although the evidence in this case showed that there was no intention to deceive on the part of defendant's manager, still there was such a misstatement of a material fact as but for the notice received by plaintiffs through their solicitor would render the defendants liable for the damage sustained thereby. *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. R. 476.

Action on a promissory note for \$1,000 made by the defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate formed under an agreement which stated that "We the undersigned hereby covenant, promise, and agree with each other to form ourselves into a syndicate," to purchase a lot of 300 acres of land in Manitoba from M., for \$50,000, divided into fifteen shares of \$3,333.33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, etc., to be borne proportionately by each member according to his share, appointing M. trustee to form the syndicate, and on completion the members were to appoint M., or any other person trustee to carry

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out the objects of the syndicate. The syndicate was completed, and the defendant appointed trustee, and a conveyance of the land made to him. It appeared that M. by fraudulently representing to defendant that the price he M. paid for the land was \$50,000, whereas it was only \$31,000, that it was well worth \$50,000 was suitable for being laid out for town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resided in Toronto, and had no knowledge, or means of acquiring knowledge, but relied upon the truth of these statements, to enter into the agreement. The defendant in consequence asked to have the agreement rescinded and the note delivered up to be cancelled:—Held, that by reason of the misrepresentation the defendant would have been entitled to be released from the contract had he been solely concerned, but that the defendant was not in a position alone to put an end to the agreement, for that the so-called syndicate was in fact a partnership, and all the members thereof were not asking for its rescission; and the defendant's remedy must be by cross-action or counter-claim for deceit. *Morrison v. Earle*, 5 O. R. 434.—C. P. D.

Evidence not admissible to cut down to a mortgage an instrument absolute in form which had been executed for the purpose of securing a debt due to a grattee, but the main object of which was to protect the property from the results of an anticipated action for breach of contract. See *Mandel v. Tinkis*, 6 O. R. 625.—Boyd.

A. who had a claim against the insolvent estate of Dr. B., purchased a right of redemption Dr. B. had at the time of his death in a certain piece of land; and in order that B. et al. (the respondents, Dr. B.'s children) who were perfectly solvent, should accept the succession of Dr. B., A. caused to be prepared a deed of assignment by a notary of this right of redemption to B. et al., who, a few days after the death of their father, had been induced for a sum of \$50 to consent to exercise this right of redemption. The notary who prepared the deed without the knowledge of B. et al. returned it to A., telling him that he did not like to receive the deed because he believed that in signing it B. et al. made themselves heirs of Dr. B., and besides he believed that if B. et al. knew that in signing the deed they accepted the succession of their father, and were responsible for his debts, they would not sign. Another notary residing at a distance was sent for by A., to whom he gave the deed as prepared, and the notary then went to the residence of B. et al., read the deed to the parties, and without any explanation whatever passed and executed the deed of cession whereby B. et al. became responsible for the debts of their father. On being informed of the legal effect of their signature, B. et al. formally renounced to the succession of their father. There was also evidence that B. et al. had done some conservatory acts and acts of administration for their mother, but it was not proved that in any of these transactions they had taken the quality of heirs. The amount in dispute was made up by including interest which on the face of the declaration was prescribed. The respondents did not demur to this part of the demand, nor was any separate judgment rendered as to it:—Held, (1) that the case was appealable; (2) that the acceptance of an insol-

vent succession is null and of no effect when it is the result of deceit and corrupt practices, artifices and fraud; (3) that as A. in this case obtained the signatures of B. et al. to the deed in question by fraud, the latter should not be burdened with the debts of their insolvent father. *Ayotte v. Boucher*, 9 S. C. R. 460.

G. M., a man of education, well acquainted with commercial business, executed a bond to pay certain sums of money, in certain events to the Merchants' Bank of Canada. By an agreement, bearing even date with the bond, it was recited inter alia that in consideration of a mortgage granted to the bank by M. Bros. & Co., the bank had agreed to make further advances to M. Bros. & Co., joint obligors with G. M., and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to the bank, G. M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over valuation of the property embraced in the mortgage, and not otherwise. The bank, the plaintiffs, made no representations whatever to the defendants:—Held, affirming the judgment of the court below, 50 R. 122. Gwynne, J. dissenting, that G. M. was bound by the execution of the documents, and was liable upon them according to their tenor and effect. *Moffitt v. Merchants' Bank of Canada*, 11 S. C. R. 46. Leave to appeal to the Privy Council refused.

In an action on a promissory note, the defendant counter-claimed, setting up that the note was given in part payment of the purchase money of certain land in Manitoba, which the defendant alleged that he was induced to purchase by plaintiff's false representation as to its value and location. The jury found the amount due on the note was \$1,500, but that the defendant was induced to enter into the contract to purchase the land by the plaintiff's fraudulent misrepresentations; and they assessed his damages at the above amount; and judgment was entered in defendant's favour:—Held, on the evidence, as set out in the report, there would be no rescission of the contract, but defendant must rely on his claim for damages for deceit; that the evidence failed to disclose actual fraud, at all events the only evidence which could be submitted to the jury was as to location, but while this was too slight to allow the verdict to stand, the court did not feel justified in disposing of the case themselves, though perhaps they might do so under O. J. Act, Rule 321 (Con. Rule 755). They therefore directed a new trial on the counter-claim, but so that plaintiff's legitimate claim on the note should not be delayed in the meantime, judgment was directed to be entered in his favour thereon. *Garland v. Thompson*, 9 O. R. 376.—C. P. D.

Misrepresentations to purchaser as to the land being free from incumbrances. See *Cameron v. Carter*, 9 O. R. 426.

In an action of foreclosure of a certain mortgage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant: that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form), and give the mortgage: that as a matter of fact the land was at the time of such representations and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the said date: that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff in consideration that he would forbear the same, agreed with him that the times for payment under the mortgage should be postponed for a length of time equivalent to that during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage; which matters of defence being duly proved:—Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counter-claimed for damages, was entitled to the same, and to a reference to fix the amount thereof. *Keays v. Emurd*, 10 O. R. 314.—Ferguson.

Fraud by mortgagees purchasing through another at mortgage sale. See *Faulds v. Harper*, 9 A. R. 537.

The plaintiff negotiated with the defendants Griffith for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for \$20,000. Defendants Griffith set up that these negotiations were had with plaintiff as their agent with the view of effecting through him a sale to the Independent Order of Odd Fellows at the same or a higher price for the defendants Griffith. After these options had been given to the plaintiff he, on the forenoon of the 17th February, 1882, agreed to sell to the Odd Fellows for \$25,000; and afterwards on the same day he went to the defendants Griffith and offered to purchase for \$19,500 in lieu of the \$20,000 previously named. He was asked by the Griffiths whether the sale to the Odd Fellows was off, to which he replied that it was, and in the same conversation informed the Griffiths that he could not sell the property for \$20,000, as a reason why he should get it for \$19,500, for if sold to another he, plaintiff, would be entitled to a commission of \$500; and the Griffiths thereupon agreed to sell to plaintiff for \$19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the Odd Fellows for \$25,000:—Held, that without reference to the question of agency to sell, the evidence showed

that a sale to the Odd Fellows was in contemplation of both parties and was the foundation of the transaction, and reversing the judgment of Proudfoot, J., that the misrepresentation by the plaintiff in regard to the sale to the Odd Fellows, was such as disentitled him to a decree for specific performance. (*Burton, J. A., dissentiente.*) *Walmley v. Griffith*, 10 A. R. 327.

The defendant, in January, 1882, bought land in Manitoba from the plaintiff for speculative purposes, paying \$500 in cash, and giving a mortgage for the balance of the purchase money. Before the conveyances were executed the defendant, in answer to inquiries made by him to persons on the spot, received unfavourable accounts of the property, which were, however, explained away by the agent of the plaintiff. The defendant resisted payment of the mortgage, on which this action was brought, and counter-claimed for a return of the \$500, upon the ground of false representation by the plaintiff's agent. On the 27th July, 1882, the defendant visited the land and found it worthless, and in the end of August or the beginning of September, gave notice of his intention to repudiate the contract. Armour, J., who tried the action, without a jury, found that the defendant was induced to purchase by false representations, but that he had by his delay elected to affirm the contract. The Queen's Bench Divisional Court affirmed the first finding (20 R. 354), but set aside the second and gave judgment in the defendant's favour. Armour, J., concurring in that judgment:—Held, that the question of false representation was peculiarly one for the judge at the trial, and that his finding should not be disturbed, especially as it was concurred in by the Divisional Court:—Held, also, (*Burton, J. A., dissenting*), that the defendant had not by lapse of time, acquiescence, or delay, lost his right to rescind. Per *Burton, J. A.*, there was evidence to justify the finding of Armour, J., that the defendant had made his election, and no sufficient grounds were shewn for disturbing it; but as Armour, J., concurred in the judgment of the Divisional Court, and as the merits of the case did not call for interference, the judgment of the Divisional Court should be affirmed. *Lee v. MacMahon*, 11 A. R. 555.

A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit. *Bell v. Mackin*, 15 S. C. R. 576.

B. bought land described as "two parcels containing eighteen acres, more or less," and afterwards brought an action for rescission of his contract, on the grounds that he believed he was buying the whole lot offered for sale, being some twenty-five acres, and that the vendor had falsely represented the land sold as extending to the river front. The evidence on the trial showed that B. had knowledge, before his purchase, that a portion of the lot had been sold:—Held, affirming the judgment of the court below, that even if B. was not fully aware that the portion so sold was that bordering on the river front, the knowledge he had was sufficient to put him on inquiry as to its situation, and he could not recover on the ground of misrepresentation. *Id.*

The plaintiffs, a company formed for the purpose of colonizing lands in the North-West Ter-

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ritories, represented to defendant, by means of an advertisement issued in a daily paper, that the Dominion Government had agreed to the selection by the company of a "compact choice tract of land," in the said territories, "comprising 2,000,000 acres, for the purpose of settlement, free from the use of intoxicating liquors." The defendant, on the faith of these representations, desiring to send his son to a place where he would be precluded from the use of intoxicating liquors, entered into two agreements with the company, agreeing in each "to purchase and pay for 320 acres of land, in the order of choice from the odd numbered sections of our lands as procured or to be procured from the Dominion," and paid certain instalments thereon. It was proved that the company never had, and could not obtain, the choice compact tract stated, nor any special privileges as to the exclusion of liquors:—Held, that these were material misrepresentations; and defendant, having been induced to enter into the agreements thereby, was therefore entitled to have them rescinded, and to recover back the money paid by him. Per Galt, C. J., the agreements were void under the Statute of Frauds, as when they were made the plaintiffs had no lands, and there was nothing in the agreements to shew what lands the defendant was entitled to, or the plaintiffs were bound to convey:—Held, on appeal, per Hagarty, C.J.O., the agreement was void for uncertainty, the land in question not being in any way defined or ascertained, or capable of being defined or ascertained, and at any rate misrepresentations justifying rescission were proved. Per Burton, Osler, and Maclellan, J.J.A., the plaintiffs were unable to give to the defendant the right of selection they had agreed to give him, so that the action necessarily failed, and the defendant was entitled to judgment on his counter-claim there being a failure of consideration. Per Burton, J.A., the agreement was in itself sufficiently certain, and was not void for misrepresentation. Per Maclellan, J.A., no misrepresentations justifying a rescission of the contract were proved, but the agreement was void for vagueness and uncertainty. *Temperance Colonization Company v. Fairfield*, 16 O. R. 544.—C. P. D.; 17 A. R. 205.

In an action to set aside a conveyance made by the plaintiff in favour of the defendant, it was charged that the conveyance in question was never executed or delivered by the plaintiff, but that the alleged execution thereof was obtained by the defendant's fraud, and that the plaintiff signed the conveyance thinking that he was signing another instrument relating to the estate of his deceased wife. There was also a general charge that the conveyance had been obtained by the fraud and undue influence of the defendant, but there were no specific allegations as to the nature of the fraud or undue influence. The statement of defence was a mere general denial of the allegations set out in the statement of claim. At the trial the plaintiff tendered evidence as to the defendant having induced him to drink to excess about the time of the transaction in question; as to the plaintiff's want of education or business capacity and other evidence of that nature, and also evidence as to the position of the wife's estate and as to transactions between the parties in connection with it, but the learned Judge ruled that this evidence could

not be introduced under the general allegations contained in the statement of claim, and at the end of the case gave judgment in favour of the defendant:—Held, that the exclusion of evidence had been pushed too far, and that for a proper determination of the real merits of the case it would be advisable to admit evidence of every circumstance, declaration, or negotiation between the parties, which could throw any light on conduct or motive, and they ordered a new trial, costs to abide the final result, each party having leave to amend. *McDonald v. Johnston*, 16 A. R. 430.

See *Cameron v. Cameron*, 14 O. R. 561.

## II. OTHER CONTRACTS.

The plaintiff in 1873 sold to defendant certain timber limits and chattel property for \$85,000, payable in eight yearly instalments, with many special terms as to advances to be made by plaintiff to defendant to assist him in getting out lumber thereon, commission to be paid by defendant to plaintiff, etc. By deed in 1878, reciting that defendant had been unable to carry out this agreement, it was agreed that in consideration of defendant being released from all obligations to plaintiff except as set out in a deed of composition of the same date, the said agreement should be cancelled. By the composition deed, between the defendant and his creditors, to which plaintiff was a party, the creditors agreed to accept 25 cents in the \$, on their respective claims, which was to be paid in part out of the proceeds of a raft belonging to defendant, then on its way to Quebec, and the balance in three years; and certain lands were assigned as security. To enable defendant to transport his said timber to market, the plaintiff agreed to advance the necessary funds, for which he was to have a preferential claim on the proceeds. The unpaid balance due by one J., under an agreement made by the plaintiff was to be deducted from the full and not from the reduced amount due to the plaintiff, and in fixing the amount due to the plaintiff \$30,000 was to be deducted for the retrocession of the limits, which the plaintiff had agreed to sell to defendant by the cancelled agreement. It appeared that the defendant in 1878, representing himself to be unable to meet his engagements, and to be largely indebted to one E., among others, and owing the plaintiff about \$80,000, had called a meeting of his creditors, the result of which was the composition deed mentioned and the agreement of the same date with the plaintiff. The plaintiff had taken possession of the property so taken back by him, and had received the advances made by him to enable the defendant to get down the raft, and part of the money due by J. He had never offered back to defendant such property or money, nor offered to release the security, and E., with defendant's other creditors, had been paid in full. Having discovered that there was no such debt as represented due by the defendant to E., the plaintiff sued on his agreement of 1873:—Held, (Armour, J., dissenting), that the whole transaction evidenced by the two deeds in 1878, must be regarded as one arrangement; that the plaintiff could not be treated as a creditor who had received part of his claim, and been induced by fraud to release the residue; that he could not repudiate the release for fraud, not being in

a position or having offered to repudiate the whole arrangement; and that his proper remedy was an action for the damages caused by defendant's deceit. Per Armour, J., the composition having been obtained by fraud, the plaintiff was entitled to sue for the balance of his debt, crediting the agreed price of the property and money received to the defendant. *Fraser v. McLean*, 46 Q. B. 302.—Q. B. D.

S. had been treasurer of a municipal corporation, and a bond which he had given having been mislaid, the council being under the impression that he had given no security, required him to furnish it. The council, having examined his books, concluded that they were in his debt, as the books shewed, and the reeve believing this was the case represented to the defendant that S., defendant's son, "was all right on the books." Defendant on this signed a bond as surety for the due performance by S. of his duties which he said he would not have done but for the reeve's statement. The reeve also said that if defendant did not go his surety S. would lose his position. Afterwards, as S. had been drinking, defendant wrote to the council desiring to have his bond annulled, but he withdrew this letter at the request of S. After S. had been dismissed, and the deficiency in his accounts discovered, defendant said he would pay whatever had occurred since he signed the bond. Upon the first trial no plea of fraud was put in, and a new trial was granted on affidavits not raising this defence; but defendant gave notice that he would at the trial move to add such a plea. The learned judge at the trial refused the application, holding that the plea could not be supported on this evidence, but he found that the bond was given upon the assumption and statement that the treasurer was not then in arrear:—Held, Hagarty, C. J., dissenting, that the plea should have been added, and that defendant was entitled to a verdict upon it. Per Hagarty, C. J., there was no false statement, and no fraud, and therefore the plea was not sustained. *Village of Gananoque v. Stenden*, 1 O. R. 1.—Q. B. D.

Where one M. was induced to become a member of a firm, on the faith of representations made to him that the previous losses of the firm only amounted to \$18,000, but it subsequently turned out that such losses amounted to about \$22,000 or \$24,000:—Held, that M. by reason of such misrepresentation was entitled to be relieved from such agreement, and to be indemnified by the other members of the firm against all liabilities incurred by him as such partner, prior to the discovery of the untruth of the representation made as to the losses of the firm. *Merchants' Bank v. Thompson, Mallon v. Craig*, 3 O. R. 541.—Boyl.

Held, that M. having become a partner also on the faith the firm in question intending to form a syndicate arrangement with another firm, which arrangement failed to be carried out for want of the concurrence of some of the members of such other firm, he was on that account also entitled to be relieved from his agreement to become a partner. *Id.*

A contract induced by fraud is not void but voidable merely at the option of the party affected or prejudiced thereby; and when the party affected adopts the contract induced by the fraud, the discovery of a new incident of the fraud does

not revive the right to repudiate. In this case there being no finding by the jury that the defendant had knowledge of, and had waived the fraud, a new trial was directed. *Walton v. Simpson*, 6 O. R. 213.—C. P. D.

The defendant, at the instance of F., the plaintiff's manager, endorsed the note of C., to secure an advance to the latter on grain. It was represented to defendant by F. that the giving of his name was a mere formal matter: that only 75 per cent. of the value of the grain would be advanced: that warehouse receipts would be taken, and that he (F.) would from time to time see that the grain was in store, and would hold it in security for the money advanced, crediting the proceeds of any sales upon the note in question. The defendant was subsequently induced, by the representation of F., as the jury found, that it would not alter his position, to sign a guaranty under seal, which, though not intended, as F. stated, to vary the defendants' original liability, as a matter of fact did so, by permitting the plaintiffs to release or abandon their security upon the grain, upon the faith of which defendant became liable as endorser:—Held, that the guaranty was void as against the defendant; and that it was not necessary to prove that the bank manager knew, when he made it, that his representation was false; nor was it an answer that the defendant could have examined the deed for himself, as he was entitled to rely upon the representation of the bank's agent. *Molsons Bank v. Turley*, 8 O. R. 293.—Q. B. D.

Amongst other defences, in an action on a covenant to pay contained in a chattel mortgage, the defendant set up that the mortgage in question was given for the purpose of defeating and delaying creditors of the mortgagor, and that the plaintiff (the mortgagee) was aware of that at the time, and aided and abetted the defendant, and that by reason thereof the mortgage was void and the covenant could not be enforced against defendant:—Held, that even if the defence was proved, the defendant, being a party to the fraud, should not be allowed to set it up as an answer to his liability on the covenant. *Millican v. Headon*, 8 O. R. 503.—Q. B. D.

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had for closed the mortgage and afterwards obtained judgment against the plaintiff on the covenant:—Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action:—Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt showed no defence, but a mere verbal agreement without consideration:—Held, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of fi. fa. against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, showed no fraud, and was no answer to the action. Per Wilson, C.J., the defendant was not at liberty to set up in answer to this action mat-

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ters which could have been pleaded in the original cause. *Paisley v. Broddy*, 11 P. R. 202.—Wilson—C. P. D.

The defendant agreed to become security with McG. for McB. to the plaintiffs. Plaintiffs' solicitor sent two bonds to their agent for execution, one by defendant, the other by McG. The agent attended defendant to get his bond executed, and in answer to a remark of defendants (made before he signed the bond), that McG. had promised to sign a bond too, told him that a bond had been sent up to be signed by McG. Defendant then signed the bond, but McG. subsequently refused to sign his. The jury found that a statement was made leading defendant to suppose that the bond executed was conditional upon the execution of the proposed bond from McG., and that its execution was obtained by a false, although unintentionally so, representation:—Held, (affirming the judgment of O'Connor, J.), that the plaintiffs could not recover. *Toronto Breving and Malting Co. v. Hery*, 13 O. R. 64.—Chy. D.

P. P. mortgaged certain lands to J. H. as security for \$2,100 and interest, who left the mortgage with E. G. P., a solicitor, for safe keeping. Afterwards K. E., a client of E. G. P., sold his farm to his own son for \$1,700, who, through E. G. P., procured the advance of the purchase money from a loan company on mortgage, and the money being transmitted to E. G. P., the latter retained it, and handed to K. E. as security for it what purported to be an assignment of the mortgage from P. P. to J. H., executed by J. H., which K. E. registered. J. H. now brought this action, denying the validity of the said assignment, and claiming the removal of it as a cloud upon her title, and for payment of the mortgage by P. P. or on default a sale of the land. K. E. set up the defence of a bona fide purchase by him of the said mortgage without notice:—Held, that inasmuch as it appeared that J. H. executed the assignment upon a misrepresentation of its nature, character, and contents, believing it only to provide for an extension of the term of payment of the mortgage held by her, the assignment was void, even in the hands of an innocent holder and should be cancelled. There being no transmission of estate legal or otherwise, there was no basis on which to found a defence of purchase for value:—Held, also, that under the circumstances, the transfer of the mortgage to K. E. was not carried out in such a way as to make him a purchaser for value of it, inasmuch as K. E. who dealt solely with E. G. P. in the matter, knew he was paying no money which could possibly go to satisfy J. H., but was taking the assignment as security for the money due from his son to him, and therefore had no reason to trust to any statement in the assignment that J. H. had been paid her mortgage money, and was not justified in accepting the assignment without the privy of J. H.; and therefore on this ground J. H. was entitled to relief by way of lien for the mortgage money. Doctrine of *ex parte Swinbanks*, 11 Chy. D. 525, applied. *Herchermer v. Elliott*, 14 O. R. 714.—Boyd.

Assignment for the benefit of creditors obtained by duress and improper use of the criminal process. See *Shorey v. Jones*, 15 S. C. R. 398.

The plaintiff with the intention of parting with the possession and property in certain flour

made an absolute sale of same, on apparently short terms of credit, to defendant, who withheld from plaintiff his intention to pay for the flour by setting up a claim he had acquired against the plaintiff:—Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour. *Baker v. Fisher*, 19 O. R. 650.—C. P. D.

See *Rogers v. Ullmann*, 27 Chy. 137; *Beausoleil v. Normand*, 9 S. C. R. 711, p. 125; *Star Kidney Pad Company v. Greenwood*, 5 O. R. 28, p. 170; *Moffatt v. Merchants' Bank of Canada*, 11 S. C. R. 46, p. 774.

### III. ACTIONS FOR.

#### 1. Evidence.

In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant, C., was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible:—Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered. Per Armour, J., when a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto the fact must be considered as in issue; therefore it was competent for C. to deny the execution of the bond, his pleading not expressly admitting it. *Waterloo Mutual Ins. Co. v. Robinson*, 4 O. R. 295.—Q. B. D.

The bill alleged that the defendant assisted in the fraud by which the plaintiff was induced to convey certain land to her husband, the other defendant. He answered the bill, denying all charges of fraud, disclaiming all interest in the subject matter of the suit, and asking for her costs:—Held, that it was competent for the plaintiff on cross-examining the defendant on her answer, and disclaimer to establish, if possible, the fraud out of her own mouth. *McFarland v. McFarland*, 9 P. R. 73.—Boyd.

In this action the plaintiff, in her statement of claim, charged her brother the defendant D. M. McD., with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it, but denied having used any portion of the estate for his own purposes:—Held, that although what took place after the father's death was no proof of the fraudulent design, it might throw light upon it; and although



the plaintiff was entitled to know generally what dealings the defendant D. M. McD. had with the estate, and to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested all the moneys of the estate in his own or his wife's name, yet a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, should not be permitted. *MacGregor v. McDonald*, 11 P. R. 386.—C. P. D.

The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant. F. McD. No order to produce had at the time of the application been taken out as against F. McD., nor had she been served with notice of the application:—Held, that D. M. McD. should not have been ordered to produce these documents without F. McD. being called upon to shew cause why they should not be produced. *Ib.*

In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and also a charge of obtaining a valuable security by false pretences, the defence averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase certain hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes:—Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J., fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill books, and all other books relating to such transactions. *Colter v. McPherson*, 12 P. R. 630.—Rose.

## 2. Damages.

By a covenant in a lease of a farm from defendant to the plaintiff, it was provided that upon receiving six months' notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation:—Held, reversing the judgment of the Queen's Bench (45 Q. B. 94), that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice. *Coveling v. Dickson*, 5 A. R. 549.

Measure of damages in an action of deceit on the part of the defendants, owners of a line of steamers, as to certain contracts alleged by them to be held in connection with their line of steamers, whereby the plaintiffs, owners of another line of steamers, alleged that they were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation in connection with the defendants of a joint stock company to own and run the same. See *Bratty v. Neelson*, 12 A. R. 50.

See *Garland v. Thompson*, 9 O. R. 376, p. 774.

## 3. Costs.

On a bill filed by W. against T. and his sister, charging them with conspiracy, and impeaching a deed on the ground of fraud and undue influence, the court (Spragge, C.), although satisfied that no fraud or undue influence had been practised on the grantor, set aside the deed as the same had been executed without proper advice, but refused the plaintiff costs in consequence of the unfounded charges of fraud contained in the bill: and as against the female defendant dismissed the bill, with costs; the fact that the court was of opinion that if the fullest explanations had been given to the father of the nature and effect of his deed he would still have executed it, making no difference in that respect as to what was required on the part of a voluntary grantee, which T. in effect was. *Lavin v. Lavin*, 27 Chy. 567; 7 A. R. 197. Followed in *Irwin v. Young*, 28 Chy. 511.

The mortgagee at whose instance the sale in this case had been effected having been made a defendant to the bill and charges made of his having combined with the agent to defraud the principal, all of which were negatived, the bill as against him, was dismissed with costs. *Thompson v. Holman*, 28 Chy. 35.—Spragge.

In a suit to set aside a conveyance on the ground of want of consideration, it was alleged that the grantor was bodily and mentally infirm, but the evidence shewed that the only difference between the grantor and grantee was, that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money had executed a mortgage thereon. In dismissing the bill, the court (Ferguson, J.) directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the next friend of the plaintiff was worthless. *Travis v. Bell*, 29 Chy. 150.

Fraud having been charged against a defendant who was a solicitor, and the charge being wholly unsupported:—Semble, that it would have been proper not merely to deprive the plaintiff of her costs but to allow such defendant all his costs. *Freed v. Orr*, 6 A. R. 690.

The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrongdoers. They were sued for an alleged conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McLean defended, meeting the charge directly. The other defendants did the

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same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which was the foundation of the actions, was true:—Held, that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants. *Petrie v. Guelph Lumber Co., and two Other Cases*, 10 P. R. 600.—Ferguson.

#### 4. Other Cases.

The inchoate right of dower at law, obtained by a wife in land conveyed to her husband, makes her a proper party defendant to a suit to set aside a conveyance, procured by fraud, by herself and her husband. *McFarland v. McFarland*, 9 P. R. 73.—Boyd.

There must be a wilful and fraudulent statement of that which is false to maintain an action of deceit, and the law still distinguishes between legal and moral fraud in this respect. *Petrie v. Guelph Lumber Co., and two Other Cases*, 2 O. R. 218.—Chy. D.

Action against personal representatives of deceased person who is charged with fraud. See *Hamilton Provident and Loan Society v. Cornell*, 4 O. R. 623.

Per Armour, J., where a buyer seeks to recover damages by an action for deceit against the seller of any property by reason of any false representations made by such seller upon the sale to him of such property, it is not necessary for him in order to maintain such action to return or offer to return the property so sold, and in respect of which such representation was made. It is only necessary to do so when the buyer disaffirms and seeks to rescind the sale as being altogether void by reason of the false representation, and to recover back the consideration he has paid or given for the property. *Star Kidney Pad Co. v. Greenwood*, 5 O. R. 28.

G. obtained a loan of \$3,700 through R. from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for \$7,500, and had paid \$4,000 cash, and wanted the loan to pay the balance with, and on the receipt of the loan paid W. the \$3,000, which was the total purchase money for the 220 acres; and another parcel of about 50 acres, and was the full value of both parcels. G. got the conveyance from W. of both parcels, and conveyed the 220 acres to R. to carry out the scheme, and retained the 50 acres himself. In an action by the plaintiffs it was:—Held, that on the conveyance of the 50 acres being executed to G., the land immediately became the property in equity of the plaintiffs. That the land was not subject to the claims of certain execution creditors of G., whose fi. fas. were in the sheriff's hands. But that a mortgage on the 50 acres, made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage money was paid), as the mortgagee was no party to the action. *Hamilton Provident and Loan Society v. Gilbert*, 6 O. R. 434.—Ferguson.

Action to recover from defendant a sum of money paid him in settlement of a loss by fire on a stock of goods, by reason, as was urged, of a

misrepresentation as to the value of such stock at a date prior to the fire. The statement of claim alleged that defendant had falsely and fraudulently represented his net loss to be the amount so paid, whereby the plaintiffs were induced to pay the same; and that defendant falsely and fraudulently represented that at the date prior to the fire his stock on hand was of a certain value, whereas it was of a much less value; and that it was on the basis of such value that the calculation was made as to the amount of such net loss; also setting up the statutory conditions whereby, as alleged, the claim was vitiated for fraud and false swearing as to the amount of the loss.—Held, on the issue as raised, the plaintiffs must fail, for the issue was as to the amount of the net loss which the evidence shewed had been misrepresented; and also that there would be no recovery on the record as framed, for—plaintiffs having accepted a surrender of the policy—they had not offered to, and possibly could not, place defendant in his original position; that no amendment would avail, for to maintain an action of deceit not only must there be misrepresentation, but it must be to the damage of the plaintiffs, which the evidence failed to shew; that the statutory conditions could hardly be invoked, for no proofs of loss had been required; but, even if invoked, they would afford no defence, as there was no misrepresentation as to the amount of loss:—Held, also, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of the loss was based, would make no difference so long as it was shewn that the loss itself was within the true amount; and also the plaintiffs were estopped from setting it up, as the evidence shewed that they did not rely upon it, but on the knowledge acquired and independent information obtained by the plaintiffs' agent in the course of his investigation:—Semble, that on the evidence there was no misrepresentation at all. *Royal Ins. Co. v. Byers*, 9 O. R. 120.—C. P. D.

To sustain an action for deceit actual fraud must be proved, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law fully imputes to produce those consequences which are the natural result of his acts; and it must also be established that such fraud was the inducing cause to the contract, and must have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct. See *Garland v. Thompson*, 9 O. R. 376.

The defendant delivered a piano to the plaintiff on a "hire contract," the price being stated to be \$500, payable by crediting \$100 on an old piano taken in exchange, and the balance of \$400 by monthly instalments, the plaintiff giving a note for the \$400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, and there were instalments in arrear when action was brought. The plaintiff sued for fraudulent misrepresentations,

and for general damages for breach of implied warranties; the alleged misrepresentations or warranties being that the piano was worth \$500; that it was a first-class instrument, and as good as any Steinway or Chickering piano. The jury found for the plaintiff, with damages:—Held, that the plaintiff could not succeed as to the false representation, for the evidence shewed that after she discovered the piano was not as represented, she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting; nor could she recover in an action for deceit, for she failed to shew that the defendant did not believe the statements made to be true, or that they were made recklessly; and also no damages were shewn; and—Sembles, the statements were such as are properly styled simple commendation:—Held, also, that as the property had not passed, an action for the breach of warranty would not lie. *Frye v. Milligan*, 10 O. R. 509.—C. P. D.

L. F. D. being the owner of certain valuable property, mortgaged it for \$700, became of unsound mind and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and the property was sold for \$900 to E. R., sister of M. A. D. Two years after E. R. sold the property to M. E. B. for \$5,000, and a mortgage for \$4,000 unpaid purchase money was taken to M. A. D. In an action by L. F. D., by L. D. his next friend, to set aside the sale or for an account, it was:—Held, on the evidence, that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D., but that as M. E. B. was a purchaser for value without notice, the sale must stand, but an account of the proceeds was ordered against M. A. D. *Dufresne v. Dufresne*, 10 O. R. 773.—Ferguson.

Deposit made in bank which contemplated suspension, and did not open again after the day on which the deposit was made.—Recovery back of the money. See *Re The Central Bank of Canada and the winding up Act*, R. S. C. c. 129; *Wells & MacMurphy's case*, 15 O. R. 611.

An action for deceit will lie against a corporation. *Moore v. Ontario Investment Association*, 16 O. R. 269.—Robertson.

Demurrer to a statement of claim for damages against a company, wherein it was alleged that the plaintiff was induced by fraudulent statements in the annual reports of the company, and in letters written to him by the President to purchase stock practically from the company, which stock was valueless, overruled with costs. *Ib.*

Sembles, that if the plaintiff had been induced to buy the stock from a private holder by the false representations aforesaid, the corporation would not have been liable, but only the individual officers; but that if the vendor of the shares was privy to the representations, the plaintiff could also recover against him. *Ib.*

Action by a married woman against the father, mother and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a frau-

dule conspiracy to induce the plaintiff to enter into the marriage contract:—Held, that the action being without precedent and contrary to public policy, was not maintainable. *Brennen v. Brennen*, 19 O. R. 327.—Falconbridge.

See *Fraser v. McLean*, 46 Q. B. 302, p. 779; *Lee v. McMahon*, 2 O. R. 654, 11 A. R. 555, p. 776; *Merchants' Bank v. Thompson—Mallon v. Craig*, 3 O. R. 541; *Beatty v. Neelon*, 12 A. R. 50, p. 240; *Moffatt v. Merchants' Bank of Canada*, 11 S. C. R. 46, p. 774.

#### IV. MISCELLANEOUS CASES.

Fraudulent transfer of shares by directors of a company, to a person of insufficient means to pay impending calls, in order to avoid liability for such calls. See *Thompson v. Canada Fire and Marine Insurance Co.*, 9 O. R. 284.

An executor or administrator is estopped by the fraud or criminal acts of the deceased persons he represents from seeking to invalidate securities tainted by such fraud or criminal acts which such deceased person had given to his creditors during his lifetime. *Merchants' Bank v. Monteith*, 10 P. R. 467.—Hodgins, Master-in-Ordinary.

Impeaching judgment in a partition case on the ground of fraud or deception having been practised on the court. See *Jenking v. Jenking*, 11 A. R. 92.

Impeaching decision of a Court of Revision on the ground of improper arrangement or conspiracy entered into before the holding of the court by the members thereof in conjunction with others to increase the assessment of plaintiffs. See *Canadian Land and Emigration Co. v. Municipality of Dysart*, 12 A. R. 80.

Defence of fraud practised on a foreign court to an action on a foreign judgment. See *Woodruff v. McLennan*, 14 A. R. 242.

Of two innocent parties, one of whom must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss. See *Merchants' Bank of Canada v. McKay*, 12 O. R. 498; 15 S. C. R. 672.

Effect of fraudulent judicial sale. See *Mitchell v. City of London Fire Ins. Co., (Limited)*, 12 O. R. 706.

Costs of official guardian where there has been fraud by the infant. See *Westgate v. Westgate*, 11 P. R. 62.

Fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been made with the knowledge of the facts, and it (the representation) must be plain and not a matter of mere inference or opinion; and certainty is essential to all estoppels. *McGee v. Kane*, 14 O. R. 226.—Ferguson.

Evidence of fraud when fraud not set up as a defence. See *McPherson v. Wilson*, 15 A. R. 294.

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## FRAUDS (STATUTE OF).

- I. RESPECTING AGREEMENTS TO BE PERFORMED WITHIN THE YEAR—*See CONTRACT.*
- II. PROMISES TO THIRD PARTIES—*See GUARANTEE AND INDEMNITY.*
- III. RESPECTING LEASES—*See LANDLORD AND TENANT.*
- IV. RESPECTING SALES OF GOODS—*See SALE OF GOODS.*
- V. RESPECTING SALES OF LAND OR INTEREST IN LAND—*See SALE OF LAND—SPECIFIC PERFORMANCE.*
- VI. PAROL EVIDENCE TO VARY DEEDS OR WRITINGS—*See EVIDENCE.*

## FRAUDULENT CONVEYANCES.

## I. AS AGAINST CREDITORS.

1. *Under 13 Eliz. c. 5—R. S. O. (1877) c. 118—48 Vict. c. 26—R. S. O. (1887) c. 124.*
  - (a) *Generally*, 789.
  - (b) *Who are Insolvents*, 791.
  - (c) *Intent of Parties*, 793.
  - (d) *Change of Possession*, 794.
  - (e) *Assignments for the Benefit of Creditors*, 795.
  - (f) *Conveyance of Lands*, 799.
  - (g) *Bills of Sale and Chattel Mortgages*, 804.
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II. AS BETWEEN PARTIES—*See FRAUD AND MISREPRESENTATION.*III. LIMITATION OF TIME FOR SETTING ASIDE—*See LIMITATION OF ACTIONS.*

## I. AS AGAINST CREDITORS.

1. *Under 13 Eliz. c. 5—R. S. O. (1877) c. 118—48 Vic. c. 26—R. S. O. (1887) c. 124.*
  - (a) *Generally.*

13 Eliz. c. 5 is directed against fraudulent alienations of property, whereby the debtor diminishes the estate, and does not touch the case of his neglecting or refusing to enrich himself. *Basin v. Malcolm*, 13 O. R. 444.—*Proudfoot*.

In actions by assignees for creditors under 48 Vict. c. 26 (Ont.), and amendments (now R. S. O.

(1887) c. 124) to impeach transactions as fraudulent and void, under that statute, the court was evenly divided as to the constitutional validity of the Act. *Clarkson v. Ontario Bank and three other cases*, 15 A. R. 166.

Per Hagarty, C. J. O., and Osler, J. A. The statute which is one of general application for the disposition of insolvent estates, must be regarded as a whole and is ultra vires, as being legislation on the subjects of bankruptcy and insolvency. *Ib.*

Per Burton and Patterson, J.J.A.—The matters dealt with by the statute come clearly within the definition of "Property and civil rights in the Province." *Ib.*

Per Burton, J. A., section 2 of 48 Vict. c. 26 (now R. S. O. (1887), c. 124, s. 2), should be read as intended to invalidate any act fraudulent in the sense of being a violation of the statute if it has the effect of defeating or delaying creditors or giving one or more of them a preference over others. *Kennedy v. Freeman*, 15 A. R. 166.

Semble, per Osler, J. A., the meaning of section 2 is, that when a person is in insolvent circumstances, if either the intent or the effect of the transaction is to prefer the creditor, that is all that is necessary to avoid it. *Ib.*

The defendant who was employed as financial manager of a firm advanced to them a large sum of money, to be repaid on his giving six months' notice demanding payment, on default of which the firm covenanted to assign certain securities. This notice was given on 15th January, 1885, but although repeated demands for payment were made by defendant, nothing was done until 19th December, 1885, when a transfer to him of certain securities was made by the firm, who within two months made an assignment under 48 Vict. c. 26 (Ont.), which came into force on 1st September, 1885. In an action by the assignee under that statute to recover back the amount realized from the securities, it was :—Held, that whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made as this was in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law. *Quære*, whether the effect of the statute is to alter the law in this respect. *Clarkson v. Sterling*, 15 A. R. 234.

Effect of the words "or which has such effect" in R. S. O. (1887), c. 124, s. 2. *See Molsons Bank v. Halter*, 16 A. R. 323.

A transaction entered into by a person in insolvent circumstances is not impeachable, unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith. *Johnson v. Hope*, 17 A. R. 10.

A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency, and in good faith, is not impeachable, because the moneys advanced are, pursuant to the direction of the insolvent, paid over to one of his creditors, who thereby obtains a preference. *Stoddart v. Wilson*, 16 O. R. 17, disapproved.

Judgment of the County Court of Hastings reversed. *Ib.*

Held, following *Johnson v. Hope*, 17 A. R. 10, that an assignee for the benefit of creditors under R. S. O. (1887), c. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full. *Lamb v. Young*, 19 O. R. 104.—Q. B. D.

A farmer mortgaged his farm to secure a debt due by him to the mortgagee and a small sum advanced at the time the mortgage was made. He knew at the time he made the mortgage that he was unable to pay his debts in full, and that he was giving the mortgagee a preference over his other creditors. The practical effect was that the mortgagee was paid in full and that the rest of the creditors received nothing. The mortgagee, however, was not aware at the time he took the mortgage, that the mortgagor was in insolvent circumstances;—Held, following *Johnson v. Hope*, 17 A. R. 10, that the mortgage was not void against creditors, under sec. 2 of R. S. O. (1887), c. 124. *Gibbons v. McDonald*, 19 O. R. 290.—Street; 18 A. R. 159.

One who has a right of action for tort and subsequently recovers judgment is not a creditor within the meaning of the Assignments and Preferences Act, so as to be in a position to attack under that Act, a transaction entered into by the tortfeasor before the action was commenced. Where a transaction is attacked under that Act, knowledge by the transferee of the insolvency of the transferor must be shown. *Johnson v. Hope*, 17 A. R. 10, adhered to. Judgment of the County Court of Hastings affirmed. *Ashley v. Brown*, 17 A. R. 500.

See *Molsons Bank v. Halter*, 16 A. R. 323; 18 S. C. R. 88, p. 803.

#### (b) Who are Insolvents.

The meaning of R. S. O. (1877), c. 118, as amended by 48 Vict. c. 26, s. 2 (O.), is that a conveyance of property which has the effect of defeating, delaying, or prejudicing his creditors, or of giving a preference, is utterly void when made by a person at a time when he is in insolvent circumstances, or unable to pay his debts in full, or knows that he is on the eve of insolvency. *Rae v. McDonald*, 13 O. R. 352.—C. P. D.

In an action by the plaintiff, a creditor, to set aside a mortgage made by the debtor to the defendant M.—Held on the evidence, the debtor was insolvent when he made the mortgage, whereby the defendant obtained a preference over the other creditors, including the plaintiff, and that the mortgage must be set aside. *Ib.*

Per Rose, J.—A debtor is legally insolvent when he has not sufficient property to pay all his debts if sold under legal process; and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course of business. *Ib.*

Per Cameron, C. J. In determining whether a debtor is insolvent, etc., his assets or effects are

not to be estimated at what they might bring at a forced sale under execution, but at the fair value in cash on the market at any ordinary sale. *Ib.*

Per Rose, J.—Evidence of the value of the right of dower is properly admissible in determining the value of a debtor's liabilities. *Ib.*

Two of the debts were to relatives of the debtor, secured by mortgage and promissory notes. The judge at the trial charged that because the debts were under the control of the debtor they should not be included in estimating his liabilities. Per Rose, J. This was misdirection. *Ib.*

A man may be deemed in "insolvent circumstances," within the meaning of 48 Vict. c. 26, s. 2, if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent. *Rae v. McDonald*, 13 O. R. 352, discussed. *Warnock v. Klepper*, 14 O. R. 238.—Chy. D.; 15 A. R. 324.

On 19th December, 1885, a transfer of certain book debts was made by the firm of B. M. & Co., to defendant, under a contract therefor, made on the 16th August, 1884, whereby defendant lent the firm \$15,000, which was to be repaid on six months' notice, and defendant to be employed as a clerk at \$2,000 a year. The firm subsequently made an assignment under 48 Vict. c. 26 (Ont.), to the plaintiff, for the benefit of their creditors. The plaintiff claimed that at the time of the transfer the firm was insolvent, and therefore the transfer was invalid as giving, or having the effect of giving, the defendant a preference. At the time of the transfer the value of the firm's stock of goods at the ordinary selling value was nearly double the amount of the firm's liabilities; but when they were sold by the plaintiff, some two months afterwards, they only realized a third of the ordinary selling price, and much less than the liabilities.—Held, that the firm were not insolvent at the time of the transfer; and the transfer was therefore valid. *Clarkson v. Sterling*, 14 O. R. 460.—C. P. D.

Under a judgment recovered and execution issued thereon in February, 1887, certain goods and chattels of C. were seized. These goods were covered by a chattel mortgage made on 18th December, 1886, in favour of the defendant. The evidence shewed that at the time of the mortgage there was a surplus of about \$13,000 of assets over liabilities. All the assets were either mortgaged or under warehouse receipts.—Held, that C. could not be deemed to be insolvent at the time of the making of the mortgage within 48 Vict. c. 26 (Ont.). *Dominion Bank v. Cowan*, 14 O. R. 465.—Rose.

There is no wider meaning to be given to the words "unable to pay his debts in full" than to "insolvent circumstances"; but both expressions refer to the same financial condition, that is, to a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted. *Ib.*

The fact that all the assets were either mortgaged or under warehouse receipts is not alone sufficient to render a debtor insolvent. *Ib.*

In order under the R. S. O. (1887), c. 124, to exist a fraudulent mortgage, the goods must be the part of the estate of the debtor. R. 472.—C.

Under R. 472, which with which made, must as the result the creditor's intent on the law. *State*

The weight in favour of fraudulent O. (1877) c. 124, of intent so creditor: a upon mere evidence of trial evidence v. The Mer followed in R. 635, 648. Boyd.

A chattel mortgage, bona fide O. (1877), c. 124, debtor was mortgagee knowledge the mortgage of intent on and the 3 (Ont.) do McKay, 10 there was mortgagee also appear pursuant to for the debt held:—Que be defeated to give security, C. P. D.

A trader and for who dorse on the current, with security, was offered to a household it, paying of the good retired the seconded, by court that the arrange the judgment E. was aw embarrassed of proof of peached as Brown.—E



(c) *Intent of Parties.*

In order to create a fraudulent preference under the statute of Elizabeth as interpreted by R. S. O. (1877) c. 95, s. 15, not only must there exist a fraudulent intent in the mind of the mortgagor, but also in that of the mortgagee. In this case, which was that of a mortgage of goods:—Held, that no such intent was shown on the part of the mortgagee; nor Semble, on the part of the mortgagor. *Hepburn v. Park*, 6 O. R. 472.—C. P. D.

Under R. S. O. (1877), c. 118, s. 2, the intent with which the conveyance, or gift in question was made, must be looked at, and if it was obtained as the result of honest pressure on the part of the creditor, that rebuts the presumption of an intent on the debtors part to act in fraud of the law. *Slater v. Oliver*, 7 O. R. 158.—Chy. D.

The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor, under R. S. O. (1877) c. 118, there must be a concurrence of intent so to do on the part of both debtor and creditor: and the rule of the court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion. *Lancey v. The Merchants' Bank*, 10 O. R. 169 (note), followed in preference to *Ivey v. Knox*, 8 O. R. 635, 648. *Burns v. Mackay*, 10 O. R. 167.—Boyd.

A chattel mortgage given as security for a bona fide debt cannot be avoided under R. S. O. (1877), c. 118, by simply shewing that the debtor was insolvent, and intended to give the mortgagee a preference, but there must be knowledge on the part of the creditor taking the mortgage so as to constitute a concurrence of intent on the part of the debtor and creditor; and the amendment made by 47 Vict. c. 10 s. 3 (Ont.) does not affect the matter. *Burns v. McKay*, 10 O. R. 167, followed. In this case there was no knowledge on the part of the mortgagee of the debtor's insolvency; and it also appeared that the mortgage was given in pursuance of a previous promise to give security for the debt. The mortgage was therefore upheld:—Quære, whether, where the statute may be defeated by shewing an antecedent promise to give security, it must be such as the promise indicated. *McRoberts v. Steinoff*, 11 O. R. 369.—C. P. D.

A trader who was in insolvent circumstances and for whom the plaintiff D. was liable as indorser on notes discounted at a bank and then current, was urged by him for a settlement and security, which, however, he refused to give, but offered to sell E. the whole of his stock-in-trade, household furniture, etc. E. accordingly bought it, paying the vendor \$1,400, the excess in value of the goods over and above the notes, which he retired the same day. Next day the vendor absconded, but the evidence failed to satisfy the court that E. intended to commit any fraud in the arrangement so carried out. Held, affirming the judgment of the court below, that although E. was aware that the debtor was in pecuniary embarrassment, the transaction, in the absence of proof of mala fides, was not liable to be impeached as a fraudulent preference. *Lewis v. Brown*.—*Elliott v. Brown*, 10 A. R. 639.

In an action impeaching the transfer of certain notes by an insolvent trader to his wife, the husband swore such transfer was made to secure her the payment of moneys loaned by her. Immediately after such transfer he absconded from the province. At the trial the jury found, in answer to questions put by the presiding judge, (1) that the husband at the time he absconded was not solvent and able to pay his debts in full; (2) that he knew himself at the time to be on the eve of insolvency; (3) that the transfer of the notes to his wife was not voluntary; (4) that the scheme of such transfer originated with him and not with his wife. The jury, however, failed to find with what intent the transfer was made, and gave a verdict in favour of the defendant (the wife), which, on motion in term, the judge refused to disturb. On appeal this court, being of opinion that the answers given by the jury did not afford sufficient ground for a decision under R. S. O. (1877), c. 118 ordered a new trial, but under the circumstances directed each party to bear their own costs, both of the appeal and of the new trial. *Fradenburgh v. Haskins*, 12 A. R. 257.

See *Allan v. McTavish*, 8 A. R. 440, p. 801.

(d) *Change of Possession.*

G. had recovered a judgment against his father for costs in an action instituted by the latter, and under the execution issued thereon seized a horse as the property of the father in the possession of the plaintiff A., another son. It was shewn that several years before the father had agreed to convey his farm to A. and another brother W., both of whom assumed possession and control of the property before any conveyance was executed, and so continued in possession, the father continuing to reside on the place with the two sons, part of the consideration for the conveyance being that they should support him. The sons also bought the chattel property from their father, the horse in question having been purchased by A. for \$50, and this he kept upon the premises, as had always been done, using him in the work of the farm, and occasionally working for others with him for hire, the father sometimes using him for his own purposes. On this state of facts, the judge of the county court of Hastings in an interpleader issue, left the question of property to the jury, who found a verdict for A. The court being of opinion that the claim of G. having arisen long after the alleged sale of chattels, it would require a preponderance of evidence in favour of G., to induce the court to interfere with the finding of the jury (but which did not exist) refused to disturb the conclusion of the judge as to the finding of the jury, and dismissed an appeal with costs. *Danford v. Danford*, 8 A. R. 518.

In an interpleader issue it was alleged that the plaintiff (the claimant) had purchased a horse from S. B. S., a married woman carrying on business in her own name, the price of which was said to have been paid partly in a note of hand by S. B. S. and her husband, for money lent to them, and partly by a set-off of wages coming to plaintiff from S. B. S. On the completion of the purchase the plaintiff took the horse, together with a cutter and harness belonging to S. B. S., and was absent for two or three days. On his return he put the horse in



the stable of S. B. S. as before, and fed it with her fodder, etc.—no other act was shewn to indicate a change of ownership before the animal was seized by the sheriff under a f. fa. goods issued against S. B. S. Per Burton and Patterson, J.J.A., affirming the judgment of the county court, that there was not such a continued change of possession as to satisfy the requirements of the statute, R. S. O. (1877), c. 118, and that the judge had rightly withdrawn the case from the jury. Per Hagarty, C. J. O., and Osler, J. A. There being a jury the evidence was such as to require the case to be left to them. *Pettigrew v. Thomas*, 12 A. R. 577.

See *Kinloch v. Scribner*, 14 S. C. R. 77, S. C., sub nom.; *Scribner v. McLaren*, 2 O. R. 265; S. C. sub nom. *Scribner v. Kinloch*, 12 A. R. 367, p. 186; *Kerr v. Canadian Bank of Commerce*, 4 O. R. 652, *infra*.

(e) Assignments for the Benefit of Creditors.

B, an insolvent debtor, made a deed of his stock-in-trade and lands to the plaintiff in trust, to convert the same into money, pay the expenses of the trust, retain ten per cent, of moneys received by way of compensation, and pay the present execution and other privileged creditors, if any, according to priority, next to divide the balance *pari passu* amongst all other creditors, and to pay the surplus, if any, to B. The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by, or communication of it, to any of the creditors. The defendants seized under an execution a few days after the deed:—Held (affirming the judgment of the county judge of Halton), that the deed was a revocable, voluntary instrument, the relation of trustee and cestui que trust not having been established between the plaintiff and the creditors, and therefore void as against the defendants. Held, also, that it was void under R. S. O., (1887), c. 118, s. 2, as it did not provide for paying ratably and proportionably, and without preference or priority all the creditors, but gave a preference to others besides execution creditors. *Andrew v. Stuart*, 6 A. R. 495.

W. and W. made an assignment of all their assets, both separate and partnership property, to the plaintiff in trust, to realize and pay "all the just debts of the said creditors of the said debtors ratably and proportionably, and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partners had no property, and owed but \$110; that the other had some household furniture which was seized for rent, which it satisfied: that he owed less than \$100 otherwise; and that all these separate debts had been satisfied:—Held, Cameron, J., dissenting, that the assignment was not void in providing for payment of partnership creditors only. Held, also, that the provision that the trustee might pay off any lien or charge on the assets, did not invalidate the assignment. Held, also, that there was, under the facts stated in the report of the case, an actual and continual change of possession. *Kerr v. Canadian Bank of Commerce*, 4 O. R. 652.—Q. B. D.

In a deed of assignment for the benefit of creditors, the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, etc., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown: Held, affirming the judgment of the court below—*Badenach v. Slater*, 8 A. R. 402—that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O. (1877), c. 118, s. 2. *Slater v. Badenach*, 10 S. C. R. 296.

Where it was sought to set aside an assignment of real and personal property made by an insolvent debtor to a trustee for creditors, on the ground that the assignee had, before the execution of it satisfied some of his creditors in full by transferring goods of his to them in a manner alleged to be preferential, but the instrument impeached did not require the creditors to submit to any conditions, and did not provide for a release of the debtor in any manner:—Held, that the instrument was valid, and could not be set aside, and the case was distinguishable from those American cases which embody the principle that a debtor shall not be allowed to dispose preferentially of part of his estate, and as part of the same scheme to turn over the remainder of it to trustees for creditors by an instrument which provides for his discharge:—Semble, that where in such an instrument the goods are transferred subject to the payment of rent to a prior mortgagee this does not invalidate the instrument. *Ontario Bank v. Lamont*, 6 O. R. 147.—Boyd.

Two persons carried on business under the name of "G. & W." Having become unable to pay their liabilities, they made an assignment to the plaintiffs of all their partnership effects and of all the personal effects of G., "other than wearing apparel," in and about the dwelling-house of G., in trust to pay all the creditors of "G. & W.":—Held, (affirming the judgment of the court below, 32 C. P. 68), that the deed was void, in consequence of providing for the payment of partnership creditors only; and parol evidence was not admissible to prove that the object of the parties, in making the assignment, was to provide for the payment of separate as well as partnership creditors. *Mil's v. Kerr*, 7 A. R. 769. See *McKintrick v. Huley*, 46 Q. B. 246.

McP. Bros., a firm composed of two partners, by deed assigned to the plaintiff the partnership property and assets only, upon trust to pay the joint creditors only. The deed authorized the plaintiff to pay creditors' claims either with or without interest. On the day before the assignment the sheriff had seized the partnership property under two writs of execution (one of which he swore at the trial he thought was against one of the partners only, but there was no further proof of this), and put the plaintiff in possession as his bailiff. McP. Bros. then determined to assign to the plaintiff, and it was arranged be-

tween the execution retain possession.—Held, that O. (1877), ship creditors, arrangers, inasmuch as such arrangement for without in

For the equitable amongst a circumstance all his property sell the same in full the the assign other persons annexed to propose, to divide the several schedule; assignor, below held, or by invalid and the judgment of the sheriff Division his consequence of On appeal divided, the A. R. 405. A., affirming Division, (Cameron, \$26.85, upon was not p omission i circumstan validate the s. 2. Per apparently Divisional dence on v proved, the treated as Hagarty, C from the o Torrance, could not a tra, per h Remarks p stances u of rent and not be an d and Camer the provis Quere, (p ted credit execution, of such cl the Supre and Fouri judgment senting) t expressed be a distr among al not bound

between the sheriff and the plaintiff that on the execution of the assignment the plaintiff should retain possession subject only to these executions:—Held, that the deed was not void under R. S. O. (1877), c. 118, for intent to prefer the partnership creditor; nor for intent to prefer particular creditors, even if such intent were shown, by the arrangement between the plaintiff and the sheriff, inasmuch as the assignors were not parties to such arrangement; nor by reason of the provision for payment of creditors' claims with or without interest. *Ewart v. Stuart*, 12 A. R. 99.

For the expressed purpose of making a fair and equitable distribution of his property and effects amongst all his creditors a trader in insolvent circumstances executed a deed of assignment of all his property, real and personal, in trust to sell the same, and out of the proceeds: (1) to pay in full the several debts due or to become due by the assignor to the assignee, and the several other persons and firms designated in a schedule annexed thereto, and if insufficient for that purpose, to distribute the proceeds ratably amongst the several persons and firms named in the said schedule; and (2) to return any surplus to the assignor. A claim for \$26.86, which the court below held to be established, was in ignorance or by inadvertence omitted from such schedule, and the defendant, a scheduled creditor, obtained judgment for \$1,780.75; and under his execution the sheriff seized the goods. The Common Pleas Division held the deed to be invalid in consequence of the omission of such claim for \$26.86. On appeal, the court of appeal being equally divided, the appeal was dismissed, with costs (10 A. R. 405.) *Hagarty, C. J. O., and Burton, J. A.*, affirming the judgment of the Common Pleas Division, (32 C. P. 524). *Patterson, J. A., and Cameron, C. J.*, held, that the alleged debt of \$26.86, upon the evidence set out in the report, was not proved; and that even if proved, its omission from the schedule did not, under the circumstances, shew the intent necessary to invalidate the deed under R. S. O. (1877), c. 118, s. 2. Per *Hagarty, C. J. O.*, there having been apparently no discussion at the trial, or in the Divisional Court, as to the sufficiency of the evidence on which the alleged debt was held to be proved, the existence of such debt should not be treated as open to question in this court. Per *Hagarty, C. J. O., and Burton, J. A.*, dissenting from the opinion of *Wilson, C. J.*, in *Thorne v. Torrance*, 18 C. P. at p. 35, the creditor omitted could not now be admitted to the schedule. Contra, per *Patterson, J. A., and Cameron, C. J.* Remarks per *Cameron, C. J.*, as to the circumstances under which a provision for the payment of rent and taxes as a first charge would or would not be an objection. Remarks per *Burton, J. A., and Cameron, C. J.*, as to the object and effect of the proviso to R. S. O. (1877), c. 118, s. 2:—*Quære*, (per *Cameron, C. J.*), whether, the omitted creditor not having obtained judgment and execution, the defendant could take advantage of such claim to defeat the plaintiff's right. In the Supreme Court, it was held per *Ritchie, C. J.* and *Fournier and Tachereau, JJ.*, reversing the judgment of the court below, (*Henry, J.*, dissenting) that the consideration for the deed, as expressed on its face, was that there should be a distribution of the estate of the insolvent among all his creditors, and the assignee was not bound to confine such distribution to the

creditors named in the schedule. Per *Strong, J.* That the assignee was confined to the schedule, but effect must be given to the word "intent" in the statute, and as the evidence showed that a bona fide effort was made to ascertain the names of all the creditors before the execution of the deed, it did not appear that the insolvent intended to prefer the schedule creditors, and the deed, therefore, was not void under R. S. O. (1877), c. 118, s. 2. *Semble*, per *Strong, J.* That the word "preference" in R. S. O. (1877), c. 118, s. 2, imports a "voluntary preference," and is not applicable to the case of a deed obtained by a creditor or creditors, who to obtain it, have brought pressure to bear on the debtor. *McLean v. Garland*, 13 S. C. R. 306.

The firm of R. & Co., consisting of three members, supplied goods to the defendants, and subsequently one of the members retired, and transferred his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and afterwards made an assignment to E., under 48 Vict. c. 26, (O.) for the benefit of their creditors. E., as assignee, sold to the plaintiff the debt supposed to be due from the defendants to R. & Co., for the price of the goods supplied, and also the interest of R. & Co., in any goods supplied and charged to anyone, remaining unsold, and the plaintiff brought this action to recover the same. The goods in question, however, were not purchased by defendants, but were consigned to them for sale by R. & Co., by whose instructions the proceeds of the goods actually sold, were remitted to H. & Co., to whom they had been assigned by R. & Co. At the trial it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The learned judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties. The plaintiff moved by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue, remaining unsold, of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co., if the transfer to them should be upheld, or absolutely if that transfer should be set aside as a fraudulent preference:—Held, 1. That these questions were "questions involved in the action" within the meaning of Rule 103, Ontario Judicature Act (Con. Rule 324) having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that Rule, but that the amendment must be confined to the plaintiff's possible rights. 2. That by sec. 7 of 48 Vict. c. 26, E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co., but that transfer was not made by the same firm of R. & Co. which assigned to E.; that the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those only against whom a fraudulent preference by the original firm could be declared void; that the plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co. The plaintiff was granted leave to amend

by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt, and of payments on account thereof, and, as against the original defendants, to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff until filing his consent, payment by the plaintiff of the defendant's whole costs to be a condition precedent. Falconbridge, J., dubitante, as to the disposition of costs. *Adams v. Watson Manufacturing Co., (Limited)* 15 O. R. 218.—Q. B. D.; 16 A. R. 2.

A deed of assignment of property in trust for the benefit of creditors provided for the distribution of the assets by the assignee as follows: First, to pay certain named creditors in full; secondly, if sufficient assets remained after such payment to pay certain other named creditors in full, or, if the assets should not be sufficient, to distribute the same pro rata among such second preferred creditors; thirdly, to divide the remaining assets among all the creditors not preferred in equal proportions according to their respective claims; and, fourthly, to pay the balance remaining after distribution to the assignor. The deed required all creditors executing it to release the assignor from any and every claim of the executing creditor against him, and provided that the assignee should not be liable to account for more money and effects than he should actually receive, nor be responsible for any loss or damage to the trust, except such as should happen through his own wilful neglect. In an action to set aside the deed:—Held, affirming the judgment of the court below, (Wynne and Patterson, JJ. dissenting, that the deed was one to which it was unreasonable to expect unpreferred creditors to become parties, and therefore, and because it contained a resulting trust in favour of the debtor, it was void under the statute, 13 Eliz. ch. 5. *Whitman v. Union Bank of Halifax*, 16 S. C. R. 410.

See *McNab v. Peer*, 32 C. P. 545, p. 83; *Cooper v. Dixon*, 10 A. R. 50, p. 101; *Alexander v. Wavell*, 10 A. R. 135, p. 105; *Beemer v. Oliver*, 10 A. R. 656, p. 601; *McDonald v. McCull*, 12 A. R. 593, p. 822; *Horey v. Whiting*, 14 S. C. R. 515, p. 194; *Lawrence v. Anderson* 17 S. C. R. 349, p. 103.

#### (f) Conveyance of Lands.

A son left his father's house at the age of sixteen, with the assent of the father, a farmer, and went to teach school at a distance, it being agreed that he should remit to his father from time to time a part of his earnings, and that the same should be repaid by the father after the son attained majority, as the son should want it. Accordingly remittances were alleged to have been made to his father, which, on the son coming of age, amounted to \$600, and upwards, when he found his father was unable to repay his advances. It was arranged that the son should make further advances, and that unless the father paid them the son was to have the farm conveyed to him, subject to certain incumbrances upon it. Advances were subsequently made by the son, and on a settlement made in 1877, it was ascertained that the father's indebtedness amounted to \$1,600 and upwards, which it was then agreed should be the consideration for the purchase of the equity of redemption of the

father in the premises, the conveyance of which was impeached by a judgment creditor of the father under 13 Eliz. The court being satisfied of the bona fides of the dealings between the father and the son, and that the sums claimed had really been advanced, (although the only evidence of the dealings was that of the father and son) dismissed the bill, but without costs. *Jack v. Greig*, 27 Chy. G.—Spragge.

In a suit by a creditor impeaching a sale by N. to his sister, made in consideration of her assuming two mortgages on the land, certain executions against him which she paid, and of a debt due to herself, it appeared she was aware of the plaintiff's claim; that her brother had no other property to meet it; that he was of improvident habits; that a sheriff's sale was pending; that N. had previously refused a larger sum for the land than his sister gave; that N. continued after the sale to reside on the land; that she shortly afterwards sold the estate for more than twice what she gave for it, and that she bought other lands with part of the proceeds, upon which lands N. did reside:—Held, that sufficient was shown to warrant a decree declaring the conveyance by N. to his sister fraudulent as against creditors under the statute of Elizabeth. *Merritt v. Niles*, 28 Chy. 346.—Spragge.

S. purchased lands with moneys payable to him by the crown for work done under a contract, which lands he procured to be conveyed to his wife:—Held, that although the moneys could not be reached by garnishing them before being paid by the crown, yet that the money having passed out of the crown, by reason of the husband's appointment in favour of his wife, the effect was to defraud creditors, and the gift was therefore void under the statute of Elizabeth. *Nicholson v. Shannon—McPherson v. Shannon*, 28 Chy. 378.—Spragge.

A sale of a lot at an absurdly inadequate price, the sale being otherwise attended with suspicion, was set aside as fraudulent under the statute of Elizabeth. *Bank of Toronto v. Irwin*, 28 Chy. 397.—Spragge.

D., the purchaser of land, in 1856, gave a mortgage thereon to A., the vendor, to secure part of the purchase money. Taxes were allowed to accumulate, for which the land was sold, and D. became the purchaser in 1868. In 1872, D. made conveyances of his other land and personal property to his two sons, each of whom gave back a mortgage to secure the maintenance of D. and his wife, and the payment of certain sums to other children. No claim was made on the mortgage given by D. until 1876, and the plaintiff claiming as assignee of A., recovered judgment against D. in June, 1878, on the covenant. In the same year, in order to defeat this judgment, the mortgages made in 1872 to D. were released and new mortgages made to his wife securing substantially the same provision. The plaintiff having obtained a decree in the court below to set aside the transactions of 1872 and 1878, as fraudulent against creditors, such judgment was reversed on appeal. Per Burton and Patterson, JJ.A., the transaction of 1872, upon the evidence more fully set out in the report, was not fraudulent, for it was not voluntary, but brought about by pressure on the part of the

sons, and mere factors being of intent to defraud the father or the latter, went to one, was made by Burton, J., the plaintiff existing before was no such plaintiff evidence, A., an assignee nor was it that the judgment. Per Patterson, J., the plaintiff was not liable for the plaintiff's 440; reversed.

Held, that trust for creditors in this case, was that section R. S. O. (18) real property C. P. D.

The male several times redemption. mortgage, made on the very other party being reissued redemption, a conveyance band was found to be a true plaintiff, layed and held, affirming that the conveyance was voluntary: no to have been fraud creditors 13 Eliz. c. 5.

On 4th April (dower) mortgage On 21st March circumstances, to the use of executed two originally as 20th December (dower) mortgage above deeds their respect G. assigned registered. jointly mortgage by deed May, 1874, released the mortgage of the use of N registered to

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sons, and was for valuable consideration; the mere fact, therefore, if it were shown, of creditors being delayed would not dispense with proof of intent to delay, etc., and there was no sufficient proof of such intent, either on the part of the father or sons, and certainly not on the part of the latter, which was essential, for the evidence went to shew that this debt, which was the only one, was neither known or apprehended. Per Burton, J. A. The allegation in the bill that the plaintiff was a creditor in respect of a debt existing before 1872, was not proved, for there was no sufficient proof of any assignment to the plaintiff, of which the judgment was no evidence, and a deed of the land by the mortgagee, A., to the plaintiff, would not operate as an assignment of the debt or of the mortgage; nor was it sufficient to shew the mortgage, and that the judgment was for the money secured by it. Per Patterson, J. A. Proof of the assignment was immaterial, for the plaintiff had judgment for the mortgage debt, and if the intent to defeat such debt had been shewn, the grantees of the land could not question the execution plaintiff's title. *Allan v. McTavish*, 8 A. R. 440; reversing, 28 Chy. 539.

Held, that a deed of assignment of lands in trust for creditors, under the circumstances of this case, was not void under 13 Eliz. c. 5; and that section 18 of the Indigent Debtors' Act, now R. S. O. (1877), c. 118, s. 2, does not refer to real property. *McNab v. Peer*, 32 C. P. 545.—C. P. D.

The male defendant mortgaged his property several times, and finally sold the equity of redemption. His wife barred her dower in each mortgage, under an agreement with her husband, made on the first occasion, that he would convey other property to her. Upon this claim being reiterated on the sale of the equity of redemption, and the refusal of the wife to join in the conveyance unless the promise of the husband was fulfilled, the husband conveyed other land to a trustee for her. The effect was that the plaintiff, a creditor of the husband, was delayed and hindered in recovering his debt:—Held, affirming the decision of the court below, that the conveyance to the wife's trustee, was not voluntary; and as the transaction had been found to have been bona fide, and without intent to defraud creditors, it could not be impeached under 13 Eliz. c. 5. *Beavis v. Maguire*, 7 A. R. 704.

On 4th April, 1863, M. and his wife (to bar dower) mortgaged the lands in question to C. On 21st May, 1867, M. being in insolvent circumstances, conveyed the said lands to W. to the use of M.'s wife. In 1868 and 1872 M. executed two other mortgages to C. for the debt originally secured by the first mortgage. On 20th December, 1874, M. and his wife (to bar dower) mortgaged the said lands to C. All the above deeds were registered about the time of their respective executions. On 6th March, 1876, G. assigned to the plaintiff, but the deed was not registered. On 7th June, 1876, M. and his wife jointly mortgaged the same lands to the plaintiff by deed registered 15th July, 1876. On 21st May, 1874, W. and M. and his wife granted and released the said lands to C. until payment of the mortgage of 1872, and on payment thereof to the use of M. in fee. This, however, was not registered till 4th August, 1881. The plaintiff

had no notice that the conveyance from M. of 21st May, 1867, was invalid, nor of the conveyance of 21st May, 1874, but he had notice of the three mortgages to C., and that C. claimed the whole debt against the land, and also that there was a defect in C.'s title under the second and third mortgages:—Held, that the plaintiff, being bound by such notice, could not avail himself of any defect in title arising from M. executing the latter two mortgages to C., although still being the owner of the equity of redemption, that the plaintiff acquired his title with knowledge that C. claimed a debt represented by the three mortgages, and took his mortgage, subject to such claim by C.:—Held, also, the deed from M. of 21st May, 1867, was either voluntary or a fraudulent preference, and in either case void; and that the fact that M.'s wife joined to bar dower, in the two last mortgages to C. after she had apparently become the owner of the equity of redemption, constituted her a party to the accounting which took place with C. in respect to the continuing debt, and bound her in her character of assignee of the equity of redemption if she could be so considered. *Edwards v. Morrison*, 3 O. R. 428.—Wilson.

In 1878 J. D., carrying on business as a wool merchant, arranged with his two sons, H. D. and T. D., to convey to H. D. two parcels of land which H. D. was to hold until T. D. came of age. H. D. held the land until 1882, when he conveyed it to his father, who immediately reconveyed one parcel to H. D. and the other to T. D. It was found that the conveyances of 1882 were merely to carry out the trust upon which the conveyance of 1878 was made; that when it was made J. D. was in a position to pay all his debts in full, even after deducting the property in question; and that no debt in existence when the conveyance of 1878 was made was now unpaid, except a sum of \$1,000 due to the wife for rent, which was secured by mortgage, but it appeared she joined in the conveyance, and therefore it was not available to the plaintiffs for the purpose of setting the conveyance aside:—Held, that the conveyances to H. D. and T. D. were valid, for that under the circumstances they could not be deemed to be made with intent to hinder, delay, or defraud creditors. *Bank of Montreal v. Davis*, 9 O. R. 556.—C. P. D.

The defendant E. C. having entered into a business partnership, at the instigation of his wife conveyed certain land to her to prevent its becoming liable to creditors of the new firm. He, then, as agent of his wife, placed the property in the hands of the plaintiff, a land agent, to sell or exchange, and through him an agreement for exchange was arranged. The plaintiff sued the wife for his commission, and recovered a verdict against her, but while the action was pending she reconveyed the land to her husband. There was no consideration for any of these conveyances. In an action to set aside the reconveyance as fraudulent and void against the creditors of the wife, it was:—Held, (reversing the judgment of Galt, C. J., C. P., at the trial) that the conveyance by the husband to the wife having been made to defraud creditors (following *Mundell v. Tinkis*, 6 O. R. 625) the court would not assist a person who has placed his property in the name of another in order to defraud his creditors; that the wife had an interest in the

property which could be made available to her creditors for the payment of her debts, and that the conveyance from her was made with intent to defeat, delay, and prejudice her creditors, and that as the evidence shewed she was unable to pay her debts in full, it fell within the provisions of 48 Vict. c. 26, s. 2 (Ont.), and was void. *Johnson v. Cline*, 16 O. R. 129.—Chy. D.

The defendant made a voluntary conveyance to his wife of certain real estate owned by him. Without this real estate, his liabilities, among which was a debt to the plaintiffs of about \$1,500, exceeded his assets. He continued to deal largely with the plaintiffs down to the time of his failure some years afterwards, the balance then due them being about \$23,000, but much more than \$1,500 had been in the meantime paid to them.—Held, affirming the decision of Boyd, C., that the conveyance was fraudulent and void as against creditors. *Ferguson v. Kenny*, 16 A. R. 276. See *Blackley v. Kenney*, 19 O. R. 169; 18 A. R. 135.

Per MacLennan, J. A. The settlement having been made with the object of putting the property beyond the chances and uncertainties of the business in which the settler was engaged and which he continued to carry on until insolvent, must be regarded as having been made with intent to defraud the creditors of that business, and it was unnecessary to prove any old debt still unpaid. *Ib.*

The defendant W., who was an executor under the will of one J., made in favour of himself and the defendant H., who was his co-executor under the will, a mortgage to secure the repayment of trust moneys improperly used by W., in breach of trust. W. was at the time this mortgage was given, and continued to be in insolvent circumstances but had made no assignment for the benefit of his creditors. The plaintiffs, execution creditors of W., attacked the mortgage:—Held, that no assignment having been made, an execution creditor might attack the security and take advantage of s. 2 of the A. C. R. S. O. (1887), c. 124. Held, that neither H. nor H. and W. as executors, were, in the strict sense of the word, creditors of W., and that the mortgage therefore could not be set aside as having been given with intent to prefer, or as having the effect of preferring, one creditor to another. *Molson Bank v. Halter*, 16 A. R. 323. Affirmed by the Supreme Court, 18 S. C. R. 88.

Held, (Osler, J. A., dissenting), that the words "or which has such effect" in s. 2, R. S. O. (1887), c. 124, relate only to the immediate preceding clause dealing with the preference of one creditor over others, and this mortgage not being made with intent to defeat, delay, or prejudice creditors, could not be set aside on the ground that it had the effect of defeating, delaying or prejudicing them. Per Osler, J. A.—These words apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, delay or prejudice, as those made with intent to prefer only, and any conveyance or transfer by an insolvent (with the exceptions specially mentioned in s. 3, which has the effect of defeating, delaying, prejudicing or preferring creditors, whatever may have been the intent with which it is made, is within the statute. *Ib.*

See *Parr v. Montgomery*, 27 Chy. 521, p. 691; *Rae v. McDonald*, 13 O. R. 352, p. 791.

#### (g) Bills of Sale and Chattel Mortgages.

G. & E., bakers, on the 18th May, 1880, agreed with the defendants that if the latter would supply them with flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & E. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & E. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on the 12th. G. & E. absconded on the 12th, and on the 14th defendants took possession under a clause in the mortgage which allowed them to do so in case the mortgagors "should attempt to sell, dispose of, or in any way part with the possession of said goods," and removed them to their own warehouse. The mortgage also contained a redemption clause. The jurat of the affidavit of bona fides was not signed by the commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff's writ of attachment issued on the 17th June, and the sheriff seized the goods under it on the 30th June:—Held, that the mortgage must be considered as having been given when the contract to give it was entered into, viz., when the flour was first sold on credit on the 18th May, to enable defendants to carry on their business; and therefore there was under R. S. O. (1877), c. 118, no preference of defendants, who became creditors only by this act:—Held, also, the property having passed by the bill of sale, and the defendants being in actual possession when the plaintiff's attachment issued, that they had a right to retain the goods as against the plaintiff, subject to the mortgagors' right of action, if any, for taking possession before default:—Semble, however, that under the clause in the mortgage above mentioned, defendants were justified in taking possession, when the mortgagors absconded, leaving no one in charge of the goods. *Robins v. Clark*, 45 Q. B. 362.—Q. B. D.

L. being in insolvent circumstances executed a chattel mortgage to D. who was cognizant of his state; and shortly after the execution thereof, in collusion with the mortgagee but against an expressed prohibition, made a delivery or pretended sale of the goods to one M., which was contrary to the terms of the mortgage, and the mortgagee sued for breach of the covenant therein, adding the common counts, the mortgage having then three months to run:—Held, that the mortgage and judgment, so far as the covenant was concerned, were void as being a fraud upon creditors. The mortgagor was really indebted to the mortgagee upon an account, though the time for payment was extended three months by the mortgage:—Held, that the mortgagee was entitled to retain his judgment on the common counts as there was not any violation of the Act (R. S. O. (1877), c. 118.) in the debtor when sued not insisting on the fact of the credit not having expired, or that the debt had been merged

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in the mortgage. *King v. Duncan*, 29 Chy. 113.—Proudfoot.

The trustees of a church had been sued by the defendant, and pending the action they passed a resolution authorizing the raising by loan of \$400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. The plaintiff being one of the trustees, thereupon advanced the money, obtaining from the trustees a chattel mortgage on all the movables contained in the church, which was prepared by a partner of the general solicitor of the trustees who was defending the action against them, but neither partner was called as a witness on the trial. In an interpleader issue the judge at the trial found for defendant:—Held, (Burton, J., dubitante,) affirming the decision of the C. P. D., that the mortgage was not invalid under R. S. O. (1877), c. 95, s. 13, and the fact that all the moveable property of the mortgagors was included in the security, was not of itself sufficient to satisfy the court of any fraudulent intent in making it. *Brown v. Sweet*, 7 A. R. 725.

One S., a trader who was in embarrassed circumstances, on consultation with W., one of his creditors, was advised by him to make an assignment of all his stock-in-trade and effects, which he did to his wife, in whose name the business was afterwards carried on, she obtaining from the plaintiff's goods on her own credit; and on the plaintiffs agreeing to settle the claims of two other creditors, which they did, she executed to them a chattel mortgage on all the effects in her shop. The sheriff having seized the goods under an execution at the suit of another creditor, the plaintiffs instituted interpleader proceedings;—Held, that the mortgage to them was a fraudulent preference, and as such void against creditors. *Boyd v. Glass*, 8 A. R. 632.

R., being a creditor of A., applied to him to give security for his debt, and, under threat of suit, procured from him a chattel mortgage on his stock-in-trade. Although R. knew A. to be in difficulties, and had also the means of learning that he was insolvent, it did not appear that he actually knew that A. was insolvent when he obtained the mortgage; while the mortgagor sought to gain time and to go on with his business:—Held, that the mortgage given under such circumstances was not a fraudulent preference within R. S. O. (1877), c. 118. *Seymour v. Meriden Silver Plating Co.*, 3 O. R. 413.—Boyd.

The plaintiff was married in 1876 without any marriage contract or settlement, being possessed of about \$1,500 derived from the estate of a former husband, which she lent at different times to her husband, directly or in paying his debts, a small portion having been lent prior to their marriage. In January, 1879, on a further advance of \$200, she obtained from her husband a chattel mortgage of certain goods, farm stock, implements and other chattels, which was duly registered but not renewed. In November, 1879, she insisted upon and obtained from her husband a bill of sale and other goods, for the expressed consideration of \$300. The plaintiff and her husband continued to reside together, and apparently had the use of the goods in much the same way as prior to such bill of sale being made,

she and her sons working the farm on which the parties resided, and which had been conveyed by her husband to a trustee for the benefit of the plaintiff, the husband working or not as pleased himself. The evidence established the bona fides of the claims set up by the plaintiff, and for the purpose of securing a creditor of the husband she executed a chattel mortgage in her own name on the goods:—Held (affirming the judge of the County Court, York), that the bill of sale and chattel mortgage were not open to objection as being given direct to the wife by the husband; and that even if her title under the chattel mortgage could not be supported for want of a sufficient change of possession, she could claim under the bill of sale, which being obtained by pressure was not a fraudulent preference under R. S. O. (1877), c. 118. *Totten v. Bowen*, 8 A. R. 602.

Held, in this case, that inasmuch as the mortgagor was coerced into making the second mortgage, the making of such mortgage could not be regarded as a fraudulent preference. *Tidey v. Craib*, 4 O. R. 696.—Ferguson.

Where it was sought to set aside a bill of sale of personal property as fraudulent and void, as against the creditors of the grantor, and the evidence showed that it was reluctantly given by the debtor, who only yielded after some delay, and to a continuous insistence on the part of his creditors, his intent being to escape his creditor's importunity, and that the demand of the creditor was made bona fide, with no intent but to obtain the security, which she was advised she ought to have:—Held, affirming the decision of Proudfoot, J., that the bill of sale was not void under R. S. O. (1877), c. 118, s. 2. *Slater v. Oliver*, 7 O. R. 158.—Chy. D.

S. & W., a firm, of whom W. was a minor, becoming embarrassed arranged with H., the managing man of J. G. & Co., their principal creditor, to give security for their debt. At the instigation of H. two notes for the amount of this indebtedness maturing at short dates were made by S. and W., payable to P., and endorsed to J. G. & Co. by P., who was a brother-in-law of J. G., and connected with him in another business, and a chattel mortgage was given by S. & W. on everything they had in their business to P. to secure him, and \$50 was paid him by J. G. & Co., for endorsing the notes. A few days after the mortgage was given C. caused the sheriff to seize S. & W.'s goods under an execution in his hands, received subsequent to the making of the mortgage. In an interpleader action between P., claiming under the chattel mortgage, and C. claiming under his execution:—Held, that the mortgage must be treated as if given to J. G. & Co., for it was made to P. only as a device to avoid the statute against fraudulent preferences, and that upon the evidence set out in the report it must be held void as against creditors:—semble, that the share of the infant W. did not pass by the chattel mortgage, nor by the assignment for the benefit of creditors which was afterwards made. *Powell v. Calder*, 8 O. R. 505.—Proudfoot.

In March, 1879, the defendant E., a milliner, removed her business to the village of Tara, and in the November following changed her then residence and place of business to a shop owned by her co-defendant, adjoining to and under the



same roof as his own. In the spring of 1880 the defendants commenced other business transactions, when her co-defendant lent E. \$120 to enable her to purchase stock for her business, she promising to give him security for its repayment by executing in his favour a mortgage on everything she had. The parties continued their business relations, T. advancing E. moneys from time to time, till in November, 1880, she was indebted to him in the sum of \$463.73, including one year's rent of her shop, a bill of E.'s for medical attendance, and a sum for interest accrued due, and for which she executed a chattel mortgage, covering all her stock-in-trade and household effects. Both defendants swore that E. refused to execute the security, notwithstanding her promise to do so, until after the receipt by her of a letter from T.'s solicitors demanding payment, or in default an action would be brought. Per Spragge, C. J. O., and Burton, J. A., affirming the judgment of Ferguson, J., (1 O. R. 119,) that although the transaction was open to grave doubts, yet the same having been sustained by the judge who heard the evidence, and who considered that there was sufficient pressure proved to show that the mortgage was not given voluntarily, there were no sufficient grounds shown to justify an interference by this court with the decision of the learned judge. Per Patterson and Morrison, J. J. A., dissenting.—The evidence sufficiently established that the mortgage was given with intent to prefer the mortgagee to the other creditors of the mortgagor: that it was not given in consequence of pressure on the part of the mortgagee, or in fulfilment of a promise to give it; and even if such pressure or promise had satisfactorily been shown, the intent to prefer would nevertheless have existed within the meaning of the statute, and have defeated the mortgage. *Brayley v. Ellis*, 9 A. R. 565.

C., a retail trader, being indebted to H. & Co., wholesale merchants, gave them a chattel mortgage to secure such indebtedness, and also a further sum of about the same amount, advanced to him by H. & Co. at the time of the giving of the mortgage, which C. represented was sufficient to pay off in full all his other creditors. C.'s indebtedness to H. & Co., was covered by his promissory notes, which at the time of the execution of the mortgage were on discount with H. & Co.'s bankers. During the currency of the mortgage, C. having allowed his property to be seized for rent, H. & Co. took possession under their mortgage. C. being unable to pay his creditors, the plaintiffs, who were creditors, but had not recovered judgment or execution, took action to set aside the chattel mortgage:—Held, affirming the judgment of Armour, J., that under the evidence set out in the report there was no fraud, and following *Hepburn v. Park*, 6 O. R. 472, that the fact that the notes in question were held by the mortgagees' bankers on discount did not invalidate the mortgage. *Hyman v. Cuthbertson*, 10 O. R. 443.—Q. B. D.

A formal defect in a chattel mortgage may be cured by a conveyance at any time before an execution reaches the sheriff's hands; but such conveyance, whether effected by a deed or by delivery only, has no retroactive operation, and if void for intent to prefer under R. S. O. (1877), c. 118, would not suffice to cure the defects. The intent to prefer is a question of fact for the jury;

and therefore where the jury found that there was such intent, and where there was evidence to support the finding, the judgment of the county judge setting aside the jury's verdict in favour of the execution creditor was reversed, but a new trial was directed in order that evidence might be given to shew that the bill of sale was made in order to carry out honestly the original mortgage contract. (Osler, J. A., dissenting.) *Smith v. Fair*, 11 A. R. 755.

An insolvent debtor informed his creditors of his difficulties, and on the 19th March, 1885, all but two of the creditors signed a memorandum to the effect that the best thing he could do was to sell out his stock and effects for a sum named and agreed to be paid by one of the creditors, and which would pay all his creditors fifty cents in the dollar on certain terms, and those who signed agreed to accept fifty cents in full of their claims. The debtor afterwards accordingly, by bill of sale dated the 9th of April following, sold and conveyed his assets to one of the creditors, who had signed the memorandum, for the sum and on the terms named therein, which were that the money was to be paid in four and eight months, and the purchaser was to endorse the vendor's notes, so that he could transfer them to the creditors. The bill of sale referred to the previous agreement, and recited that "the creditors" had agreed to accept these notes "in full satisfaction and discharge of their respective claims" against the debtor, and also provided that the balance, if any, "after deducting the debt of the purchasers," (who were among those agreeing to accept the fifty cent composition,) should be paid to the debtor:—Held, that this amounted in effect to a condition that any creditor receiving the fifty cents in the dollar of his claim, should release the debtor, and that the sale was therefore void as against the two non-assenting creditors under R. S. O. (1877), c. 118, s. 2. Per O'Connor, J., the reservation to the purchasers of "the amount of the debt" was ambiguous, and might mean their whole debt, in which case the sale was preferential, and so void. *Jennings v. Hyman*, 11 O. R. 65.—Q. B. D.

A company, incorporated in the state of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them:—Held, that under 48 Vict. c. 26 (Ont.), without regard at all to any question of bona fides, pressure, or knowledge of the company's financial position by its officers, or by defendant, the effect alone of the transaction avoided it:—Held, also, that this mortgage was not given in pursuance of any antecedent contract or promise of the company, but even if it were that it could not be upheld, because it was not shown to have been given in consideration of a money advance made in the bona fide belief that such advance would enable the debtors to continue business and pay their debts in full. *River Shore Company v. Sill*, 12 O. R. 557.—Q. B. D. See *Marlinton v. Patterson*, 20 O. R. 125, 720.

A company being indebted to L. & B. in a large amount, and believing that their charter

did not secure a give such sum, agree to the action time from carry on hope was pany w payment also cre execution mortgage to try the hearing tion cre Appeal s of the co Supreme judgment the comp this mortg for paym able to c was not a other cre under R. cack, 12 S

The plain a country as their a thereon as The mortg the proper mortgage t hands at t these latte the County in the mor expected e who was i made no cl of the Cou that the ac gage on go through alh executions covered by transaction itors, so the tiffs to C. cutions. gage back same trans interest of mortgage e of the cutions w therefore v dants, the e it. Domi referred to distributi cover their as against pressed w money, w under the A. R. 565. A mortg acquired e

did not allow a mortgage on their property to secure an overdue debt, made an agreement to give such mortgage for an advance of a larger sum, agreeing to return the amount of the debt to the mortgagees. At the time of this transaction the company believed that by getting time from this creditor they would be able to carry on their business and avoid failure. This hope was not realized, however, as the company were subsequently compelled to stop payment, and the respondents, who were also creditors, obtained judgments and issued executions against the goods secured by the mortgage, and on an interpleader issue brought to try the title to such goods, the Chancellor hearing the cause gave judgment for the execution creditors (7 O. R. 154), and the Court of Appeal sustained that judgment by a division of the court (12 A. R. 137). On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the Chancellor, that inasmuch as the company bona fide believed that by giving this mortgage and getting an extension of time for payment of plaintiffs' debt they would be able to carry on their business, the mortgage was not a preference of this debt over those of other creditors, and not a fraudulent preference under R. S. O. (1877), c. 118. *Loug v. Hancock*, 12 S. C. R. 532.

The plaintiffs sold to C. their stock-in-trade in a country store which he had managed for them as their agent; and took a chattel mortgage thereon as security for the purchase money. The mortgage also included sundry other chattels the property of C. At the time of the sale and mortgage there were executions in the sheriff's hands at the suit of the defendants by which these latter goods were bound. The judge of the County Court found they had been included in the mortgage in order to defeat or delay an expected execution against C. at the suit of S. who was no party to the proceedings and had made no claim:—Held, affirming the judgment of the County Court (Osler, J. A., dissenting), that the acceptance by the plaintiffs of a mortgage on goods which they knew belonged to C. though already bound up by the defendants' executions, with knowledge of the judgment recovered by S. against C., rendered the whole transaction fraudulent and void against creditors, so that the stock-in-trade sold by the plaintiffs to C. became subject to the defendants' executions. Per Osler, J. A. The sale and mortgage back of the stock-in-trade being parts of same transaction the executions bound only the interest of C. therein, and were subject to the mortgage for the purchase money. The mortgage of the other goods could not affect the executions which had all along bound them, and therefore was not fraudulent against the defendants, the only creditors who were complaining of it. *Dominion Bank v. Davidson*, 12 A. R. 20, referred to. The issue might have been found distributively, and the plaintiffs could either recover their own goods under the mortgage title as against the executions, or equitably, as impressed with a trust to secure the purchase money, which was paramount to any claim under the executions. *Cameron v. Perrin*, 14 A. R. 565.

A mortgage by an insolvent person on future, acquired chattels to secure the repayment of the

price of such chattels to the vendor thereof is binding, notwithstanding 48 Vict. c. 26, s. 2 (Ont.). *Goulding v. Deeming*, 15 O. R. 201.—Chy. D.

On April 26th, 1886, M. A. V., in pursuance of a written agreement of the same date, gave a mortgage to the plaintiffs on her furniture and stock-in-trade, present and future, to secure advances of goods to be made by the plaintiffs within seven months, to the extent of \$1,000 in value; and at the same time she executed a mortgage on the same goods to secure a past indebtedness to the plaintiffs. The advances were made, pursuant to the mortgage, to the extent of about \$600. M. A. V. was insolvent at the time, but not to the knowledge of the plaintiffs, and the transaction was an honest one throughout. Over a year after, the goods were seized in execution by the defendant. At that time the past indebtedness secured by the mortgage relating thereto had all been paid off. It did not appear that the payments were made out of the new goods:—Held by the Divisional Court, upon the evidence, that there were two agreements—one to secure a past indebtedness, and the other to secure the future advances; and that the mortgage to secure future advances was a valid security within section 6 of R. S. O. (1887), c. 119. *Coyne v. Lee*, 14 A. R. 503, cited and followed. Held, also, that the transaction had not the effect of giving a preference under 48 Vict. c. 26, s. 2. The mortgage was not void under 48 Vict. c. 26, s. 2, for substantially it was given by way of security for a present actual bona fide sale and delivery of goods, within the exception to that section; and it was not a preference of the plaintiffs over other creditors, as but for it the plaintiffs would never have become creditors at all; and there was no question under section 3 (1), as to the goods bearing a fair and relative value to the consideration therefor, inasmuch as it was not an absolute conveyance or transfer, but a mortgage, and would attach only to the exact extent to which value was given therefor, by the delivery of goods. *Id.*

Per Proudfoot, J. The "advances" referred to in R. S. O. (1877), c. 119, s. 6, need not be pecuniary. *Id.*

W., being in insolvent circumstances, and pressed by one of his creditors, G., procured his wife to convey her house and lot to G., who, by consent of Mrs. W., applied part of the purchase money in payment of W.'s debt to him, and paid the balance to W., who made a chattel mortgage on his stock-in-trade to his wife for the amount of the purchase money which she should have received:—Held (reversing the judgment of Rose, J., at the trial), that the chattel mortgage was void as against W.'s creditors under R. S. O. (1887) c. 124, and that it did not come within any of the exceptions in section 3. Per Street, J. The necessary preference of a particular creditor placed the transaction outside of the class which it was the intention of the legislature to protect. *Stoddart v. Wilson*, 16 O. R., 17.—Q. B. D. Disapproved in *Johnson v. Hope*, 17 A. R. 10.

A solicitor, acting for a creditor, obtained for the debtor on the security of a chattel mortgage a loan from another client who was ignorant of the purpose for which the loan was required.

The solicitor, by direction of the debtor, out of the moneys advanced paid off the creditor in full and shortly afterwards the debtor assigned:—Held, affirming the judgment of the Chancery Division, 17 O. R. 290, that the mortgage was one to secure a present actual bona fide advance, and could not be impeached. *Stoddart v. Wilson*, 16 O. R. 17, questioned. The question of notice to the solicitor as affecting the client discussed. *Gibbons v. Wilson*, 17 A. R. 1.

Plaintiffs having recovered judgment against one H. issued execution under which the sheriff professed to sell certain goods of H., and gave a deed to plaintiffs conveying all the "share and interest" of H. in the goods. Six months before the recovery of the plaintiffs' judgment, H. had made a mortgage covering all the goods proposed to be sold by the sheriff. The plaintiffs filed a bill to set this mortgage aside as fraudulent under the statute of Eliz., and fraudulent in fact. The court below held the mortgage good and dismissed the bill:—Held, that no fraud being shown, and the plaintiffs not offering to redeem the mortgage, the action was rightly dismissed. *Halifax Banking Co. v. Matthew*, 16 S. C. R. 721.

It appeared on the trial of an interpleader issue, that the claimant had agreed in writing with the execution debtor, an insolvent, to furnish material to the latter for the manufacture of carriages, from time to time, for one year, it being provided that no property in such goods should pass, but that notwithstanding any improvement or work upon the same, or change of form or addition thereto or use thereof, the same and every part thereof should be and remain the goods and property of the claimant. The material was supplied and manufactured into carriages by the execution debtor, which were seized by the defendants, execution creditors of his, and the claimant claimed the same, more being owing to him for the material supplied than the value of the goods seized:—Held, reversing the decision of *Armour, C. J.*, that the above agreement was not one which could be said necessarily to have the effect of defeating or delaying creditors, and in the absence of fraud the claimant was entitled to succeed on the issue:—Held, also, that the fact that the claimant, thinking that the above agreement was lost, from time to time took mortgages from the execution debtor upon the carriages manufactured by him, made no difference; for even if this had the effect of vesting the property therein in him that could only be subject to the lien of the claimant to be paid out of them. Moreover the mortgages having been taken, not to supersede the original writing, but under the error that that being lost (as supposed) would be no longer available, the rights of the parties were still subject to the original agreement. *Wellbanks v. Heney*, 19 O. R. 549.—Chy. D.

See *Hepburn v. Park*, 6 O. R. 472, pp. 190, 793; *McRoberts v. Steinoff*, 11 O. R. 369, p. 793; *McCall v. McDonald*, 13 S. C. R. 247, p. 822; *Barber v. Macpherson*, 13 A. R. 356, p. 188; *Furlong v. Reid*, 12 O. R. 607, p. 675; *Dominion Bank v. Cowan*, 14 O. R. 405, p. 792; *Coats v. Kelley*, 15 A. R. 81, p. 818; *Banks v. Robinson*, 15 O. R. 618, p. 181; *Bank of Hamilton v. Tamblin*, 16 O. R. 247, p. 186; *Morris v. Martin*, 19 O. R. 564, p. 192.

#### (h) Ante Nuptial Settlements.

In November, 1876, a marriage being contemplated between the defendant and M., the defendant's father proposed that M. should erect a house, which he had intended building, on a lot belonging to the father, who agreed to convey the same to his daughter as a marriage portion. This M. assented to, and in that month the marriage took place. During the year following M. built the house, and his father-in-law conveyed the lot to the defendant as had been previously agreed upon. In January, 1880, M. became insolvent, and proceedings were taken by his assignee to have the transaction declared fraudulent as against creditors, under the 132nd section of the Insolvent Act, 1875; or under the 13th Elizabeth, c. 5:—Held, (affirming the decree of Proudfoot, V. C., 27 Chy. 493) that no fraudulent intention was shewn on the part of M., and any knowledge by the defendant or her father was distinctly negatived by the evidence, and therefore the transaction could not be impeached under either statute. *Jackson v. Bowman*, 14 Chy. 156, remarked upon, distinguished and approved of. *Davidson v. Maygure*, 7 A. R. 98.

In an action brought by T. K. & Co. on behalf of themselves and all other creditors, of J. G. against J. G., his wife, and the trustee to set aside a marriage settlement by which J. G., a day or two before his marriage, had settled the greater portion of his property on his wife, in which it was shown that he and his wife before the marriage, were living on the most intimate terms short of the intimacy of husband and wife, and that she would have accepted a proposal of marriage without hesitation, without any condition as to a marriage settlement, and that he was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on his part, and that she knew nothing of it until she was asked to sign the deed:—Held, that the settlement was not the consideration, or part of the consideration of the marriage, and that it must be set aside as fraudulent and void against creditors: *Commercial Bank v. Cooke*, 9 Chy. 524, and *Columbine v. Penhall*, 1 Sm. & G. 228, referred to and followed: *Fraser v. Thompson*, 1 Gif. 49, distinguished. *Thompson v. Gore*, 12 O. R. 651.—Chy. D.

On 28th June, 1876, L. et al. sold to M. T. a property for \$12,250, of which \$3,789 were paid in cash. On 16th June, 1879, E. T., daughter of M. T., married J. K., and in their contract of marriage M. T. made a donation to his daughter, E. T., of certain property of considerable value, and remained with no other property than that sold to him by L. et al. In July, 1881, L. et al. brought an action to set aside the gift in question, claiming that the property sold having become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them, and secured only by the property so sold, the gift in this marriage contract had reduced M. T., to a state of insolvency, and had been made in fraud of L. et al., and that at the time the gift was made, M. T. was notoriously insolvent. M. T., pleaded inter alia, denying averments of insolvency, fraud, or wrong-doing. The only evidence of the value of the property still held by M. T. at the date of the donation,

16th June, 1881, was a valuation of the property estate agtion the stated th in Nover property years before price:—Court bation of on the p confiture tion, and sufficient to the don adequate which it v C. R. 441.

See *Bos Hillock v.*

S., a wh marriage v tion, verbal ment for h of a partic sequently, place, whic to was sold anticipated tween the June, 1873: ties four se purpose of the impro \$15,320, o ances of w to S. himse veyed th was not reg S, subsequ filed by th conveyanc the court ( an agreem the parties only evide themselves parcels to clared the in settle It was alle of the sett in the rep was not sh property i did not, u remained Chy. 280.

One of March, 18 his wife o ling-house following compromi February, was appo fled a bill

16th June, 1879, was the evidence of an auctioneer, who merely spoke of the value of the property in November, 1881, and that of a real estate agent, who did not know in what condition the property was two years before, but stated that it was not worth more than \$6,000 in November, 1881, adding that he considered property a little better now than it was two years before, although very little changed in price:—Held, (reversing the judgment of the Court below), that in order to obtain the revocation of the gift in question, it was incumbent on the plaintiffs to prove the insolvency or deconfiture of the donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged. *Treacey v. Liggett*, 9 S. C. R. 441.

See *Bowstead v. Shaw*, 27 Chy. 280, *infra*; *Hillock v. Button*, 29 Chy. 490.

#### (i) Post Nuptial Settlements.

S., a wholesale merchant, upon the treaty for marriage with the defendant, and at her suggestion, verbally agreed to make a provision or settlement for her benefit, and proposed the purchase of a particular property for that purpose. Subsequently, and after the marriage had taken place, which was in 1870, the property referred to was sold, but producing a larger sum than was anticipated, S. did not buy. Afterwards, and between the 9th of April, 1872, and the 10th of June, 1873, S. purchased amongst other properties four several parcels of land, for the alleged purpose of the proposed settlement, which, with the improvements put thereon, amounted to \$15,320, or thereabouts; some of the conveyances of which it was alleged were in error taken to S. himself, who, two years afterwards, conveyed the same in trust for his wife, but the deed was not registered until three years after its date. S. subsequently became insolvent, and on a bill filed by the assignee of his estate impeaching the conveyance in trust as a fraud upon creditors, the court (Proudfoot, V. C.) being satisfied that an agreement, though verbal, had been made by the parties prior to the marriage, although the only evidence thereof was that of the parties themselves, and that the conveyances of the parcels to S. had been so made by mistake, declared the defendant entitled to hold the lands in settlement, and dismissed the bill, with costs. It was alleged that S. was indebted at the time of the settlement, but upon the evidence set out in the report of this case, it was held that this was not shewn, and that the entry of some of the property in the business books of S. as an asset did not, under the circumstances, shew that it remained his property. *Bowstead v. Shaw*, 27 Chy. 280.—Proudfoot.

One of the members of a trading firm, in March, 1875, effected a voluntary settlement on his wife of land on which he had erected a dwelling-house at an expense of \$3,000, and in July following the firm were compelled to effect a compromise of their liabilities, and finally, in February, 1877, became insolvent. The plaintiff was appointed their assignee, and thereupon filed a bill impeaching the settlement as having

been made, while insolvent, with a view of defrauding creditors. There was no evidence that any debt due at the time of making the settlement was unpaid at the date of the insolvency. Under these circumstances the court, on rehearing, reversed a decree of Proudfoot, V. C., directing the payment of the plaintiff's claim out of the estate remaining after the payment of two mortgages created by the wife and repaying to the wife what, if anything, she had paid on account of the purchase of the land, and dismissed the bill without prejudice to the right to institute proceedings to obtain relief out of any separate estate of the wife. *Darling v. Price*, 27 Chy. 331.—Chy. D.

The defendant B., who was carrying on a thriving business, and possessed of personal property to the value of about \$1,000, his debts not exceeding half that sum, in 1876 bought some land which he had conveyed to his wife, who had been instrumental in increasing the earnings of her husband. It was shewn that all debts due by B. at the time of the settlement had been paid before the institution of this suit by the plaintiff, whose debt had accrued after this conveyance:—Held, under the circumstances, that the plaintiff was not in a position to impeach the conveyance, as it had not been made with a view of placing the property beyond the reach of future creditors. *Collard v. Bennett*, 28 Chy. 556.—Spragg.

In 1877, B., being in difficulties, could not obtain credit. In 1878 the debt to the plaintiff was contracted, and in the same year B. made additions to the house on the land, which he paid for:—Held, that in respect of the moneys so expended, the case came within the principle of *Jackson v. Bowman*, 14 Chy. 156. *Id.*

The defendant F. was married in 1849 without any settlement. He was appointed and acted as executor of the estate of his wife's father, and, acting on behalf of his wife, he received large sums from the estate which it was alleged he borrowed from her:—£7,600 before 1856, and £2,800 in 1879; all such moneys being charged to the wife in the books of the estate. The conveyances impeached in this suit were of lands which, with other property, had been purchased by the husband with the moneys so received on account of his wife, the deeds for which, however, had been taken in the name of F. The mother of his wife had frequently requested F. to settle these properties on the wife, and which he did not object to do, and in 1873, when he with his wife was about to visit Europe, F. did convey the property in question to the wife. In 1872 and 1873 F., jointly with one C., entered into extensive speculations and made a considerable amount of money. In 1873 F. endorsed C.'s note for \$10,000, which C. discounted, and the same remained unpaid, and F. in 1874 gave his cheque to the plaintiff for \$4,000 on which this suit was instituted: Held (1) that as to the £7,600, F. having acted for his wife in obtaining this money from her father's estate, and having never made any claim thereto in exercise of his marital right, having borrowed it only, as established by the testimony of the wife's mother, there was no reduction into possession by the husband of the money. (2) And as to the £2,800 the onus was upon the plaintiff to establish a gift to the husband by the wife, which he failed to do; on the contrary, the evidence

shewed it to have been a loan. When F. incurred the liability for C., he was in affluent circumstances, and continued to be so for a year after the conveyance impeached in this suit, after which period the liability to the plaintiff was incurred:—Held, that the plaintiff was not, in respect of his own claim, in a position to impeach the conveyance, and could not be in a better position than the prior creditors, who clearly could not have avoided the transaction, the settlement having been made when the settlor in a pecuniary point of view was well able to make it. *Vinden v. Fraser*, 28 Chy. 502.—Proudfoot.

A husband, not being in debt or engaged in or contemplating engaging in business, bought certain land and stock thereon from one C., the purchase money comprising nearly all the husband's means, and procured C. to make the conveyance and assignment thereof direct to the wife, who had been married to her husband in 1860 without any marriage contract or settlement; and the wife mortgaged the property to the plaintiff. In an interpleader action between the plaintiff and defendants, subsequent execution creditors of the husband, to try the title to the above stock:—Held, that the husband, being in a position to make such voluntary gift or settlement, the conveyance was good: that the property in question was the wife's equitable separate estate, and was not affected by section 5 of the Married Woman's Property Act. R. S. O. (1877), c. 125, which leaves such settlements untouched. Per Osler, J. The legal ownership of the goods would vest in the husband in his marital right, and to constitute him a trustee for his wife there must be clear and convincing evidence of an intention on his part to make himself such trustee, and divest himself of all title to or interest in the property, and to enable the wife to absolutely dispose of it; while the evidence here merely shewed that though the goods were formally assigned to her, and she was to have the use and enjoyment of them, the right to alienate and dispose of them was to remain in the husband. *O'Doherty v. Ontario Bank*, 32 C. P. 285.—C. P. D.

See *Beavis v. Maguire*, 7 A. R. 704, p. 801; *Re Russell*, 7 A. R. 777, p. 124.

#### (j) Other Cases.

A man in insolvent circumstances was sued about the same time by two creditors, one of the plaintiffs being his son. To the one action he entered a defence, while to the other, that brought by his son, he made no defence, by reason of which judgment was obtained therein and all his effects sold, which were bought in by an agent of the son, the whole realizing less than the debt, interest, and costs. In order to make up sufficient to satisfy the balance of his son's claim, the defendant in the action was urged to make an assignment to his son of all his book debts, which he did, thereby denuding himself of all property:—Held, that as the book debts could be seized under an execution, the assignment thereof was a fraudulent preference within the Act: and the assignment being declared void, the son was ordered to account for the moneys received thereunder. Under the circumstances

no costs were allowed to either party. *Labatt v. Bixel*, 28 Chy. 593.—Spragge.

Where T., being then insolvent, transferred to A., one of his creditors, all his estate and effects, and it appeared that the impelling cause of the transfer was the application of A. to be paid or protected, and the present plaintiff, also a creditor, sought to set aside the said transfer as a fraudulent preference:—Sembles, the transfer was not "voluntary" within R. S. O. (1877), c. 118, and could not be set aside. Before the present proceedings A. had transferred the said effects for value to a bona fide purchaser:—Held, that A. could not, in any event, be called on to make good the value of the goods, as if he were a debtor of the plaintiff. *Stuart v. Tremain*, 3 O. R. 190—Boyd.

L. being in insolvent circumstances went to A. and asked A. to procure discounts for him, which A. agreed to do on condition that he should retain a part of the proceeds of the paper which should be brought to him, and apply it to the indebtedness of L. to him, and to several other creditors whom he, A., represented. This was agreed to and acted on, and certain securities were thus transferred to A. by L., also at the same time, requested A. to sell some leather for him, which A. agreed to do on similar terms as to the application of the proceeds, and the leather was duly transferred to A. who was aware of L.'s circumstances. On an action being brought impeaching the transfer of the securities as a fraudulent preference:—Held, that inasmuch as the idea of the transfer as made was proposed by A., and he and not L., was the originator of the scheme, whereby he, and the creditors represented by him were preferred, the transfers were not made "voluntarily," and "with intent" to give such creditors a preference over the other creditors within the meaning of the statute, and could not be set aside. *Whitney v. Toby*, 6 O. R. 54.—Ferguson.

Pressure will not validate a security unless it be a bona fide pressure to secure a debt, and without a view of obtaining a preference over the other creditors. *Powell v. Calder*, 8 O. R. 505.—Proudfoot.

V., who was a practising attorney, and also clerk of the peace and county attorney, having been ordered to pay over certain moneys, or in default be struck off the roll of attorneys, made an assignment of his emoluments as county attorney to H., W., and J., to secure the amount which he had been ordered to pay their client, at the same time telling H., W., and J., that he would leave it to them to hand him back such part as they chose on which to live, such an assignment being generally executed at the beginning of each quarter, upon which they drew the amount coming from the county and handed V. back a portion to live on. Subsequently V. recovered a judgment in favour of a client, on which costs were taxed in his favour at \$164, which he also assigned to secure the same claim. About a month afterwards the plaintiff G., as an execution creditor, obtaining an attaching order:—Held, (affirming the judgment of Senkler, county judge,) that the existence of the order held by H., W., and J., was a sufficient pressure to prevent the assignment executed by V. being considered a preference within the

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meaning of the Act R. S. O. (1877), c. 118. *Grant v. VanNorman*, 7 A. R. 526.

Per Armour, J., in a provision in a lease that if the lessees shall make an assignment for the benefit of creditors the said term shall immediately become forfeited and void and the full amount of the next ensuing one year's rent shall be at once due and payable, is fraudulent and void against creditors. *Baker v. Atkinson*, 11 O. R. 735.

In an action by a creditor for an amount due on a mortgage, and to set aside a conveyance of personal property in which the judge who tried the case found that the transaction complained of was not made with intent to defeat the claims of creditors, or to give a preference, and that no collusion or fraud was proved, it was:—Held, that as none of the creditors were judgment and execution creditors, in the absence of fraud, the plaintiffs could not set aside the transaction under the statute of Elizabeth, and that although under 48 Vict. c. 26, s. 2 (Ont.), it might possibly be that the transaction should be held to be void as against creditors as having the effect of defeating, delaying, or prejudicing creditors, yet as the sale was not a sham, or a colourable one, but was a real transaction and bona fide, that the plaintiffs failed on that branch of the case. Part of the purchase money of the goods was arranged by the substitution of a note of the defendants for the notes of the defendant J. P., which had been transferred to a banker, and which note was on the subsequent sale to the defendant F. paid by him:—Held, that the transaction was a bona fide payment under 48 Vict. c. 26, s. 3 (Ont.). *Building and Loan Association v. Palmer*, 12 O. R. 1.—Ferguson.

The jury having found that T. was, to his own knowledge and that of the preferred creditors, unable to pay his debts in full, and that assignments to certain creditors of two policies of insurance and moneys secured thereby, after the larger portion of the property insured had been destroyed by fire, had been made under simulated pressure with the intent on the part of T. to give, and on the part of the preferred creditors to obtain a preference over the other creditors of T.:—Held, that the assignments were null and void under R. S. O. (1877), c. 118, s. 2, as against the other creditors of T. *Ivey v. Knox*, 8 O. R. 635.—Q. B. D.

J. M., who was in insolvent circumstances, with the concurrence if not at the instance of his brother, who was liable as indorser on some of the insolvent's paper held by the defendants S. & M., effected a sale of all his (J. M.'s) stock-in-trade, book debts, etc., to a bona fide purchaser at 60c. in the dollar; the proceeds of the sale he paid to S. & M., and they credited a portion thereof on the notes endorsed by the brother:—Held, that this was not liable to be impeached as a fraudulent preference of S. & M. *Harvey v. McNaughton*, 10 A. R. 616.

Held, per Ritchie, C. J., Fournier and Taschereau, JJ., that a fraudulent preference to one or more creditors is a secession within the meaning of Art. 798 C. C. P. (Que.) Also, that an endorser of a note discounted by a bank has the right under Art. 1953 C. C. to avail himself of the remedy provided by Art. 793 C. C. P. if the maker fraudulently disposes of his property. (Strong,

Henry, Gwynne, JJ., contra.) *Mackinnon v. Keroack*, 15 S. C. R. 111.

One Chamberlain being in insolvent circumstances, and indebted to K. in \$120, was pressed by him for payment when he agreed to sell K. a horse for \$110, in part payment; and about the 15th August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, and then he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On the 31st of October, Chamberlain executed an assignment to the plaintiff in pursuance of the Act 48 Vict. c. 26 (Ont.) respecting assignments for the benefit of creditors, which came into force on the 1st September, 1885. In an action against K. to recover the horse on the ground of fraudulent preference:—Held, affirming the judgment of the court below, that the sale having been made before the Act came into force, the provisions thereof did not apply. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, followed:—Held, also, that the sale was not void, either as a fraudulent preference under R. S. O. (1877), c. 118, or for non-compliance with the Bills of Sale Act. *Coats v. Kelly*, 15 A. R. 81.

Held, (affirming the judgment of the Chy. D. 14 O. R. 288), that book debts are a species of property covered by section 2 of 48 Vict. c. 26 (Ont.), and that any gift, conveyance, assignment, transfer, or delivery thereof by a debtor in insolvent circumstances, is void. *Burton, J.A.*, dissenting. *Warnock v. Klepper*, 15 A. R. 324.

A favoured creditor, with the connivance of an insolvent debtor, procured a third person to purchase the debtor's entire stock-in-trade, for which the purchaser gave his note to the debtor, who immediately indorsed it to the favoured creditor, who discounted it with a bank. The debtor did not execute any assignment for the benefit of creditors. In an action by the other creditors to compel the preference creditor to share ratably with them:—Held, (reversing the judgment of Galt, C. J., at the trial) that as the preference creditor had disposed of the note to a bona fide holder for value no relief could be given. *Robertson v. Holland*, 16 O. R. 532.—C. P. D.

A person knowing that a claim was to be made against him by the father of a young woman for her seduction, some six days before the writ issued therefor, arranged with his brother, who was aware of all the facts, to sell out to him his estate, receiving for himself \$150, the balance to be applied in payment of his liabilities, the intention being not to acknowledge or treat the claim for seduction as a liability. The action for seduction was proceeded with and judgment recovered thereon:—Held, that the father having a cause of action at the time of the transfer was a person who might become a creditor within the meaning of the statute; and having become a judgment creditor, the sale having been made with intent to defeat his claim must be set aside. *Barling v. Bishopp*, 29 Beav. 417, followed; *Ex parte Mercer*, 17 Q. B. D. 290, distinguished. *Cameron v. Chuack*, 18 O. R. 520.—Rose. Reversed, 17 A. R. 489.

See *Wellbanks v. Heney*, 19 O. R. 549, p. 811.







the Act was ultra vires. *Ferguson v. Kenney*, 12 P. R. 455.—C. P. D.

Since the Judicature Act, in an action by a simple contract creditor, claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee. *Gibbons v. Darvill*, 12 P. R. 478.—Rose.

Per Hagarty, C.J.O., and Osler, J.A. In case of a continuous dealing and account where the customer goes on paying with one hand on general account and purchasing fresh goods with the other hand to an equal or larger amount, with a constantly increasing balance against him, the creditor is from the commencement of such dealing, so long as his ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance. *Ferguson v. Kenny*, 16 A. R. 276.

The action was brought to set aside a conveyance as fraudulent against creditors. The plaintiffs sued on behalf of themselves and all other creditors of the defendant R. W., and began this action in July, 1888. The statement of defence filed in December, 1888, alleged that in August, 1888, R. W. executed an assignment for the benefit of his creditors under 48 Vict. c. 26 (Ont.), whereby the exclusive right of action became vested in the assignee. In February, 1889, the plaintiffs obtained an order under R. S. O. (1887), c. 124, s. 7, sub-s. 2, giving them leave to take proceedings in the name of the assignee but for their own exclusive benefit to set aside the conveyance in question; and then applied for an order adding or substituting the assignee as plaintiff in this action. The consent of the assignee was not filed:—Held, that the assignee could not be added as a plaintiff without his consent in writing being filed, under Con. Rule 324 (b); but that the plaintiffs had the right to proceed under the order they had obtained by bringing a new action in the name of the assignee, to which his consent would not be necessary. *Bank of London v. Wallace*, 13 P. R. 176.—Q. B. D.

Where an assignment under the statute had been made to a sheriff, who died shortly after, and proceedings were subsequently taken in their own names by judgment creditors of the assignor to set aside a transfer of property as fraudulent:—Held, that the plaintiffs, suing alone, had no locus standi to maintain the action. *Brown v. Grove*, 18 O. R. 311.—Chy. D.

Where a debtor at the express instance and under the advice and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's land, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary and void as against him. Such a mortgagee cannot charge against the land under his mortgage any advances made after notice of the conveyance. *Hopkinson v. Rolt*, 9 H. L. C. 514, and similar cases, considered and applied. *Blackley v. Kenny*, 16 A. R. 522.

See *McLean v. Bruce*, 29 Chy. 507, p. 771; *Scane v. Duckett*, 3 O. R. 370, p. 824; *Hyman v. Bourne*, 5 O. R. 430, p. 198; *Mundell v. Tinkis*, 6 O. R. 625; *Building and Loan Association v. Palmer*, 12 O. R. 1, p. 817; *Adams v. Watson Manu-*

*facturing Co. (Limited)*, 15 O. R. 218; 16 A. R. 2, p. 799; *Molsons Bank v. Halter*, 16 A. R. 323, p. 803; *Heaton v. McKellar*, 13 P. R. 81.

#### (b) Pleading.

In an action to set aside a conveyance of land as a fraudulent preference the non-avertment that the plaintiff sues on behalf of all other creditors is not ground for demurrer, but a mere informality, to be dealt with under O. J. Act, Rules 103, 104, (Con. Rules 324, 325). *Scane v. Duckett*, 3 O. R. 370.—Boyd.

Where in an action by the assignee of C. for the benefit of his creditors under 48 Vict. c. 26, (Ont.) stated to be brought for the benefit of one of such creditors, the F. Bank, to set aside a mortgage made to the defendants, as fraudulent and preferential, a judgment for foreclosure of the mortgage obtained against the plaintiff was pleaded as a bar to the action, and a counter-claim was asserted for payment by the F. Bank of certain moneys alleged to be due to the defendants, a motion to strike out such defence and counter-claim was refused, and the plaintiff was left to demur:—Semble, that the counter-claim was not inadmissible. *Glass v. Grant*, 12 P. R. 480.—Boyd.

If a defendant wishes to set up in answer to an action to declare him a trustee of land the defence that the land was conveyed to him for a fraudulent purpose he must in his pleading specifically say so, and admit his own criminality in joining in a criminal act. If the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to show, as a reason why the plaintiff should not recover, the fraud in which the defendant himself participated. Judgment of *Ferguson, J.*, reversed. *Day v. Day*, 17 A. R. 157.

See *Campbell v. Campbell*, 29 Chy. 252; *Adams v. Watson Manufacturing Co.*, 15 O. R. 218; 16 A. R. 2, p. 799.

#### (c) Costs.

W. assigned all his estate by deed to B., one of his creditors, in trust for his creditors generally. Afterwards, at a meeting of creditors it was resolved, with B.'s consent, that M., as an execution creditor of W., should bring an action on behalf of all the creditors of W., to contest the validity of a certain chattel mortgage made to H. & Co., by W., prior to the above assignment to B., the costs of which the creditors present agreed should be borne by the estate. H. & Co., were not present at the meeting. This action by M., was dismissed with costs, and B., who had retained the solicitor and really managed and controlled the action, paid the defendants H. & Co.'s costs of that action, and also the costs of the solicitor who acted for M., out of the moneys of the estate, \$462 in all. H. & Co., as creditors, of W., now brought this action, asking that the executors of M. should pay the \$462 to B. to be distributed among the creditors of W. There was no evidence of M. or his executors having requested B. to pay the \$462 of costs:—Held, that as to the \$300 paid to M.'s solicitor, no request on M.'s part to B. to pay this to the solicitor could

be implied or managed, his name to be liable to the fore the plaintiff Semble, B. of the estate property not the plaintiff's, \$162, doubt that paid to the was money, and being so paid 400.—Ferguson.

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be implied, for M. did not retain the solicitor or manage the proceedings, but merely allowed his name to be used as plaintiff, and M. was not liable to the solicitor as to those costs, and therefore the plaintiff failed as to that sum, though, *Semble*, B. had no authority to expend moneys of the estate in endeavouring to get or obtain property not assigned to him:—Held, also, that the plaintiffs could not succeed as to the balance, \$162, for there could be no reasonable doubt that they knew that this \$162 which was paid to them by B., as their costs of defence, was moneys of the estate of which B. was trustee, and must be held to have assented to its being so paid. *Hyman v. Howell*, 13 O. R. 400.—*Ferguson*.

In a creditor's action to set aside a chattel mortgage as preferential, the judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant C. as might contribute to the expenses of the suit; and directed that the plaintiff should be paid his party and party costs by the defendant McC., and his additional costs as between solicitor and client out of the fund recovered for the creditors by setting aside the mortgage. The case was carried by the defendants to the Court of Appeal and the Supreme Court of Canada, and the judgment at the trial was finally affirmed in all respects, but the additional costs as between solicitor and client were not given by the Court of Appeal or the Supreme Court:—Held, that the plaintiff's expenses in saving the fund were not limited to party and party costs, but extended to those incurred as between solicitor and client to the end of the proceedings in the Supreme Court; that the plaintiff had a right to object to the other creditors coming in to share in the fund until they had contributed to these extra costs; and, in order to avoid circuity, it was directed that they should be taxed and paid out of the fund. *Macdonald v. McCall*, 12 P. R. 9.—*Boyd*.

In an action by a judgment creditor seeking payment out of land alleged to have been conveyed away by the debtor in fraud of the plaintiff, the proceedings were not alleged to be taken on behalf of other creditors, and the plaintiff's judgment was less than \$200. It appeared that there were three other claims, amounting in all to \$36, owing by the judgment debtor. Before the trial of the action a settlement of the plaintiff's claim was effected for \$75 and costs, and upon the taxation of these costs a question arose as to the scale:—Held, that the case was taken out of the provisions of the Creditors' Relief Act by the compromise between the plaintiff and defendant; and the claims of other creditors need not be considered; and the plaintiff's claim being less than \$200, the costs should be on the lower scale. *Forrest v. Laycock*, 18 Chy. at p. 622, followed. *Dominion Bank v. Heffernan*, 11 P. R. 504, distinguished. *McKay v. Magee*, 13 P. R. 106, 146.—*Chy. D.*

In an action by creditors to set aside a conveyance of land as fraudulent, a consent judgment was pronounced, which was so framed as to exclude creditors other than the plaintiffs from sharing in the proceeds of the property. Upon the petition of a creditor this judgment was opened up, the conveyance was declared

fraudulent and void against all creditors, and a reference was directed to a master to sell the lands and distribute the proceeds of sale among the creditors and incumbrancers. It was also ordered that the petitioner's costs should be paid by the plaintiffs and the two defendants. The master made a special finding in his report that the whole of the petitioner's costs had been paid by one of the defendants. The latter appealed from the report on the ground that the plaintiffs should have been found liable to contribution in respect of these costs, and also moved substantively for an order for payment of one-third thereof by the plaintiffs:—Held, that the master was right under the terms of the reference not to deal with the question of contribution; but that the appellant was entitled to a substantive order against the plaintiffs for payment of one-third of the costs, because the plaintiffs were jointly liable with him and the other defendant therefor. *Fouchier & Son v. St. Louis*, 13 P. R. 318.—*Boyd*.

See *Fradenburgh v. Haskins*, 12 A. R. 257, p. 704; *Coursolles v. Fookes*, 16 O. R. 691, p. 827.

#### (d) Other Cases.

H. obtained from his debtor an absolute conveyance of land as security which was attacked by the plaintiff who had subsequently recovered an execution against the grantor as being a fraudulent preference. H. insisted that the conveyance to him was bona fide, while the grantor alleged it had been obtained by the fraud of H. The court (Blake, V. C.), in view of the fact that the grantor in another suit had sworn that it was made for a valuable consideration and in good faith, refused the relief asked; the other circumstances in the case being such as not to justify a decree on the grantor's present statements, although not estopped by the first statement, but that he was at liberty now to present the facts otherwise. In such a case the explanations given for the different account of the transaction must be convincing. Under these circumstances and H. claiming to hold the land only as security for the amount due him, and the court being satisfied of the bona fides of the transaction, ordered an account to be taken of the amount due H., and the land to be sold; the proceeds to be applied first in payment of the amount due to H. for principal, interest, and costs, and the balance as in ordinary fraudulent conveyance cases; and for these purposes the usual reference to the master was directed. *Sommerville v. Rae*, 28 Chy. 618.

One G., in 1873, made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance brought this action to have the said conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors:—Held, that the plaintiff was entitled to the relief asked. *Boyer v. Gaffield*, 11 O. R. 571.—*Boyd*.

A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without

notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years. *Id.*

As a general rule the doctrine of subrogation does not apply in favour of a party who has not paid money or given something in satisfaction or extinguishment of a security, claim, or demand, or partly so, or who has not paid something by way of getting in a security, or the like. The plaintiff, an execution creditor against lands, brought an action to set aside as fraudulent, two mortgages of real estate made by his execution debtor and succeeded as to the first, the action being dismissed as to the second mortgage. The lands were sold but did not realize enough to pay the plaintiff and the second mortgagee. The plaintiff then claimed to be entitled by his diligence to priority for his execution over the second mortgage to the extent of the mortgage so set aside as fraudulent:—Held, that he was not entitled to any such priority as to his execution, but that his costs as between solicitor and client over and above his costs as between party and party, and such of the latter costs as might not be realized from the defendants (other than the second mortgagee) were a first charge on the fund as in the nature of salvage. *Coursoles v. Pookes*, 16 O. R. 691.—Ferguson.

## FRAUDULENT DEPRIVING OF USE OF PROPERTY.

See CRIMINAL LAW.

## FRAUDULENT DEVICE.

See PARLIAMENTARY ELECTIONS.

## FRAUDULENT JUDGMENT.

I. WHEN OBTAINED BY CONFESSION OR DEFAULT, 827.

II. OTHER CASES, 830.

I. WHEN OBTAINED BY CONFESSION OR DEFAULT.

A man in insolvent circumstances was sued about the same time by two creditors, one of the plaintiffs being his son. To the one action he entered a defence, while to the other—that brought by his son—he made no defence by reason of which judgment was obtained therein, and all his effects sold, which were bought in by an agent of the son, the whole realizing less than the debt, interest, and costs. The amount claimed by the son was admitted to be a bona fide debt. The court (*Sprague, C.*):—Held, that the refraining from putting in a defence to the action brought by the son was not such a facilitating of his recovering judgment as was prohibited by the statute—R. S. O. (1877) c. 118, in this following *Young v. Christie*, 7 Chy. 317. *Labatt v. Bixell*, 28 Chy. 593. See also, *King v. Duncan*, 29 Chy. 113.

The defendant C., defended an action brought against him by the plaintiffs, while in an action

brought against him by defendant S., he entered an appearance and filed a plea some days before the plea was due, and on the same day filed a relicta verification, whereupon judgment was signed and execution issued.—Held, that these proceedings did not offend against the provisions of the Act R. S. O. (1877) c. 118, s. 1; following in this the decision in *Young v. Christie*, 7 Chy. 317; *McKenna v. Smith*, 10 Chy. 40; *Labatt v. Bixell*, 28 Chy. 593; and *MacKeddie v. Watt*, decided in appeal 28th Nov. 1881. *Heaman v. Seale*, 29 Chy. 278.—Proudfoot.

The defendant, a creditor of O., who was in insolvent circumstances, commenced an action on the 25th May, 1882. By arrangement with O., who appeared, pleaded to the plaintiff's statement of claim, and consented to an order striking out his defence, a judgment was obtained the next day. The plaintiff commenced proceedings immediately after the defendant, and in due course obtained judgment against O., and the validity of the defendant's judgment came in question on interpleader:—Held, following the decisions under R. S. O. (1877) c. 118, that the defendant's judgment was valid:—Per *Armour, J.*—If the matter were *res integra*, O., by actively interfering to enable the defendant to recover a judgment against him sooner than by due course of law he otherwise would have done, was giving a confession of judgment within the words of the Act, and certainly within its spirit. *Turner v. Lucas*, 1 O. R. 623.—Q. B. D.

The plaintiff was suing the defendant, F., who was in insolvent circumstances, when the defendant, M., applied to him, and by threats of action to enforce his claim, and a promise to give time to F. if he acceded to his request, induced F. to execute a cognovit whereby M. obtained priority over the plaintiff. Both parties placed writs of execution in the sheriff's hands. Under that at the suit of M., the goods of F. were sold, M. having paid thereof, the price of which he retained on account of his judgment and received a balance from the sheriff:—Held, that the judgment of the court below, 3 O. R. 673, that the cognovit was collusive and void under R. S. O. (1877) c. 118, s. 1, and the amount realized at the sale by the sheriff was properly applicable to the plaintiff's writ:—Held, also, that a judgment for payment by M. to the plaintiff of the proceeds of the sale could properly be made in this action. *Martin v. McAlpine*, 8 A. R. 675.

Where certain persons who were liable as endorsers of certain promissory notes not yet due, knowing the maker's insolvent circumstances, under threat of suit, induced him to give a cognovit actionem, whereon they entered judgment and issued execution:—Held, not such pressure as exempted the cognovit and subsequent proceedings from being collusive, fraudulent and void within R. S. O. (1877) c. 118. *Meriden Silver Co. v. Lee*, 2 O. R. 451.—Boyd.

A mercantile firm obtained from their debtor promissory notes for the amount of his indebtedness which notes they endorsed to third parties; before the notes were due and while they were still outstanding in the hands of third parties they applied to the debtor to give a cognovit actionem, knowing at the time that he had recently given a chattel mortgage on his stock-in-

trade and threat of suit which judgment issued:—Held, that the judgment was void under the Act, the ground being that the judgment was obtained by fraud. *D. 580* follow.

The plaintiff, April, 1877, brought an action against Peter for possession of his property on default. After the judgment was given, the plaintiff obtained judgment for them \$50. *Armour, J.*—The plaintiff to issue against the defendant, who was having been allowed to order as she pleased, and to set aside the judgment, and to recover \$50. This was a Common Pleas action, and the plaintiff, by active interference, was not to be heard for the purpose; the operation of the intended fraud was allowed to the judgment of the plaintiff, and the plaintiff declared judgment, because the plaintiff's husband lent purpose took the action. A. R. 673.

Held, that the plaintiff, failing to appear in a foreign court on her part, was not to be heard. *Magura v. ...*

On the 28th, C. et al., recovery of was duly in view of the claim of \$32,155.33, settled between being arrived five per cent term of credit purchase of entered by judgment of the same day, et al., appeal action against obtained judgment same day stock-in-trade action, and



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trade and was hopelessly insolvent—and under threat of suit the debtor gave the cognovit, upon which judgment was entered and execution issued:—Held, a fraudulent preference, and that the judgment and execution were fraudulent and void under R. S. O. (1877) c. 118:—Held, also, that the transaction could not be supported on the ground of pressure. Ex parte Hall, 19 Ch. D. 580 followed. *Id.*

The plaintiffs by their agent, Patrick R., in April, 1877, procured a judgment to be signed against Peter R., the defendant, who, for purposes of his own, suffered the judgment to go by default. No execution was ever issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick, who paid them \$50 therefor; and, on her application, Armour, J., made an order allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment, as having been fraudulently obtained, and to be allowed to defend the action, or for such other order as should seem just; and upon such application, Wilson, C. J., made an order setting aside the judgment and all proceedings in the action, and directing the plaintiffs to repay the \$50. This order was affirmed on appeal by the Common Pleas Division. Per Hagarty, C. J. O., and Oaler, J. A.:—The judgment should merely be set aside and the executors allowed in to defend. Per Burton, J. A.:—The executors cannot be heard to allege their testator's fraudulent purpose; they are estopped from confining the operation of the judgment within the limit of his intended fraud: and the judgment should be allowed to stand. Per Patterson, J. A.:—The judgment should not be set aside, but the order of Armour, J., should be rescinded, and it should be declared that Patrick's wife as assignee of the judgment, was not entitled to issue execution, because the judgment was procured by Patrick, her husband, and suffered by Peter for a fraudulent purpose, of which she had notice when she took the assignment. *Schroeder v. Rooney*, 11 A. R. 673.

Held, that the non feaſance of the wife in failing to appear or defend an action for divorce in a foreign court, did not amount to collusion on her part so as to estop her from impeaching the validity of the decree made in that court. *Magura v. Magura*, 11 A. R. 178.

On the 28th March, 1882, a writ was issued by C. et al., respondents, against one M., for the recovery of the sum of \$32,155.33, and said writ was duly indorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the respondents for the said sum of \$32,155.33 on an account previously stated and settled between C. et al. and M., such amount being arrived at by allowing to M. a discount of five per cent. for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. et al., appellants, creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued. The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to

the respondents, who were the highest bidders. On a trial in an interpleader issue, to try whether appellants' execution against M. was entitled to priority over that of respondents, and whether the judgment of the latter was void for fraud, and as being a preference; and whether respondents' executions were void as against appellants' execution, on account of their having issued them before the expiration of eight days from the last day for appearance, Mr. Justice Armour directed a verdict or judgment to be entered in favour of the appellants. That judgment was reversed by the Queen's Bench Division of the High Court of Justice of Ontario (2 O. R. 243), whose judgment was affirmed by the Court of Appeal for Ontario. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the Court of Appeal, 10 A. R. 92, that what the debtor did in this case did not constitute a fraudulent preference prohibited by R. S. O. (1877) c. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity. *Macdonald v. Crombie*, 11 S. C. R. 107.

S., a judgment creditor of J. N., sr., applied to the Supreme Court of New Brunswick, on affidavits, to have a judgment of J. N., jr., against J. N., sr., his father, set aside as being obtained by collusion and fraud, and in order to cover up assets of the said J. N., sr. The facts alleged in the affidavits supporting the application were: that a cognovit was given and said judgment of J. N., sr., was signed on the same day; that no account was ever rendered of the debt; that no entries were ever made by said J. N., jr., against his father; that the account for which the cognovit was given was made up from calculation and not from books; that the father had offered to have the judgment discharged on payment of a much smaller sum; and that on an examination of the father for disclosure he would not swear that he owed his son the amount and that he had no settlement of accounts. The affidavits in answer set it down the debts had accrued, giving the details; that there was no collusion between the father and son; that the son frequently asked his father for a settlement but could not get it; and that he had never been a party to, or authorized any settlement. The court below held that the applicant had failed to shew fraud and refused to set aside the judgment:—Held, that the decision of the court below should be affirmed. *Snowball v. Neilson*, 16 S. C. R. 719.

See *Field v. Galloway*, 5 O. R. 502, p. 261.

## II. OTHER CASES.

In an action by a creditor against a shareholder for unpaid stock, in a company incorporated under 32 & 33 Vict. c. 13 (Dom.):—Held, (Barton, J. dissenting), that the shareholder under a plea that the judgment was obtained by fraud, was entitled to set up as a defence that the company had not in the original suit been served with process, under section 50, the person served as secretary not being such officer. Per Burton, J. A. Such an omission was an irregularity only which must be moved against promptly, and could not be the subject of a plea; but that fraud or collusion between the plaintiff and the company or its officers, would avoid the judg-



ment, or could be set up by plea, but was not shewn by the evidence here. *Harvey v. Harvey*, 9 A. R. 91.

Where proceedings for a partition in a County Court have been terminated by an order confirming such partition, and nothing remains to be done by way of enforcing the judgment, such judgment cannot afterwards be impeached on the ground of fraud or deception practised on the court otherwise than in resisting an action in which it is relied on, or by bringing an action for the express purpose of setting it aside. *Jenking v. Jenking*, 11 A. R. 92.

Defence of judgment recovered by fraud in an action on a foreign judgment. See *Woodruff v. McLellan*, 14 A. R. 242.

See *Stewart v. Sutton*, 8 O. R. 341; *Paisley v. Broddy*, 11 P. R. 202; *Bowerman v. Phillips*, 15 A. R. 679, p. 706.

### FRAUDULENT REMOVAL OF GOODS.

See CRIMINAL LAW.

### FRAUDULENTLY DEPRIVING OF THE USE OF PROPERTY.

See CRIMINAL LAW.

### FREE GRANTS AND HOMESTEADS ACT.

See CROWN LANDS.

### GAME.

The defendant killed upon his own land, which adjoined that of the plaintiffs and was unfenced, a deer, one of the progeny of certain deer imported by the plaintiffs and defendant, and allowed to run at large upon the land:—Held, that the deer was fera nature and, having been shot by the defendant upon his own land, belonged to him:—Held, also, that neither the Act incorporating the plaintiffs, 29-30 Vict., c. 122, nor R. S. O. (1887) c. 221, s. 10, vested the absolute property in the deer in the plaintiffs. *Re Long Point Co. v. Anderson*, 19 O. R. 487.—Q. B. D. See S. C., 18 A. R. 401.

### GAMING.

The defendant, being the proprietor of a newspaper, advertised in it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street, should receive a \$20 gold piece; the person making the next nearest guess, a set of harness; and the person making the third nearest guess, a \$5 gold piece; any person desiring to compete to buy a copy of the newspaper, and to write his name and the supposed number of the beans on a coupon to be cut out of the

paper. The defendant was convicted of a contravention of C. S. C. c. 95:—Held, that as the approximation to the number depended as much upon the exercise of skill and judgment as upon chance, this was not a "mode of chance" for the disposing of property within the meaning of the Act. *Regina v. Dodds*, 4 O. R. 390.—Q. B. D.

Per Hagarty, C. J. The Act applied to the unlawful disposal of some existing real or personal property. In this case there were no specific gold coins, nor was there any particular set of harness, to be disposed of, which might have been forfeited pursuant to section 3 of the Act, and therefore the conviction was bad on that ground. *Id.*

The defendant placed in his shop window a globular glass jar, securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number of buttons in the jar a pony and cart, which he exhibited in his window, stipulating that the successful one should buy a certain amount of his goods:—Held, that as the approximation of the number of buttons depended upon the exercise of judgment, observation, and mental effort, this was not a "mode of chance" for the disposal of property within the meaning of the Act:—Quære, whether defendant should not get the costs of quashing conviction made to test the law in such a case. *Regina v. Jamieson*, 7 O. R. 149.—Rose.

Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money for which they sued. Defendants having refused to settle for losses sustained:—Held, reversing the judgment of Patterson, J. A., that, assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing, and this defence not having been clearly proved, judgment was given for the plaintiffs. *Rice v. Gunn*, 4 O. R. 579.—Q. B. D.

The defendant was convicted by the police magistrate of the city of Toronto for playing at a game of cards called faro, contrary to the statute 12 Geo. II., c. 28, and sentenced to pay £50 sterling, the penalty thereby imposed:—Held, that under 27 Geo. III., c. 1, s. 2, the jurisdiction of justices of the peace in such cases was taken away, and in lieu thereof the recovery of such a penalty was to be by civil action. The conviction was therefore quashed:—Semble, per Wilson, C. J., that the defendant could have been convicted under the Municipal Act, 46 Vict. c. 18, s. 49, sub-s. 33, against gambling, and the by-law of the municipality passed with reference thereto. *Regina v. Matheson*, 4 O. R. 559.—C. P. D.

D. and H. agreed to match a colt owned by D. against a colt owned by S. Under the agreement the stakes were deposited with P., who, default being made by D., handed over the amount of D.'s deposit to H., although D. had previously demanded it back. D. now brought

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this action against H. and P. to recover the amount of the deposit:—Held, that the race was an illegal one under 13 Geo. II., c. 19, one of the participants not being the owner of the horse he bet upon, and therefore D. could not recover back from H. the deposit money, being himself in *pari delicto*:—Held, however, that inasmuch, as P. should have handed back D.'s deposit on demand made before disposal, D. could now recover the amount of the same from P. *Davis v. Hewitt*, 9 O. R. 435.—Boyd.

The Act 49 Vict. c. 31 (Dom.), intituled an Act for the repression of betting and pool selling, does not forbid betting, and does not apply to stake-holders in any of the three cases mentioned in section 2. *Regina v. Dillon*, 10 P. R. 352.—Osler.

A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within s. 53, sub-s. 3, R. S. O. (1877) c. 47, and such a security is void under 9 Anne, c. 14, even in the hands of a bona fide holder for value. *In re Summerfeldt v. Worts*, 12 O. R. 48.—Q. B. D.

A conviction under the provisions of the "Act respecting Gaming Houses," R. S. C. c. 158, s. 6, provided, in addition to fine and imprisonment, for distress in default of payment of the fine:—Held, that the punishment being in excess of that warranted by the statute, the conviction must be quashed:—Held, also, that, as the maximum penalty prescribed for the offence was imposed, the defect in the conviction in the provision for distress was not cured under R. S. C. c. 178, ss. 87 and 88. *Regina v. Sparham*, 8 O. R. 570, approved of. *Regina v. Logan*, 16 O. R. 335.—Chy. D.

The Act 51 Vict. c. 42, 1 (Dom.), makes it an indictable offence to make or authorize contracts by way of gaming or wagering on the rise or fall of stocks and merchandize, and to habitually frequent any office or place where such contracts are made. By section 3: The keepers of such places are to be held to be keepers of common gaming houses; the place of business to be a common gaming-house, and the instruments used instruments of gaming, "the whole within the meaning of R. S. C. c. 158, the Act respecting Gaming Houses, and shall be subject to all the provisions of the said Act." Section 6 of the R. S. C. c. 158, enacts that persons playing or looking on while others are playing, are guilty of an offence under the Act; and by section 9, authority is given to the policeman to try offences under the Act summarily. An information under R. S. C. c. 158, charging the defendant and others with unlawfully playing in a common gaming-house, was heard before the police magistrate summarily and the defendant convicted. The evidence shewed that the defendant was merely in a place where it was alleged that contracts in violation of the 51 Vict. c. 42, were made:—Held, that section 3 of 51 Vict. c. 42 (Dom.), was not incorporated into sections 4 and 6 of R. S. C. c. 158, so as to make the fact of a person being in an office or place of business where such prohibited contracts were made equivalent to playing or looking on while others were playing in a common gaming-house and so punishable by summary conviction. *Regina v. Murphy*, 17 O. R. 201.—C. P. D.

Section 2 of R. S. C. c. 159, prohibits the sale of "any lot, card, or ticket, or other means or device for \* \* \* selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever." The complainant went to the defendant's place of business, and having been told by the defendant that in certain spaces on the two shelves there were in cans of tea a gold watch, a diamond ring, or \$20 in money, he paid one dollar and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional fifty cents, and received another can, which also contained an article of small value. He handed this can back also, paid another fifty cents and secured another can, which also contained an article of small value. He then refused to pay any more money, and went away, taking the third can and the article in it with him. On a complaint laid by him before the police magistrate, the defendant was convicted, in that he "unlawfully did sell certain packages of tea, being the means of disposing of a gold watch, a diamond ring, \$20 in money, by a mode of chance, against the form of the statute," etc.:—Held, that the transaction came within the terms of the said section 2, so as to make the defendant liable to conviction thereunder:—Held, also, that "The Summary Convictions Act," applied to cure any defect in the form of the conviction. *Regina v. Freeman*, 18 O. R. 524.—C. P. D.

## GAOL.

Arbitration between city and county as to compensation for care and maintenance of prisoners. See *In re the Arbitration between the City of St. Catharines and the County of Lincoln*, 46 Q. B. 425.

## GARNISHMENT.

See ATTACHMENT OF DEBTS—DIVISION COURTS.

## GENERAL AVERAGE.

See INSURANCE—SHIP.

## GENERAL SESSIONS.

See SESSIONS.

## GIFT.

- I. GENERALLY, 835.
- II. OF PERSONALTY.
  1. Husband and Wife, 835.
  2. Other Persons, 837.
- III. DONATIO MORTIS CAUSA, 838.
- IV. LANDS—See DEDICATION—VOLUNTARY CONVEYANCE.
- V. BY WILLS—See WILL.

## I. GENERALLY.

Held, that the word "bonus" in 36 Vict. c. 48, s. 372, sub-s. 5 (Ont.), does not necessarily import a gift. See *Scottish American Investment Co. v. Village of Elora*, 6 A. R. 628.

Per Street, J.—The order in council directing that all funds received under the Canada Temperance Act within any city or county which had adopted the Act, which would otherwise belong to the Crown, should be paid to the treasurer of such city or county for the purposes of the Act, operated as a gift from the Crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no legal obligation that it should be applied in any particular manner. It was a complete gift; the money was finally at home, so far as the Crown was concerned, when the municipality received it, and the revocation of the order could not revoke a completed transaction, nor retract that which had been actually done under it. *United Counties of Leeds and Grenville v. Town of Brockville*, 17 O. R. 261.

## II. OF PERSONALTY.

## 1. Husband and Wife.

One J. O'B., and B. O'B., his wife, were the holders of a certain deposit certificate of the Bank of British North America to the following purport: "Received from J. O'B. and B. O'B. the sum of \$2,800, for which we are accountable to either, with interest at current rate," etc. Three or four days before his death, J. O'B. called his wife to his bedside, and in the presence of P., gave the certificate to her, saying she was to keep it for her own use, and unequivocally expressing an intention to make an absolute gift of the money to her:—Held, J. O'B. having died, that his wife was entitled to the money in the bank. *O'Brien v. O'Brien*, 4 O. R. 450.—Ferguson.

The widow of a testator claimed as a gift from her husband a promissory note payable to his order, but not endorsed by him. The evidence, in the master's office, on taking the accounts of the estate, shewed that the wife had taken possession of this and other notes belonging to her husband during his lifetime. The master at London found that under the circumstances appearing in the report of the case (29 Chy. 443), the testator had intended the note to belong to the widow, and that it did not form part of the assets of the estate, which finding was reversed by the court (Blake, V. C.):—Held per Spragge, C. J. O., and Morrison, J. A., (reversing the order then pronounced) that the evidence established a valid gift inter vivos. Per Burton and Patterson, J. J. A.—That even if the facts shewn in the evidence failed to establish a good gift inter vivos, the testator under the circumstances had constituted himself a trustee for his wife of the note. Per Burton, J. A.—The mere delivery of such a note, not endorsed, could not take effect as a gift inter vivos. Per Spragge, C. J. O.—There is no distinction in this respect between a gift inter vivos and a donatio mortis causa. *Tiffany v. Clarke*, 6 Chy. 474, remarked upon by Spragge, C. J. O., *Re Murray—Purdham v. Murray*, 9 A. R. 369.

The evidence shewed that the husband had purchased a piano, and had made a present of it to his wife by putting it in the house where they lived, and subsequently recognizing her right to it:—Held, that the piano did not form part of the wife's separate estate, as the husband could not at common law make a gift inter vivos of this description of property, so as to prevent its passing to his personal representatives; and that there was no evidence of intention on his part to constitute himself a trustee of the piano for his wife. *Schaffer v. Dumble*, 5 O. R. 716.—Cameron.

W. G. gave to his wife, M. G., a bond conditioned as follows: "That my executors shall pay M. G. \$200 in one year, and \$200 in two years after my decease, and these payments to be made as above stated to M. G. I bind myself to make full provision for her in my will to be hereafter made. And should I not make a will, this shall be full authority to my executors to make such payments. When my executors fulfil the above named obligation by making said payments the above obligation to be null and void, otherwise to remain in full force and virtue." W. G. died leaving a will, which, however, did not specially mention the above obligation. M. G. alleged that she had left the home of the testator for good cause, and that this bond was given to induce her to return and live with him, which she did; but the judge found otherwise, and that the bond was wholly without consideration in fact. M. G. now sued the executors of W. G. for the \$400 mentioned in the bond:—Held, that M. G. could not recover for that if the action were considered as an action at law on the bond, the bond was void, since at law husband and wife could not contract; while if considered as a suit in equity it was equivalent to a suit for specific performance, or the enforcement of an imperfect gift, and in either case equity would not aid a volunteer, neither did the presence of a seal make any difference:—Held, also, that the bond could not be regarded as a declaration of trust. *Glass v. Burt*, 8 O. R. 391.—Ferguson.

The defendant, having in her possession a large sum of money which her husband had given her, went with him to the bank to deposit it, and was about to do so when, on a question arising as to the power of withdrawing it in case of the wife's illness, the money at the bank agent's suggestion, was deposited in both their names subject to withdrawal by either of them, and it remained on deposit uninterfered with by the husband up to the time of his death which occurred some months after:—Held, that there was a good gift inter vivos to the wife. *Payne v. Marshall*, 18 O. R. 488.—C. P. D.

Where, in administration proceedings, the widow of the deceased claimed from the executor repayment of certain moneys paid by her, at her husband's request, out of her separate property, on premiums payable on policies on his life, which she swore were to be repaid to her; and it appeared that the moneys were paid by a third person who held them to the use of the claimant; that she acquiesced in the payment of them with great reluctance; and that she had no claim to any part of the policy moneys, which were wholly at the disposition of the deceased:—Held, that under these circumstances the onus

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was on the executor to prove that the moneys were a gift to the deceased, and that it was not necessary for the claimant to produce corroborative evidence that the moneys were to be repaid in order to recover. *Elliot v. Bussell*, 19 O. R. 413.—Robertson.

In order to make out that money paid by a wife to her husband was a gift, it is necessary to prove it either by direct evidence or by such a course of dealing between the husband and wife as shews that the money was so paid to him as a gift. *Id.*

M. having assigned his property to trustees for the benefit of his creditors his wife preferred a claim against the estate for money lent to M. and used in his business. The assignee refused to acknowledge the claim, contending that it was not a loan but a gift to M. It was not disputed that the wife had money of her own and that M. had received it. The trial judge gave judgment against the assignee, holding that M. did not receive the money as a gift. This judgment was confirmed on appeal:—Held, confirming the judgment of the Court of Appeal, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favour of the wife and confirmed by the Court of Appeal, this, the second appellate court, would not interfere with such finding. *Warner v. Murray*, 16 S. C. R. 720.

See *Vinden v. Fraser*, 28 Chy. 502, p. 815; *O'Doherty v. Ontario Bank*, 32 C. P. 285, p. 815.

## 2. Other Persons.

The plaintiff had performed services for one P. in his life-time, and he, intending to make some recognition thereof told her that a certain promissory note payable to himself or bearer, which he produced, was hers, saying: "Here is your note; take it when you want it." The plaintiff told him to keep it for her, as she had no place in which to keep it herself, and he did so:—Held, affirming the judgment of the County Court, that this constituted a complete gift inter vivos, there being a gift, and an acceptance of it by the donee, and actual delivery not being necessary as in the case of a donatio mortis causa:—Held, also, that the plaintiff's evidence was, upon the facts stated in the report, sufficiently corroborated. *Watson v. Bradshaw*, 6 A. R. 666.

A verbal gift of personal chattels does not confer any property on the donee, if there be no actual delivery to him. Therefore, where the mother of the defendant, while on her death-bed, gave to another son, J., the key of a drawer containing a mortgage in her favour executed by the defendant, directing J. to give the instrument to the defendant in the event of her not again seeing him, and the defendant was subsequently summoned by telegraph to see his mother, and he thereupon again visited her, when she told him that his mortgage was in the drawer, and that when he went home he should take it with him; but he did not on this occasion take possession of or see it, and after the

mother's death (intestate) J., as directed by her, handed the mortgage to the defendant:—Held, affirming the judgment of Boyd, C., (8 O. R. 516), that there had not been such a complete delivery of the security as to constitute a gift inter vivos or a donatio mortis causa, and therefore that the money due on the mortgage formed part of the personal assets of the deceased. *Watson v. Bradshaw*, 6 A. R. 656, observed upon. *Travis v. Travis*, 12 A. R. 438.

The mother had signed and given to defendant a year before her death a receipt for interest on the mortgage, and had endorsed a similar receipt on the mortgage, but no money was paid:—Held, a valid gift of the interest. *S. C.*, 8 O. R. 516.

A testator, who was suffering from an incurable disease, went to stay with his married daughter, one of the defendants hereto, and was tended and nursed by her, and was afterwards joined by his wife, who remained with him until his death which took place shortly after. Nearly three months after he had been at defendant's house, another daughter asked him to give defendant the price of a piano, when he said he would not do that, but pointing to a box in which he kept some money and promissory notes, and which he kept locked, retaining the key, said it was defendant's to do what she liked with, and that there was sufficient for all. No change was made in the possession of the box and its contents, it continuing in his possession up to the time of his death, he taking what money he required for his own use and for presents to his wife and daughters, the defendant at his request sometimes taking out money for him for such purposes. The notes were never otherwise alluded to:—Held, that neither a good donatio mortis causa nor gift inter vivos to defendant was shewn, but that the testator's intention was that the defendant should be paid for her services, and she was accordingly allowed for his board and her attendance on him as well as for the board of his wife. *Brown v. Davy*, 18 O. R. 559.—MacMahon.

See *Freeman v. Freeman*, 19 O. R. 141, *infra*; *Turner v. Prevost*, 17 S. C. R. 283.

## III. DONATIO MORTIS CAUSA.

Shortly before the execution of the will testator had handed to his daughter a bank deposit receipt which she had transferred to her name, and partly used, he stating that he wanted her to take care of him, and that he was going to have a will drawn:—Held, that the gift of the deposit receipt was a valid donatio mortis causa. *Freeman v. Freeman*, 19 O. R. 141.—C. P. D.

See *Re Murray—Purdham v. Murray*, 9 A. R. 369, p. 835; *Travis v. Travis*, 12 A. R. 438, *supra*; *Brown v. Davy*, 18 O. R. 559, *supra*.

## GLENGARRY (COUNTY OF.)

Dickinson's Island, on Lake St. Francis, is part of the county of Glengarry. *Regina v. Duquette*, 9 P. R. 29.—Oaler.

## GOODS.

- I. ASSIGNMENT OR MORTGAGE OF—See *BILLS OF SALE AND CHATTEL MORTGAGES*.
- II. CONVERSION OF—See *CONVERSION*.
- III. GIFT OF—See *GIFT*.
- IV. HIRE OF—See *HIRING*.
- V. CARRIAGE OF—See *CARRIERS*.
- VI. SALE OF—See *SALE OF GOODS*.
- VII. WARRANTY OF—See *WARRANTY*.

## GOODWILL.

S. and H., trading partners sold out their business to E. under a written agreement, as follows:—"S. & H. do hereby bind themselves to E. under a penalty of \$2,000, that they will not do business in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M.:—Held, that this did not amount to a breach of the above agreement, though the matter was not free from doubt. *Elliot v. Stanley*, 7 O. R. 350.—Boyd.

Partnership articles for a firm of three persons provided that if any partner should violate certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken such conditions of partnership the others verbally notified him that he must leave the firm and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business and the assignee brought an action against the remaining partners for the value of the same:—Held, reversing the judgment of the C. P. D. *Mead v. O'Keefe*, 15 O. R. 84, and Court of Appeal, 15 A. R. 103, (Fournier, J., dissenting), that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from shewing that it took place in consequence of the misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to expel could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited:—Held, also, that if it was a dissolution by one partner voluntarily retiring no claim could be made by the retiring partner in respect to goodwill, as the account to be taken under the partnership articles in such cases does not provide therefor:—Semble, that the goodwill consisted wholly of the trade name of the firm. *O'Keefe v. Curran*, 17 S. C. R. 596.

Where the land itself upon which a trade is carried on is expropriated, damage to the good will may be a proper subject of compensation. *Rickett's Case*, L. R. 2 H. L. 175, distinguished.

*Re McCauley and City of Toronto*, 18 O. R. 416.—Boyd.

See *Williamson v. Ewing*, 27 Chy. 596, p. 327; *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, 17 O. R. 495; 1b. 501; 17 A. R. 292, p. 335.

## GROWING CROPS.

See *CROPS*.

## GUARANTEE AND INDEMNITY.

- I. OPERATION OF THE STATUTE OF FRAUDS.
  1. *Agreements Within the Statute*, 840.
  2. *Consideration*, 841.
- II. CONSTRUCTION OF CONTRACT.
  1. *What Amounts to a Guarantee*, 842.
  2. *Other Cases*, 842.
- III. CONTINUING GUARANTEE, 843.
- IV. PAYMENT OR SATISFACTION, 844.
- V. DETERMINATION OF CONTRACT, 845.
- VI. MISCELLANEOUS CASES, 845.
- VII. AS BETWEEN PRINCIPAL AND SURETY—See *PRINCIPAL AND SURETY*.
- VIII. WARRANTY—See *WARRANTY*.

## I. OPERATION OF THE STATUTE OF FRAUDS.

1. *Agreements Within the Statute.*

Where a contractor for the building of a house made default in carrying on the work, and in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed verbally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor would go on and finish the work he the owner would pay him:—Held, that the agreement with the sub-contractor was a new and independent contract, and was not a contract to answer for the debt, default or miscarriage of another within the fourth section of the Statute of Frauds, and was therefore valid and binding on the owner, although not in writing. *Bond v. Treahy*, 37 Q. B. 360, distinguished. *Petrie v. Hunter*; *Guest v. Hunter*, 2 O. R. 233.—Boyd.; 10 A. R. 127.

F. being indebted to the plaintiffs, who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F.: "I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within ten days." The security referred to was a mortgage upon real estate to be executed, and a paid-up life policy of \$5,000, which F. had agreed verbally to give the plaintiffs, neither of which existed at the time of F.'s agreement, or the defendant's guaranty. F. never gave the security, and the plaintiffs, by refraining from suing him, lost their debt:—Held, affirming the judgment of Burton, J.A., Hagarty, C.J., dissenting, that

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the writing signed by the defendant was not sufficient to satisfy the fourth section of the Statute of Frauds, whether regarded as an original promise or guaranty. Per Hagarty, C. J. The contract was divisible. The writing was not sufficient as to the mortgage of real estate, because the promise of the debtor himself was not enforceable against him, not being in writing, but as to the policy the writing was sufficient. *Lighbound v. Warnock*, 4 O. R. 187.—Q. B. D.

A collateral verbal promise to pay the debt of another, who still remains liable, although founded on a good consideration, is not binding. Therefore where defendant had bought the stock of one A., who was indebted to the plaintiff for wages, and in order to induce the plaintiff to continue with the defendant, the defendant promised to see that he was paid, and the plaintiff did accordingly work for the defendant:—Held, reversing the judgment of the County Court, that the Statute of Frauds was a bar to the action. *James v. Balfour*, 7 A. R. 461.

A. M. was carrying on business as a brewer when, owing to financial difficulties, he left, and S. M., his brother, a large creditor, took charge thereof. The plaintiff claimed that at this time there was a large sum due him for wages under a special agreement made with A. M.; and that S. M. agreed, if he would remain, to pay him the past wages then due him, and like wages for the future:—Held, that the agreement by S. M. to pay such past wages being merely a collateral promise A. M. remaining liable, and not being in writing, could not be enforced:—Held, also, that, on the evidence as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory the fair inference was that the parties' minds were never ad idem, and the recovery would only be on the quantum meruit. *Hoener v. Merner*, 7 O. R. 629.—C. P. D.

In an action for the price of goods supplied by the plaintiffs to C. A. E., it was proved that the plaintiffs received in an envelope, addressed to their firm, the following letter: "Lake Superior, Ont., July 4th, 1883. Gentlemen,—I beg to inform you that I have assumed all liabilities of the S. P. Co. lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to July 24th, 1882. Kindly ship chases immediately. Respectfully yours, (Signed) C. J. S." The envelope was lost, but its receipt and the address on it were proved:—Held, a sufficient agreement in writing to satisfy the statute for that the address on the envelope referring to the "gentlemen" within showed that the plaintiffs were the persons guaranteed. *Richard v. Stillwell*, 8 O. R. 511.—Boyd.

## 2. Consideration.

The defendant, after a note payable to the plaintiff, had become due and while it remained unpaid, endorsed upon it the following words: "I guarantee the payment of the within note to Messrs. T. D. & Co. (the plaintiffs), on demand." The evidence showed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security:—Held, that the evidence that the giving of time to C. was the consideration for the guarantee did not contradict

the latter, though it was expressed to be "on demand;" for these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration. *Davies v. Funston*, 45 Q. B. 369.—Q. B. D.

See *Whitelaw v. Taylor*, 45 Q. B. 446, *infra*.

## II. CONSTRUCTION OF CONTRACT.

### 1. What Amounts to a Guarantee.

The plaintiff agreed with M. to repair a boiler in the latter's sawmill. During the progress of the work he received the following letter from the defendant: "As Mr. Morden's sawmill at Bismark is about to come into my hands right away, and as I am to assume the expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible; everything at present is at a standstill waiting on you. Please push on the work and oblige yours truly, R. Taylor." The plaintiff, without communicating with the defendant, went on with the work. The defendant's contemplated purchase was not carried out:—Held, that had not rendered himself liable by his letter for the price of the work done, and that a nonsuit had been properly entered. *Whitelaw v. Taylor*, 45 Q. B. 446.—Q. B. D.

See *Dobell v. Ontario Bank*, 3 O. R. 299, p. 843; *Sutherland v. Patterson*, 4 O. R. 565, p. 844.

See also Subhead I., 1, p. 840.

### 2. Other Cases.

The defendant R. contracted with the plaintiffs to deliver on their vessels at Montreal a large quantity of deals, and he delivered in 1877, all but 108 standard hundreds. These could not be shipped till the spring of 1878, and R. required in the meantime to receive payment for them. He had in his yard at Ottawa more than the required quantity of deals; and in place of then separating and delivering to the plaintiffs the 108 standards, he procured his son to give a storage receipt under 34 Vict. c. 5 (Dom.), acknowledging the receipt from the Ontario Bank of 108 standard hundreds of deals specifying the qualities required by the contract. The bank thereupon gave a guaranty to the plaintiffs that those deals should "be satisfactorily culled next spring previous to shipment, and that any question arising as to the same shall be settled in the manner usual in Quebec, viz.: Messrs. D. & Co. for purchasers, and Messrs. C. & R., for Mr. R., to agree upon a sworn culler to act in the interests of both parties." Thereupon the plaintiffs paid for the deals, and the bank received the money. In the spring of 1878, R. forwarded 108 standards to Montreal by two barges, being urged to expedition in so doing by the plaintiffs: and sixty standard were loaded on vessels of the plaintiffs, which sailed with them to England. The quality of the remaining forty-eight standards was objected to and they were landed at Montreal, and there culled and found deficient in quality. Messrs. C. & R., agents at Montreal for the defendant R., verbally agreed with the plaintiffs, after the sixty standards had been shipped, that the quality of the forty-eight standards should be

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taken to be the average of the whole 108:—Held (Spragge, C. J. O. dissenting,) reversing the decision of Proudford, J. (3 O. R. 299), that the guaranty given by the bank only required that the plaintiffs should be satisfied with the culling at R.'s yard in Ottawa, and that no objection having been made there the guaranty was satisfied. But held also, that the bank was not bound by the agreement made at Montreal by C. & R., and even if the culling were to have been at Montreal the shipment of the sixty standards having rendered it impossible to settle the question in difference in the manner agreed upon, the bank would have been discharged. *Dobell v. Ontario Bank*, 9 A. R. 484.

Held, by Proudford, J., in the court below, that the guarantee did not come within the description of a guarantee for the act of a third party, for the bank were selling under R. S. O. (1877) c. 121, by virtue of being holders of a warehouse receipt for the lumber. *S. C.*, 3 O. R. 299.

A deceased person, of whom the plaintiff was executor, gave the defendants a guaranty in respect of goods sold and to be sold to another, in the following terms:—"In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater sum than \$2,500." The principal debtor, being indebted to the defendants in \$5,500, made an assignment under R. S. O. (1887), c. 124, and the defendants filed a claim with the assignee but did not in the affidavit proving the claim state whether they held any security or not. At a later date the plaintiff paid the defendants the \$2,500 and filed a claim with the assignee. The dividends from the estate were insufficient to pay the balance of the defendants' claim:—Held, that the guaranty was not a security which the defendants were required to value under the Act, and that the omission from their claim of a piece of information which could not affect it did not render it invalid:—Held, also, that this was a guaranty not of part, but of the whole of the debt, limited in amount to \$2,500, that is, a guaranty of the ultimate balance after all other sources were exhausted; and the plaintiff was not entitled to rank upon the estate in respect of the \$2,500, nor to recover any part of any dividend which the defendants had received. *Hobson v. Bass*, L. R. 6 Ch. 792, distinguished; and *Ellis v. Emmanuel*, 1 Ex. D. 157, followed. *Martin v. McMullen*, 19 O. R. 230.—Street.

But held on appeal to the Queen's Bench Division, Street, J., dissenting, that the guarantee was a limited suretyship for a floating balance and was to be construed as applicable to a part only of the debt coextensive with the amount of the guarantee and the plaintiff was entitled to a dividend from the estate of M. in respect of the \$2,500 paid. *S. C.*, 20 O. R. 257.

See *Sutherland v. Patterson*, 4 O. R. 566, *infra*.

### III. CONTINUING GUARANTEE.

On 11th June, 1877, defendant wrote to the plaintiff that J. S., the person he wished to as-

sis, "informs me now that I could help him by pledging myself to you that you might give him a letter of credit in Montreal, and I now say, if you will assist him in that way to \$7,000 or \$8,000 that I will become responsible to you for the like amount in any manner you may wish, etc." J. S. then applied to the plaintiff, who gave a continuing guarantee in his favour to some Montreal merchants, dated 23th August, for goods to the extent of \$5,000, for three years. At the same time the following note signed by the defendant in blank was filled up by J. S.: "Three years after date I promise to pay to the order of J. S. \$5,000, etc." "Value received." To which was added, "This note is given as collateral security for a guarantee of \$5,000 given to J. S. by A. S.," the plaintiff. No notice was ever given to defendant of the plaintiff's guarantee, or of the form in which the note was filled in. In an action on the defendant's letter as a continuing guarantee,—and on the note. Per Wilson, C. J.—The letter was a guarantee, but not a continuing one, and there could be no recovery under it as the evidence shewed that the amount of \$5,000 secured thereby had been paid. Per Galt, J., agreeing with the judgment of Burton, J. A., at the trial, it was not a guarantee, but merely a proposition leading up to a guarantee; at all events, if a guarantee, it was not a continuing one. *Sutherland v. Patterson*, 4 O. R. 565.—C. P. D.

See *Cosgrave Brewing and Malting Co. v. Starrs*, 11 A. R. 156; 12 S. C. R. 571, p. 845; *Merchants' Bank of Canada v. McKay*, 15 S. C. R. 672, p. 140.

### IV. PAYMENT OR SATISFACTION.

Declaration on a guaranty, by which in consideration of the plaintiffs accepting three notes of G. for \$751 each, in satisfaction of their claim against G. & Co., defendant did, "to the extent of \$751, guarantee the payment of the first two of the said notes according to their tenor and effect." Pleas, 1. That the notes were payable to plaintiffs' order, and the plaintiffs endorsed the first note to certain persons who held it at maturity, and to whom in the event of G. not paying it, the plaintiffs were liable as endorser: that G. notified defendant of his inability to pay it in full, and defendant paid thereon \$276, of which plaintiffs had notice, and afterwards G. failed to pay the second note, whereupon defendant paid the plaintiffs \$476, being the balance of the sum of \$751 guaranteed by defendant. 2. That the first two notes to the amount of \$1,276, were paid to plaintiffs as they became due, whereby defendant's guarantee was satisfied:—Held, on demurrer, pleas bad; for, as to the first, defendant was not liable to the plaintiffs' endorsees, and no express or implied request by the plaintiffs to pay was shewn; and as to the second the guarantee was not satisfied by the payment of G. of \$751. *Crutcher v. Bell*, 45 Q. B. 473.—Osler.

The defendant, in order to enable one G. to carry out a contemplated settlement with the plaintiffs (creditors of G.), signed a memorandum guaranteeing the payment by G. of the first two of three promissory notes of \$751 each, "to the extent of \$751." When the first note to mature fell due G. was unable to meet it, and the defendant, without the knowledge of the

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plaintiffs or their agents, enabled G. to raise a part of the amount required to retire that note, which amount G. so applied; and this sum the defendant subsequently was compelled to pay:—Held, (affirming the judgment of the court below, 46 Q. B. 365,) no answer to a claim afterwards made upon the defendant to pay the second note on G.'s failing to do so, the advance which had been so made by the defendant to G. forming no part of the sum the defendant was liable for under his guarantee. *S. C. 8 A. R. 537.*

#### V. DETERMINATION OF CONTRACT.

By an agreement under seal made in April, 1879, the defendant guaranteed to C. & Sons, or the members for the time being forming such firm, the price of any goods supplied by C. & Sons to one Q. to the amount of \$5,000, and which he agreed should be a continuing guarantee. C. died in September, 1881, after which the sons, who were named as executors in his will, carried on the same business under the like firm name until December, 1882, when the assets of the partnership were transferred to the plaintiffs, a joint stock company. Q. continued to obtain goods from the sons, and the plaintiffs since the formation of the joint stock company, until the spring of 1883. Meanwhile, and on the 5th of April, 1882, the defendant being dissatisfied with the manner in which Q. was conducting his business, wrote to the firm forbidding them to supply any more goods to Q. under such guarantee:—Held, affirming the judgment of Rose, J., (5 O. R. 189), that such notice put an end to defendant's liability for any goods subsequently supplied to Q.; but—Held, by the Supreme Court, reversing the judgment of the Court of Appeal, which reversed the judgment of Rose, J., that the death of P. C. dissolved the firm of C. & Sons, and put an end to the contract of suretyship. *Cosgrave Brewing and Malting Co. v. Starrs*, 11 A. R. 156; *S. C.*, sub nom. *Starrs v. Cosgrave*, 12 S. C. R. 561.

#### VI. MISCELLANEOUS CASES.

Held, that a promise of indemnity to a sheriff by an attorney is binding on his client, when the attorney had the conduct of the suit in the course of which the promise was made, and the subsequent acts of the client shewed that he had adopted the attorney's proceedings. *Muirhead v. Shirreff*, 14 S. C. R. 735.

Semble, where in an action on a guaranty, the writ is not specially indorsed, but full particulars are set out in the statement of claim, final judgment may be signed upon default of defence. *Molson's Bank v. Dillabaugh*, 13 P. R. 312.—Boyd.

*Molson's Bank v. Turley*, 8 O. R. 293, p. 780; *Moffatt v. Merchants' Bank*, 5 O. R. 122; 11 S. C. R. 46, p. 774; *Wyld v. Clarkson*, 12 O. R. 589, p. 106.

### GUARDIAN.

I. OF INFANT—See INFANT.

II. OF LUNATIC—See LUNATIC.

### HABEAS CORPUS.

#### I. ISSUE OF.

1. *When Granted*, 846.
2. *Who may Grant*, 847.
3. *Practice*, 847.

#### II. APPEALS, 848.

#### III. RETURN.

1. *Reviewing Evidence*, 849.
2. *Other Cases*, 849.

#### IV. DISCHARGE OF PRISONER, 849.

#### V. ACTION FOR PENALTY UNDER 31 CAR. II. c. 2, s. 6, 850.

#### VI. APPLICATION OF R. S. O. c. 70, 850.

#### I. ISSUE OF.

##### 1. *When Granted.*

Writ held to be issued improvidently when the matter in controversy had been decided and the legality of the detention of the prisoner established in the previous proceedings. See *In re Hall* 32 C. P. 498; 8 A. R. 135.

The prisoner was convicted before a county judge's Criminal Court. On an application for a habeas corpus:—Held, that the court was a Court of Record, and that under R. S. O. (1877) c. 70 s. 1 there was therefore no right to the writ. *Regina v. St. Denis*, 8 P. R. 16.—Cameron.

Held, (Henry, J., dissenting), that the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion at which he arrived as to the guilt of the prisoner, the Supreme Court could not go behind the conviction and enquire into the merits of the case by the use of a writ of habeas corpus, and thus constitute itself a court of appeal from the magistrate's decision. *In re Melina Trepamier*, 12 S. C. R. 111.

After a conviction of felony by a court having general jurisdiction over the offence charged a writ of habeas corpus is an inappropriate remedy. *In re Sproule*, 12 S. C. R. 140.

The right to issue a writ of habeas corpus being limited by section 51 of the Supreme and Exchequer Court Act, to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case of common law. Fournier and Henry JJ. dissenting. *Ib.*

Per Fournier and Henry JJ.:—The restriction imposed by section 51 is merely intended to exclude any enquiry into the cause of commitment for the infraction of some provincial law; and the words "in any criminal case" were inserted to exclude the habeas corpus in civil matters; it is sufficient to give jurisdiction if the commitment be in virtue of an Act of the Parliament of Canada. *Ib.*

Query—Is section 51 of the Supreme and Exchequer Court Act ultra vires? *Ib.*

Held, that a writ of habeas corpus should not issue where the accused is in custody pending a preliminary investigation before a magistrate, during a remand to enable the prosecution to supply evidence in support of the charge. *Regina v. Cox*, 16 O. R. 228.—MacMahon.

See *Regina v. Goodman*, 2 O. R. 468, p. 447; *Re Smart Infants*, 12 P. R. 312, 435, 635, p. 848.

## 2. Who may Grant.

Section 51 of the Supreme and Exchequer Court Act does not interfere with the inherent right which the Supreme Court in common with every superior court, has incident to its jurisdiction to enquire into and judge of the regularity or abuse of its process, and to quash a writ of habeas corpus and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued by a judge of said court. The section does not constitute the individual judges of the Supreme Court separate and independent courts, nor confer on the judges a jurisdiction outside of and independent of the court, and obedience to a writ issued under said section cannot be enforced by the judge but by the court, which alone can issue an attachment for contempt in not obeying its process (Fournier and Henry, J.J., dissenting).—Per Strong, J.—The words of section 51 expressly giving an appeal when the writ has been refused or the prisoner remanded, must be attributed to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to deprive the court of the right to entertain appeals from, and revise, rescind and vary, orders made under this section. *In re Sproule*, 12 S. C. R. 140.

## 3. Practice.

Power of judge in chambers. See *Regina v. Arscott*, 9 O. R. 541.

Held, that the provision in R. S. O. (1887), c. 70, s. 6, that the court or judge before whom any writ of habeas corpus is returnable, may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation, is permissive only, and that a judge has power in such a case to direct that the evidence shall be taken *viva voce* before him. In this matter it was directed, as in *Re Murdoch*, 9 P. R. 132, that the evidence should be taken *viva voce*, and it was further ordered that a foreign commission should issue to take evidence abroad, and that the parties to the application should be at liberty to examine each other for discovery before the hearing. The costs of the demurrer to the return (11 P. R. 482) were given against the father of the infant in any event of the proceeding. *Re Smart Infants*, 12 P. R. 2.—Ferguson.

A father was proceeding by habeas corpus to obtain an order awarding him the custody of his infant children:—Held (by Ferguson, J.), that a more comprehensive adjudication could be had upon a petition, and that there was power to direct that a petition should be substituted for the habeas corpus proceedings. Such a direction was given where it appeared to be in the

interest of the infants and all concerned. This order was affirmed by the Chancery Division and the Court of Appeal with one variation, viz., the habeas corpus to run concurrently with the petition directed to be filed, and to be disposed of with it, and the Court of Appeal holding that the infants' father had waived his right to appeal from the order directing the filing of a petition by having complied with such order:—Sembles, but for the waiver, the appeal of the father must have succeeded; for the power given by Rule 474, O. J. Act (Con. Rule 444), is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular. *Re Smart Infants*, 12 P. R. 312, 435, 635.

If the record of a superior court, produced on an application for a writ of habeas corpus, contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence (Henry, J., dissenting.) *In re Sproule*, 12 S. C. R. 140.

Sembles, that when a judge in a province has the right to issue a writ of habeas corpus returnable in term as well as in vacation, a judge of the Supreme Court might make the writ he authorizes returnable in said court in term as well as immediately (Fournier and Henry, J.J., dissenting). *Id.*

An application to the court to quash a writ of habeas corpus as improvidently issued may be entertained in the absence of the prisoner. (Henry, J., dissenting). *Id.*

## II. APPEALS.

The Act 29-30 Vict. c. 45 apparently substituted the right of appeal in habeas corpus cases for successive applications from court to court. *In re Hall*, 8 A. R. 135.

Per Ritchie, C. J. As regards habeas corpus in criminal matters, the Supreme Court has only concurrent jurisdiction with the judges of the Superior Courts of the various provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any judge or court, or any appellate court, because the prisoner can come direct to any judge of the Supreme Court individually, and upon that judge refusing the writ or remanding the prisoner, he could take his appeal to the full court. *In re Boucher*, Cassel's Dig. 182.

The only appellate power conferred on the Supreme Court in criminal cases is by the 49th section of the Supreme and Exchequer Court Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of reversal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.—Section 34 of the Supreme Court Amendment Act of 1876 does not in any case authorize the issue of a writ of certiorari to accompany a writ of habeas corpus granted by a judge of the Supreme Court in chambers; and as the proceedings before the court on habeas corpus arising out of a criminal charge are only by way of appeal from the decision of the judge in chambers, the said section does not authorize

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the court to issue a writ of certiorari in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court. *In re Melina Trepanier*, 12 S. C. R. 111.

For the purpose of an appeal to the Supreme Court of Canada in a habeas corpus case the first step is the filing of the case in appeal with the registrar. The judgment of the Court of Appeal in a habeas corpus proceeding was pronounced on 13th November, 1888. Notice of intention to appeal was immediately given but the case in appeal was not filed in the Supreme Court until 18th February, 1889:—Held, that the appeal was not brought within sixty days from the date on which the judgment sought to be appealed from was pronounced and there was no jurisdiction to hear it. *In re Smart Infants*, 16 S. C. R. 396.

### III. RETURN.

#### (a) Reviewing Evidence.

Held, that where the proceedings before a magistrate are removed under 29 & 30 Vict. c. 45, s. 5, the judge is not to sit as a court of appeal from the findings of the magistrate upon the evidence; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found the fact, then the evidence may be looked at to see whether there was anything to support his findings upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a rule except upon an appeal. *Regina v. Green*, 12 P. R. 373.—Street.

#### (b) Other Cases.

A return was made by the mother of the infants, in whose custody they were, to a writ of habeas corpus obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. (1877), c. 130, sec. 1:—Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law. *Re Murdoch*, 9 P. R. 132, explained and followed. *Re Smart Infants*, 11 P. R. 482.—Ferguson.

The course to be taken by the court on return of a habeas corpus, shewing prisoner detained under a defective warrant in execution of a conviction of a justice of the peace discussed.—*Arscott v. Lilley*, 11 O. R. 153.—Q. B. D.

A return by the sheriff to the writ setting out the conviction and sentence and the affirmation thereof by the Court of Error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff (Henry J. dissenting). *In re Sproule*, 12 S. C. R. 140.

### IV. DISCHARGE OF PRISONER.

Held in this case that the discharge of the plaintiff from custody on habeas corpus was not

a quashing of the conviction. *Hunter v. Gilkinson*, 7 O. R. 735.—Q. B. D.

Even if the writ of habeas corpus in this case had been rightly issued, the prisoner on the materials before the judge was not entitled to his discharge, but should have been remanded. *In re Sproule*, 12 S. C. R. 140.

See *Regina v. Arscott*, 9 O. R. 541.

### V. ACTION FOR PENALTY UNDER 31 CAR. II., c. 2, s. 6.

The defendant L., a magistrate, had convicted the plaintiff for being the keeper of a bawdy house, and sentenced her to six months' imprisonment. Plaintiff, after undergoing two days' imprisonment, was released on bail, pending an appeal to the sessions. The appeal was dismissed and plaintiff subsequently arrested upon a warrant issued by the defendant L. under advice of defendant H. the county crown attorney. Upon return to habeas corpus she was discharged from custody under the latter warrant, upon the ground that it did not take into account the two days' imprisonment she had suffered prior to her appeal. Thereupon she was detained under a third warrant, on which nothing turned, and she was again arrested under a fourth warrant issued by defendant L. upon the original conviction. In an action brought by the plaintiff for the penalty of £500 awarded by the 6th section of the habeas corpus Act, 31 Car. II., c. 2:—Held, reversing the judgment of Cameron, C. J., at the trial, that the 6th section of the habeas corpus Act, 31 Car. II., c. 2, has no application to a case in which the prisoner is confined upon a warrant in execution:—Held, also, that the warrant in execution, issued by the convicting justice upon the discharge of the prisoner from custody for defects in the former warrant, was the legal order and process of the court having jurisdiction in the cause:—Semble, that the warrant issued after the dismissal of the appeal by the sessions, and which followed the original conviction in directing imprisonment for six months, without making allowance for the two days' imprisonment already suffered, was not open to objection. *Arscott v. Lilley*, 11 O. R. 153.—Q. B. D. Affirmed 14 A. R. 297.

### VI. APPLICATION OF R. S. O. c. 70.

Semble, per Ritchie, C. J., that chapter 70 of the Revised Statutes of Ontario relating to habeas corpus does not apply to the Supreme Court of Canada. *In re Melina Trepanier*, 12 S. C. R. 111.

See *Regina v. Arscott*, 9 O. R. 541.

### HABENDUM.

See DEED.

### HALF-BREEDS' RIGHTS.

See *Burns v. Young*, 10 A. R. 215.

**HANDWRITING.**

See EVIDENCE.

**HARBOUR.**

See COBBOURG HARBOUR.

The soil and bed of the foreshore in public harbours is vested in the Dominion Government. See *Holman v. Green*, 6 S. C. R. 707.

**HARD LABOUR.**

See IMPRISONMENT.

**HAWKERS.**

See MUNICIPAL CORPORATIONS.

**HEALTH.**

See PUBLIC HEALTH.

**HEIR-AT-LAW.**

See ESTATE.

**HIGH COURT OF JUSTICE.****I. CONSTITUTION OF COURT, 852.****II. JURISDICTION.****1. Criminal, 852.****2. Civil.****3. Quashing Convictions—See JUSTICE OF THE PEACE.****III. DIVISIONS AND DIVISIONAL COURTS.****1. Jurisdiction, 853.****2. Appeals to.****(a) From Single Judge, 854.****(b) From Judge or Master-in-Chambers—See PRACTICE.****(c) Other Appeals, 856.****(d) Practice on Appeals, 857.****3. Appeals from—See COURT OF APPEAL.****4. Transferring Causes from one Division to Another—See PRACTICE.****5. Exclusive Jurisdiction of the Court of Chancery—See TRIAL.****6. Other Cases, 858.****IV. SINGLE JUDGE, 859.****V. POWERS OF LOCAL JUDGE—See PRACTICE.****VI. PLEADING IN—See PLEADING.****VII. PRACTICE IN—See PRACTICE.****VIII. TRIAL—See TRIAL.****I. CONSTITUTION OF COURT.**

An indictment was found against the defendants in the High Court of Justice at its sittings of Oyer and Terminer and Gaol Delivery, and on being called upon to plead the defendants demurred to the indictment. A writ of certiorari was subsequently obtained by the defendants, and the indictment, demurrer, and joinder were removed to the Queen's Bench Division. Upon the return the Crown took out a side-bar rule for a concilium, and the demurrer was set down for argument. Defendants moved to set aside the proceedings of the Crown on the ground that they should have been called upon to appear and plead de novo in this division:—Held, Wilson, C. J., dissenting, that the Court of Assize of Oyer and Terminer and General Gaol Delivery is now, by virtue of the Judicature Act, the High Court of Justice: that the indictment was found, and the defendants appeared and demurred thereto in the High Court of Justice; and that it was not necessary to plead de novo to the indictment. *Regina v. Bunting*, 7 O. R. 118.—Q. B. D.

Per Armour and O'Connor, JJ.: The Supreme Court of Judicature is not properly a court, and ought more properly to have been called the Supreme Council of Judicature. The divisions of the High Court are not themselves courts, but together constitute the High Court, which is thus divided for the convenience of transacting business; and the judges sit as judges of the High Court, and exercise the jurisdiction and administer the jurisdiction of the High Court. *Id.*

See *Regina v. Beemer*, 15 O. R. 266.**II. JURISDICTION.****1. Criminal.**

A judge of the High Court has power under section 83 of the Criminal Procedure Act (R. S. C. c. 174), to admit to bail in cases where the accused has not been finally committed for trial if he thinks it right to do so. *Regina v. Cox*, 16 O. R. 228.—MacMahon.

See *Regina v. Bunting*, 7 O. R. 118, *supra*; *Regina v. Beemer*, 15 O. R. 266; *Regina v. Runchy*, 18 O. R. 478, p. 854; *Regina v. Birchall*, 19 O. R. 697, p. 854.

**2. Civil.**

As to jurisdiction to set aside an award made under the Railway Act of 1868 (31 Vict. c. 28 (Dom.)) See *In re Horton and Adamston and Canada Central R. W. Co.*, 45 Q. B. 141.

In trials of controverted elections. See *In re Russell Election (Dom.)*—*Henderson v. Dickenson*, 1 O. R. 439; *Mitchell v. Cameron*, 8 S. C. R. 126; *Montmorency Election (Dom.)*—*Valin v. Langlois*, 3 S. C. R. 1.

Held, affirming the judgment of Armour, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vict. c. 8, s. 14 (Ont.), though no objection can be taken to this jurisdiction of the Division Court in that Court, the jurisdiction of the High Court of Justice to prohibit the proceedings is not ousted. *Clarke v. Macdonald*, 4 O. R. 310.—Q. B. D.

Semble, county judge, R. S. O. (18) immediate not excluded join the taking making use collateral to but otherwise a judge of the county *Jenkins v. C. 593*.—Proulx.

Per Cameron. Court has the election officer power to do *Voters' List*, 13 O. R. 3.

Upon the being commenced has power to possession under R. S. O. (18) R. 264.—Armour.

The High by virtue of 2, or otherwise verdict or judgment Court in and *Sullivan*, 16 O.

The High where a marriage to be void de some essential null and void most clear and the interpositio *berlain*, 18 O.

See *Dickson Strange v. R.*

**III. DIVISIONS.**

Held that to remove proceedings the decision of the Division Court is as much as the special tribunal c. 109. *Re A. R. W. Co.*, 12 O. R. 12.

A Division Court is to be set aside by a Court action. *Q. B. D.*

Under R. S. O. c. 52, ss. 1 and 2, a court could exercise jurisdiction in proceedings, a Court to grant by the 1st Chancery might upon motion appearing to every Division jurisdiction. *and Town of*



Semble, that the powers conferred on the county judge under the Railway Act of Ontario, R. S. O. (1877) c. 165, s. 20, sub-s. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this court to enjoin the taking of possession, if the company is making use of its powers to attain any object collateral to that for which it was incorporated; but otherwise it is not within the jurisdiction of a judge of this court to interfere with an order of the county judge, though granted ex parte. *Jenkins v. Central Ontario R. W. Co.*, 4 O. R. 593.—Proudfoot.

Per Cameron, C. J. Quare whether the High Court has the power to interfere with certain election officers, except where express statutory power to do so is given. *In re Revision of the Voters' List for the City of St. Thomas—Re Boyes*, 13 O. R. 3.

Upon the proceedings before the county judge being commanded to be sent up, the High Court has power to stay proceedings upon the writ of possession under the Overholding Tenants' Act, R. S. O. (1877) c. 144. *Price v. Guinane*, 16 O. R. 264.—Armour.

The High Court of Justice has no jurisdiction, by virtue of R. S. O. (1877) c. 91, s. 56, sub-s. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in the District Court in an interpleader issue. *Isbister v. Sullivan*, 16 O. R. 418.—Q. B. D.

The High Court of Justice has jurisdiction, where a marriage correct in form is ascertained to be void de jure by reason of the absence of some essential preliminary, to declare the same null and void ab initio; but nothing short of the most clear and convincing testimony will justify the interposition of the court. *Lawless v. Chamberlain*, 18 O. R. 296.—Boyd.

See *Dickson v. Monteith*, 14 O. R. 719, p. 857; *Strange v. Radford*, 15 O. R. 145.

### III. DIVISIONS AND DIVISIONAL COURTS.

#### 1. Jurisdiction.

Held that the Divisional Court had no power to remove proceedings by certiorari in order that the decision of a judge might be quashed or rescinded as made in excess of his authority as a special tribunal under the Railway Act, R. S. O. c. 109. *Re McQuillan and the Guelph Junction R. W. Co.*, 12 P. R. 294.—Chy. D.

A Divisional Court has power under Con. Rule 1051 to set aside or vary an order for arrest made by a County Court judge in a County Court action. *Elliott v. McCuaig*, 13 P. R. 416.—Q. B. D.

Under R. S. O. (1877) c. 40, s. 86; c. 49, s. 24; and c. 52, ss. 4, et seq., the Court of Chancery could exercise the powers of a court of law in any proceeding, and the powers of the Common Law Courts to grant mandamus upon motion not being by the latter Act restricted, the Court of Chancery might also have granted a mandamus upon motion; and under the O. J. Act, nothing appearing to restrict the jurisdiction, the Chancery Division of the High Court has the same jurisdiction. *Re Board of Education of Napanee and Town of Napanee*, 29 Chy. 395.—Proudfoot.

Held, that this being a case which before the O. J. Act would have been in the sole jurisdiction of the Court of Chancery to grant the relief asked, the Divisional Court could act without the intervention of a second jury; and the evidence failing to establish the plaintiff's right to the relief asked for, the decree was set aside; but as to the damages, as they had not been moved against, they were not interfered with. *James v. Clement*, 13 O. R. 115.—C. P. D.

Semble, that the Chancery Division of the High Court has jurisdiction to declare a will valid. *Dickson and Monteith*, 14 O. R. 719.—Proudfoot.

The jurisdiction to hear motions for orders nisi in criminal matters vested in the Common Pleas Division of the High Court of Justice is the original jurisdiction of the Court of Common Pleas prior to Confederation, and by virtue of section 5 of C. S. U. C. c. 10, the court "may be holden by any one or more of the judges thereof in the absence of the others." On the return of an order nisi to quash a conviction, the court was composed of two of the judges thereof, the third judge being absent.—Held, that the court was properly constituted to dispose of the order. *Regina v. Runchy*, 18 O. R. 478.—C. P. D.

On a motion to make absolute a rule nisi in a criminal matter before the Chancery Divisional Court:—Held, per Boyd, C., that the court had jurisdiction to entertain the matter, for the divisional sittings of the High Court of Justice are now the equivalent for the former sittings in full court in term at common law, or for the purpose of rehearing in Chancery, and the criminal jurisdiction vested in the High Court not exercisable by a single judge is by the effect of legislation to be administered by judges composing any of these Divisional Courts. Each Division is to follow the same practice, and therefore the Chancery Division is empowered to use the criminal practice and procedure which was formerly peculiar or limited to the Common Law Courts:—Held, per Ferguson, J., that the court had not jurisdiction to entertain the matter, inasmuch as it was a Divisional Court sitting under the provisions of Con. Rule 218; and had, therefore, only power to exercise the jurisdiction of the High Court for the purposes referred to in R. S. O. (1877), c. 44, s. 62, and not the power to exercise the full jurisdiction of the High Court, such as, semble, would be possessed by a division of the court sittings under the provisions of old marginal Rule 480. There were no rules of court whereby it had been ordered that any criminal business should be transacted and disposed of by this Divisional Court of the High Court, for the purpose of which it would be necessary to exercise any part of the criminal jurisdiction of the High Court. *Regina v. Birchall*, 19 O. R. 697.—Chy. D.

See *Regina v. Beemer*, 15 O. R. 266.

#### 2. Appeals to.

##### (a) From Single Judge.

Where a judge in single court had, before the Judicature Act, decided applications to quash a by-law and to set-off judgments:—Held, that



under the Act there could be no appeal to a Divisional Court. *In re Galerno and the Township of Rochester*; *Grant v. McAlpine*, 46 Q. B. 379.—Q. B. D.

A Divisional Court has no jurisdiction to entertain an appeal from an order of a judge, made in court on motion, except by consent. *Re Galerno*, 46 Q. B. 379, followed. *McTiernan v. Fraser*, 9 P. R. 246.—Chy. D.

Rules 274 and 317, O. J. Act (See Con. Rule 798), restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of fact have been undisputed, and in which it is only sought to modify or set aside the conclusion drawn by the judges therefrom; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal. *Trude v. Phenix Ins. Co.*, 29 Chy. 426.—Chy. D.

Although the decree was pronounced before the Judicature Act, and might have been reheard under the former practice, yet the cause not having been set down to be reheard before the coming into force of the Act, it could not under the provisions of the Act respecting pending business, be reheard. *Ib.*

An action having been tried before a judge with a jury, the judgment was directed to be entered by the judge upon the answers to questions put by him to the jury, and the damages were assessed by the jury. The defendants subsequently moved before the three judges of the Divisional Court to set aside the judgment directed to be entered, but the Divisional Court, when giving judgment upon the motion, consisted of two judges only, one of them being the judge at the trial:—Held, that a court so constituted had by reason of section 29, sub-section 5 of the Judicature Act, no power to give judgment, and there being therefore nothing to appeal from leave to appeal was refused. *Cochrane v. Boucher*, 8 A. R. 555.

Held, that a Divisional Court may review the action of a judge in setting aside a writ of ca. sa. and the arrest thereunder, and also his action in making the order to arrest. *Cartwright v. Hinds*, 3 O. R. 384.—C. P. D.

This action was not tried, but was referred to the master, further directions and costs being reserved. After report made the case was heard on further directions before Proudfoot, J.:—Held, that the case could not be reheard before the Divisional Court, as the proceedings taken could not be regarded as the trial of an action within the meaning of Rules 317 and 310 O. J. Act (See Con. Rule 798). *Wansley v. Smallwood*, 10 P. R. 233.—Chy. D.

Held, notwithstanding section 28, sub-sections 2 and 3, O. J. Act, that the Divisional Court had jurisdiction to hear an appeal from the order of Armour, J., in this case having regard to the language of Rule 254, O. J. Act (Con. Rule 653), and of the order itself. *Bull v. North British Canadian Loan and Investment Co. (Limited)*, 11 P. R. 83.—C. P. D.

An order of a judge sitting at the assizes changing the place of trial on leave given by the master in chambers, who refused the application, to so appeal from his decision was held to

be an order of the judge and not of the High Court, and could therefore be reviewed by the Divisional Court. *Sarnia Agricultural Implement Manufacturing Co. v. Perdue*, 11 P. R. 224.—C. P. D.

The trial of a petition before a judge at the assizes, praying that a liquidator might be ordered to deliver up certain lumber claimed by a bank is not the trial of an action, and, therefore, no appeal lies to the Divisional Court. *Re Rainey Lake Lumber Co.*, 12 P. R. 27.—Chy. D.

Leave was given to appeal from the decision of Proudfoot, J. (12 O. R. 492), because of the importance of the question and of conflicting decisions. An appeal now lies to a Divisional Court from a discretionary order, by virtue of 49 Vict. c. 16, s. 39 (Ont.), but that enactment has not altered the rule that a very strong case must be made out to induce the court to reverse such an order. *Powell v. Peck*, 12 P. R. 34.—Proudfoot.—Chy. D.

Held, that no appeal will lie to a Divisional Court from the decision of a judge acting under R. S. C. c. 109 s. 8, sub-s. 28. *Re McQuillan and the Guelph Junction R. W. Co.*, 12 P. R. 294.—Chy. D.

The jurisdiction of the full court to rehear motions to quash convictions has not been taken away by the Judicature Act, but still exists in the Divisional Courts. *Regina v. Fee*, 13 O. R. 590.—Chy. D.

See *Imperial Loan Co. v. Baby*, 13 P. R. 59, p. 858; *Regina v. McAuley*, 14 O. R. 643; *Till v. Till*, 15 O. R. 133, p. 859; *Cousineau v. City of London Fire Ins. Co.*, 15 O. R. 329, p. 859.

#### (c) Other Appeals.

An interpleader issue arising out of an action in the Chancery Division of the High Court of Justice was sent to a County Court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7 (Ont.), rather than under the interpleader jurisdiction of the old Court of Chancery; and that being so, that a Divisional Court of the High Court of Justice had no jurisdiction to hear an appeal from the judgment of the County Court on such issue, and that such appeal should have been to the Court of Appeal under R. S. O. (1877) c. 54, s. 23. *Close v. Exchange Bank*, 11 P. R. 186.—Chy. D.

Pending proceedings under an order for the winding-up of a company under 45 Vict. c. 23 (Dom.), the Union Bank filed a petition praying that the liquidator might be ordered to deliver up certain lumber claimed by the bank. The petition came on to be heard before a judge in court, and was adjourned by him for the sake of convenience before the judge holding the Port Arthur assizes, who heard the evidence orally and pronounced judgment thereon:—Held, that the proceeding at Port Arthur was not the trial of an action, and therefore and also having regard to the provisions of 45 Vict. c. 23, s. 73 (Dom.), that no appeal lay to the Divisional Court. *Re Rainey Lake Lumber Co.*, 12 P. R. 27.—Chy. D.

Per Car cannot review having jurisdiction upon the O. R. 380.

A mandamus will annex of the next papers), not out of the against the applicant since the time of the will for an application in Courts Act would appeal contests the one was done jurisdiction Monteith, I.

An appeal court:—H. Con. Rule 1 elapsed and Hewson v.

As to set Divisional patch Co., 4

Held, in a case argued before the judge, the plaintiff succeeded in her costs of the suit, to portionment received. *Id.*

When a case is heard, a summons strike it out 233.—Chy.

The decision of the 14th, and the 15th, of the month, being the 19th, was on an application for a writ of mandamus. Rule 414 (the appeal was the court, were with 10 P. R. 27.—Chy. D.)

The judgment of the 19th of the month, settled till the Chancery Division, the defendant was the 19th of the month, the neglect as the judge could not Rule 800 attention to

Per Cameron, C. J. The Divisional Court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence. *In re Weir*, 14 O. R. 380.

A mandamus was directed to issue to compel the judge of the Surrogate Court of the county of Wellington to grant administration with the will annexed of a certain testator to G. D., one of the next of kin (who had filed all necessary papers), notwithstanding that in an issue directed out of the said Surrogate Court a jury had found against the will. It appeared that the present applicant was no party to that issue, and that since the trial of it this court had held in favour of the will:—Held, that this was not a case for an appeal from the refusal to grant administration under the 31st section of the Surrogate Courts Act, because an appeal under that section would appear to be granted only when some one contests the grant of administration, which no one was doing here:—Semble, that this court has jurisdiction to declare a will valid. *Dickson v. Monteith*, 14 O. R. 719.—Proudfoot.

#### (d) Practice on Appeals.

An appeal made at the first sittings of the court:—Held, not too late under Rule 414 (See Con. Rule 847) though more than eight days had elapsed and the time had not been extended. *Hewson v. Macdonald*, 32 C. P. 407.—C. P. D.

As to separate appeals to Court of Appeal and Divisional Court. See *Hately v. Merchants' Despatch Co.*, 4 O. R. 723.

Held, in this case, that inasmuch as the plaintiff succeeded in the only branch of the case argued before the Divisional Court, she should get her costs of that appeal, but as to the rest of the suit, to save the expense and trouble of appointment, no costs should be given or received. *Gough v. Bench*, 6 O. R. 699.—Chy. D.

When a case is improperly set down to be reheard, a substantive motion should be made to strike it out. *Wansley v. Smallwood*, 10 P. R. 233.—Chy. D.

The decision appealed from was given on the 14th, and the notice of appeal on the 26th November, the first day of Michaelmas sittings being the 17th November:—Semble, that this was an appeal from a judge, and not a substantive motion to rescind his order, and if so, and Rule 414 (See Con. Rule 847) was to govern, the appeal was too late, but:—Held, even so, that the court would extend the time, as the merits were with the appellant. *McLaren v. Marks*, 10 P. R. 451.—Q. B. D.

The judgment at the trial was pronounced on the 19th of June, 1885, but was not drawn up and settled till the 11th September. The sittings of the Chancery Divisional Court (to which the defendant wished to appeal) began on the 3rd September:—Held that the time for appealing under Rule 523 (See Con. Rule 798) began to run from the 19th June, and that it was not extended by the neglect to draw up the judgment, although, as the judgment was not drawn up, the cause could not be set down under Rule 522 (Con. Rule 800). But, as there was a bona fide intention to appeal, instructions had been given,

the defendant lived abroad, in Texas, the judgment was complex, and there were only twelve days exclusive of vacation during which it could have been settled, leave to set the cause down was granted on payment of costs. *Hickey v. Stover*, 11 P. R. 88.—Chy. D.

A motion to extend the time for moving before a Divisional Court against the judgment of the trial judge should not be made to a judge in chambers, but to the Divisional Court itself. *Imperial Loan Co. v. Baby*, 13 P. R. 59.—Ferguson.

New evidence was allowed to be used upon appeal under Con. Rule 585, and the decision of Ferguson, J. (13 P. R. 388), was reversed thereupon. The discovery of the new evidence after a sitting of the Divisional Court had passed was received as an excuse for delay. *Leach v. Grand Trunk R. W. Co.* (2), 13 P. R. 467.—Chy. D.

It was contended by the plaintiffs before a Divisional Court that the defendants were members of a de facto corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial. The court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions, as they might be advised. *Flatt v. Waddell—Townsend v. Waddell*, 18 O. R. 539.—Q. B. D.

See *Cochrane v. Boucher*, 8 A. R. 555, p. 855; *Pierce v. Palmer*, 12 P. R. 308, p. 35.

#### 6. Other Cases.

Per Patterson, J. A.—By the effect of the Judicature Act a decision of any one division is a decision of the High Court. *In re Hall*, 8 A. R. 135.

An award having been directed to be made within a year by an order of the Chancery Division where the parties were litigating concerning it:—Held, that a motion to set it aside should have been made in that division, and should be transferred. *In re Township of Muskoka and Village of Gravenhurst*, 6 O. R. 352.—Cameron.

An objection that a notice of motion given for a sittings of the Divisional Court, and served in time to be set down during that sittings, could not be set down in the following sittings, was overruled. *Brassart v. McEwen*, 10 O. R. 179.—C. P. D.

In moving to quash a by-law, the practice having been adopted of applying to a judge sitting alone, an objection that the application should have been to the Divisional Court was not entertained; but such an application if required to be made to the Divisional Court, must be to the common law Divisional Courts, and not to the Chancery Divisional Court. *In re Finsdon and the Township of Tilbury East*, 11 O. R. 75.—O'Connor.

The Divisional Court ought not to entertain applications to quash by-laws, which should be made to a single judge. *Landry v. City of Ottawa*, 11 P. R. 442.—C. P. D.

The two judges who composed the Divisional Court at the hearing of this case disagreeing, a

motion to set aside the judgment of the trial judge in favour of the plaintiff was dismissed. *Cousineau v. City of London Fire Ins. Co.*, 15 O. R. 329.—Q. B. D.

See *Regina v. Bunting*, 7 O. R. 118, p. 852.

#### IV. SINGLE JUDGE.

Held, that a single judge, sitting as the court, has power to review the findings of an official referee upon a reference under section 48 O. J. Act. *Hill v. Northern Pacific Junction R. W. Co.*, 11 P. R. 103.—Ferguson.

The judge who presides at the trial and pronounces judgment by default for the defendant in the absence of the plaintiff, has power under Rule 270 O. J. Act (Con. Rule 795), when afterwards sitting as the court at Toronto, to set aside such judgment. *Ross v. Carscallen*, 11 P. R. 104.—Ferguson.

Applications to quash by-laws. See *In re Funston and Tilbury East*, 11 O. R. 74, p. 858; *Lantry v. City of Ottawa*, 11 P. R. 442, p. 858.

As to power to hear motions to quash convictions. See *Regina v. McAuley*, 14 O. R. 643.

A judge has jurisdiction under section 48 O. J. Act, to make a compulsory order referring not only questions of account, but also all the issues of fact in any action to an official referee. *Ward v. Pilley*, 5 Q. B. D. 427, followed. *Shields v. MacDonald*, 14 A. R. 118.

Under the O. J. Act, s. 25, sub-s. 2, a judge sitting elsewhere than in a Divisional Court is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of the Divisional Court. *Till v. Till*, 15 O. R. 133.—C. P. D.

On the trial of an action, the pleadings were admitted to state the facts, and what was called "a special case on the pleadings," was reserved for the opinion of the judges of this court. On the case coming before the Divisional Court it was held that the special case as such could not be entertained; but the application was directed to be turned into a motion for judgment under Rule 323, (Con. Rule 757) or on the pleadings and admissions under Rules 315 and 321. (Con. Rules 748, 755.) *Ib.*

Appeal directly to the Supreme Court without any intermediate appeal either to the Divisional Court or the Court of Appeal. See *Kyle v. Canada Company*—*Hislop v. Town of McGillivray*, 15 S. C. R. 188.

See *Synod v. DeBlaquiere*, 10 P. R. 11; *Regina v. Beemer*, 15 O. R. 266.

See also Subhead III. 2, (a), p. 854

#### HIGH SCHOOLS.

See PUBLIC SCHOOLS.

#### HIGHWAY.

See WAY.

#### HIRING.

##### I. OF CHATTELS, 860.

##### II. OF EMPLOYEES—See MASTER AND SERVANT.

##### III. OF CONVEYANCES AND ROOMS AT ELECTIONS — See PARLIAMENTARY ELECTIONS.

##### I. OF CHATTELS.

Action for false representation and for implied warranty on the sale of a piano under a "hire contract." See *Frye v. Milligan*, 10 O. R. 509.

Plaintiff sued the defendants for the value of a portable engine and boiler which had been hired by the defendants, and which boiler had exploded when in their possession immediately after they had begun to use it, and while in charge of a competent engineer.—Held, that as the lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff, in the absence of negligence on the part of the defendants, could not recover. Per Armour, J.—The plaintiff was bound to establish beyond reasonable doubt that the defendants were guilty of negligence, and that such negligence caused the explosion and destruction of the boiler and engine, and the negligence required to be established was ordinary negligence, for the hirer of a chattel is required to use no more than that degree of diligence which prudent men use, that is, which the generality of men use in keeping their own goods of the same kind. The explosion and destruction of the engine and boiler not being legally attributable to the negligence of the defendants, they were relieved from the performance of their promise to return them, and the contract of hiring was dissolved. *Reynolds v. Roxburgh*, 10 O. R. 649.—Q. B. D.

Remarks upon the position of holders of hire receipts after resuming possession of the chattels covered thereby. *Discherv. Canada Permanent Loan and Savings Co.*, 18 O. R. 273.—Boyd.

Where machinery was sold upon the terms expressed in a hire receipt that "The title of and right to the possession of the above mentioned property wherever it may be, shall remain vested in the said vendor and subject to his order until paid for in full"—Held, that the vendor or his assigns had the legal right (the purchase money being in arrear and unpaid) to enter upon the premises where the property was, in order to resume actual possession of the machinery, giving notice and using all care in so doing, but that it would be illegal for him to take possession by force, and an injunction might properly issue to restrain acts of force on behalf of the vendor, but only on the terms that the assignee of the vendee be likewise enjoined from using force in resisting the vendor. Before taking possession of the machinery the vendor was ordered to give such security as is usual in replevin. *Traders' Bank of Canada v. G. & J. Brown Manufacturing Co.*, 18 O. R. 430.—Boyd.

See *Oliver v. Newhouse*, 32 C. P. 90; *Thomas v. Inglis*, 7 O. R. 588, p. 753; *Bickford v. Canada Southern R. W. Co.*, 14 S. C. R. 743, p. 47.

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Injunction from erecting other municipality v. T.

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**HOLIDAY.**

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**HORSE RACE.**See *Davis v. Hewitt* 9 O. R. 435, p. 833.**HOSPITAL.**

Injunction granted to restrain a municipality from erecting a smallpox hospital within another municipality. See *Township of Elizabeth-ton v. Town of Brockville*, 10 O. R. 372.

**HOTCHPOT.**

A secured creditor need not bring his security into hotchpot as a condition precedent to ranking on the estate of a deceased person, his lien being expressly preserved by the Act, R. S. O. (1877), c. 107, s. 30. *Chamberlen v. Clark*, 1 O. R. 135.—Proudfoot; 9 A. R. 273.

J. H. died intestate, and among his assets was a promissory note for \$500 made by his son in respect to moneys received by the latter from him. The son pre-deceased J. H. and died intestate and insolvent, leaving a child, who, under the Statute of Distributions, was entitled to a one-fifth distributive share of the estate of J. H.:—Held, that the grandchild of J. H. was not bound to bring the \$500 into hotchpot before sharing in the estate of J. H., and that R. S. O. (1877), c. 105, ss. 41-43, did not apply to this case. *Re Hall*, 14 O. R. 557.—Boyd.

Difference between the law of England and our own as to advancements to children commented on. Under our law advancement is neither a loan nor debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution. *Ib.*

Semble, that the administrator of J. H. did not properly and fully represent the next of kin entitled to share in the estate of J. H., and they would not be bound by any decision in their absence. *Ib.*

**HOTEL.**

See INNKEEPER—INTOXICATING LIQUORS.

**HUSBAND AND WIFE.**

I. ACTION FOR BREACH OF PROMISE OF MARRIAGE, 863.

II. MARRIAGE, 866.

III. REMOVAL OF DISABILITY BY MARRIAGE, 867.

**IV. MARRIAGE SETTLEMENTS.**

1. Generally, 868.

2. *Fraudulent against Creditors.*—See FRAUDULENT CONVEYANCES.

V. HUSBAND AND WIFE TAKING BY ENTIRE-TIES—See ESTATE.

VI. TENANCY BY CURTESY—See ESTATE.

VII. DOWER—See DOWER.

VIII. PROPERTY, RIGHTS AND LIABILITIES OF WIFE.

1. *Separate Estate*, 869.2. *Conveyance of Real Estate*, 871.3. *Redemption of Husband's Mortgage*, 873.4. *Liability on Contracts.*

(a) Generally, 874.

(b) *Husband's Contracts*, 876.(c) *Separate Trading*, 877.5. *Liability for Torts*, 880.6. *Judgment and Execution*, 880.7. *Liability to Arrest or Commitment*, 881.8. *Quarantine*, 881.9. *Dower*—See DOWER.10. *Wills by Married Women*—See WILL.

IX. DEALINGS BETWEEN HUSBAND AND WIFE.

1. Generally, 882.

2. *Gifts between Husband and Wife*—See FRAUDULENT CONVEYANCES—GIFT—VOLUNTARY CONVEYANCES.

X. HUSBAND'S LIABILITIES.

1. *For Wife's Necessaries*, 883.2. *On Contracts made by Wife*, 884.

XI. ACTIONS AND PROCEEDINGS BY AND AGAINST.

1. *Wife Suing by Next Friend*, 884.2. *Parties to Suits.*

(a) Generally—See PLEADING.

(b) *Foreclosure*—See MORTGAGE.(c) *Specific Performance*—See SPECIFIC PERFORMANCE.3. *Actions by Wife Against Husband*, 884.4. *Other Cases*, 885.5. *Motion for Judgment against Wife under Con. Rule 739*—See JUDGMENT.

XII. DEED OF SEPARATION, 886.

XIII. FOREIGN DIVORCE, 887.

XIV. ALIMONY.

1. *Writ of Arrest*, 887.2. *Writ of Ne Exeat*, 888.3. *Particulars*, 888.4. *When Granted.*(a) *Desertion*, 888.(b) *Interim Alimony*, 888.





which affords a justification in law for a breach of a promise to marry. It is no justification to shew that the woman had been heard to use obscene language; nor is such evidence admissible in mitigation of damages, although general evidence of reputation may perhaps be admissible. *Ib.*

In an action for breach of promise of marriage the plaintiff swore to the promise, and the defendant denied it, and alleged that the plaintiff had been his mistress, which she denied. Witnesses were called on her behalf who shewed that the parties were of the same social rank; that there was nothing unreasonable or improbable in their becoming engaged to be married; that he formed her acquaintance in 1880, and then commenced and continued for about six years to pay her attention, during which time his visits to her were constant; that he took her out driving frequently; that she received the attentions of no other man during that period, nor did he pay attention to any other woman; that he was received by her family as a lover; that he went to see and sat up with her father during his last illness; and that he made her frequent presents of jewellery, wearing apparel, and money. Letters also were put in by the plaintiff, written by the defendant to her about the time it was alleged he had broken off their engagement, addressing her in loving terms. The jury found that there was a contract, and a breach by the defendant, and that the defendant had failed to prove his defence; and they gave the plaintiff damages:—Held, that the evidence given was material evidence in support of the promise to marry, and that it furnished the corroboration of the plaintiff's testimony required by R. S. O. (1887) c. 61, s. 6. *Yarrowd v. Hart*, 16 O. R. 23.—Q. B. D.

It was contended that the evidence was as consistent with the keeping by the defendant of the plaintiff as his mistress, as it was with an engagement to marry:—Held, that the presumption was in favour of the moral and against the immoral relationship; and the fact that the defendant set up the immoral relationship as a defence did not render the evidence less material in support of the promise. *Ib.*

In an action for breach of promise of marriage the defendant admitted a promise but said that he was an infant when he made it, and that there was no ratification in writing after majority, as required by R. S. O. (1887) c. 123, s. 6. The plaintiff insisted that there was no engagement between her and the defendant until he became of age on the 20th August, 1887. The jury found that the promise to marry was first made on that day. There being evidence to sustain that finding, and also evidence upon which the jury might have found a previous promise, the court refused to interfere with the finding. There was evidence to corroborate the statement of the plaintiff that an engagement to marry existed, such evidence being not inconsistent with the precise engagement sworn to by the plaintiff as having been entered into on the 20th August, 1887:—Held, that this evidence satisfied the requirements of R. S. O. (1887) c. 61, s. 6, and it was not necessary that it should go so far as to negative the promise which the defendant admitted he made before majority. *Smith v. Jamieson*, 17 O. R. 626.—Q. B. D.

The plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August:—Held, that this was not an agreement not to be performed within a year, and was therefore not void under the Statute of Frauds, although not in writing. *Ib.*

In an action for breach of promise of marriage the plaintiff's evidence was that after promising to marry her in 1885, the defendant in March, 1886, visited her and repudiated his promise, whereupon she ordered him out of her house, and refused afterwards to renew the engagement. The trial judge nonsuited the plaintiff on the ground that this amounted to an absolute release, and that the relationship between the parties was terminated:—Held, that the defendant having previously violated his engagement, the matter should have been left to the jury, who might have reasoned that the plaintiff chose to consider the connection at an end, and that she was not willing to subject herself to the pain and mortification of being again deceived. *Reynolds v. Jamieson*, 19 O. R. 235.—Chy. D.

## II. MARRIAGE.

In order to render void a ceremony of marriage, otherwise valid, on the ground that the man was intoxicated, it must be shewn that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of knowing what he was about. *Roblin v. Roblin*, 28 Chy. 439.—Proudfoot.

Semble:—A combination amongst persons, friendly to a woman, to induce a man to consent to marry her, it not being shewn that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid the marriage. *Ib.*

A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about is voidable only and may be ratified and confirmed. *Ib.*

Three years after the ceremony of marriage, which the man alleged he had been induced to enter into while under arrest and intoxicated, an action at law was brought against him for necessities furnished to the woman, and for expenses incurred in the burial of her child, in which the validity of the marriage was distinctly put in issue. Before the cause was called on for trial, the man signed a memorandum endorsed on the record in which he admitted the existence and validity of the marriage, and consented to a verdict for the plaintiff in the action:—Held, that if the marriage was previously voidable, it was thereby confirmed. *Ib.*

By English law as adopted in this province in 1792, marriage with a deceased wife's sister was not ipso facto void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such remained the law here until 45 Vict. c. 42 (Dom.), which removed all disabilities. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

In ejectment it appeared that M., one of the defendants, was married to N., 7th February, 1886, on one calling of banns, a dispensation having been procured from the Roman Catholic



Archbishop for the other two calls, both parties belonging to that faith. The husband had immediate and continued possession of the land in question under deed to him. Of this marriage was born, 20th February, 1867, an only daughter. N. died 3rd May, 1868, and his widow M., on 11th October, 1870, intermarried with the defendant K., and they continued in uninterrupted possession until the issue of the writ herein. On 11th January, 1886, the daughter of M. & N. intermarried with the plaintiff, to whom was born, in wedlock (3rd July, 1886,) though conceived before, the infant plaintiff, the mother dying on the following day. On the issue of the writ herein by the plaintiff and his infant daughter against M. and her husband, the defendant K., they claimed title by possession and denied the validity of the marriage between M. and N., on the ground of the non-publication of banns:—Held, (1) That the onus of disproving the marriage was on the defendants. (2) That 26 Geo. II., c. 33, was in force in Canada as to publication of banns. (3) That 37 Vict. c. 6, s. 1, remedied any defect in the marriage. (4) That the invalidity was not established, inasmuch as defendants did not prove that no license had been issued for this marriage, so as to overcome the legal presumption in favour of marriage. *O'Connor v. Kennedy*, 15 O. R. 20.—Q. B. D.

Per Armour, C. J.—Full effect is given to the proviso of section 1 of 37 Vict. c. 6 (Ont.) by reading it as limited to preserving the invalidity of a marriage illegally solemnized, when either of the parties to such illegal marriage has since, during the life of the other, contracted marriage according to law. *Ib.*

The High Court of Justice in this province has jurisdiction, where a marriage correct in form is ascertained to be void de jure by reason of the absence of some essential preliminary, to declare the same null and void ab initio; but nothing short of the most clear and convincing testimony will justify the interposition of the court. *Lawless v. Chamberlain*, 18 O. R. 296.—Boyd.

Where duress is alleged, it must be manifest that force preponderated throughout, so as to disable the one interested from acting as a free agent. Although the plaintiff in this action, in which he sought to have his marriage with the defendant declared void, on the ground that he was forced into it by intimidation and threats, at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary and final details, and submitted to the proposed method of procedure, and intelligently forwarded its accomplishment.—Held, on the evidence, that his consent to the marriage was proved. *Ib.*

Held, also, that section 11 of 26 Geo. II., s. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license, without the consent of parent or guardian, was absolutely void, is not in force in this province. *Ib.*

See *Wadsworth v. McCord*, 12 S. C. R. 466; *McMullen v. Wadsworth*, 14 App. Cas. 631, p. 556.

### III. REMOVAL OF DISABILITY BY MARRIAGE.

See *Cameron v. Walker*, 19 O. R. 212.

## IV. MARRIAGE SETTLEMENTS

### 1. Generally.

The plaintiff, in 1854, being about to marry, conveyed certain lands to trustees—one of whom was her intended husband—upon trust to suffer her to receive the rents, etc., to her own use during her natural life, and upon her death, if she should leave a child or children surviving her, in trust to convey the lands, etc., unto such child or children, their heirs, etc., for ever, freed and discharged of the trust mentioned in the deed; and in case of her death, before her husband, without any child, in trust to permit him to receive the rents, etc., for life, and after his death, or in case he should die before the plaintiff, she leaving no child, then in trust to convey the said lands to her right heirs, freed and discharged from the trusts thereof. The deed gave the trustees power to sell or lease, and also to borrow on the security of the lands. The husband died in 1879, there never having been any child of the marriage, and the plaintiff, who was then fifty-three years old, requested the trustees to reconvey the trust estate to her, which they declined to do without the sanction of the court, as the trust for children was not confined to the issue of the then contemplated marriage, but was wide enough to include the children of any other marriage, but:—Held, that as there were no children, and it must be assumed that the plaintiff never could have any children, she was entitled, as equitable tenant in fee simple, to call upon the trustees for a conveyance; the costs of the trustees to come out of the estate. *Farrell v. Cameron*, 29 Chy. 313.—Proudfoot.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside. The plaintiff, who had just come of age, being about to marry, applied to her solicitor, who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage:—Held, that it was not a voluntary settlement, and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake. *Hillock v. Button*, 29 Chy. 490.—Proudfoot.

It is evident from the scope of C. S. U. C. c. 73 that notwithstanding a marriage settlement any separate personal property of a married woman acquired after marriage and not coming under or being affected by such settlement, shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without a settlement. *Dawson v. Moffatt*, 13 O. R. 170.—Boyd.

By antenuptial settlement made in 1881, as reformed afterwards by decree of this court, C. G. being possessed of \$25,000, and also of \$1,000, conveyed these sums to trustees on trust

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after the marriage to pay the income to her, to her separate use, and after her decease to pay the said income, or such part as she should appoint to R. G., her intended husband, during his life, and after his death, on trust, "to and for any child or children of the said intended marriage, share and share alike if more than one, and if only one, then to such one in trust to apply the yearly income, revenue and increase arising from the said trust funds and estate towards the maintenance, support and education of such children during their respective minorities, each child to receive his or her share of the principal of said trust fund and estate on his or her attaining the age of twenty-one years, or in case of females on attaining such age or being married." The marriage took place, and C. G. died in 1884, leaving R. G. her surviving, and two children, issue of the marriage, H. R. G. G. and A. G. G. the former of whom, however, died in 1886, under age:—Held, that H. R. G. G. took a vested interest at birth in the moiety of the sums of \$25,000 and £1,000, and that R. G., his father, was entitled, as next of kin of H. R. G. G. to a moiety of said amounts, and that letters of administration should be taken out to his estate before the same could properly be paid to R. G. *Gill v. Gilmour*, 14 O. R. 129.—Boyd.

Settlement of personal property. Registration of instrument as bill of sale. Affidavit of bona fides. Wife maintaining claim, without joining trustee in the settlement, to goods in interpleader issue. See *Connell v. Hickock*, 15 A. R. 518.

See *Ferris v. Ferris*, 9 O. R. 324, p. 593. *Hughes v. Rees*, 5 O. R. 654.

#### VIII. PROPERTY RIGHTS AND LIABILITIES OF WIFE.

##### 1. Separate Estate.

In January, 1856, R. McC. sold certain real estate to J. McC., his sister, by notarial deed, in which she assumed the qualities of a wife duly separated as to property of her husband, J. C. A. After the latter's death, in 1866, J. McC., before a notary, renounced to the communauté de biens which subsisted between her and her late husband. E. C. K., a judgment creditor of R. McC., seized the said real estate as belonging to the vacant estate of the said R. McC., deceased. J. McC. opposed the sale on the ground that the seizure was made super nom domino et possidente, and setting up title and possession. She proved some acts of possession, and that the property had stood for some time in the books of the municipality in her name. E. C. K. contested this opposition on the ground that J. McC.'s title was bad in law, and simulated and fraudulent, and that there was no possession:—Held, that by her renunciation to the communauté de biens which subsisted between her and her late husband at the date of the deed of January, 1856, J. McC. divested herself of any title or interest in said lands, and could not now claim the legal possession of the lands under that deed or by prescription, or maintain an opposition because the seizure was super nom domino et non possidente. *McCorkill v. Knight*, 3 S. C. R. 233.

The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land and had it conveyed to his wife, the plaintiff; who with the rents and profits thereof, she and her husband not living on the land, with money raised by mortgage thereof, and with money borrowed from her sons, purchased the chattels in question herein, which were seized under execution against the husband:—Held, that the chattels were her separate property within the meaning of R. S. O. (1877) c. 125, s. 1, and free from the debts of her husband. *Trotter v. Chambers*, 2 O. R. 515.—Q. B. D.

Held (reversing the judgment of the County Court of York), that the rents derived by a feme covert, married before 1859, from real estate acquired by her in 1865, were her separate estate. *Horner v. Kerr*, 6 A. R. 30.

The plaintiff, a widow, had, during her coverture, lent the defendants a sum of money which she earned when living apart from her husband, who had never made any claim to this money, or to any of her earnings:—Held, affirming the judgment of the County Court, that the plaintiff was entitled to recover, as the evidence shewed that the husband had acquiesced in her treating her earnings as her separate property; and that C. S. U. C. c. 73, which was in force when the money was lent, in no way abridged the power of the husband to make such a settlement by his acts or acquiescence as well as by a formal writing or distinct words. *Carroll v. Fitzgerald*, 6 A. R. 93.

The plaintiff, a married woman, who had been married in 1864, lived on a 200 acre lot with her husband and children. The land had belonged to her husband's father, who died in 1874, having devised the east half to the plaintiff's son, a minor, and the west half to the plaintiff, there being then a judgment against the husband, which it was supposed was the testator's reason for such devise. The whole farm had been occupied and farmed together, the plaintiff being under the impression that she was entitled to the son's half until he came of age. The husband did some little work about the place, but it was generally known and understood by those who worked upon the farm, as well as by the public, that the place was hers and how it had been left to her. The crops having been seized under an execution issued upon the judgment above mentioned:—Held, on an interpleader issue; 1. That the wife was not carrying on any occupation or trade separate from her husband, nor were these crops her wages or earnings, within section 7 of the Married Woman's Property Act, R. S. O. (1877) c. 125; 2. That she was entitled to such crops as owner of the land, for the husband could not be said to be working the farm as head of the family, and the case was distinguishable, therefore, from *Leff v. Commercial Bank*, 24 Q. B. 552; 3. That the crops on both halves of the lot must be treated in the same way, the whole being managed in all respects as one farm. *Ingram v. Taylor*, 46 Q. B. 52.—Q. B. D.; 7 A. R. 216.

A petition was presented by the husband of D. to declare his wife a lunatic which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit

of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dunbrill*, 10 P. R. 216.—Boyd.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was before the Married Woman's Property Act, 1884, was passed:—Held, reversing the judgment of Osler, J. A. (6 O. R. 581), that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but was property falling within R. S. O. (1877) c. 125, s. 3, and she not having the *ius disponendi* without her husband's concurrence, her interest was not liable to be sold under execution against her. *Douglas v. Hutchison*, 12 A. R. 110.

Quare, per Patterson, J. A., whether a writ of *fieri facias* is the appropriate remedy for reaching the separate property of a married woman. *Id.* See however *Beemer v. Oliver*, 10 A. R. 656, 661, per Osler, J. A.—See 50 Vict. c. 8.

A married woman to whom land is conveyed, subject to incumbrance, whether by way of purchase or exchange, is bound to indemnify her grantor against the payment of such incumbrance and the property so conveyed to her is separate estate with respect to which such obligation arises. *McMichael v. Wilkes*, 19 O. R. 739.—C. P. D.

See *In re Widmeyer v. McMahon*, 32 C. P. 187, p. 881; *Murray v. McCallum*, 8 A. R. 277, p. 879; *Griffin v. Patterson*, 45 Q. B. 536, p. 874; *O'Doherty v. Ontario Bank*, 32 C. P. 285, p. 815; *Sims v. Wright v. Lys*, 24 Chy. 498; *Sanders v. Malburg*, 1 O. R. 178, p. 882; *Southam v. Rindou*, 9 A. R. 530, p. 162; *Smith v. McLellan*, 11 O. R. 191; *Dawson v. Moffatt*, 13 O. R. 170, p. 868; *Ambrose v. Fraser*, 14 O. R. 551, p. 877; *Klock v. Chamberlin*, 15 S. C. R. 325, p. 877.

## 2. Conveyance of Real Estate.

Where a deed in a chain of title had been made to a husband and wife as joint tenants:—Held, following *Shaver v. East*, 31 Q. R. 603, that notwithstanding the terms of the deed the husband and wife took by entireties. And when the husband made a conveyance of the same land in the lifetime of his wife, she merely joining to bar her dower, and she predeceased her husband:—Held, that the husband's deed conveyed the fee. *Re Morse*, 8 P. R. 475.—Blake.

In 1834, C. A., a married woman, purported to convey to one T., in fee, the east half of a lot of land granted to her by the Crown, but the conveyance was invalid by reason of the want of the usual certificate by justices of the peace on the deed. T. never took possession, but in 1852 conveyed to H., through whom the plaintiff claimed. In or about the year 1866, the two

sons of C. A. went and resided on the west half of the land upon the understanding and agreement with their mother that they were to have the whole lot, but no conveyance was executed to them until 1875. During the interval, however, the sons paid the taxes on the whole property, and cut timber at times on the east half:—Held (reversing the judgment of the Q. B. D. 2 O. R. 352), that this was a sufficient "actual possession or enjoyment" of the east half of the lot to prevent the operation of section 13 of R. S. O. (1877) c. 127 (36 Vict. c. 18, s. 12), by means of which such void deed would be rendered valid. Osler, J. A., dissenting. *Elliott v. Brown*, 11 A. R. 228.

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully compos mentis, and no unfair advantage having been taken of her, the agreement could not be set aside. B.'s marriage took place in 1876, and the land was held by her to her separate use:—Held, that the concurrence of her husband in the contract was unnecessary, nor was it necessary for him to join in the conveyance. *Bryson v. Ontario and Quebec R. W. Co.*, 8 O. R. 380.—Ferguson.

The real estate of a married woman, married after March 2nd, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband; and her contracts respecting such real estate are binding upon her without the joinder of her husband. *Id.*

J. H., by his will dated 14th April, 1874, devised certain property to his daughter, M. A. J., for life, with remainder to her children, and died soon after making the will. M. A. J. died about 1880, leaving five children, the youngest of whom came of age in 1884. Before the death of J. H., one of the children, M. J. J., married one C., and C. in 1870 deserted his wife and had not been heard of afterwards:—Held, that M. J. J. could convey her interest in the property without the concurrence of her husband. *Re Coulter and Smith*, 8 O. R. 536.—Ferguson.

Upon a petition under the Settled Estates Act, Boyd, C., dispensed with the examination required by the Act of a married woman interested who lived out of the jurisdiction, but not one who lived within the jurisdiction. The Married Woman's Property Act, 1884 (Ont.), does not apply to cases under the Settled Estates Act, where the woman had acquired the property before the passing of the former Act. *Re English*, 11 P. R. 198.—Boyd.

Where a woman, married in 1867 without marriage settlement, acquired lands in 1879, by deed of conveyance to her in fee simple absolute:—Held, that she could convey the said lands to a purchaser without the concurrence of her husband. *Re Konkle*, 14 O. R. 183.—Ferguson.

In an action for specific performance by a married woman, the question was whether the husband of the plaintiff was entitled to a tenancy by the curtesy initiate in certain land of the

plaintiff's husband, who died in 1867, was acquired in 1879, and the case was decided in 1884, 4 of R. S. O. (1877) c. 125, s. 3, not being a virtue of the husband of this wife, the land was Loomis v. Frampton.

The case was decided in 1884, 4 of R. S. O. (1877) c. 125, s. 3, not being a virtue of the husband of this wife, the land was Loomis v. Frampton.

When coming to the consideration of an infant, the defendant was ignorant of the facts, and the plaintiff was not bound to disclose the same. The plaintiff was not bound to disclose the same. The plaintiff was not bound to disclose the same.

A woman and who lived in the same house, and in 1870 conveyed her husband's property, and in 1870 conveyed her husband's property, and in 1870 conveyed her husband's property.

The effect of the Act, 1859, is that all during the life of the wife, the husband's property is not to be made.

Co., 16 O. R. 100.

3. R. S. O. (1877) c. 125, s. 3, not being a virtue of the husband of this wife, the land was Loomis v. Frampton.

plaintiff which she agreed to sell to the defendant, so as to require the joining of the husband in the conveyance. The marriage took place in 1867, and issue had been born alive. The land was acquired by the plaintiff, one portion in 1879, and the remainder in 1882:—Held, that the case was governed by R. S. O. (1877), c. 125, ss. 3 and 4, similar to sub-sections 2 and 3 of section 4 of R. S. O. (1887), c. 132, and the land could not be conveyed by the plaintiff alone, unless by virtue of an order under 51 Vict. c. 21 (Ont.), so as to give the purchaser a title free from the husband's claim; and under the circumstances of this case such an order was made:—Sembles, the wife alone could convey her own estate in the land. *Re Konkle*, 14 O. R. 183, and *Adams v. Loomis*, 24 Chy. 242, considered. *Wylie v. Frampton*, 17 O. R. 515.—Rose.

The effect of legislation now embodied in R. S. O. (1887), c. 127, s. 3, has been to give to the conveyance of an infant feme covert the same characteristics as are by law attributed to the conveyances of male infants, i. e., if such deeds are of benefit to the infant or operate to pass an estate or interest they are voidable not void. *Whalls v. Learn*, 15 O. R. 481.—Chy. D.

When a little more than two months after coming of age, a married woman sought to set aside conveyances for value made by her, while an infant feme covert, to the defendants, who were ignorant of her disability, and under which defendants had taken possession, it was:—Held (reversing the judgment of Rose, J., at the trial), that she was entitled to such relief; but before the same could be granted, she must make complete restoration to the defendants of the specific or an equivalent value of that which she had received from them during her infancy. Mere acquiescence for about two and a-half months, after attaining majority was considered insufficient to operate as a ratification of the conveyance. *Ib.*

A woman married between 1859 and 1872, and who had issue living and capable of inheriting, acquired before the year 1872, a vested remainder in fee in land subject to a life estate, and in 1886 the life tenant still being alive, conveyed her remainder by deed without her husband joining therein:—Held, that the conveyance was valid to pass her whole interest freed from any right, interest, or control of her husband, and the life tenant having died, a good title in fee simple under the conveyance could be made. *Re Gracey and the Toronto Real Estate Co.*, 16 O. R. 226.—Robertson.

The effect of the "Married Woman's Property Act, 1859," as to property not excepted thereby, is that all interference on the part of the husband during their joint lives is ended. *Cameron v. Walker*, 19 O. R. 212.—Chy. D.

### 3. Redemption of Husband's Mortgage.

Plaintiff, being the wife of A. W. C. who mortgaged his lands, she joined therein for the purpose of barring her dower, brought an action to be allowed to redeem the mortgaged premises after foreclosure by the mortgagee against the husband, but during the husband's lifetime. A demurrer to the plaintiff's statement of claim, on the ground that the plaintiff had no interest

in the lands, and that her pleadings affirmed that her husband's interest had been foreclosed, was allowed. *Casner v. Haight*, 6 O. R. 451.—Proudfoot.

### 4. Liability on Contracts.

#### (a) Generally.

Quære, per Burton, J. A., whether a married woman can be liable on a joint contract. *Horner v. Kerr*, 6 A. R. 30.

Action against husband and wife for the price of goods supplied in 1877 by plaintiff to the female defendant, who was married in 1856 without a marriage settlement, and who lived with her husband and family. The husband and wife were devisees in fee of land under a devise to them in 1866, and the sheriff had, in 1874, affected to sell to the wife the husband's interest in the land under an execution against the husband:—Held, that the wife's interest in the land was not such as to entitle the plaintiff to a remedy against it:—Held, also, Armour, J., dissenting, that she was not liable to the plaintiff for the goods sold:—Per Hagarty, C. J.—The fact of a woman (living with her husband and family) ordering household goods does not raise an implied personal promise to pay or bind her separate estate, or any other presumption than that she is acting as her husband's agent; and the interest of the husband, being inalienable, was not saleable under execution under R. S. O. (1877) c. 66, s. 59. Per Armour, J.—(1) That whatever might be the effect of the sheriff's sale, it should be treated according to the effect ascribed to it by the plaintiff's and female defendant's conduct, viz., as having vested the estate in her. (2) That from the evidence it was the fair inference that the claim was the separate debt of the wife, part of it having been incurred by her in respect of the business of farming, in which she appeared to be engaged on her own account; that she had contracted in respect of separate personal estate appearing to be hers, and that the husband's name should be struck out, and a verdict entered for the amount against her. *Griffin v. Patterson*, 45 Q. B. 536.—Q. B. D.

In an action on a promissory note made by the defendant G., a feme covert, married after 2nd March, 1872, without a settlement, and C., her brother, as trustees under their father's will, for the purpose of raising money to pay certain insurances on the trust estate, it appeared that the testator had devised his real estate to his trustees in trust to sell as one B. should deem expedient, and out of the proceeds to pay debts and invest the residue, and to expend the income in the maintenance of the trustee and his other children until the youngest should attain the age of twenty-one, and then equally to divide amongst all the children, the issue of deceased children to represent their parent:—Held, that until the youngest came of age, C. had no separate estate available in execution, and that she was not liable on the note; Armour, J., dissenting, and holding that the true construction of the Married Woman's Property Act is impliedly to enable a feme covert to incur debts, to make engagements, and to enter into contracts as if she were a feme sole and that the remedy in respect of any such debts, etc., should be against her personally, and should not depend upon the

fact of her ever having had separate estate or not. *Clarke v. Creighton*, 45 Q. B. 514.—Q. B. D.

In an action in a Division Court against a married woman on a promissory note, the existence of separate real estate was proved, but no evidence was given of any separate personal estate. Judgment was rendered for plaintiff, the amount thereof to be paid out of the separate property she had when the note was made. *In re Widmeyer v. McMahon*, 32 C. P. 187.—C. P. D.

The rule of the court is, that it will not restrain a married woman from dealing with her separate estate pending suit; but if she die seized thereof, the court will administer her estate for the satisfaction of her debts:—Held, therefore, that the estate of a married woman, deceased, in the hands of her infant heirs, was liable to the payment of a note on which she was endorser as surety for her husband. *Merchants' Bank v. Bell*, 29 Chy. 413.—Boyd.

The endorser, a married woman, died intestate during the currency of the note, and notice of protest was sent to "James Bell, executor of the last will and testament of M. A. Bell, Perth," and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted:—Held, that the notice was sufficient, and the interest of the husband as tenant by the curtesy was directed to be exhausted before resorting to the estate of the children in remainder. The costs of the infant defendants were to be added to the plaintiff's claim, and paid out of the estate if not realized against the husband. *Id.*

Held, per Burton, J., at the trial, that the defendant Catharine, who joined in the note with her husband, the other defendant, was not, under the facts stated in the report, possessed of separate estate, and was therefore not liable, notwithstanding her admission endorsed on the note that the payee had advanced the money on the faith of such separate estate. *Bell v. Riddell*, 2 O. R. 25.

In an action against a married woman, married in 1871, on a promissory note made by her, the only property she was proved to have was a right to dower in certain land owned by a former husband. Judgment was entered for the plaintiff for the amount of his claim, with a direction for the recovery of the same out of the separate property then and at the date of the making of the note vested in defendant, or in any person in trust for her, with which amount such separate estate was charged. *Wallace v. Hutchinson*, 3 O. R. 398.—C. P. D.

A creditor's rights against a married woman debtor are determined by the statute at the time the debt is contracted; and cannot be enlarged by the debtor subsequently becoming a widow. *Re McLeod v. Emigh*, 12 P. R. 450.—C. P. D.

To entitle a plaintiff to recover judgment on a contract entered into by a married woman it is necessary for him to shew that at the time the contract was entered into by her she owned separate estate in respect of which she is entitled by statute to contract. *Moore v. Jackson*, 16 A. R. 431.

The defendant, a married woman endorsed certain notes held by the plaintiff and wrote him the following letter: "I hold 400 acres of land near W. which is worth \$33,000 and is all in my own name and right. By your renewing of the note for \$1,500 and the other for \$600 I pledge myself solemnly to do nothing to affect my interest in the said lands either by deed or mortgage unless said notes are paid to you in full." The notes and the letter were proved at the trial and the examination of the defendant before the trial in which she stated that at the time she signed the notes she owned property on her own account was also put in. There was no evidence as to the date of the marriage of the defendant or as to the mode in which the property was held by her:—Held, reversing the decision of Boyd, C., that there was not sufficient evidence to entitle the plaintiff to recover. *Id.*

Upon a motion by the plaintiffs for summary judgment against a married woman under Con. Rule 739:—Held, following *Moore v. Jackson*, 16 A. R. 431, that the plaintiffs were bound to prove the existence of some separate property at the time of entering into the alleged contract, and that this was not shewn by the affidavit; and the motion for judgment was refused. *Canadian Bank of Commerce v. Woodcock*, 13 P. R. 242.—Ferguson.

See *Ambrose v. Fraser*, 14 O. R. 551, p. 877.

#### (b) Husband's Contracts.

Plaintiff agreed with J. R. to build a house on certain land for \$850. After building the house he discovered that the land belonged not to J. R. but to J. R.'s wife, who, at the time of the agreement, was an infant, and was in no way a party to it. Afterwards J. R. and his wife sold and conveyed the land and house to M., an innocent purchaser. The plaintiff was only paid a portion of the \$850, and now brought this action to recover the balance from the wife of J. R., or the amount by which the building had enhanced the value of the land:—Held, that inasmuch as there was no property or fund transferred or settled upon the wife that would have been liable to seizure by a creditor, the plaintiff could not recover against her. *Kincaid v. Read*, 7 O. R. 12.—Ferguson.

In 1849 W. F. married A. F. without marriage settlement. In 1872 W. F. entered into a covenant for himself, his heirs and assigns, as lessor of certain lands, to pay, at the expiration of the lease, for a certain malthouse, which the lessee was to have liberty to erect, and did erect upon the demised premises. Pending the term W. F. conveyed the reversion in such a way that it became vested in himself and W. as trustee, as to the whole beneficial interest for A. F.:—Held (affirming the decision of Ferguson, J., 12 O. R. 459), that the separate estate of A. F. was not bound by the covenant, though she was equitable owner of the reversion as above mentioned at the time of the erection of the malthouse, and until the expiration of the lease. Per Boyd, C.—Whether the covenant was one that ran with the land or not, and whether A. F. or her trustees were assignees within the meaning of 32 Hen. VIII. c. 34, or not, privy of estate is not tantamount to privy of con-

tract so as to constitute an estate of ally cont. *rose v. A.*

When separated her husband tended to ment of her set aside (P. Q.)

Where her husband thereafter to manage sory notes that notwithstanding real scope certain there was husband h tion which before his A. R. 535

The pla in Cincinnati any marriage any separate husband c ber, 1878, appointed, purchased carried on by her hus from him. ilton, whe and the gu to Hamilton and carried to that ca goods from issue to t execution the eviden did it app Cincinnati but that deemed to protection also, that Hamilton put into ness, tho Levine v.

Held, woman in occupation separately as if she without of equity perty.

Where made by ture, and made in dant was from her



tract so as without more to affect the separate estate of a married woman, as if she had especially contracted with reference thereto. *Amrose v. Fraser*, 14 O. R. 551.—Chy. D.

When the sale of real estate by the wife, duly separated as to property from her husband, to her husband's creditor is shewn to have been intended to operate as a security only for the payment of her husband's debts, such a sale will be set aside as a contravention of Art. 1301 C. C. (P. Q.) *Klock v. Chamberlin*, 15 S. C. R. 325.

#### (c) Separate Trading.

Where a wife had purchased the estate of her husband, who had become insolvent, and thereafter authorized him by power of attorney to manage the same for her, and to make promissory notes in and about the said business:—Held, that notwithstanding the power of attorney the real scope of the husband's agency could be ascertained from any admissible evidence, and there was sufficient to justify a finding that the husband had authority to sign the notes in question which were given to creditors for a debt due before his insolvency. *Cooper v. Blacklock*, 5 A. R. 535.

The plaintiff, a married woman, was married in Cincinnati, Ohio, in October, 1878, without any marriage settlement, and not possessed of any separate estate except about \$200. Her husband carried on business there until December, 1878, when he failed, and an assignee was appointed. The plaintiff claimed that she then purchased the stock from the assignee, and carried on a business, similar to that carried on by her husband, on her own behalf and separately from him. Subsequently she removed to Hamilton, where her husband had previously gone, and the goods which remained unsold were sent to Hamilton, where with them she commenced and carried on, as she claimed, a similar business to that carried on in Cincinnati, purchasing new goods from time to time. Upon an interpleader issue to try her right to these goods as against execution creditors of her husband:—Held, on the evidence set out in the report, that not only did it appear that the business carried on in Cincinnati by the wife was in fact the husband's, but that according to the law of Ohio it must be deemed to be such in the absence of an order of protection, which was the case here:—Held, also, that the business subsequently carried on in Hamilton, although \$400 of her money had been put into it was also in fact the husband's business, though carried on in the wife's name. *Levine v. Clayton*, 31 C. P. 600.—C. P. D.

Held, that debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf, or separately from her husband, may be sued for as if she were an unmarried woman; that is, without regard to separate estate such as courts of equity recognize as that particular class of property. *Berry v. Zeiss*, 32 C. P. 231.—Wilson.

Where to a declaration on a promissory note made by a married woman she pleaded coverture, and the plaintiffs replied that the note was made in respect of a business in which defendant was employed on her own behalf separate from her husband, but did not allege that she

had separate property:—Held, that the replication was good. *Id.*

B. told the plaintiff that having failed he was unable to carry on business in his own name, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a grocer, either on his or her order, the account to be opened in her name. Goods were shipped accordingly upon orders of the husband, and on one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate:—Held, Hagarty, C. J., dissenting, that the plaintiff was entitled to recover. Per Cameron, J., the defendant was liable, being possessed of separate estate, whether the goods were bought by her or by her husband. In the latter case she would be surety for her husband as acceptor of bills drawn upon her for the price of the goods. Per Hagarty, C. J., the goods were bought by the husband, and the liability was his and not the wife's, her name being used merely to shield him from his creditors, and the plaintiff being aware of this; therefore the defendant was not liable to him. *Hessin v. Baine*, 2 O. R. 302.—Q. B. D.

In an interpleader issue to try the right to certain goods seized under an execution against A. and claimed by B., his wife, it appeared that since their marriage a store business had been carried on in the name of the wife, and that frequent trades and transactions in real estate had also taken place in her name, but that in most of them the husband was the bargainer, and it was only when the bargains had to be carried out that the wife appeared in them; that the husband kept the store books, which she said she did not know much about, as she was no scholar; that the husband made nearly all the purchases of stock, and sold goods, and spoke and acted as if he were the owner; that he was not in receipt of wages, but took what money he wanted out of the store when he pleased, and in the transaction out of which the stock was seized, he opened the negotiation by a letter signed by himself, referring to the property he offered in trade as his property, and when the bargain was closed took a deed of the store in his own name, and gave back a mortgage and his own note for the balance due. The jury, in the face of the judge's charge in favour of the execution creditor, found that the stock was the property of the wife, that she did not act fraudulently, and that she carried on business separate from her husband. Upon a motion to the Chancery Divisional Court to set aside the verdict, and to enter a verdict for the defendant, or for a nonsuit, or for a new trial, on the ground that the verdict was contrary to the evidence and to the direction of the judge, and perverse, and that it was against the weight of the evidence, it was:—Held, that the business was not one protected by R. S. O. (1877), c. 125, s. 7; that the verdict could not be sustained; and under Rule 321, O. J. Act and R. S. O. (1877), c. 50, s. 383, it was set aside and judgment entered for the defendant. *Murray v. McCallum*, 8 A. R. 277, referred to and distinguished. *Campbell v. Cole*, 7 O. R. 127.—Chy. D.

The plaintiff, a married woman, carried on business as an hotel-keeper, and owned the



chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff. An injunction was granted restraining the defendant from interfering in the business, or with the servants, or agents, or removing any of the plaintiff's chattels:—Sembie, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances. *Donnelly v. Donnelly*, 9 O. R. 673.—Rosc.

In order that the property of a married woman who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate and apart from her husband, or that the business should be carried on in a house other than that in which the husband and his wife reside. *Murray v. McCullum*, 8 A. R. 277.

The plaintiff, who was possessed of a sum of money (about \$300), felt dissatisfied with her husband's management of his business, his goods having been sold under execution for debt whilst residing on a rented farm, the sale not realizing sufficient to pay the arrears of rent and his debts; leaving, in fact, unpaid the debt for which the defendant in the present action had obtained execution. The husband had literally no means, and the plaintiff resolved to start hotel-keeping, and agreed to give her husband \$15 a month for his services as barkeeper, the duties of which he discharged, and resided with her in the hotel. It was shewn that whilst thus engaged she had two partners in carrying on the hotel business. The defendant seized the goods in the hotel, and in an interpleader issue a verdict was rendered in favour of the plaintiff, which the court in banc refused to set aside. On appeal to this court:—Held, per Spragge, C.J., and Cameron, J., that the facts shewed the plaintiff to have had a separate trade or occupation within the Act, the husband not having the control of the business, but being hired for a particular duty. Per Burton, J. A., it was not intended that there should be an enquiry under the Act as to the bona fides of such transactions; but that the fact of the husband's interference with the concurrence of the wife, deprived it at once of its separate character. Per Burton and Patterson, J.J.A., that the interference of the husband with the business, as shewn by the evidence, was such in reality as to prevent its being treated as the separate business of the plaintiff. *Id.*

A married woman carried on business in her own name, the business being managed for her by her husband. For the purpose of the business she purchased the goods constituting her stock-in-trade, and which the vendors sold to her upon her credit exclusively, and not to her husband:—Held, affirming the decision of the C.P.D., (14 O.R. 468), that even though the business might not be the business of the wife, carried on by her separately from her husband, within the meaning of section 7, so as to protect the earnings from her husband's creditors, the goods so sold to the wife were her own property, under section 5 of the Act, and were not liable to be taken in execution at the suit of the husband's creditors. Whether this would be so with regard to goods purchased, and to be paid

for out of earning of such a business: *Quere. Dominion Savings and Investment Society v. Kitroy*, 15 A. R. 487.

The defendant, a married woman, married to her present husband in 1877, or 1878, and carrying on business separately from him by farming one of her former husband's farms, in 1883 and 1884, contracted the debt sued on. She was entitled to dower in the lands of her first husband, who died in 1875, which were sold, realizing a large sum, and also to her share in his personal estate, neither of which she had received:—Held, that the Act of 1884, 47 Vict. c. 19 (Ont.), had not the effect of repealing the prior Acts, and that it was not necessary to shew that the defendant had married, or had acquired separate estate since the Act of 1884 came into force; that it was sufficiently shewn that she was possessed of separate estate, and that she intended it should be bound. The plaintiff was, therefore, held entitled to have judgment against it. *Robertson v. Larocque*, 18 O. R. 469.—MaeMahon.

R. S. O. (1887), c. 132, s. 5, sub-s. 1, makes the earnings of a married woman in a trade or occupation in which her husband has no proprietary interest separate property. *Id.*

See *Griffin v. Patterson*, 45 Q. B. 536, p. 874; *Rigina v. Campbell*, 8 P. R. 55, p. 886.

#### 5. Liability for Torts.

Where the plaintiff proved a joint wrongful occupation and conversion of the rents and profits of his land by a husband and wife:—Held, that the husband and wife were jointly liable to the plaintiff, and the plaintiff was entitled to recover against the separate property of the wife, for it could not be inferred that the latter was acting under the direction or coercion of her husband so as to exempt her from liability. *Barker v. Westover*, 5 O. R. 116.—Boyd.

A bear belonging to one of the defendants escaped from premises, the separate property of his wife, the other defendant, where it had been confined by him without objection from her, and attacked and injured the plaintiff on a public street:—Held, that the wife having under R. S. O. (1887) c. 132, ss. 3 and 14, all the rights of a feme sole in respect of her separate property, might have had the bear removed therefrom, and not having done so she was liable to the plaintiff for the injury complained of. The principle of *Fletcher v. Rylands*, L. R. 1 Kx. 282, L. R. 3 H. L. 330, applied. *Shaw v. McCready*, 19 O. R. 39.—Chy. D.

#### 6. Judgment and Execution.

In an action in a Division Court against a married woman on a promissory note, the existence of separate real estate was proved, but no evidence was given of any separate personal estate. Judgment was rendered for plaintiff, the amount thereof to be paid out of the separate property she had when the note was made. Per Wilson, C. J. The Married Woman's Act is complied with by a general judgment or by a general judgment against her separate property, and under such judgment after acquired separate personal

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property can be followed. *Per Osler, J.* A married woman's separate personal estate, but not her real estate, may be charged and sold under a judgment against her in the Division Court. The omission to prove the existence of such separate personal estate, though it may be urged as a defence, does not affect the jurisdiction. Prohibition was therefore refused. *In re Widmeyer v. McMahon*, 32 C. P. 187.—C. P. D.

The original process in the action was served upon the defendant, the married woman, personally; she swore that she handed it to her husband, but never authorized any one to act for her as solicitor. She was not proceeded against as a married woman. D., an attorney, appeared for her and her husband, and judgment was signed against both defendants by consent of D., as her attorney, on an order made in chambers in 1875. Execution was at once issued under the judgment, and the personal property of the female defendant was seized and sold by the sheriff without complaint from her. It appeared that at the time of the commencement of the suit the married woman had an interest in certain real estate which she and her husband conveyed away after action brought and before judgment. No affidavit from the male defendant nor from D., the attorney, was filed:—Held, that after the long lapse of time and under the circumstances shown the judgment should not be set aside. *McLean v. Smith*, 10 P. R. 145.—Dalton, Master.

A judgment against a married woman by virtue of the Married Woman's Property Act creates no general personal liability, but merely charges her separate estate: and the provisions of section 177 of the Division Courts Act, R. S. O. (1877), c. 47, as amended by 43 Viet. c. 8, touching the examination of judgment debtors, are not applicable to a married woman against whom judgment has been obtained in the Division Court, and even if liable to be examined, such a person is not liable to be committed to gaol under section 182. *Metropolitan L. & S. Co. v. Mara*, 8 P. R. 355, distinguished. *Re McLeod v. Emigh*, 12 P. R. 450.—C. P. D.

Judgment under Con. Rule 739.—See JUDGMENT.

See *Douglas v. Hutchison*, 12 A. R. 110, p. 871; *Canadian Bank of Commerce v. Woodcock*, 13 P. R. 242, p. 876.

#### 7. Liability to Arrest or Commitment.

Held, that the defendant was liable to committal for contempt in not attending to be examined as a judgment debtor, although she was a married woman and the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for nonpayment of costs. *Pearson v. Essery*, 12 P. R. 466.—Ferguson.

See *Metropolitan Loan and Savings Co. v. Mara*, 8 P. R. 355, p. 685; *Re McLeod v. Emigh*, 12 P. R. 450, *supra*.

#### 8. Quarantine.

Held, that the right of a dowress to occupy the mansion house during her days of quarantine is not merely a personal right, but that she is entitled to have reasonable and proper attend-

ance and companionship, and an action will therefore lie for the eviction of such companion or attendant. *Lucas v. Knox*, 3 O. R. 463.—C. P. D.

### IX. DEALINGS BETWEEN HUSBAND AND WIFE.

#### 1. Generally.

The widow of the intestate claimed against his estate a sum of \$700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock in-trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C. c. 73:—Held, per Proudfoot, V.C., that the C. S. U. C. c. 73, gave her the right to assert her proprietorship as against her husband, and as incident thereto the right to bring a suit against him; to which proceedings however the Statute of Limitations was a bar. *Re Laws—Laws v. Laws*, 28 Chy. 382.

Where by an agreement before marriage made in Montreal between the intending husband and wife, it was provided that each should enjoy all property, real and personal, which either might possess at the time of, or acquire during the marriage, in any way as his or her separate property, and should have the absolute control and management thereof free from the debts and demands of the other, and after marriage the wife acquired certain land of which she and her husband executed a mortgage, and the wife conveyed to the husband in fee:—Held, that by the agreement the land was vested in the wife as her proper separate estate, and there was no incongruity in the husband being the grantee of the wife. *Ogden v. McArthur*, 36 Q. B. 346, distinguished. *Sanders v. Malbury*, 1 O. R. 178.—Boyd.

A. being about to sell a certain property, and in order to induce his wife, B., to bar her dower, entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B. "as she may require it for the maintenance of A. and B. and their family:—Held, a valid agreement, and not opposed to public policy. *Lavin v. Lavin*, 2 O. R. 187.—Proudfoot.

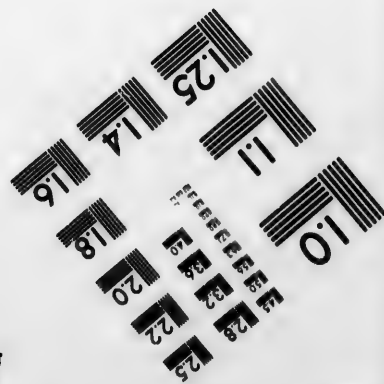
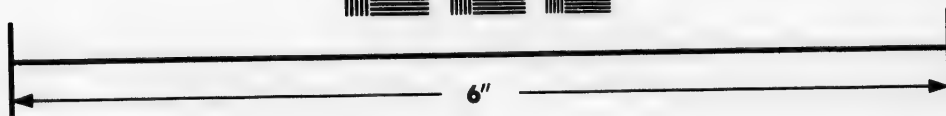
Chattel mortgage and bill of sale given by husband to his wife for advances made to him out of her separate estate.—Change of possession.—Fraudulent preference. See *Totten v. Bowen*, 8 A. R. 602.

A husband, on 2nd September, 1885, by deed of bargain and sale, made in pursuance of the Act respecting short forms of conveyances, conveyed to his wife certain lands, the consideration being "natural love and affection and \$5," the receipt of the consideration being also admitted in the deed, besides the usual marginal receipt of the \$5; habendum to the wife, her heirs and assigns for her and their sole and only use forever:—Held, that the evident intention of the owner might be given effect to, as far at least as the beneficial interest in the property was concerned, and an order was, therefore, made vesting in the



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wife all the estate and interest of the husband at the date of this deed to her. *Whitehead v. Whitehead*, 14 O. R. 621.—Proudfoot.

A conveyance direct from husband to wife is not necessarily void to all intents and purposes; in equity it may be valid. *Jones v. McGrath*, 15 O. R. 189.—Chy. D. See R. S. O. (1887) c. 100 s. 5.

The defendant being the owner of the equity of redemption in certain lands, executed a deed on October 18th, 1884, purporting to convey them directly to his wife for a consideration of \$100, the receipt of which was acknowledged in the margin and in the body of the deed. The plaintiff, who claimed by conveyance from the wife, brought this action to recover possession from the defendant, who contended that the deed to his wife had been made without consideration, and was, therefore, void. The plaintiff purchased bona fide without notice of there having been no consideration:—Held, that under 49 Vict. c. 29 (Ont.), the acknowledgment of the consideration in the deed authorized the plaintiff to deal on the footing of its having been paid upon execution of it, and the defendant could not now dispute the consideration. *Jones v. McGrath*, (2) 16 O. R. 617.—Chy. D.

49 Vict. c. 20, s. 10 (Ont.), is not to be restricted to claims upon alleged vendors' liens and the like. *Id.*

Semble, that even if the deed in question were to be considered voluntary and without consideration, the authorities though not at all in unison, were sufficient to support a judgment in the plaintiff's favour, inasmuch as he had at all events a good title in equity, which was now sufficient. *Id.*

Claim by wife of insolvent for money lent and used in his business. See *Warner v. Murray*, 16 S. C. R. 720.

See *Glass v. Burt*, 8 O. R. 391, p. 836.

See also Subhead XI., 3, p. 884.

## X. HUSBAND'S LIABILITIES.

### 1. For Wife's Necessaries.

The defendant's wife, who had been supported by the plaintiff with the defendant's consent, returned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of and supported her:—Held, that the defendant, by turning his wife out of his house, sent her forth as his delegated agent to pledge his credit for the necessaries of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting the defendant's wife. And such claim can be maintained up to the date of a judgment allowing alimony to the defendant's wife. *Hughes v. Rees*, 10 P. R. 301.—Hodgins, *Master-in-Ordinary*.

Held, that a foreign judgment for alimony, put an end to any implied liability on the husband's part to pay for his wife's maintenance subsequently to the date from which alimony was to be paid under such judgment. *S. C.*, 9 O. R. 198.—Proudfoot.

### 2. On Contracts Made by Wife.

See *Griffin v. Patterson*, 45 Q. B. 536, p. 874.

## XI. ACTIONS AND PROCEEDINGS BY AND AGAINST.

### 1. Wife Suing by Next Friend.

When a married woman filed a bill in respect of property acquired by her after the passing of 35 Vict. c. 16 (the 2nd day of March, 1872,) she is not, though married before that date, required to sue by a next friend. Leave was given to strike out the name of a next friend, where one had been named by mistake, and an order had been obtained requiring security for costs. *Shelley v. Goring*, 8 P. R. 36. *Stephens, Referee*.—Sprague.

Where a married woman, married before the passing of 35 Vict. c. 16, (2nd March, 1872), files a bill in respect of property, whether acquired before or after that date, she is required to sue by a next friend. *Shelley v. Goring*, 8 P. R. 36, referred to. *Godfrey v. Harrison*, 8 P. R. 272.—*Stephens, Referee*.

In an action by a married woman commenced before the O. J. Act, it was held *ex demerit* that the plaintiff must sue by next friend, and an order was made accordingly. Subsequently, and after the passing of the O. J. Act, the next friend became insolvent. On an application to the master in chambers for the appointment of a new next friend, he made an order for such appointment, which was affirmed on appeal by Proudfoot, J., he holding that he was bound by the previous order: that even although under the O. J. Act, Rule 97, a married woman may sue in respect of her separate estate without a next friend, by Rule 484 this was not to apply to pending business. On appeal to the Divisional Court the judgment of Proudfoot, J. (10 P. R. 80), was affirmed. Per Rose, J., that there was no evidence to shew that the woman had separate estate when the order appealed from was made. *Webster v. Leys*, 5 O. R. 599.—C. P. D.

See *Vardon v. Vardon*, 6 O. R. 719, *infra*.

### 3. Actions by Wife Against Husband.

Held (affirming the decision of Wilson, C. J., C. P.), a married woman can not only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms in settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend. And so in the present case where, by way of compromising such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys:—Held, that the plaintiff was entitled to specific performance of this agreement; that it was not the separation which was being enforced, but the performance by the defendant of his contract. *Vardon v. Vardon*, 6 O. R. 719.—Chy. D.

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A woman, married to her husband in 1880 without marriage settlement, afterwards advanced certain moneys to him, which she now sought to recover as money lent. She failed, however, to prove a contract for repayment:—Held, that she could not recover. *Hopkins v. Hopkins*, 7 O. R. 224.—Ferguson.

During the trial M. A. D. obtained leave to amend, and claimed to be allowed a sum of \$1,500, which she alleged she had given to her husband, the plaintiff, as a loan, and which was employed in the purchase of the property and building thereon:—Held, that as no contract for repayment was shewn, no security being taken and no attempt having been made to collect the amount, although many years had passed, the transaction could not be treated as a loan, and the wife could not recover or be allowed the amount so claimed. *Dufresne v. Dufresne*, 10 O. R. 773.—Ferguson.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the land in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for \$2,000, and expended it on improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession, and for use and occupation. No demand was made prior to service of writ:—Held, following *Donnelly v. Donnelly*, 9 O. R. 673, the plaintiff was entitled to possession; but could only recover for the use and occupation since the service of the writ:—Held, also, that the defendant could not claim for the moneys expended by him on the land. *Till v. Till*, 15 O. R. 133.—C. P. D.

#### 4. Other Cases.

Slander of married woman—Special damage. See *Palmer v. Solmes*, 45 Q. B. 15, p. 509.

Evidence of husband and wife upon prosecution of husband for refusal to provide for family. See *Regina v. Bissell*, 1 O. R. 514, p. 444; *Regina v. Meyer*, 11 P. R. 477, p. 445.

Application to restrain nuisance where the title to property injured is in the wife. See *Hathaway v. Doig*, 6 A. R. 264, p. 924.

Held, reversing the judgment of the County Court, that notwithstanding R. S. O. (1877) c. 125, s. 20, a married woman is still entitled, under 21 Jac. I., c. 16, to bring an action in respect of her separate property within six years after becoming discovers. *Carroll v. Fitzgerald*, 5 A. R. 322.

Action by husband on behalf of himself and children against a railway company, claiming damages under Lord Campbell's Act for death of wife. See *Lett v. St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545; 11 A. R. 1; 11 S. C. R. 422.

The court has no authority to make a personal order against a defendant, a married woman, unless she has separate estate. Where a bill prayed such a personal order but contained no

allegation as to separate estate, the order was refused. *G— v. R—*, 9 P. R. 174.—Proudfoot.

A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. (1877) c. 181:—Held, that she was liable to be fined under section 83 of the Act, although the sale of the liquor took place in her absence. *Regina v. Campbell*, 8 P. R. 55.—Hagarty.

Refusal of husband and wife to answer questions that might criminate each other in an action of libel. See *Millette v. Little*, 10 P. R. 265.

Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife:—Held, Proudfoot, J., dissenting, that although suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. The case did not come within the class of cases where a nominal insolvent plaintiff is put forward whilst the substantial litigant keeps in the background in order to avoid liability for costs; and an order for security for costs was set aside. *McKay v. Baker*, 12 P. R. 341.—Chy. D.

Action by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract:—Held, that the action being without precedent and contrary to public policy was not maintainable. *Brennen v. Brennen*, 19 O. R. 327.—Falconbridge.

See *Connell v. Hickock*, 15 A. R. 518, p. 180.

#### XII. DEED OF SEPARATION.

Semble, that a provision of a deed of separation that the maintenance secured to the wife for life, and her children during their residence with her, should continue notwithstanding a renewal of cohabitation, and that in the event of parties again separating for any like causes as induced the first parting, the whole of the provisions of the deed should revive, does not render the deed void, on the ground that it is contrary to the policy of the law, as being a provision for future separation. *Meredith v. Williams*, 27 C. J. 154.—Proudfoot.

Where a deed after reciting an agreement for separation between husband and wife; that she was to have the custody of the children until twelve years old, and that he in consideration of her releasing her dower in his lands, had agreed to pay her a certain sum for her own and the children's maintenance, secured to the wife for her separate maintenance a yearly sum of \$600, and a further yearly sum of \$200 for the maintenance of each of the children so long as they should continue in her custody, and provided,



that in the event of a reconciliation taking place the annuity for the wife and allowance for the children should not be thereby defeated or revoked; and in case of any future separation of the parties for any of the same causes (which were such as to justify a separation), the whole of the provisions of the deed should be revived and be in full force:—Held, that such deed, upon a fair construction of it, was not open to objection as providing for a future separation; and, *Semble*, if it had provided for such separation for the causes mentioned, it would not have been void. *Ib.*

### XIII. FOREIGN DIVORCE.

Where one obtained a divorce from his wife in a foreign state, in which he was *bonâ fide* domiciled, by proceedings of which notice was served personally on the wife living here, which were not collusive, nor contrary to natural justice, and for adultery on the wife's part:—Held, that entire credit must be given to the foreign divorce in this province, although the wife at the time of the divorce proceedings resided here, for the domicile of the husband was the domicile of the wife, and the validity of the divorce depended on the law of the domicile of the parties. *Guest v. Guest*, 3 O. R. 344.—Boyd.

In an action for alimony the defendant relied upon a divorce granted on his own petition by the Circuit Court of St. Louis County, Missouri, where he then resided; the wife (the present plaintiff) having made no defence thereto though notified of the proceedings. It appeared that the domicile of the husband at the time of the marriage and of the divorce was Canadian, though the marriage was celebrated at Detroit, and the wife was an American citizen. It was proved that the evidence of desertion by the wife as alleged by the husband, and on which the decree for divorce was founded, was untrue:—Held, that the decree, having been obtained on an untrue statement of facts, and for a cause not recognized by our law, could not be set up as a bar to the wife's claim for alimony:—Held, also, that the non-feasance of the wife in failing to appear or defend the action for divorce did not amount to collusion on her part so as to estop her from impeaching the validity of the decree made in that action. *Magurn v. Magurn*, 11 A. R. 178.

Held, affirming the decision of the Chancery Division, 3 O. R. 570, and following *Harvey v. Farnie*, 5 P. D. 153; 6 P. D. 35; 8 App. Cas. 43, that the jurisdiction to divorce depends upon the domicile of the parties, that is of the husband—and this being Canadian, the Missouri court had no jurisdiction. *Ib.*

Per Hagarty, C. J. O.—There is no safe ground for distinction between domicile for succession, and for matrimonial purposes, or a domicile by residence. *Ib.*

### XIV. ALIMONY.

#### 1. Writ of Arrest.

Where the plaintiff in an alimony suit obtains a writ of arrest, and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the

writ was marked, paid into court, to be applied from time to time in payment of the alimony and costs: and—*Semble*, that upon such payment the sureties are entitled to be discharged from their bond. *Needham v. Needham*, 29 Chy. 117.—Boyd.

#### 2. Writ of Ne Exeat.

Where, in an alimony suit, the statutory bond under a writ of ne exeat has been given the plaintiff is entitled to have the moneys deposited as collateral security therefor paid into court and applied in discharging arrears of alimony. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot.—Spragge.

#### 3. Particulars.

The statement of claim in an alimony suit contained the following clause: "The plaintiff alleges and charges adultery on the part of the defendant as a further ground for relief in the premises." The plaintiff was ordered to give particulars of the acts of adultery intended to be proved within a month, and limited to those only at the hearing. In default no evidence to be given under the general charge. Such an allegation, without specifying particulars, is bad. *Rosenstadt v. Rosenstadt*, 9 P. R. 311.—Boyd.

#### 4. When Granted.

##### (a) Desertion.

In consequence of a wife having disobeyed her husband by visiting at the house of his brother-in-law, the husband, during her absence, put sundry chattels belonging to her outside the dwelling-house, and locked the door:—Held, that this was such an act of exclusion and expulsion by the husband as entitled the wife to a decree for alimony, independently of the fact that during such exclusion of the wife the husband entered into a formal marriage with another woman, with whom he continued to live until after the institution of this suit; and, *Quere*, whether adultery per se by the husband is not a ground entitling the wife to alimony. *Howey v. Howey*, 27 Chy. 57.—Spragge.

In an alimony action the defendant in his defence alleged that he had refused, and still refused to support the plaintiff by reason of her having committed adultery with M. At the trial it appeared that the plaintiff, on being charged by the defendant with adultery, and ordered to go away, left his house, though, before she actually departed, he forbade her to go. The defendant persisted in the charge of adultery, but did not attempt to prove it. The plaintiff proved none of the acts of violence alleged in her statement of claim:—Held, that the statements in the defence, taken in connection with the above facts, must be treated as sufficient proof of desertion on his part, and he must be taken to have dispensed with the necessity for the plaintiff offering to return. *Ferris v. Ferris*, 7 O. R. 496.—Osler.

##### (b) Interim Alimony.

An application for interim alimony cannot be made until defence is filed, or the time for filing

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A writ was issued in an alimony suit on 27th December, 1882, and served on the 4th January, 1883. The statement of claim was filed 11th April, 1883, and a sittings of the court held on 2nd April, 1883. On the application of the plaintiff on the 15th May, 1883, to the master in chambers, interim alimony was allowed her from the 1st May, 1883, her delay in proceeding not being satisfactorily accounted for. On appeal, Boyd, C., upheld the master's order. *Thompson v. Thompson*, 9 P. R. 526.—Boyd.

Interim alimony was stayed until the plaintiff had produced on oath, books, papers, etc., belonging to her husband, which she had taken with her when leaving his house, and which deprived him of the means of paying it. *Old v. Old*, 9 P. R. 552.—Boyd.

Held, that the principle which underlies all the decisions is, that the allotment of alimony pendente lite depends upon the marital relationship of the parties existing de facto. *Walker v. Walker*, 10 P. R. 633.—Boyd.

The court exercises a discretion in granting or withholding alimony pendente lite which is regulated by the circumstances of each case. And the defendant in this action by his own act and conduct having clothed the plaintiff with the reputation of being his wife, although he denied the marriage, the decision of the master awarding interim alimony was not interfered with. *Ib.*

Held, that a wife was not entitled to interim alimony and disbursements where she sued on the ground of desertion, not alleging cruelty, and where the husband offered by his defence and by affidavit to resume cohabitation with her. *Snider v. Snider*—*Snider v. Orr*, 11 P. R. 140.—Boyd.

An order of the local master directing the defendant in an alimony action based upon desertion to pay interim alimony was affirmed, though the wife was in occupation of the defendant's homestead; she having established that she was in need of interim alimony, and the defendant not shewing that she was in receipt of any income from the farm. An order directing the defendant to pay forthwith interim disbursements was affirmed, except as to the counsel fee to be paid to the plaintiff's solicitor, who intended to act as counsel at the trial. *Lalonde v. Lalonde*, 11 P. R. 143.—Proudfoot.

The peculiar practice of awarding interim alimony and disbursements in alimony suits is founded on the presumption that the husband has everything and the wife nothing, but when the contrary appears the presumption is done away; and the court will, on applications for interim alimony, consider the question of the wife's ability to maintain herself out of separate estate or other sources of income, such as her earnings and allowances from friends. *Knapp v. Knapp*, 12 P. R. 105.—Chy. D.

Where the wife had been living apart from her husband for five years, and had been supporting herself out of the rents of houses owned by her, and by taking boarders, and through assist-

ance rendered by members of her family, the court refused to award interim alimony, but directed the husband to pay the prospective cash disbursements of the plaintiff's solicitors upon their undertaking to account. *Ib.*

Per Boyd, C. The change in the status of married women under recent legislation has no effect upon the law as to disbursements in actions for alimony, unless the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the costs of litigation without alimentation pending the action for alimony. *Ib.*

#### 5. Costs.

Waiver of right to security for costs. See *Knowlton v. Knowlton*, 8 P. R. 400, p. 360.

Appeal from order of referee directing security for costs allowed without costs, as the suit was for alimony. *Ib.*—Proudfoot.

In a suit by the woman for alimony brought seventeen years after the marriage on the ground of refusal by the man to receive her as his wife, he set up the invalidity of the marriage, but while under examination stated that if it was determined that she was his wife he would receive her as such. The court (Proudfoot, V. C.), while finding there was a valid marriage directed that upon the defendant undertaking to receive the plaintiff as his wife, the bill should be dismissed; but ordered the defendant to pay the costs between solicitor and client. *Roblin v. Roblin*, 28 Chy. 439.

The plaintiff, during the pendency of a motion for interim alimony, returned to her husband:—Held, that the defendant must pay the costs as between solicitor and client of the plaintiff's solicitor. *Leonard v. Leonard*, 9 P. R. 450.—Dalton, *Master*.

An application to compel the defendant to pay the costs of the plaintiff's solicitors in an action for alimony. The action was settled before trial, the plaintiff refusing to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitors' costs:—Held, that before the Act 32 Vict. c. 18 (Ont.), (i. S. O. (1877) c. 40, s. 43), the defendant would have been liable to pay costs:—Held, under the wording of section 2 of the above Act, that the plaintiff had not failed to obtain a decree for alimony, and that the defendant was therefore liable to pay costs. *Moore v. Moore*, 10 P. R. 284.—Dalton, *Master*.

Pending an action for alimony, and before trial, the plaintiff returned to live with the defendant:—Held, that the defendant should pay only the cash disbursements of the plaintiff's solicitors. *Keith v. Keith*, 25 Chy. 110, considered. *Ringrose v. Ringrose*, 10 P. R. 299.—Proudfoot.—Affirmed *Ib.* 596.—Chy. D.

An order was made in an alimony suit for payment to the plaintiff, before the trial, of \$22.35, on account of her disbursements for witness fees, and of \$40 on account of counsel fee:—Quære, whether the counsel fee should be paid in advance if the plaintiff's solicitor acts as counsel. *Ingram v. Ingram*, 10 P. R. 569.—

Ferguson. See, also, *Magurn v. Magurn*, 1b. 570; *Bradley v. Bradley*, 1b. 571.

The defendant having, at the trial, after the plaintiff's evidence had been given, for the first time offered to take her back to his house:—Held, that the judgment for alimony should stand over for six weeks to see if this offer was carried out, and that the plaintiff was, in any event, entitled to her full costs of suit. *Ferris v. Ferris*, 7 O. R. 496.—Osler.

See *Lalonde v. Lalonde*, 11 P. R. 143, p. 889; *Knapp v. Knapp*, 12 P. R. 105, p. 889.

#### 6. Application to Reduce Amount.

On an application to reduce the amount of alimony payable by the defendant to the plaintiff, the property of the defendant was variously estimated (lands and personalty) at from \$2,938 to \$6,000, and the evidence of the defendant, when cross-examined upon his affidavit filed by him in support of the motion, being unsatisfactory, the court (*Ferguson*, V. C.), refused to interfere with the report of the master fixing the amount which had been paid under such report for about eighteen months without objection; but the result of the application was not to be considered conclusive against the defendant on any other motion he should be advised to make. *Holway v. Holway*, 29 Chy. 41.

#### 7. Other Cases.

Where in a suit for alimony a decree was obtained and registered in the counties in which the defendant owned lands, pursuant to R. S. O. (1877), c. 40, s. 44, and writs of fieri facias against the goods of the defendant had been issued and returned nulla bona, on application by petition, setting forth the facts, an order was made declaring the plaintiff to have a lien upon the lands of the defendant affected by the registration of the decree, and for an immediate sale of the said lands, the proceeds to be paid into court, and applied in payment of alimony. *Forrester v. Forrester*, 9 P. R. 338.—Blake.

Where a suit for alimony was pending, and it was alleged, that an action brought against the husband was so brought for the purpose of defeating the suit for alimony and depriving the wife of her dower, an order was made admitting the wife to defend the action. *Ferris v. Ferris*, 9 P. R. 443. *Dalton, Master*.

Change of venue in action of alimony. See *Fogg v. Fogg*, 12 P. R. 249.—Ferguson.

The precedence given to an assignment for the general benefit of creditors by R. S. O. (1887), c. 124, s. 9, over "all judgments and all executions not completely executed by payment" does not extend to a judgment for alimony registered under R. S. O. (1887), c. 44, s. 30, against the lands of a defendant prior to the registration of an assignment by him; and a plaintiff in such a judgment is not obliged to rank with the other creditors of the defendant. *Abraham v. Abraham*, 19 O. R. 256.—MacMahon.

See *Hughes v. Rees*, 9 O. R. 198, p. 883; *Magurn v. Magurn*, 11 A. R. 178, p. 887.

#### XV. MISCELLANEOUS CASES.

Law of Quebec as to assets belonging to the community existing between husband and wife. See *Pilon v. Brunet*, 5 S. C. R. 318.

Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her. *Mullin v. Pasco*, 8 P. R. 372.—Dalton, Q. C.

When land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia (4th Series), c. 36, s. 40, et seq., the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land. *Kearney v. Kean*, 3 S. C. R. 332.

Quere whether a married woman can be one of the five persons required for the formation of a road company under R. S. O. (1877), c. 152. See *Hamilton and Flamborough Road Co. v. Townsend*, 13 A. R. 534.

Appointment of husbands as trustees for their wives. See *McLachlin v. Osborne*—*Magee v. Osborne*, 7 O. R. 297.

Sale of liquor by wife to Indians. Liability of husband. See *Regina v. McAuley*, 14 O. R. 643.

#### HYPOTHÈQUE.

On the 14th October, 1874, Mrs. R. sold to one Q. the south half of the cadastral lot No. 4679, in the city of Montreal, and on the same day Mrs. C. sold him the north half of the same lot. On the 17th October, 1874, Q. sold to G. and to L. and R. three undivided fourths of the two properties en bloc for a sum of \$49,612.50, in deduction of which purchasers paid cash \$22,246.87, and covenanted to pay the balance for Q. to Mrs. R. Mrs. R. was not a party to this last deed, and did not then accept the delegated debtors. In June, 1876, Mrs. R. sued G. et al. hypothecarily for sums due to her on the deed of sale by herself to Q., and thereupon G. abandoned (délaisé en justice) his undivided fourth of the said south half of lot No. 4679. On the 4th December, 1877, Mrs. R. accepted the delegation of payment made in her favour by Q. in the deed of the 17th October, 1874, and afterwards brought the present action against G. for one-third part of the debt of \$27,356.68, with interest due her in virtue of said delegation of payment. G. contended that the acceptance of the delegation of payment being subsequent to the hypothecary action and his délaissement, was null and of no effect, and therefore he could not be sued for any portion of the money:—Held, that under these circumstances G. was relieved from personal liability under the delegation of payment, but only to the extent of his interest in the south half of said lot No. 4679, and remained liable for his interest in the remainder of the property, the amount to be estimated by a valuation (ventilation) of the south half of the lot proportionately to the price of the whole property. *Reeves v. Perrault*, 10 S. C. R. 616.

By a judgment en déclaration d'hypothèque certain property in the possession and ownership of respondents was declared hypothecated in favour of the appellant in the sum of \$5,200 and

interest and costs; they were condemned to surrender the same in order that it might be judicially sold to satisfy the judgment, unless they preferred to pay to appellant the amount of the judgment. By the judgment it was also decreed that the option should be made within forty days of the service to be made upon them of the judgment, and in default of their so doing within the said delay that the respondents be condemned to pay to the appellant the amount of the judgment. This judgment (the respondents residing in Scotland and having no domicile in Canada), was served at the prothonotary's office and on the respondents' attorneys. After the delay of forty days, no choice or option having been made, the appellant caused a writ of *fi. fa. de terris* to issue against the respondents for the full amount of the judgment. The sheriff first seized the property hypothecated, sold it and handed over the proceeds to a prior mortgagee. Another writ of *fi. fa. de terris* was then issued and other realty belonging to the respondents was seized. To this second seizure the respondents filed an opposition a *fin d'annuler*, claiming that the judgment had not been served on them and that they were not personally liable for the debt due to appellant:—Held, 1st. That it is not necessary to serve a judgment en déclaration d'hypothèque on a defendant who is absent from the province and has no domicile. Art. 476 C. C. P. and C. S. L. C. c. 49 s. 15. 2nd. That the respondents, by not opposing the first seizure of their property, had waived any irregularity (if any) as to the service of the judgment. 3rd. That in an action en déclaration d'hypothèque the defendant, may in default of his surrendering the property within the period fixed by the court, be personally condemned to pay the full amount of the plaintiff's claim. Art. 2065 C. C. *Dubuc v. Kildston*, 16 S. C. R. 357.

### IDENTITY.

EVIDENCE OF—See CRIMINAL LAW.

Identification of pledged stock. See *Carnegie v. Federal Bank of Canada*, 8 O. R. 75, p. 202.

Proof of identity of chattel. See *Stevens, Turner & Burns Foundry and General Manufacturing Co. (Limited) v. Barfoot*, 9 O. R. 692.

A discharge of mortgage was signed by "Eliza" Switzer, whereas the mortgage purporting to be discharged was made to "Elizabeth" Switzer:—Held, on a vendor and purchaser application, that there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar, and as a matter of family usage the names are synonymous and interchangeable. *Re Clarke and Chamberlain*, 18 O. R. 270.—Byrd.

See *Oliver v. Newhouse*, 32 C. P. 90; 8 A. R. 122.

### ILLEGAL DETENTION.

See CONVERSION.

### ILLEGALITY.

#### I. OF CONTRACTS.

1. *Generally*—See CONTRACT.
2. *Of Consideration*—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

### ILLEGITIMATE CHILD.

See BASTARD.

### IMMEDIATE EXECUTION.

See EXECUTION.

### IMMORALITY.

See PUBLIC MORALS.

### IMPEACHMENT.

Of County Court judge. See *Re Squier*, 46 Q. B. 474, p. 394.

### IMPOUNDING.

See DISTRESS—MUNICIPAL CORPORATIONS.

### IMPRISONMENT.

#### I. ARREST.

1. *Generally*—See ARREST.
2. *Malicious Arrest*—See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

II. ATTACHMENT—See ABSCONDING DEBTOR—CONTEMPT OF COURT—EVIDENCE—EXAMINATION OF JUDGMENT DEBTOR.

III. DISOBEDIENCE OF JUDGMENT SUMMONS—See DIVISION COURTS.

IV. FALSE IMPRISONMENT—See JUSTICE OF THE PEACE—TRESPASS.

V. CONVICTIONS—See INTOXICATING LIQUORS—JUSTICE OF THE PEACE.

VI. DURESS—See DURESS.

VII. PRISONER—See PRISONER.

VIII. HABEAS CORPUS—See HABEAS CORPUS.

A county judge has power to imprison in the county judges' criminal court. *Regina v. St. Denis*, 8 P. R. 16.—Cameron.

"Standing in front of the horses and carriage driven by V," although he was "thereby forcibly detained on the highway against his will" is not an imprisonment. See *Regina v. McElligott*, 3 O. R. 535.

## IMPROVEMENTS ON LAND.

## I. TRUST PROPERTY, 895.

## II. TENANT FOR LIFE, 895.

## III. MISTAKE OF TITLE, 896.

## IV. UNSKILFUL SURVEY, 900.

## V. RENT PAYABLE BY IMPROVEMENTS—See LANDLORD AND TENANT.

## VI. ASSESSMENTS FOR LOCAL IMPROVEMENTS—See ASSESSMENT AND TAXES.

## I. TRUST PROPERTY.

The court under special circumstances, allowed money to be expended on improvements on a certain property of a testator who had directed by his will that the rents and profits of all his property should be expended in payment of debts, and in the support of his wife and children until the youngest child should come of age. *Re Bender*, 8 P. R. 399.—Spragge.

See *Foott v. Rice*, 4 O. R. 94, p. 899; *Foott v. McGeorge*, 12 A. R. 351, p. 899.

## II. TENANT FOR LIFE.

J. T. S. devised certain lands to M. H. for life, and afterwards to any child of M. H. who might survive her, in fee. M. H. had one child, aged ten, when she petitioned under 19-20 Vict., c. 120 (Imp.), claiming to be allowed for expenditure made by her upon two houses upon the land for much needed repairs and lasting improvements, and also for \$100, paid to a tenant for improvements made by him under a promise from the testator that he should be paid for them; and praying for a sale, or power to lease:—Held, that M. H. might be reimbursed the \$100, from the testator's general estate, as this appeared to have been a debt due by the testator: but neither this nor the other expenditure could be charged on the land:—Held, further, it appearing that there was no means from the income of the property of putting it into a sufficiently remunerative condition to support M. H., and her child, it was a proper case for the sale or leasing of the estate, with a right to build. The repairs of a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligations, and he cannot charge the inheritance with them. *Re Smith's Trusts*, 4 O. R. 518.—Boyd.

Under the will of W. B. K. his widow, E. K., took a life estate in the whole of his real property (see 12 O. R. 469), and his son, W., the remainder in fee. A railway company, after the death of W. B. K., expropriated part of the lands and paid the compensation money to E. K., who had obtained letters of guardianship of her infant children. This money she expended in making improvements in the remaining portion of the lands. After W. attained full age he sold this land with the improvements on it, E. K. joining in the conveyance in ignorance of her rights to a life estate, and receiving no compensation in respect to it. W. afterwards died intestate, and in taking the accounts in this action as against E. K. in respect to the moneys received by her as above from the railway, the heirs of W. sought to charge E. K. with the whole of the said

money (less the value of her life estate), without regard to the sums spent by her on the improvement of the rest of the land:—Held, that if W. were living and making this claim, E. K. could have answered it by shewing that he had already got the equivalent by the sale of the other property long before the termination of her life estate at a value enhanced by the improvements, and that besides she had released to his purchaser her life estate, which further enhanced the amount of purchase money received by him, and since his heirs (the present claimants) could have no higher claim than he would have had if living, E. K. could answer the claim now made by them in the same way. E. K. could not be said to occupy the position only of a tenant for life seeking to charge the estate with the value of a permanent improvement made by her, or seeking to charge the remainderman with such value or part of it. *Wilson v. Graham* (2), 13 O. R. 661.—Ferguson.—Osler.

See *Hill v. Hill*, 6 O. R. 244, p. 715.

## III. MISTAKE OF TITLE.

The plaintiff being in possession of property—a flouring-mill—of which he believed his wife to be owner in fee as heiress of her father, expended upon it about \$3,253. After her death the father's will was discovered, which gave her a life estate only. Upon a reference to the master, at London, to ascertain the amount of enhancement in value of the property, that officer, on the evidence adduced, found that its value at the death of the testator was \$2,700, and that the value at the date of the report was \$4,500:—Held, that he had, under the circumstances, properly found the enhanced value of the estate by reason of such expenditure to be \$1,800, not \$1,300—although upon a sale under a decree of the court the property had realized \$4,000 only—and further, that the plaintiff was entitled to interest on such enhanced value from the time the money was expended. *Fawcett v. Burwell*, 27 Chy. 445.—Proudfoot.

The master-in-ordinary, on appeal from the master at London thought the plaintiff had been charged with rent on the unimproved value; but Proudfoot, V. C., on appeal, reversed this finding, thinking it against the weight of evidence, which he had the same opportunity of judging of as the master-in-ordinary, who had not seen the witnesses. *Id.*

Semble, that a forced sale for cash is not a proper mode of determining the amount of the enhancement in value of an estate which has been improved by a person in possession under a bona fide mistake of title. *Id.*

Some time before 1863 the defendant M. at the solicitation of his father and mother went into possession of 300 acres of land, 100 acres of which were the estate of the mother, and cultivated the same, relying on the promise and agreement of his parents to give him a conveyance. In 1866 the mother died without having executed any deed of her 100 acres, and in October of that year the father, in the belief that he was heir to his wife, executed a conveyance to M. of the whole 300 acres, and which M. executed as grantee. The father died in 1873, and M. continued to reside on the property with the know-

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ledge of his several brothers and sisters until 1877, when, owing to an objection raised by a railway company who desired to obtain a deed of a portion of the 100 acres, it was discovered that the deed of 1886 had not effectually conveyed that portion belonging to the mother, and thereupon the defendant obtained a deed of quit claim from the several heirs. In 1878 a bill was filed by the heirs impeaching this deed as having been obtained by fraud, and the court being satisfied that the same had been obtained improperly set it aside with costs; but ordered M. to be allowed for his improvements, as having been made under a bona fide mistake of title, he accounting for rents and profits since the death of the father. *McGregor v. McGregor*, 27 Chy. 470.—Spragge.

The owner of lands created two mortgages thereon, and subsequently released his equity to the mortgagee who was entitled to priority, who afterwards bought the interest of the mortgagor at sheriff's sale, and subsequently sold the premises to several purchasers, who bought without notice of the second mortgage:—Held, that this had not the effect of merging the mortgagee's charge in the equity of redemption; and that in a proceeding by parties claiming under the second mortgage, their only right was to redeem as puisne incumbrancers, and that the purchasers were entitled to an enquiry as to the enhanced value of the property by reason of their improvements. *Weaver v. Vandusen—Wills v. Agerman*, 27 Chy. 477.—Spragge.

Held, reversing the judgment of Galt, J., (31 C. P. 227,) that under R. S. O. (1877) c. 95, s. 4, which entitles a defendant in ejectment to the value of the lasting improvements made on the land to the extent to which the land has been enhanced thereby, the plaintiff is entitled to an account of the rents and profits to be set off against the value of such improvements. *McCarthy v. Arbuckle*, 31 C. P. 405.—C. P. D. See also *S. C.*, *ib.* 48.

In ejectment it was ordered in Hilary Term, 1879, that a verdict should be entered for plaintiff, but no execution to issue until the value of the improvements was ascertained and the amount thereof paid to the defendant, and that it be referred to the master in chancery at Ottawa to ascertain such value. The master made his report on the 30th of October, 1879, merely finding the value of the improvements, without making any allowance for the rents and profits. In Easter Term, 1880, the plaintiff moved to refer back the report to the master to make such allowance:—Held, that the reference was to the master as an officer of the court, and that there was nothing in any of the sections of the C. L. P. Act, R. S. O. (1877) c. 50, relating to arbitrations, which interfered with the right of the court, under the circumstances, to review the act of their officer, and to send the matter back for his reconsideration. The matter was therefore referred back to the master to make such allowance. *Id.*

Where in 1875, in an action of ejectment the parties agreed in writing that a verdict be entered for the plaintiff, but not enforced until defendant had paid \$50 for costs and the value of his improvements, said value to be fixed by arbitration; and, though the \$50 had not been paid, nor the said value so ascertained, plaintiff

entered judgment on the verdict, and ejected the defendant, whose devisee now filed this bill, claiming possession, damages, a reference as to improvements, and an order for payment of the amount found due, and of the \$50 for costs:—Held, that though the judgment could not be set aside, and possession given to plaintiff, the plaintiff was entitled to a reference as prayed, with costs. *Watson v. Ketchum*, 2 O. R. 237.—Chy. D.

When a claimant of certain lands commenced an action of ejectment, in which he afterwards entered a nolle pro., and then, subsequently, commenced a suit in this court for the recovery of the said lands, and the defendant claimed compensation for improvements made under bona fide mistake of title:—Held, the defendant was entitled to compensation for improvements made before the ejectment action, and for those made between the nolle pro. and the commencement of the second suit, but not for those made during the pendency of the ejectment, or since the commencement of the second suit. *O'Grady v. McCaffray*, 2 O. R. 309.—Chy. D.

G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F. describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees by the direction of G. W. F., conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land:—Held, (Hagarty, C. J., dissenting) that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.; that this land was subject to the trusts of the previous conveyance to them: that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover:—Held, also, that there should be a reference to the master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved. Per Hagarty, C. J. The legal estate being in the defendant by conveyance from the trustees, the plaintiff should shew an equity to recover what she claimed as part of the trust estate, which she had not done; that the patent



to the trustees, though describing them as such, did not in terms declare any trust respecting this land, and it could not be assumed that it formed part of the trust premises. Per *Armour, J.* The case was not within R. S. O. (1877) c. 95, s. 4, as to improvements under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and cestui que trust. Per *Cameron, J.* The case was within the statute. *Foot v. Rice*, 4 O. R. 94.—Q. B. D. Affirmed. See *Foot v. McGeorge*, 12 A. R. 351.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor v. McGregor*, 5 O. R. 617.—Ferguson.

Improvements made under a mistake of title are not, since R. S. O. (1877), c. 95, s. 4, to be allowed for as liberally as improvements made by a mortgagee in possession. *Munsie v. Lindsay*, 10 P. R. 173. *Hodgins, Master-in-Ordinary.*

The enhanced value of a farm, improved under a mistake of title, is found by deducting from the present value of the land, with the improvements, the estimated present value of the land without the improvements, plus any increase in value from other causes than such improvements. *Ib.* But see *S. C.* 11 O. R. 520.

The occupation rent chargeable to a person improving land under a mistake of title is the rental value of the land without the improvements. *Ib.*

In fixing an occupation rent to be charged against one who had been occupying land under mistake of title, and at the same time an allowance to be made to him for improvements, if such occupation rent is charged on the full increased value (as it should be in such case), then interest should be allowed on the actual costs of proper outlay for lasting improvements as an offset. Manner of taking the account and contra account in such cases pointed out. *S. C.*, 11 O. R. 520.—Boyd.

In this action it was referred to the master to take an account of the rents and profits received by one who had occupied land under mistake of title, viz.: as assignee of a devisee the devise to whom was void, and to fix an occupation rent to be paid by him, and also to fix the sum to be allowed to him in respect of improvements, and to certain legacies charged by the will on the said land and which he had discharged, and also of payments made by him on account of taxes, and it appearing that in discharge of some of the said legacies less than the face value thereof had been paid:—Held, that in computing interest on the sums so paid in respect of the legacies, it should only be computed on the amounts actually paid, and not on the face value of the legacies, and further that the account should be taken together so that on one side would appear the disbursements for improvements, legacies, and taxes, and on the other the occupation rent. *Ib.*

Held, in this case where a tax sale was set aside for irregularities in sale, that the defendant was entitled under R. S. O. (1877) c. 95, s. 4, though not under R. S. O. (1877) c. 180, s.

159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses. *Haisley v. Somers*, 13 O. R. 600.—Proudfoot.

H. by his will appointed F. and W. executors and trustees of his estate. F. for the purpose of securing a debt due him by the estate, executed a mortgage to W.—W. died intestate, and F., five years subsequently having agreed to sell the mortgaged premises to M., executed a statutory discharge of the mortgage, which he expressed to do as sole surviving executor, and then conveyed the estate to M. Held, (affirming the judgment of Boyd, C., 13 O. R. 21), that the act of F., in executing a discharge of his own mortgage had not the effect of releasing the land:—Held, also (in this reversing the same judgment), that M., the purchaser and his assigns, were not entitled to any lien for improvements on the lands during their occupancy thereof. *Beatty v. Shaw*, 14 A. R. 600.

#### IV. UNSKILFUL SURVEY.

Where S. having purchased a lot of land, employed a public land surveyor to mark out the boundaries of it for him, and the surveyor, by reason of an unskilful survey, included in the lot, as marked out by him, land which should not have been so included, and S. misled thereby, effected improvements upon the land so erroneously included:—Held, on recovery of the said land by the rightful owner, that S. was entitled to compensation for the said improvements, under R. S. O. (1877) c. 51, ss. 29, 30. *Plumb v. Steinhoff*, 2 O. R. 614.—Ferguson. But see *S. C.* 11 A. R. 788; 14 S. C. R. 739.

#### IMPROVEMENTS ON STREAMS.

See WATER AND WATER COURSES.

#### IMPROVIDENCE.

See FRAUD AND MISREPRESENTATION.

"Improvvidence" as distinguished from "error" as applied to letters patent which are sought to be avoided and set aside as issued "improvidently." See *Fonseca v. Attorney-General of Canada*, 17 S. C. R. 612.

#### INCOME.

I. ASSESSMENT OF—See ASSESSMENT AND TAXES.

II. INCOME QUALIFICATION OF VOTERS—See PARLIAMENTARY ELECTIONS.

#### INCORPORATED COMPANIES.

See COMPANY.

**INDECENT ASSAULT.**

See *Regina v. Chute*, 46 Q. B. 555, p. 432.

**INDEMNITY.**

See **GUARANTEE AND INDEMNITY.**

**INDIAN ACT.**

See **INDIANS — INDIAN LANDS — INTOXICATING LIQUORS.**

The words "appeal brought" in section 108 of the Indian Act, R. S. C. c. 43, are satisfied by the giving of notice and perfecting the appeal by the giving of the security provided for by the Summary Convictions Act; and it is not necessary for an appellant from a conviction under that Act to bring his appeal to a hearing within the time limited by section 108. In re *Hunter v. Griffiths*, 7 P. R. 86, not followed. Semble, merely giving notice of appeal within the thirty days would have satisfied the words of the statute. *Regina v. McGauley*, 12 P. R. 259.—Armour.

The Canada Temperance Act can have no operation where the Indian Act is in force. *Re Metcalfe*, 17 O. R. 357.—Boyd.

**INDIAN LANDS.**

**ASSESSMENT OF—See ASSESSMENT AND TAXES.**

The Liquor License Act applies to Indian land under lease from the Crown to a private individual. *Regina v. Duquette*, 9 P. R. 29.—Osler.

Application to quash a by-law regulating animals running at large in municipalities in which are situate Indian lands. See *In re Milloy and the Township of Onondaga*, 6 O. R. 573.

Held, that the defendant, who was a visiting superintendent and commissioner of Indian affairs for the Brant and Haldimand Reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in the county of Brant. *Hunter v. Gilkison*, 7 O. R. 735.—Q. B. D.

The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vict. c. 28, s. 66 (Dom.), and was convicted:—Held (Wilson, C. J., dissenting), that he ought not to have been convicted, because, per Armour, J., the wood, the subject of the alleged larceny, was not in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act; and because, per O'Connor, J., the affidavit required by sec. 64, had not been made, and was a condition precedent to a seizure. Per Wilson, C. J.—Sec. 64 cannot apply to trees found by the officer of the department in the act of being removed from the lot on which they have been

wrongfully cut, or where there can be no doubt they have been unlawfully cut, for such an application would make it impossible to effect a seizure in such case. *Regina v. Fearman*, 10 O. R. 660.—Q. B. D.

The defendant was convicted for moving hay from Indian lands contrary to section 26 of the Indian Act, R. S. C. c. 43:—Held, that the word "hay" used in the statute does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass or grass sown and cultivated:—Held, also, that under this Act and the legislation incorporated therewith, there is no power to include in the conviction the costs of commitment and conveying to jail. *Regina v. Good*, 17 O. R. 725.—C. P. D.

Section 109 of the British North America Act of 1867 gives to each province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown subject to such rights as the Dominion can maintain under sections 108 and 117. Attorney-General of Ontario v. Mercer (8 App. Cas. 767), followed: By royal proclamation in 1763, possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories" as not having been ceded to or purchased by the Crown were reserved "for the present" to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person. In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing:—Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the good will of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the province in the same," within the meaning of section 109:—Held, also, that by force of the said surrender the certain beneficial interest in the lands subject to the privilege was transmitted to the province in the terms of section 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein. *St. Catharines's Milling and Lumber Co. v. The Queen*, 14 App. Cas. 46. Judgments in courts below 13 S. C. R. 577; 13 A. R. 148; 10 O. R. 196, affirmed.

**INDIANS.**

I. **INDIAN LANDS—See INDIAN LANDS.**

II. **SALE OF LIQUOR TO—See INTOXICATING LIQUORS.**

As to right of electors on Indian lands to vote under Canada Temperance Act, 1878. See

*Regina v. Shavelear*, 11 O. R. 727. *Re Metcalfe*, 17 O. R. 357.

On an application which was granted under Rule 80 (Con. Rule 739), for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve :—Held, that since the repeal of C. S. C. c. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, section 77 (Dom.), the judgment will not bind any property of the Indian except that described in section 75. *Bryce v. Salt*, 11 P. R. 112.—*Dalton, Master*.

Claims of half-breeds. See *Burns v. Young*, 10 A. R. 215.

### INDICTMENT.

See CRIMINAL LAW.

As to whether indictment or mandamus is the appropriate remedy to compel a municipality to repair an existing bridge or erect a new one. See *In re The Townships of Moulton and Canborough and the County of Haldimand*, 12 A. R. 503.

### INDIGENT DEBTORS' ACT.

In an action for seduction, the defendant was arrested under a writ of ca. re., and judgment having been entered against him, a ca. sa. was issued, and he was surrendered by his bail to the custody of the sheriff.—Held, that the defendant was not in custody as a debtor, or on execution, but on mesne process as a wrong-doer, and that he was not entitled to an order for payment of a weekly allowance under the Indigent Debtors' Act, R. S. O. (1877), c. 69. *Wheatly v. Sharp*, 8 P. R. 189.—*Cameron*.

Held, that it is within the power of the clerk of the Crown in chambers to make an order for the payment of a weekly allowance to a debtor, under the above Act, where it can legally be made. *Ib*.

### INFANT.

#### I. POWERS OF.

1. *To Devise*, 904.
2. *As Executor*, 904.

#### II. CONTRACTS BY, 904.

#### IV. ACTIONS AND PROCEEDINGS BY AND AGAINST.

1. *As Executor*, 906.
2. *Next Friend*, 906.
3. *Official Guardian*.
  - (a) *Service on*, 906.
  - (b) *Costs*, 907.
4. *Other Cases*, 907.
5. *Partition of Estate*—See ESTATE.

#### V. GUARDIAN AND TRUSTEE.

1. *Security by*, 908.
2. *Other Cases*, 908.

#### VI. CUSTODY OF, 906.

#### VII. SUPPORT OF, 911.

#### VIII. INFANTS' ESTATE.

1. *Advancement*, 911.
2. *Maintenance*, 911.
3. *Sale of*, 911.
4. *Partition of*—See PARTITION.
5. *Payment of Money Out of Court*, 913.
6. *Trustees of*—See TRUSTS AND TRUSTEES.
7. *Possession By or Against Infants*—See LIMITATION OF ACTIONS.

#### IX. ADOPTION, 913.

#### X. MISCELLANEOUS CASES, 913.

#### XI. PARENT AND CHILD—See PARENT AND CHILD.

#### XII. ILLEGITIMATE CHILD—See BASTARD.

#### XIII. SEDUCTION OF—See SEDUCTION.

#### I. POWERS OF.

##### 1. *To Devise*.

In a so-called will, executed a few days before her death, G. L.'s wife, assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age ;—Held, that the will was invalid. C. S. U. C. c. 73, s. 16 (R. S. O. (1877), c. 106, s. 8), only removes the disability of coverture in respect to wills, not of infancy. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—*Boyd*.

##### 2. *As Executor*.

See *Merchants' Bank v. Monteith*, 10 P. R. 334, pp. 709, 720, 736 ; *Re Jackson—Massey v. Crookshanks*, 12 P. R. 475, p. 907.

#### II. CONTRACTS BY.

The plaintiff being at the time an infant, on 20th February, 1878, executed a mortgage in favour of the defendants. The proceeds were chiefly applied in paying off prior incumbrances on the land. The plaintiff came of age on 19th April, 1880. After this date, and with full knowledge of his position, he, on January 10th, 1884, executed another mortgage, with the object of in part paying off the mortgage in question ; and, moreover, by certain conversations with an agent of the defendants he admitted his liability under the latter mortgage, nor did he take any steps to disaffirm it until 7th September, 1882. On 30th September, 1882, this action was commenced :—Held, that the mortgage in question was not void, but only voidable, and that the plaintiff's conduct after he came of age amounted to a ratification of it. *Foley v. Can-*

*ada Permanent Loan and Savings Co.*, 4 O. R. 38.—Chy. D.

The rule is now well established, that the deed of an infant is not void ab initio, but voidable, on his attaining majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time after coming of age, otherwise his silence will be held to amount to an affirmation of it. *Ib.*

Semble, that acts of less moment and significance than are required to avoid the conveyance of a minor, may be sufficient evidence of its ratification. *Ib.*

Semble (per Proudfoot, J.), that it must be presumed that an adult who affirms a deed executed by him during infancy, does so with knowledge of his rights, and of his exemption from liability. *Ib.*

Per Boyd, C.—The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury, till he is of legal capacity to bind himself as an adult. When he arrives at majority he is clothed with full legal capacity with all its incidents, and, as an adult, has no special protection on the ground of ignorance of the law, and any disaffirmance by him of a deed executed during minority should only be given effect to on the terms of his restoring to the other party, as far as possible, any benefit obtained by him during minority. *Ib.*

Execution of chattel mortgage and assignment for creditors by infant partner. See *Powell v. Calder*, 8 O. R. 505, p. 806.

Application to set aside a conveyance made by plaintiff, a married woman, while under age.—Terms of granting relief.—Acquiescence after attaining majority. See *Whalls v. Learn*, 15 O. R. 481, p. 873.

An infant cannot during infancy avoid a lease by him, reserving rent for his benefit, and possession of the demised premises will be ordered to be given in an action by the lessee for that purpose. *Hartshorn v. Early*, 19 C. P. 139, and *Slator v. Brady*, 14 Ir. C. L. R. 61, 342, followed. The discretion given by Con. Rule 1170 as to costs authorizes the imposition against the infant of the costs of an action to enforce such lease, including the costs of the official guardian, paid by the plaintiffs. *Lipsell v. Perdue*, 18 O. R. 575.—C. P. D.

Where a loan of money is improperly obtained by a tutor for his own purposes and the lender, through his agent who was also the subrogate tutor, has knowledge that the judicial authorization to borrow has been obtained without the tutor having first submitted a summary account as required by Article 298 C. C., and that such authorization is otherwise irregular on its face, the obligation given by the tutor is null and void. The ratification by the minor after becoming of age of such obligation is not binding if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor. *Davis v. Kerr*, 17 S. C. R. 235.

If a mortgage, granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action by

the lender against a subsequent purchaser of the property mortgaged will not lie. *Ib.*

Infant stock-holder repudiating liability as contributory. See *Re Central Bank and Hogg*, 19 O. R. 7, p. 250.

#### IV. ACTIONS AND PROCEEDINGS BY AND AGAINST.

##### 1. As Executor.

An infant whether executor or executor de son tort is not liable for a devastavit. *Young v. Purvis*, 11 O. R. 597.—Proudfoot.

See *Merchants' Bank v. Monteith*, 10 P. R. 334 p. 736. *Re Jackson—Massey v. Crookshanks*, 12 P. R. 475, p. 907.

##### 2. Next Friend.

An administration of an estate in which infants were interested, was made on the mere suggestion of their next friend that it would be for their benefit, without going into the merits of the case between the plaintiff and the defendant, the executor. *Re Wilson—Lloyd v. Tickborne*, 9 P. R. 89.—Proudfoot.

Where one commenced an action as next friend to an infant to restrain waste on the infant's property without any notice to the defendant, and without any investigation as to the good reasons which the defendant had for acting in the manner complained of:—Held, that the next friend should pay the costs. *Mill v. Mill*, 8 O. R. 370.—Boyd.

An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the Supreme Court of Canada, where the appeal was advised by more than one counsel, and one of the judges of the Court of Appeal had dissented from the rest. *Cottingham v. Cottingham*, 11 P. R. 13.—Ferguson.

Action for penalty under Election Act. See *Garrett v. Roberts*, 10 A. R. 650 p. 914.

When an infant appears and defends a suit by his guardian ad litem, or by his next friend institutes proceedings, he is bound by such proceedings just as if he had been an adult. *Ricker v. Ricker*, 27 Chy. 576.—Proudfoot.

##### 3. Official Guardian.

###### (a) Service on.

The costs of serving an infant personally who is out of the jurisdiction, will not be allowed. The proper method is to obtain a precept ordering appointing a guardian ad litem, under G. O. Chy. 610, and serve him. The official guardian is now by O. J. Act, section 66, such guardian. In this case an allowance was ordered to be made if the personal service on the infants had facilitated the official guardian in communicating with them or their relatives. *Rew v. Anthony*, 9 P. R. 545.—Boyd.

In a partition suit an order allowing substitutional service of the bill, on the official guardian of an infant defendant, resident without the jurisdiction of the court, was granted on the ground that the share of the infant in the lands

in question amounted to only \$40, and substitutional service would be inexpensive. *Weatherhead v. Weatherhead*, 9 P. R. 96.—Stephens, Referee.

Held, that administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian were invalid. *Re Jackson—Massey v. Crookshanks*, 12 P. R. 475.—Boyd.

The provisions of the rules and general orders as to service in case of infancy apply whether the infant be a sole or a joint defendant, and whether he be sued personally or in a representative capacity. *Ib.*

In a proceeding by petition under the Quiet-ting Titles Act, service on the official guardian, is good service upon infants who are required to be notified of the proceedings. *Re Murray*, 13 P. R. 367.—Ferguson.

#### (b) Costs.

The official guardian's costs of defending this action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action. *Westgate v. Westgate*, 11 P. R. 62.—Ferguson.

See *Lipsett v. Perdue*, 18 O. R. 575, p. 905.

#### 4. Other Cases.

Where there was no evidence to shew that infants had been served with a decree of foreclosure, reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with notice of proceedings under the Quiet-ting Titles Act, proof of service of the decree was dispensed with. *Re Gilchrist*, 8 P. R. 472.—Blake.

A final order of foreclosure should reserve a day for infant defendants to shew cause. *Spragge, C.*, was of opinion that the practice should be changed for the sake of putting an end to litigation and to the evil of having estates tied up for perhaps many years, but refused to change the practice in the present case. *London and Canadian Loan and Agency Co. v. Everett*, 8 P. R. 489.—Spragge.

In an action of ejectment by mortgagees, on the application of the infant defendants, an order for immediate possession and sale of the mortgage premises was made, with a reference to the master to take the usual accounts, but \$80 was ordered to be paid into court to meet the expenses of the sale. *Western Canada Loan and Savings Co. v. Dunn*, 9 P. R. 587.—Armour.—Rescinding order of the master in chambers in *S. C. Ib.* 490.

Costs of enforcing lease made by infant and costs of official guardian. See *Lipsett v. Perdue*, 18 O. R. 575, p. 905.

Defence of infancy to action for breach of promise of marriage. See *Smith v. Jamieson*, 17 O. R. 626, p. 865.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor when of age for the amount so loaned and used. *Davis v. Kerr*, 17 S. C. R. 235.

See *Young v. Huber*, 29 Chy. 49, p. 916; *McPherson v. McPherson*, 10 P. R. 140, p. 705.

### V. GUARDIAN AND TRUSTEE.

#### 1. Security by.

An order having been made under 47 Vict. c. 20, s. 12 (Ont.), for the appointment of a trustee to receive insurance moneys to which infants were entitled, the master-in-ordinary named a person as trustee, and required him to give security in double the amount to be received. On an ex parte appeal the direction of the master that security should be given was affirmed, and:—Held, that it would be contrary to the uniform practice of the court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties. *Re Thin*, 10 P. R. 490.—Hodgins, Master-in-Ordinary.—Boyd.

A foreigner was appointed trustee for infants under 47 Vict. c. 20 (Ont.), to receive insurance moneys, without being required to give security in this province, on its being shewn that he had given security upon his appointment as guardian, to the satisfaction of a court in the state where he and the infants resided. The insurance company were discharged upon payment to the trustee of the moneys in their hands. *Re Andrews*, 11 P. R. 199.—Ferguson.

See *Galbraith v. Duncombe*, 28 Chy. 27.

#### 2. Other Cases.

It was provided in a will, (1) That the interest on investments should be paid by trustees for the benefit of certain infants to their guardian appointed by the will, or to such guardian, except the father of the infants, as the court should appoint; and (2) That if the father applied to the court, the trustees were to allow the interest to accumulate and be invested till the infants became of age. The guardian named ceased to act, and after the lapse of two years (notice having been given to the father), it was ordered, (1) That the petitioner, the aunt of the infants, with whom they had lived since the death of their mother, the testatrix, should be appointed guardian; (2) That the petitioner should be paid for the past maintenance of the infants. *Re Heywood*, 8 P. R. 292.—Blake.

The sum allotted to the guardian of infants for commission in partition suits should not be measured only by the work done in the master's office. *Cameron v. Leroux*, 9 P. R. 304.—Proud-foot.

Where one brought an action against an executor in this country to recover legacies bequeathed to infants, resident in Minnesota, of whom he had been appointed guardian by a Probate Court of Minnesota, and it appeared that the duties and powers of guardians under the laws of Minnesota were not greater than

those of appointment:—Held, that the court, in that the small, require an, of the R. 199, Boyd.

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those of testamentary guardians, or guardians appointed by a Surrogate Court in this country:—Held, that the money must be paid into court, and not to the foreign guardian. Semble, that the rule might be modified if the sum were small, and the whole, or nearly the whole, were required for the infant's education and maintenance, or other immediate use. *Flanders v. D'Evelyn*, 4 O. R. 704.—Proudfoot.

An application for an order sanctioning the payment of a bequest in favour of infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Surrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into court. *Re Andrews*, 11 P. R. 199, distinguished. *Re Parr*, 11 P. R. 301.—Boyd.

Payment of infants' legacy to guardian. See *Huggins v. Law*, 11 O. R. 565.

Held, that the duly appointed tutors in the Province of Quebec of an infant domiciled and residing there, which province had also been the domicile of the father at his death, were entitled to have paid over to them from the Ontario administrators of the father's estate, there being no creditors' money coming to the infant from said estate, which had been collected in Ontario. *Hanrahan v. Hanrahan*, 19 O. R. 396.—C. P. D.

See *Galbraith v. Duncombe*, 28 Chy. 27; *Rew v. Anthony*, 9 P. R. 545, p. 906; *Rattray v. Larue*, 15 S. C. R. 102; *Hickey v. Stover*, 11 O. R. 106; *Kent v. Kent*, 20 O. R. 445; *Clarke v. Macdonell*, 20 O. R. 564.

#### VI. CUSTODY OF.

The mother of a child six years of age, whose father was dead, having remarried, delivered up the child to a cousin for nurture and adoption. No written agreement was made and the parties differed as to the verbal understanding:—Held, that the court looking only to the best interests of the child, should refuse to direct its redelivery to the mother. The fact of the mother having remarried, and having children by both husbands, and that the child would be under the custody of a stepfather, was regarded as one ground for the non-interference of the court. *In re Scott*, 8 P. R. 58.—Osler.

While the undoubted natural right of a father to the custody and guardianship of his child is undisputed, and while the law imputes ability and inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, and his superior claim to the custody of his offspring may be suspended while the incapacity lasts. Under the circumstances of this case, stated in the report, the court refused, on the application of the father, to take the child out of the custody of its grandmother and her brother-in-law. *Re Ferguson*, 8 P. R. 556.—Boyd.

Where the father and mother of a female child under five years of age were living apart, the court refused, under the circumstances stated in the judgment, to take the child out of the custody of the mother, but allowed the father to have access to the child at stated times. *In re Murdoch*, 9 P. R. 132.—Osler.

Custody of illegitimate child. See *In re Smith*, 8 P. R. 23, p. 149; *O'Rourke v. Campbell*, 13 O. R. 563, p. 149.

A return was made by the mother of the infants, in whose custody they were, to a writ of habeas corpus obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. (1877) c. 130, s. 1:—Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law. *Re Murdoch*, 9 P. R. 132, explained and followed. *Re Smart Infants*, 11 P. R. 482.—Ferguson.

A father was proceeding by habeas corpus to obtain an order awarding him the custody of his infant children (See 12 P. R. 2):—Held, that a more comprehensive adjudication could be had upon a petition, and that there was power to direct that a petition should be substituted for the habeas corpus proceedings. Such a direction was given where it appeared to be in the interest of the infants and all concerned. *S. C.*, 12 P. R. 312.—Ferguson.

The order of Ferguson, J., *supra*, was affirmed with one variation, viz., the habeas corpus to run concurrently with the petition and to be disposed of with it. *S. C.*, *ib.* 435.—Chy. D.

The order of the Chancery Divisional Court, 12 P. R. 435, affirmed on appeal:—Held, that the infants' father had waived his right to appeal from the order directing the filing of a petition by having complied with such order:—Semble, but for the waiver of the appeal the father must have succeeded; for the power given by Rule 474, O. J. A. (Con. Rule 444), is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular. *S. C.*, *ib.* 635.—C. of A.

Upon an application by the father of two infants under the ages of five and three respectively, for a habeas corpus to obtain their custody from the mother, it appeared that the applicant was a man of drunken habits and of evil conversation, that he had beaten his wife and so ill-treated her that she was justified in leaving him, while she was a moral and sober woman. It was also shewn that the maternal grandmother of the infants was able and willing to give them a home with their mother, who lived with her, while the paternal grandmother was neither able nor willing to do so:—Held, that, having regard to the welfare of the infants and the conduct of the parents, the mother should have the custody for the present. *Re Dickson Infants*, 12 P. R. 659.—Street.

It was urged that the father had a right to have the children brought up as Presbyterians, and that the mother and her mother were both members of the Salvation army:—Held, that this question was not a pressing one owing to the tender age of the infants; the father might raise it again. *ib.*

Held, also, that having regard to the wide discretion given by R. S. O. (1887), c. 137, s. 1, the judge was freed from any possible obliga-



tion to make, upon the application of the father an order which would be reversed on the application of the mother. *Ib.*

See *Roberts v. Hall*, 1 O. R. 388, p. 913.

#### VII. SUPPORT OF.

Where a father whose children are maintained by another, and who could have obtained possession of their persons by habeas corpus, allows them to be so maintained, he is liable for their support and maintenance to the person in whose care such children are. *Hughes v. Rees*, 10 P. R. 301.—Hodgins, *Master-in-Ordinary*.

Liability of parent for wearing apparel furnished to his son. See *Hayman v. Howard*, 18 C. P. 353.

#### VIII. INFANTS' ESTATE.

##### 1. Advancement.

Difference between the law of England and our own as to advancements to children, commented on. Under our law an advancement is neither a loan nor debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution. *Re Hall*, 14 O. R. 557.—Boyd.

##### 2. Maintenance.

Where an allowance for past maintenance of infants is sought out of the infants' estate, it is a rule that the principal is not to be encashed upon, unless for unavoidable reasons falling little short of necessity; and the court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor. Where the aggregate amount of principal of the estate of five infants was \$11,250, the master allowed their mother \$9,504 for five years' past maintenance, but Boyd, C., on appeal, reduced the amount to \$6,600. *Crane v. Craig*, 11 P. R. 236.—Boyd.

See *Re Heywood*, 8 P. R. 292, p. 908.

##### 3. Sale of.

Although by the general rule and course of proceeding in mortgage cases the mortgagor is entitled to six months to redeem, before a sale is ordered, the court will, under special circumstances, direct an immediate sale, even against the infant heirs of the mortgagor. *Swift v. Minter*, 27 Chy. 217.—Blake.

Liberty of plaintiff, who was mortgagee and trustee, to bid at sale of the mortgaged premises made under a decree. See *Ricker v. Ricker*, 27 Chy. 576; 7 A. R. 282.

On a sale of the land of an infant under R. S. O. (1877), c. 40, ss. 75-83, an order was made under 44 Vict. c. 14, s. 5 (Ont.), barring the dower of the infant's mother, who was a lunatic and confined in an asylum. *Re Colthart*, 9 P. R. 356.—Ferguson.

Interest of infants in land, barred by a conveyance to a railway company by their mother who was part owner. See *Dunlop v. Canada Central R. W. Co.*, 45 Q. B. 74.

Certain infants' lands were sold under an order which appeared upon its face to have been procured under the statuabie jurisdiction of the Court of Chancery relating to the sale of infants' estates: 12 Vict. c. 72, R. S. O. (1877), c. 40, s. 76. The petition and order were entitled in the matter of the infants, and the subsequent proceedings were taken as provided by the general orders of the court, the order setting out that what was being done was because it was beneficial to the infants, and the conveyance was executed by the referee for the infants. A subsequent purchaser objected that the order for sale did not disclose any jurisdiction:—Held, that as the court would never allow the infants to recede from what was so done for their benefit, a subsequent purchaser could not raise doubts as to jurisdiction, when upon the face of the proceedings the statute authorizing the sale appeared to have been followed. *Calvert v. Godfrey*, 6 Beav. 97, considered and distinguished. *Blean v. Blean*, 10 O. R. 693.—Boyd.

Where a will devised lands to the executors on trust to sell the same:—Held, that the case was not within section 8 of the Devolution of Estates Act and the approval of the official guardian or an order of the court was not necessary to a sale. The word "devolve" in this section, is not used in its strict and accepted meaning of falling upon by way of succession, but in the sense merely of "passing," and what is meant is, that where infants are concerned, no real estate which, but for the preceding sections, would not come to the executors or administrators by a devise, gift, or conveyance, can be validly sold without the written consent of the official guardian. *In re Booth's Trusts*, 16 O. R. 429.—Ferguson.

Notwithstanding the provision of R. S. O. (1887), c. 137, s. 4, that an application for the sale of an infant's lands shall not be made without the consent of the infant if he is of the age of fourteen years, the consent of a majority of infant landowners may be sufficient; for by the Interpretation Act, R. S. O. (1887), c. 1, s. 8, sub-ss. 24 and 34, words importing the singular number shall include more persons than one, and females as well as males, and where an act or thing is required to be done by more than two persons, a majority of them may do it. And in this case, where there were three infants all over fourteen, and two of them consented to a sale of their lands, but the eldest had disappeared and could not be reached, an order was made dispensing with the consent of the one, the sale being evidently for the benefit of all the family. *Re Harding*, 13 P. R. 112.—Boyd.

Upon a petition under R. S. O. (1887), c. 137, s. 3, for the sale of lands belonging to three infants, the examination of the eldest, a girl of sixteen, was dispensed with, notwithstanding the provisions of section 4 of the Act and of Con. Rule 999, upon the ground that she was an imbecile. *Re Lane*, 9 P. R. 251, and *Re Harding*, 13 P. R. 112, followed. *Re Delanty*, 13 P. R. 143.—Ferguson.

See *Re Hornbrook*, 12 P. R. 591.

### 5. Payment of Money Out of Court.

Payment of money out of court to infants under order made prior to passage of O. J. Act. See *Re Cameron*, 9 P. R. 77.

A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into court by McD.'s executors. The daughter by her will had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid to the executor:—Held, that the will of the testatrix should be respected, and the infants' money paid out to the executor. *Re McDougall Trusts*, 11 P. R. 494.—Ferguson.

### IX. ADOPTION.

Where a father enters into a contract whereby he parts with the custody and control of his child, with the bona fide intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy; and although, where such a contract is executory on both sides, the court cannot decree specific performance, by reason of the want of mutuality, yet where the contract has been faithfully performed so far as the father and child are concerned, so that their status has become altered, the court will, if possible, enforce in specie the performance of the contract by the other party to it. *Roberts v. Hall*, 1 O. R. 388.—Chy. D.

Where, the parents of the plaintiff agreed with H. and his wife to give up to them their daughter, the plaintiff, then six years old, to bring up as their own, and make her sole heiress to their property at their death, and where it appeared that the agreement was bona fide intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will:—Held (reversing the judgment of Ferguson, J.), that the agreement could be enforced against H.'s representative, and that it must be decreed accordingly:—Held, also (affirming Ferguson, J.), that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Id.*

### X. MISCELLANEOUS CASES.

Quere, whether an order made by the referee of titles barring the claims of an infant heir-at-law would have the effect of divesting the estate of the infant. *Re Shaver*, 6 O. R. 312.—Boyd.

An infant cannot form one of the five persons requisite to incorporate a road company under R. S. O. (1877) c. 152. See *Hamilton and Flam- borough Road Co. v. Townsend*, 13 A. R. 534.

Held, that section 2 of 26 Geo. III., c. 33 (Lord Hardwick's Act), by which the marriage of a minor by license without the consent of the parent or guardian was absolutely void is not in force in this province. *Lawless v. Chamberlain*, 18 O. R. 296.—Boyd.

### INFORMATION.

I. BEFORE MAGISTRATES—See INTOXICATING LIQUORS—JUSTICE OF THE PEACE.

II. REMOVAL OF—See CERTIORARI.

In charging forgery in proceedings under the Extradition Act. See *In re H. L. Lee*, 5 O. R. 583, p. 741.

### INFORMER.

Held, that 18 Eliz. c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this Province; and, therefore, the plaintiff, an infant suing by his next friend, could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below, this court on allowing the appeal on that ground refused him his costs of appeal. *Garrett v. Roberts*, 10 A. R. 650.

A person who sues for a penalty given by the Election Act is a common informer. *Id.*

### INJUNCTION.

I. FROM COUNTY COURT, 915.

II. WHEN GRANTED.

1. On Application of Attorney-General, 915.

2. To Stay Legal Proceedings, 915.

3. To Restrain Arbitrators from Proceeding—See ARBITRATION AND AWARD.

4. Breaches of Contract or Covenant, 916.

5. Against Corporations and Companies.

(a) Municipal Corporations, 917.

(b) Railway Companies, 919.

(c) Other Companies and Corporations, 920.

6. Committing or Continuing Nuisances.

(a) Offensive Trades, 923.

(b) Pollution or Penning back Water—See WATER AND WATER-COURSES.

7. Breach of Copyright—See COPYRIGHT.

8. Infringement of Trade Marks—See TRADE MARKS.

9. Infringement of Patents—See PATENT FOR INVENTION.

10. To Restrain Waste—See WASTE.

11. Other Cases, 924.

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distinctness, and the fact that it comprised about six acres of land, while the portion conveyed to the purchaser was about one-fourth of an acre only, was not such a ground of hardship as would prevent the court from interfering by injunction to restrain the breach of covenant, and *E. W.*, being joined with the vendor in the erection of the house, she could not be heard to say she had not notice of the covenant, and the demurrer was overruled with costs. *Van Koughnet v. Denison*, 28 Chy. 485.—Proudfoot. See *S. C.*, 1 O. R. 349; 11 A. R. 699.

See *Clouse v. Canada Southern R. W. Co.*, 4 O. R. 23, p. 919.

#### 4. Against Corporations and Companies.

##### (a) Municipal Corporations.

The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost, whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties, and that the injunction might be awarded upon an interlocutory application. *Mearns v. Town of Petrolia*, 28 Chy. 98.—Proudfoot.

To restrain the reeve and village corporation from excluding plaintiff from office as councillor. See *Smith v. Petersville*, 28 Chy. 599.

To restrain misapplication of moneys assessed for drainage purposes. See *Smith v. Township of Raleigh*, 3 O. R. 405.

On a motion for injunction by *W.* a ratepayer, against a town corporation to restrain them from paying for a site for a post-office, it was shewn that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by one *McA.*) should be chosen, that *W.* had taken an active part in support of the one owned by the corporation, and the majority of ratepayers had voted for the other. It was contended that *W.* was estopped by his conduct from maintaining the suit, and that *McA.* and the individual members of the corporation should have been made parties. *W.* having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given:—Held, that he was not estopped, and that although *McA.* and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties, and the injunction was granted. *Wallace v. Town of Orangeville*, 5 O. R. 37.—Ferguson.

Held, reversing the judgment of the Court of Queen's Bench (P. Q.), *Fournier and Taschereau, J.J.*, dissenting, that the portion of the railway bridge built over the Richelieu river, and the railway track belonging to appellant's company within the limits of the town of St. Johns, are exempt from taxation under sections 326 and 327 of 40 Vict. c. 29, (P. Q.) although no return had been made to the council by the company of the actual value of their real estate in the municipality. 2. That a warrant to levy the rates upon such property for the years 1880-83, is illegal and void and that a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same. *Central Vermont R. W. Co. v. Town of St. Johns*, 14 S. C. R. 288. Affirmed, 14 App. Cas. 590.

To restrain the corporation of one municipality from establishing a smallpox hospital within the limits of another. See *Township of Elizabethtown v. Town of Brockville*, 10 O. R. 372.—Boyd.

To restrain municipal corporations from the abuse of their power to exempt from taxation manufacturing establishments. See *Scott v. Tilsenbury*, 13 A. R. 233.

To restrain defendants and Court of Revision from increasing plaintiff's assessment. See *Canadian Loan and Emigration Co. v. Municipality of Dysart*, 9 O. R. 495; 12 A. R. 80, p. 69.

The defendants' council passed through two readings by-laws for the limitation of the number of tavern and shop licenses, under R. S. O. (1877) c. 181, ss. 17 and 24. Before the third reading the council passed a resolution authorizing the submission to the electors, contemporaneously with the general municipal elections, of the question whether such limitation was desirable or not, reserving, however, to the council, the final decision upon the propriety of passing the by-laws. The council also passed a subsequent resolution authorizing the expenditure of \$300 out of municipal funds in advertising the vote so to be taken. After the expenditure of the greater portion of the sum so voted, an action was brought by the plaintiff, on behalf of himself and all other ratepayers except the individual defendants, against the corporation and against the individual members of a sub-committee appointed by the council to superintend the advertising of the vote, and an interim injunction was moved for to restrain the defendants from submitting the question to the electors and from printing ballot papers, advertising the vote, or otherwise expending municipal moneys for the purposes contemplated by the resolutions:—Held, 1. That in so far as the application depended upon the expenditure of municipal funds for an improper purpose, it was too late, the greater portion of the funds voted having already been expended, and that the plaintiff should be left to obtain such order for repayment to the city by the other defendants as he might appear entitled to at the trial. 2. That the taking of a vote without legislative authority upon a matter over which, without the electoral assent, the council had complete jurisdiction should not be restrained, there being no express legislative prohibition, and the council having acted bona fide, unless some good reason were shown for the conclusion that the result would be injurious

or unjust to the corporation or some of its members, which was not shewn in this case:—Semble, that if the resolution had proposed to give to the result of the proposed vote a final and binding effect, thus substituting the direct decision of the electors for that of the council, the submission of the by-law to the vote of the electors would have been illegal and ultra vires, and would have been restrained. *Helm v. Port Hope*, 22 Chy. 273, distinguished. *Davies v. City of Toronto*, 15 O. R. 33.—Street.

To restrain municipal council from proceeding to enforce rights claimed under an illegal by-law, the by-law not having been quashed. See *Rose v. Township of West Wavemosh*, 19 O. R. 294.

To restrain municipalities from continuing improperly constructed drainage works. See *McGarvey v. Town of Strathroy*, 10 A. R. 631; *Van Egmond v. Town of Seaforth*, 6 O. R. 599; *Malott v. Township of Mersea*, 9 O. R. 611.

See *Clark v. St. Catharines*, 10 P. R. 205, p. 927; *Chaplin v. Public School Board of the Town of Woodstock*, 16 O. R. 728, p. 923.

#### (b) Railway Companies.

Where the defendants, a railway company, through their right of way agent, purchased certain land for the railway from the plaintiff, and verbally agreed with him at the time to make and maintain certain over and under crossings across the railway, to be built on the land so purchased, whereupon the plaintiff conveyed the land to them, for a less sum than he otherwise would have done, and for more than ten years the defendants maintained the crossings as agreed, but afterwards caused some to be filled up or obstructed:—Held, that, whether the agent had authority to make such an agreement or not, the plaintiff was entitled to damages and an injunction to restrain the defendants from interfering with the crossing, for the company had recognized the agreement, and adequate compensation could not be given to the plaintiff in damages, and, moreover, farm crossings, when once made by a railway company, must, under C. S. C. c. 66, s. 13, et seq., which was incorporated in the defendants' charter, be maintained by it, and this independently of any agreement for permanent maintenance, although it is otherwise as to stations. *Clouse v. Canada Southern R. W. Co.*, 4 O. R. 28.—Proudfoot.

Where the special Act of a railway company incorporated the clauses of the General Railway Act relating to powers, plans, and surveys, and lands and their valuation, and also authorized the company from and out of the mines obtained along their line of railway, to manufacture iron and steel for their own use, and to acquire mining properties by purchase; and the company had chosen a site for a station upon the lands of the plaintiffs, covering a valuable mine of magnetic iron ore, and called upon the plaintiffs to arbitrate, and the plaintiffs were unwilling to part with the land:—Held, that the plaintiffs could not obtain an injunction restraining the company from expropriating the land in question, even though it were conceded that the company knew of the mine, and that it was the property of the plaintiffs, for the legislature had left the expro-

priation clauses to their full effect, which, in this country, at least, enables the company to acquire the fee of the land. Aliter, if it were proved that the company were acquiring the land not for the purposes for which the powers were given, but for some collateral object, as, for example, with the object of afterwards selling it to a third party. Semble, that if it should afterwards appear that such a scheme was actually in contemplation, and had been carried out, means might be found to frustrate it. *Jenkins v. Central Ontario R. W. Co.*, 4 O. R. 593.—Proudfoot.

A municipality may file a bill to compel a railway company to put streets and highways improperly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information. *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4.—Boyd.

A municipal corporation, filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their track along one of the streets of the municipality without the consent thereof, thus impeding traffic in contravention of the Railway Act C. S. C. c. 66, s. 12, sub-s. 1:—Held, that under the Municipal Act there is such power of management, control, etc., given to municipalities, and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights. Semble, but for the language used in *Guelph v. The Canada Company*, 4 Chy. 656, the proper frame of the suit would have been by way of information in the name of the Attorney-General with the corporation as relators. *Id.*

An action for an injunction may be maintained by a municipality to restrain the obstruction of a highway. They are not confined to the remedy by indictment. *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4, approved of. *St. Vincent v. Greenfield*, 15 A. R. 567.

See *Attorney-General v. International Bridge Co.*, 27 Chy. 37; 6 A. R. 537; *Sanson v. Northern R. W. Co.*, 29 Chy. 439, p. 926.

#### (c) Other Companies and Corporations.

Where there are conflicting claimants to the position of president of a company, and one takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175.—Proudfoot.

The plaintiffs individually were members of the Master Plasterers' Association, and the defendants individually were members of the Operative Plasterers' Association. The plaintiffs did not by their writ state in what character they sued; but by their affidavits filed professed to represent their association, and joined the defendants as representing the operative association. Some of the defendants by threats, intimidation and violence, prevented one man, who had contracted to work for one of the plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired

to work, his business master to the defendants. *Hynes v.*

It appears that four workmen, one of whom had refused to demand plaintiffs' fine, employing them to communicate. The latter resolution, and that in the resolution struck. plaintiffs that the resolution the plaintiff ex parte moved to injunction merits, the injunction. *Id.*

An injunction granted to the plaintiff on behalf of the corporation, way as to working the corporate the corporate years pre Held, that plaintiffs had their the defense them the sides of the poles, yet that of the the right the injury that inde (1877) c. tric light the plaintiff the plaintiff cases of the defendant Telephone O. R. 57.

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to work, whereby his master suffered injury to his business:—Held, that this entitled the master to an injunction restraining these defendants from so interfering with his servants. *Hynes v. Fisher*, 4 O. R. 60.—Wilson.

It appeared that previous to the intimidation four workmen had struck work with one W., a member of the plaintiffs' association, because W. had refused to pay one of his workmen the wages demanded for him by them. Thereupon the plaintiffs' association passed a resolution imposing a fine on any of its members who should employ the four striking workmen, and communicated this to the defendants' association. The latter demanded the rescission of the resolution, and notified the plaintiffs' association that in default the workmen would strike. The resolution was not rescinded and the workmen struck. The intimidation complained of by the plaintiffs followed as a consequence:—Held, that the defendants, by shewing the fact of the resolution of the plaintiffs' association, which the plaintiffs had not divulged on their motion ex parte for the injunction, which they now moved to continue, were entitled to have the injunction dissolved:—Held, also, upon the merits, that the plaintiffs were not entitled to the injunction on account of their resolution. *Id.*

An interlocutory injunction having been granted to restrain defendants, who were carrying on business in partnership as an electric light company under license from a municipal corporation, from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated telephone company, also licensees of the corporation, under authority granted two years previously to the defendants' license:—Held, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights. Held, also, that independently of the provisions of R. S. O. (1877) c. 157, ss. 59 and 70, as extended to electric light companies, by 45 Vict. c. 19, s. 3 (Ont.), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted. Quare, whether defendants were liable to indictment. *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 O. R. 571.—Wilson.

Where a registered shareholder of a company finding the annual reports of the company misleading applies for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiffs' affidavit, and petition there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction. *Montreal Street Railway Co. v. Ritchie*, 16 S. C. R. 622.

In a company consisting of seven shareholders, the plaintiffs, four of the shareholders holding twenty-five per cent. of the stock, claimed that there had been mismanagement of the company's funds in the payment out of large sums to the president and secretary, for salaries or services without any legal authority therefor, and in the failure to declare any dividends though the company had made large profits, and that no satisfactory investigation or statement of the company's affairs could be obtained though frequently applied for, and that it was impossible to ascertain the company's true financial standing. Under these circumstances an investigation of the company's affairs was directed. At a meeting of four of the directors, constituting the majority, held, after proceedings taken by the minority to disallow the illegal payments made to the president and secretary, and without proper notice to the minority of such meeting or its object, a resolution was passed ratifying the payments made to the secretary, and at an adjourned meeting, of which also the minority received no notice, by-laws were passed ratifying the payments made to the president and secretary:—Held, that the resolution and by-laws were invalid, and could not be confirmed by the shareholders, and an injunction was granted restraining the company from acting thereunder, or from holding a meeting of shareholders to ratify and confirm the same. *Waddell v. Ontario Canning Co.*, 18 O. R. 41.—Robertson.

In an action brought by a ratepayer against a school board, three of the persons elected as trustees, and one G., the statement of claim alleged that the three defendant trustees had by reason of their being interested in certain contracts with the board ipso facto vacated their seats, by virtue of section 247 of the Public Schools Act, R. S. O. (1887), c. 225; that they nevertheless continued to sit and vote, and had voted in favour of certain resolutions which were passed, whereby the principal of the schools was dismissed and the defendant G. appointed in his place; and that but for the votes of the three defendant trustees the result would have been different. The prayer was that the seats of the three should be declared vacant, and the votes and resolution declared void, and for an injunction restraining the defendants the trustees from further acting as members of the board:—Held, upon demurrer, following *Hardwick v. Brown*, L. R. 8 C. P. 406, that the seat of a trustee does not under section 247 actually become vacant until the other members of the board have declared it to have become vacant; and in this case, no action having been taken by the remaining members of the board, that the seats of the three defendant trustees were full; and being full, that the court would not interfere by injunction to restrain the occupants of them from acting as trustees. 2. That quo warranto proceedings were the only means by which the seats of school trustees could be declared vacant by the court; that the duty of declaring them vacant, if the facts charged were established, devolved upon the remaining individual members of the board, who were not parties to the action and were not made parties by the fact that the school corporation was a party defendant. *Regina v. Mayor of Hereford*, 2 Salk. 701; *Rex v. Smith*, 2 M. & S. 583, referred to.



3. That the defendant G. was an unnecessary and improper party to the action. *Chaplin v. Public School Board of the Town of Woodstock*, 16 O. R. 728.—Street.

The seats being full, the court will not interfere by injunction to restrain the occupants of them from acting as trustees. Injunction, since the Judicature Act, seems to be the appropriate, or at all events the alternative, remedy in cases of disputed claims of this nature, in which mandamus would have been formerly required. In *Smith v. Petersville*, 28 Chy. 599; *Mearns v. Petrolia*, 28 Chy. 98; *Aslatt v. Corporation of Southampton*, 16 Ch. D. 143, injunction was granted at the suit of the holders of seats at a council board, to restrain other persons claiming the seats from preventing their exercising their rights as such actual holders, because before the Judicature Act mandamus was the remedy provided for enforcing the rights of the occupants of offices against persons preventing their enjoyment of them. But on the other hand, where the actual holder of the office is charged with holding it improperly, quo warranto proceedings on behalf of the Queen remain the only means by which it can be declared vacant (see *Regina ex rel. Stewart v. Standish*, 60 R. 403); and so long as it is full, a general injunction against acting in it cannot be granted. 1b.

The defendants by letters patent under the Street Railway Act, R. S. O. (1887) c. 171, were authorized to build and operate (on all days except Sundays) a street railway, etc. On an information laid to restrain the operating the railway on Sunday:—Held, per Galt, C. J., that an information would not lie for the Act did not prohibit the running cars on Sunday:—Per Rose, J., that the information would lie, for the authority to operate the railway "on all days except Sundays" implied a prohibition against working it on Sunday:—Per MacMahon, J., that the information would not lie, for no private right or right of property was involved nor any injury of a public nature done, and the interference of the court will not be exercised merely to enforce performance of a moral duty. *Attorney-General, ex rel. Richard Hobbs v. Niagara Falls Wesley Park and Clifton Tramway Co.*, 19 O. R. 624.—C. P. D. Affirmed on appeal.

See *Attorney-General v. International Bridge Co.*, 27 Chy. 37; 6 A. R. 537; *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, 17 O. R. 495; 17 A. R. 292, p. 335.

#### 6. Committing or Continuing Nuisances.

##### (a) Offensive Trades.

The defendant was engaged in making boilers and gas receivers; in the manufacture of which it was necessary to join together pieces of iron, about an inch thick, by riveting, which produced noises, continuing from seven in the morning until six o'clock at night, rendering the occupation of the house of the plaintiff's wife, which was only fifteen feet distant, and in which they lived, almost impossible and seriously interfered with her health. Upon a bill filed by the plaintiff, Proudfoot, V. C. (28 Chy. 461), granted an interlocutory injunction restraining the defendant from continuing the boiler-making in such a manner as to be a nuisance to the plaintiff and

his premises:—Held, reversing this decree, that the wife was the proper person to file the bill, for as an injury to property is the ground of jurisdiction in cases of nuisance, the owner of the property is the proper party to complain. Quere, whether the husband had any title in the land, and whether his occupancy with his wife was more than permissive on her part. An application made by counsel to add the wife as a party, in order to meet the difficulty, authority having been given by her, was refused on the ground that the suit was not merely improperly constituted, but that the husband having no locus standi, the suit had no proper existence at all, and another person who had the right could not be substituted for one who had not the right to institute the proceedings:—Held, also, that if the suit had been properly constituted, the court would not have interfered with the discretion of Proudfoot, V. C., in granting the interlocutory injunction. *Hathaway v. Doig*, 6 A. R. 264.

##### 11. Other Cases.

A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents and for a receiver. It appeared that the defendant was a stranger whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young v. Wright*, 8 P. R. 198.—Blake.

Held, under the circumstances of this case, that the vendor of standing timber was entitled to an injunction to prevent the cutting and removing of timber by the vendee until payment of the agreed price. See *Summers v. Cook*, 28 Chy. 179.

To prevent removal of fixtures. See *Dickson v. Hunter*, 29 Chy. 73, p. 752.

Where the defendant raised the height of a party wall beyond that of the building of the plaintiff, the adjoining owner, without the latter's consent and subsequently opened a window through the wall so raised so as to overlook the plaintiff's premises: Held, that by piercing the window defendant had distinctly given notice that he ceased to regard the wall so as a party wall, and that plaintiff was entitled to an injunction to restrain the further continuance of such window. *Sproule v. Stratford*, 1 O. R. 335.—Boyd.

In 1883, M. W. being seized of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards died having devised the other half to M. There was a house upon the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. M. now commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same:—Held, that he was entitled to the relief claimed. *Wray v. Morrison*, 9 O. R. 180.—Ferguson.

The plaintiff, a married woman, carried on business as an hotel-keeper, and owned the chattels in the hotel. The defendant, her hus-

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band, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff. An injunction was granted restraining the defendant from interfering in the business or with the servants or agents, or removing any of the plaintiff's chattels:—*Semble*, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances. *Donnelly v. Donnelly*, 9 O. R. 673.—*Rose*.

On a motion by a road company for an injunction to restrain the defendant from passing through their toll gates without paying tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under section 129, R. S. O. (1877), c. 152, the court would not interfere by way of injunction:—*Held*, that as the plaintiffs had established a *prima facie* case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial, and an injunction was granted, upon a consideration of the balance of convenience, in favour of the plaintiffs. *Letton v. Goodden*, L. R. 2 Eq., 130, and *Cory v. Yarmouth*, etc., R. W. Co., 3 Ha. 593, considered and followed. *Hamilton and Milton Road Co. v. Raspberry*, 13 O. R. 466.—*Ferguson*.

*Held*, that the court has jurisdiction to prevent trustees about to sell property under a power or trust for sale, from selling in an imprudent and improper manner; and thus in this case where it appeared that although *cestuis que trustent* representing five-sixths of the property desired a sale without reserve, the interests of the remainder would be prejudiced by so selling, an injunction was granted to restrain such trustees from selling without a reserve bid. *Downey v. Dennis*, 14 O. R. 219.—*Ferguson*.

To restrain use by defendant of name used by plaintiffs to designate their business. See *Robinson v. Boyle*, 18 O. R. 387.

The defendant having distrained for rent in arrear, the plaintiff claimed that defendant was indebted to him in damages for breach of the covenants in the lease to repair, and to lease to plaintiff an adjoining piece of land, and obtained *ex parte* an interim injunction restraining proceedings under the distress which was dissolved on the ground of concealment of facts:—*Held*, that the damages claimed by the plaintiff were not a "debt" within section 3 of 50 Vict. c. 23, (Ont.), so as to constitute a set-off against the rent; and although under the O. J. Act they might be the subject of counter-claim, they would not justify an injunction as against a distress levied as here. *Walton v. Henry*, 18 O. R. 620.—*MacMahon*.

The plaintiffs, by first sinking a well on the land near the defendants, did not thereby acquire the right to restrain the defendants from sinking wells upon their own lands for the purpose of reaching the portion of the reservoir which lies under them. *Ontario Natural Gas Co. v. Smart*; *In re Ontario Natural Gas Co. v. Township of Gosfield South*, 19 O. R. 591.—*Street*. This case is in appeal.

See *Mead v. O'Keefe*, 15 O. R. 84; *S. C.*, *O'Keefe v. Curran*, 17 S. C. R. 596, p. 839;

*Canadian Land and Emigration Co. v. Municipality of Dysart*, 12 A. R. 80, p. 69.

### III. PRACTICE.

#### 1. Delay in Applying.

The plaintiff was owner of a steam vessel plying on Lake Couchiching, and accustomed to run into the River Severn, where it leaves the lake, and to lie in a basin alongside a wharf at Washago. The defendants in extending their line of railway, constructed a bridge across the river, which completely obstructed the entrance, and caused, it was alleged, special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes. Some correspondence took place while the bridge was in course of construction, by the plaintiff personally, and through his solicitor with the defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of the plaintiff, when a bill was filed, praying that it might be declared a nuisance, and that the defendants might be ordered to abate it:—*Held*, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the action of the defendants, and the bill was therefore dismissed, with costs. *Sanson v. Northern R. W. Co.*, 29 Chy. 459.—*Spragge*.

See *Davies v. City of Toronto*, 15 O. R. 33, p. 919.

#### 2. Adding Parties.

After decree a party defendant may be added for the purposes of an injunction on motion merely. See *Young v. Huber*, 29 Chy. 49, p. 916; *Peterkin v. Macfarlane*, *Id.* 53, note.

See *Hathaway v. Doig*, 6 A. R. 264, p. 924.

#### 3. Extending or Continuing.

A motion by the plaintiff to continue an *ex parte* injunction was refused, with costs, but at the same time leave was given to amend the bill, and another interlocutory injunction was granted *ex parte*. On the return of the motion to continue the latter, it was objected that the costs of the former motion which had not been taxed were not paid:—*Held*, that the non-payment was no objection to the motion being proceeded with. *Taylor v. Hall*, 29 Chy. 101.—*Ferguson*.

The proposed amendments of the bill were set out substantially in the order for the injunction, which was served:—*Held*, that, as the defendant had thereby notice of the proposed amendments, the objection that the amended bill had not been served was not entitled to prevail. Where there appeared to be a substantial matter to be tried and no irreparable injury would be done by preserving the subject matter of the suit in medio, an injunction restraining the defendant from dealing with it was continued to the hearing. *Id.*

On a motion to continue an injunction the defendant may bring forward such facts as he might if he were moving to dissolve the injunction, and may shew suppression of facts by the

plaintiff as a ground for dissolving it, and may thereupon move to dissolve it. *Hynes v. Fisher*, 4 O. R. 60.—Wilson.

#### 4. Appeals.

Section 27 of the Court of Appeal Act, R. S. O. (1877) c. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause. *McLaren v. Caldwell*, 29 Chy. 438.—Ferguson.

Where an injunction is ordered at the hearing of a cause, and the parties enjoined give the security required by R. S. O. (1877) c. 38, s. 26, pending an appeal to the Court of Appeal, all proceedings to enforce the injunction are, by virtue of section 27 of that Act, thereupon stayed; and a writ of sequestration cannot therefore be obtained, pending the appeal, on the ground of non-compliance with the injunction. *Dundas v. Hamilton and Milton Road Co.*, 19 Chy. 455, followed, and preferred to *McLaren v. Caldwell*, 29 Chy. 438. *McGarvey v. Town of Strathroy*, 6 O. R. 138.—Proudfoot.

Held, that the operation of an injunction awarded by a judgment of the court below was stayed pending an appeal to this court, after the perfecting of the security on appeal, by virtue of R. S. O. (1877) c. 38, s. 27. *City of Toronto v. Toronto Street R. W. Co.*, 12 P. R. 361.—C. of A.

#### 5. Costs.

Security for costs was ordered in an action brought by a ratepayer for himself and the other ratepayers to restrain the delivery by the corporation of certain debentures to a railway company, where it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, and was only interested to an insignificant extent; and where he swore that he expected certain persons named to pay his costs and to protect him should the case go adversely, that he did not want to spend any money on the prosecution of his own right in the matter, and that he did not know who instructed the plaintiff's solicitor. *Clark v. St. Catharines*, 10 P. R. 265.—Dalton, Master.

Where an ex parte injunction is dissolved on the ground of concealment of the true state of facts, it is proper to dissolve it with costs; and "with costs" in such case means "with costs payable forthwith." *Walton v. Henry*, 13 P. R. 390.—MacMahon.

See *Donnelly v. Donnelly*, 9 O. R. 673, p. 929.

#### IV. INTERIM INJUNCTION.

An interim injunction was granted, without going into the case, in terms of an undertaking given by the defendants upon a prior return of the motion, that nothing should be done in the meantime. On settling the minutes the registrar refused to comply with the request of the defendants, by inserting an undertaking on the part of the plaintiffs that the property be retained in the same plight and condition as at the date of the order. A motion was made to vary the minutes by inserting such an undertaking:—Held, that though the undertaking might have

been properly asked for on the motion as a condition of granting the injunction, it could not now be exacted, as the effect would be to reverse or alter the order which had been made by arrangement of the parties. As a misunderstanding seemed to have arisen, however, the injunction was stayed for ten days to allow a substantive motion to be made for an injunction restraining the plaintiffs from doing anything detrimental to the property pending the interim injunction. *Hendrie v. Beatty*, 29 Chy. 423.—Proudfoot.

An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action in statu quo long enough to enable him to obtain the decision of an Appellate Court on points already decided in other cases, against his contention, in courts of first instance. *Wyd v. McMaster*, 4 O. R. 717.—Ferguson.

The plaintiff, who claimed the exclusive user of certain streams flowing through his lands, which right the defendants denied, obtained an interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs, upon the usual undertaking to pay any damages sustained thereby:—Held, reversing the order of Proudfoot, V. C., Armour, J., dissenting, that the plaintiff was not entitled to an interlocutory injunction, as it was not shewn that irremediable damage would result from refusing it, or that the balance of inconvenience was in his favour. Remarks as to the general principles on which interlocutory injunctions should be granted or refused. *McLaren v. Caldwell*, 5 A. R. 363.

Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of the plaintiff must be considered, and the court will not generally investigate it upon an interlocutory proceeding, such as an application for an interlocutory injunction. *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175.—Proudfoot.

The court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed. *Id.*

See *Mearns v. Town of Petrolia*, 28 Chy. 98, p. 917; *Hathaway v. Doig*, 6 A. R. 264, p. 924.

#### VI. BREACH OF INJUNCTION.

On moving for a writ of sequestration for breach of injunction two clear days notice of motion is sufficient. *Cook v. Credit Valley R. W. Co.*, 8 P. R. 167.—Blake.

Pending the injunction in this case (see 4 O. R. p. 60), one P., who was not a party to the action, but was a member of the plaintiffs' association, on behalf of the association hired one H. to work for him. McCord and Jenkins, members of the defendants' association, but not parties to the action, hearing of this went to H. and induced him to refuse to work for P. and to leave Toronto. The court was of opinion that M. and J. knew of the injunction pending at the time. The plaintiffs did not state by their writ that they sued in any representative character, nor did they sue the defendants in a representative capacity, but the plaintiffs' affidavits stated

that the plaintiffs represented their association and the defendants, theirs. On motion to commit M. and J. for contempt of process of the court:—Held, that the master plasterers' association was not made a party to nor sufficiently represented in the action by the allegations in the plaintiffs' affidavits; and that no act against the plaintiffs individually having been established, M. and J. could not be held guilty of contempt for interference with the association and F.: that though the association might be added by amendment, the injunction would also have to be amended, and in the meantime M. and J. must be acquitted of contempt of the injunction as it now stood, and therefore the motion must fail. *Hynes v. Fisher—McCord and Jenkins Case*, 4 O. R. 78.—Q. B. D.

On a motion to commit a defendant for non-compliance with a decree which contained this clause: "And this court doth further order and decree that an injunction be awarded to the plaintiff perpetually restraining the defendant, his servants, workmen, and agents from trespassing upon the lands of the plaintiff in the pleadings mentioned," the trespass complained of being two walls built by the defendant on four inches of the plaintiff's land, it was objected: 1. That the suit was revived while pending in the Court of Appeal by an order issued from the Division of the High Court of Justice appealed from. 2. That no certificate of the Supreme Court (which had in substance affirmed the decree) had been served; and 3. That the notice of motion did not specify the acts of disobedience. It was:—Held, that the suit was properly revived: that it was not necessary to serve the certificate of the Supreme Court when the decree was not materially altered, and when the defendant well knew that the decree would be enforced; and that when (as in this case) a correspondence had shewn the defendant what acts were complained of, it was not necessary to repeat them in the notice of motion, and the objections were overruled:—Held, also, that under the form of decree, the plaintiff was entitled to have the walls removed, and if the defendant did not remove them within a month the order must go. *Graselt v. Carter*, 6 O. R. 584.—Boyd.

The defendant was committed for breach of an injunction, but was discharged on an application explaining and apologizing for his contempt. It appeared that he was unable to pay costs, and therefore, though costs of both motions were imposed, payment thereof was not made a condition of such discharge. *Donnelly v. Donnelly*, 9 O. R. 673.—Osler.

A municipal corporation having been enjoined from purchasing a property for municipal purposes under a by-law which was invalid, repealed such by-law and proceeded to purchase the same property under a new by-law valid on its face:—Held, that in purchasing under the new by-law the corporation was not guilty of a breach of the injunction, and a motion for a writ of sequestration was dismissed. *Young v. Town of Ridgetown*, 18 O. R. 140.—MacMahon. See also *Waldie v. Burlington*, 7 O. R. 192; 13 A. R. 104, p. 3.

See *McGarvey v. Town of Strathroy*, 6 O. R. 138, p. 927.

## INNKEEPER.

See INTOXICATING LIQUORS.

The plaintiff had been for some time a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing luggage, etc. The plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost; there was no other evidence of any negligence in the matter:—Held, reversing the judgment of the County Court, that the plaintiff could not recover. *Palin v. Reid*, 10 A. R. 63.

An innkeeper, claiming to act under R. S. O. (1887), c. 154, sold by public auction a stallion belonging to the plaintiff, a boarder at his inn, to enforce a lien thereon for the keep and accommodation thereof:—Held, that the lien existed and the sale was authorized. *Huffman v. Walterhouse and Broddy*, 19 O. R. 186.—C. P. D.

After the lien accrued the plaintiff removed the stallion and subsequently brought it back to the inn:—Held, that the lien revived on the return of the stallion. *Id.*

See *Newcombe v. Anderson*, 11 O. R. 665, p. 198.

## INQUEST.

See CORONER.

## INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

## INSPECTION ACT.

Liability of inspectors' sureties for deputy's default. See *Verratt v. McAulay*, 5 O. R. 313.

In an action against a government inspector of raw hides for fraudulently grading and branding incorrect weights and qualities on hides:—Held, that "anything done under this Act," in R. S. C. c. 99, s. 26, has the same meaning throughout the section, and means "anything intended to be done under this Act;" and the defendant not appearing to have acted mala fide, or to have intended not to perform his duty under the Act, was entitled to the protection of this section, though he had not pleaded the general issue in terms, inasmuch as he had in effect stated that what he did was done under the Act:—Semble, that full effect may be given to sections 96 and 104 of R. S. C. c. 99, by holding that up to five per cent. of any deficiency or excess in the weight of certain kinds of leather the inspector is protected against any action, and as to any excess he is entitled to any defence open to him under the Act or otherwise. *Grant v. Culbard*, 19 O. R. 20.—Rose.

## INSURANCE.

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## II. INSURANCE COMPANIES GENERALLY.

1. *Government Deposit*.

An insurance company in order to deposit \$50,000 with the minister of finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R. S. C. c. 124), deposited the money in a bank, and forwarded the deposit receipt to the minister. The money in the bank drew interest, which by arrangement was received by the company. The bank having failed, the government claimed payment in full of this money as money deposited by the Crown.—Held, reversing the judgment of the court below, Strong, J., dissenting, that it was not the money of the Crown, but was held by the finance minister in trust for the company. It was not therefore subject to the prerogative of payment in full in priority to other creditors. *Liquidators of the Maritime Bank v. The Queen*, 17 S. C. R. 657.



## 2. Calls on Stock after Suspension of License.

In these cases which were actions for calls on stock, an objection was taken that there was no power to sue, because the company's license under 42 Vict. c. 25 (Ont.), had been revoked, but it was shown that one B. had been appointed receiver, and was specially required by order of the Chancery Division to prosecute all members in arrear for calls; and that he had adopted these actions, and was prosecuting them as receiver:—Held, that the objection was not tenable. *Union Fire Ins. Co. v. Fitzsimmons; Same Plaintiffs v. Shields*, 32 C. P. 602.—Hagarty.

Statement: Call on stock. Defence: That by an order of the Lieutenant-Governor of Ontario in council, issued under 42 Vict. c. 25, the plaintiffs' license had been and still was suspended, whereby it became unlawful for the plaintiffs to do any further business in Ontario; and that the calls sued for were made for the purpose of enabling the plaintiffs to carry on their business in Ontario:—Held, on demurrer, that the defence should have alleged notice in the Gazette of the suspension of the license, pursuant to R. S. O. (1877), c. 160, s. 34, and 42 Vict. c. 25, s. 3, sub-s. 7; but an amendment was allowed, this point not having been taken, and:—Held, also, a good defence for that bringing an action for calls was transacting business of insurance within the meaning of the above Acts. *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 471.—Wilson.

## 3. Policy not Under Seal.

Section 7 of 37 Vict. c. 85 (Ont.) incorporating the appellants after specifying the powers of the directors, enacts:—"but no contract shall be valid unless made under the seal of the company, and signed by the president, etc." J. E. W. brought an action to recover the amount of a policy issued by the appellants in favour of her father. The policy sued on was on a printed form, and had the usual attestation clause: To a plea that the policy sued on was not sealed, and therefore not binding upon the appellants. The plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it:—Held, affirming 29 C. P. 221 and 5 A. R. 218, that the setting up of "the want of a seal" as a defence, was a fraud which a court of equity could not refuse to interfere to prevent without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears, and therefore the respondent was entitled to the relief prayed, as founded upon the facts alleged in her equitable replication, (Ritchie, C. J., and Taschereau, J., dissenting). *London Life Ins. Co. v. Wright*, 5 S. C. R. 466.

See *Burnett v. Union Mutual Fire Ins. Co.*, 32 C. P. 134, p. 976.

## 4. Locality of Operations.

A company incorporated by a Provincial Legislature for the business of insurance, possesses

the same capacity and franchises within the jurisdiction, creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the province wherever such contracts are recognized by comity or otherwise. *Clark v. Union Fire Ins. Co.*, 10 P. R. 313.—Hodgins, Master-in-Ordinary. See S. C., 6 O. R. 223.

See *Duff v. Canadian Mutual Fire Ins. Co.*, 9 P. R. 292, p. 979.

## IV. FIRE INSURANCE.

### 1. Application of Fire Insurance Policy Act.

The Fire Insurance Policy Act, R. S. O. (1877) c. 162, does not apply to property outside of Ontario. *Cameron v. Canada Fire and Marine Ins. Co.*, 6 O. R. 392.—Ozier.

Application of Act to Mutual Insurance Companies. See *Robins v. Victoria Mutual Fire Ins. Co.*, 6 A. R. 427, p. 984; *Mutual Ins. Co. of the County of Wellington v. Frey*, 5 S. C. R. 82, p. 978; *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82, p. 980.

### 2. Form of Application.

In the application for insurance prepared by the company there was inserted, in very small type, a notice that the estimated value of personal property and of each building to be insured "must be stated separately," etc., which had escaped the notice of the applicant, and such separate valuations, etc., were not given. The court being of the opinion that although this provision might not have been framed in order to elude observation, it was certainly calculated to elude observation, refused to give the insurers the benefit of it, if under the circumstances it would have operated in their favour. *Greet v. Citizens Ins. Co.*, 27 Chy. 121.—Spragge. See S. C. 5 A. R. 596.

See *Smith v. City of London Ins. Co.*, 11 O. R. 38; 14 A. R. 328; 15 S. C. R. 69, p. 950; *Cockburn v. British America Assurance Co.*, 19 O. R. 245, p. 937.

### 3. Authority and Duty of Agent.

The agent of an insurance company cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the company. And the same principle prevails in the case of a second insurance, although the prior policy had been granted with the express sanction and approval of the company. *White v. Lancashire Ins. Co.*, 27 Chy. 61.—Blake.

The defendants executed policies, acknowledging the receipt of the premiums for re-insurances, which their agent at St. John had accepted, and sent them to him for delivery, but afterwards hearing that a loss had occurred, and that the premiums had never been paid, they instructed him not to deliver the policies. The plaintiffs alleged that it was the custom of agents to give each other credit for such premiums, and to settle at the end of the month, when the balance, if any, was handed by one to the other; but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part



of their agents, was proved, and it was shewn that their agents had no authority to reinsure, except upon payment of the premium:—Held, affirms 26 Chy. 661, that the defendants were not liable:—Held, also, that even if such a custom had been proved to exist, it would not be binding on the company, unless authorized by it:—Held, also, that the defendants were not bound by their admission on the policy of the receipt of the premium. *Xenos v. Wickham*, L. R. 2 H. L. 296, distinguished. *Western Assurance Co. v. Provincial Ins. Co.*, 5 A. R. 190.

An agent instructed to receive payment for his principal, cannot, as a general rule, accept anything but money:—Held, therefore, on this principle, and also in view of R. S. O. (1877), c. 161, s. 34, and of the fact that the renewal receipt in question in this case, contained a notice that it would not be valid unless dated and countersigned by the agent on the day on which the money was paid, that, where in consideration merely of a setting off of debts as between the agent of a company and a policy holder, the former wrongfully delivered a renewal receipt to the latter, the receipt did not bind the company, and the policy lapsed. *Frazer v. Gore District Mutual Fire Ins. Co.* 2 O. R. 416.—Chy. D.

In an action brought on an interim receipt, signed by one S., an agent for the respondent company at L. One of the pleas was that S. was not respondent's duly authorized agent, as alleged. The general managers of the company for Ontario had appointed, by a letter, signed by them both, one W., as general agent for the city of L. S., the person by whom the interim receipt in the present case was signed, was employed by W. to solicit applications, but had no authority from, or correspondence with, the head office of the company. In his evidence, S. said he was authorized by W. to sign interim receipts, and the jury so found. He also stated that Z., one of the joint general managers, was informed that he (S.) issued interim receipts, and that the former said he was to be considered as W.'s agent. There was no evidence that the other general manager knew what capacity S. was acting in:—Held, affirming the judgment of the Court of Appeal that W. had no power to delegate his functions; and that S. had no authority to bind the respondent company. Per Strong, J., the general agents, being joint agents, could only bind the respondent company by their joint concurrent acts, the appointment of S. as agent by Z. without the concurrence of the other general manager would have been insufficient. *Summers v. Commercial Union Ins. Co.*, 6 S. C. R. 19. See *Cockburn v. British America Assurance Co.*, 19 O. R. 245, p. 937.

Agent filling up application. See *Sowden v. Standard Fire Ins. Co.*, 5 A. R. 290, p. 948; *Quinlan v. Union Fire Ins. Co.*, 8 A. R. 376, p. 949; *Graham v. Ontario Mutual Ins. Co.*, 14 O. R. 358, p. 954.

Assent of agent to assignment. See *McQueen v. Phoenix Mutual Fire Ins. Co.*, 4 S. C. R. 660, p. 956.

Notice to agent. See *Billington v. Provincial Ins. Co. of Canada*, 3 S. C. R. 182, p. 957; *Klein v. Union Fire Ins. Co.*, 3 O. R. 234, p. 941.

Authority of agent to give time for payment of premium. See *Moffatt v. Reliance Mutual Life Assurance Co.*, 45 Q. B. 561, p. 994.

Power of agent to waive conditions in policy. See *Western Assurance Co. v. Doull*, 12 S. C. R. 446, p. 958.

Power of agent to vary condition. See *Peck v. Agricultural Ins. Co.*, 19 C. R. 494, p. 950.

#### 4. Payment of Premiums.

The fire occurred on the 13th of September. On the 15th September, the plaintiff, through a solicitor, paid the amount of an overdue insurance premium note to the defendants, who were ignorant of the loss. On the 17th of September, notice of loss was given to the defendants, when they immediately returned the premium to the solicitor:—Held, that the payment having been made in fraud of the defendants, could not avail the plaintiff. *Sears v. Agricultural Ins. Co.*, 32 C. P. 585.—C. P. D.

See *Frazer v. Gore District Mutual Fire Ins. Co.*, 2 O. R. 416, p. 935; *Neill v. Union Mutual Life Ins. Co.*, 7 A. R. 171, p. 995; *Anchor Marine Ins. Co. v. Corbett*, 9 S. C. R. 13, p. 984.

#### 5. Interim Receipts.

The plaintiff was insured by the defendants under an interim receipt, which stated that it was "subject to approval at the head office, and to the conditions of the policy. Unless previously cancelled this receipt binds the company for thirty days from the date hereof, and no longer:—Held, that the conditions of the policy applied to the insurance during the thirty days, and included any variations of the statutory conditions adopted by the defendants. *Compton v. Mercantile Ins. Co.*, 27 Chy. 334.—Chy. D.

An interim note being merely an agreement for interim insurance preliminary to the grant of a policy is not a policy within the meaning of that term in the Ontario Act. "Subject to all the usual terms and conditions of this company" in such note means that such conditions ought to be read into the interim contract to the extent to which they may lawfully be made a part of the policy when issued by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the court or judge. *Citizens Ins. Co. of Canada v. Parsons—Queen's Ins. Co. v. Parsons*, 7 App. Cas. 96. See 50 Vict. c. 26, s. 114.

The plaintiff had for some years insured his mill and machinery therein with the defendants, the policy having been effected through one of their local agents, there being also another insurance with another company. The plaintiff, desiring additional insurance thereon, signed an application therefor, for a portion thereof, through the same agent, on which was an indorsement, of which he was unaware, and to which his attention was not called, that where steam was used for propelling purposes the pro-

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posals were required to be submitted to the defendants before the interim receipt was issued. The agent issued the interim receipt to the plaintiff at the time of the proposal, as was his practice, recognized by the defendants. The application, which contained a statement, without the names of the companies, of the amount of additional insurances effected elsewhere and also the amount of the prior insurance, was sent by the agent to the defendants, but was mislaid by them after they had made from it certain extensions on the policy, which had also been forwarded to them for that purpose. About two months after the date of the interim receipt the defendants wrote their agent declining to continue the risk on the interim receipt, retaining however the portion of the premium earned, at the same time reinsuring half the risk. Of this the plaintiff was not informed, nor was any portion of the premium repaid him:—Held, that the indorsements formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed prima facie to be the agent of the company; and as the defendants never repudiated the contract, but merely determined to put an end to it and treated it as a subsisting contract, they were liable upon it. *Cockburn v. British America Assurance Co.*, 19 O. R. 245.—Q. B. D.

Under the eighth statutory condition the defendants claimed that they were not liable upon the receipt because there was prior insurance in another company, and their assent did not appear in and was not indorsed on the policy, or that they were not liable upon their earlier insurance because of the subsequent insurance in other companies without their assent:—Held, that the application and the interim receipt constituted the contract of insurance, and as in this contract the total amount of insurance was truly stated, and the contract continued to be binding until after the loss occurred, the defendants must be considered to have assented to such insurance, and would be compellable to make their assent appear in or to have it indorsed on their policy if such policy were issued:—Held, also, that the prior insurance was voidable, not void, and that the defendants, after the subsequent contract was entered into in which the total amount of insurance was stated, and after they knew that it was entered into, had elected not to avoid the prior insurance, but to treat it as still subsisting by extending it. *Ib.*

Seemingly, that the defendants, having assented to the insurance stated in the contract of insurance, could not assert that the effecting such insurance had the result of avoiding the prior insurance effected by their policy. *Ib.*

#### 6. Insurable Interest.

A vendor, who has agreed to sell for full value, has nevertheless, pending the contract of sale, a perfect right to insure the premises sold. If such a vendor insures the premises, describing them as "his," this is no misrepresentation, for pending the contract he remains the legal owner. The fact of the vendor insuring under such circumstances, being an assignee in bankruptcy, makes no difference from the case of an ordinary

vendor. *Gill v. Canada Fire and Marine Ins. Co.*, 1 O. R., 341.—Boyd.

The appellants granted a fire policy to one T. on divers buildings and their contents for \$3,280. In his written application T. represented that he was the owner of the premises, while he had previously sold them to S., the respondent, subject to a right of redemption, which right T., at the time of the application, had availed himself of by paying back to S. a part of the money advanced, leaving still due to S. a sum of \$1,510. Subsequent to the application, and after some correspondence, the respective interests of T. and S. in the property were fully explained to the appellants through their agents. Thereupon a transfer for—(the amount being in blank) was made to S. by T. and accepted by the appellants. The action was for \$3,280, the amount of insurance on the buildings and effects:—Held, that at the time of the application for insurance T. had an insurable interest in the property, and as the appellants had accepted the transfer made by T. to S., which was intended by all parties to be for \$1,510, the amount then due by T. to S., the latter was entitled to recover the said sum of \$1,510. 2nd. That S. having no insurable interest in the moveables, the transfer made to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to said moveables. *Art. 2482 C. C. L. C. Ottawa Agricultural Ins. Co. v. Sheridan*, 5 S. C. R. 157.

J., the manager of appellant's firm, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance J. represented appellant to be mortgagee of the stock of S. S. became insolvent and J. was appointed creditors' assignee, and the property of the insolvent was conveyed to him by the official assignee. On 8th March, 1876, S. made a bill of sale of his stock to J., having effected a composition with his creditors under the Insolvent Act of 1875, but not having had the same confirmed by the court. The insurance policy was renewed on 5th August, 1876, one year after its issue. On 12th January, 1877, the bill of sale to J. was discharged and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on 8th March, 1877. An action having been brought on the policy it was tried before Smith, J., without a jury, and a verdict was given for the plaintiff. The Supreme Court of Nova Scotia set aside this verdict and ordered a new trial on the ground that plaintiff had no insurable interest in the property when insurance was effected, and that no interest subsequently acquired would entitle him to maintain the action. One of the conditions of the policy was, "that all insurances, whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings." On appeal to the Supreme Court of Canada:—Held, that the appellant having had no insurable interest when

the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract. *Howard v. Lancashire Ins. Co.*, 11 S. C. R. 92.

Held (reversing the judgment of the court below), Fournier, J., dissenting, that C. had an insurable interest in the property in question in this case at the time of the loss as husband of the owner in fee and tenant by the curtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by a deed given by C. to B., who had reconveyed to C.'s wife. *Caldwell v. Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

In 1877 T. held a policy of insurance on his property which he mortgaged to W. in 1881, and an endorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W., an endorsement was made on the policy permitting the premises to remain vacant. The policy was renewed each year until 1885 when all the policies of the insurance company were called in and replaced by new policies, that held by W. being replaced by another in the name of T. to which W. objected and returned it to the agent who retained it. The premiums were paid by W. up to the end of 1886. The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T. having the vacancy permit and an assignment from T. to W. endorsed thereon and containing a condition not in the old policy, namely, that all endorsements or transfers were to be authorized by the office at St. John, N. B., and signed by the general agent there. The company having refused payment an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action and ordered a new trial on the ground that his interest was not insured and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision the Supreme Court of Canada:—Held, reversing the judgment of the court below (20 N. S. Rep. 487) that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as owner of the property and the contract of insurance was complete. *Wyman v. Imperial Insurance Co.*, 16 S. C. R. 715.

Partnership interest. See *Stillman v. Agricultural Insurance Co.*, 16 O. R. 145, p. 951.

See *Klein v. Union Fire Ins. Co.*, 3 O. R. 234, p. 941.

### 7. By or for Mortgagees.

M. who had mortgaged his property to the plaintiffs, subsequently on the second of April, 1881, insured with defendants, loss if any pay-

able to plaintiffs. Attached to the policy on a printed slip dated 29th May, 1881, was the following clause: "It is hereby agreed that this insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of the policy;" a loss having occurred the defendants disputed their liability, and the matter was referred to an arbitrator, who awarded in favour of the plaintiffs, after refusing to admit evidence for the defendants, that the policy had been obtained by fraud:—Held, that the above clause provided only against future acts that the defendants did not thereby guarantee the policy to the plaintiffs as indisputable, and therefore that they were not debarred from setting up that the insurance had been effected by fraud, and the case was remitted to the arbitrator for the admission of such evidence:—Held, also, that the clause did not amount to a new insurance in favour of the mortgagees. *Omnium Securities Co. v. Canada Fire Mutual Ins. Co.*, 1 O. R. 494.—Hagarty.

On 21st February, 1879, A. B. & Co., the plaintiffs, gave a mortgage on a mill property covenanting to insure, which they did in the R. company, by policy dated 19th March, 1879, expiring 1st March, 1880. On 10th March, 1879, A. left the firm. On 1st March, 1880, the mortgagees, having received no renewal receipt of the above policy, insured the property in the U. company in the name of the plaintiffs. This U. policy provided that the loss should be payable to the mortgagees, and the insurance as to the interest of the latter should not be invalidated by any act of the mortgagors, and that if the mortgagors did any act invalidating the policy, and the insurers should pay the amount of the policy to the mortgagees, they should be subrogated to the rights of the latter, or might pay the whole of the mortgage debt, and obtain an assignment of the mortgage. There was no written application for the U. policy. The R. policy was simply handed to the insurers, and from it they drew their policy, which had the statutory conditions only. No representations were made to them in any other way. The premium was paid by the mortgagees, who collected it from the plaintiffs, the latter having taken no part in effecting it. On 14th March, 1881, the mortgagees wrote a letter to the plaintiffs in which they represented the U. policy as indisputable. A fire having occurred the U. company paid the mortgagees the amount of the loss, which more than covered the amount due on the mortgage, of which they took an assignment. The evidence shewed that at the time of effecting this policy there were certain insurances on the property, and also certain mortgages, of which the U. company were not informed and to which they never assented. The plaintiffs now, suing on the U. policy claimed to have the mortgage discharged and the balance of the insurance money paid to them, and the U. company counterclaimed for the amount due on the mortgage:—Held (reversing the decision of Ferguson, J.), that the non-communication of A.'s retirement from the firm was not a breach of statutory condition No. 1, because A., though he had retired, retained

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an insurable interest, both as liable to the covenants in the mortgage, and as still retaining the right to redeem the mortgage; and, moreover, even if A. had no interest at all, the surviving partners could recover according to the extent of their interest. Semble, that even if notice of the change had been of moment, yet, since the evidence shewed that the matter of the policy, as between the mortgagees and the U. company, was left to the under-clerks to deal with, and that a clerk of the mortgagees informed a clerk of the U. company of the change in question, a jury might properly find that notice of the change was communicated to the U. company. *Klein v. Union Fire Ins. Co.*, 3 O. R. 234.—Chy. D.

Held, further, that the non-communication of other mortgages, subsequent to that to the plaintiffs, was not a breach of statutory condition No. 1, because such non-communication will not, apart from stipulation, irrespective of the nature and amount of the other mortgages, and without any imputation of fraud, avoid a policy; and also because the plaintiffs were not bound unasked to state the exact nature and extent of the interest to be insured, and there was at least contributory negligence on the part of the insurers, who might be regarded as having waived information as to the mortgages. *Samo v. Gore District Mutual Ins. Co.*, 1 A. R. 545, followed. *Ib.*

Held, further, that the fact of there being two prior insurances unassented to was not a breach of statutory condition No. 8, because the evidence shewed the U. policy was to take the place of the R. policy, and of the prior insurances one was assented to on the face of the R. policy and the other had been taken in substitution for another, which also appeared as assented to on the R. policy. It was the duty of the U. company to have properly issued their policy, agreeing to take the position of the R. company, as also it was the duty of the mortgagees to see the policy properly issued. *Ib.*

Held, further, that the letter of 14th March, 1881, contained representations which the mortgagees were bound to make good, especially as the U. company acted as agents for the plaintiffs in effecting the policy. *Ib.*

Held, further, that the claim of the U. company to foreclose could not be entertained, for the U. company could not take advantage of their own default, in not making the formal entry of assent to the prior insurances on their policy, to bring into play the subrogation clause for their own advantage. *Springfield Fire Ins. Co. v. Allen*, 43 N. Y. 387, distinguished. *Ib.*

Held, lastly, on the whole case, it should be declared that the mortgage had been paid, and the proper discharge should be executed, and the mortgagees should pay the balance of the insurance money to the plaintiffs, with interest, with costs of suit to the plaintiffs as against both defendants, but without prejudice to the defendants litigating their respective liabilities as between themselves. *Ib.*

Quere, whether upon the facts stated in the report the plaintiffs were not entitled to recover on the ground of the compromise made between the parties. *Ib.*

Held, that the usual covenant to insure contained in a mortgage executed under the Act respecting short forms of mortgages operates as an equitable assignment of the insurance when effected. *Greet v. Citizens Ins. Co.*—*Greet v. Royal Ins. Co.*, 5 A. R. 506.

Under a covenant in a mortgage the mortgagor effected an insurance in the Queen Insurance Co. for \$6,000, and transferred the policy to the mortgagees. The mortgagees, not having received the renewal receipt within three days before the expiration of the policy as required by the mortgage, effected an insurance of \$5,000 with the Imperial Insurance Co., and by a subsequent arrangement the Queen policy was allowed to lapse. In 1880 a fire occurred and an amount was paid by the insurance company which was applied on the mortgage reducing it to \$1,750, and the policy was reduced to that amount. The policy was then cancelled, and an application made by the investment company for a policy for said sum. The policy was to be, and was, issued in the name of the owner, stated in the application to be the plaintiff. The premiums were paid by the plaintiff. Attached to the policy was the mortgage clause whereby the insurance, as to the mortgagees' interest only, should not be invalidated by any act of the mortgagor; and if payment was made to the mortgagees and, as to the mortgagor no liability therefor existed, the company as to such payment should be subrogated to the mortgagees' rights under all securities held collateral to the mortgage debt. In 1882 a fire occurred and the insurance company paid the investment company the \$1,750. The plaintiff claimed to have his mortgage discharged; but the insurance company disputed this, setting up that plaintiff had no claim under the policy; and that having paid the investment company they were subrogated to their rights:—Held, that the plaintiff was entitled to the benefit of the money paid and to have his mortgage discharged, unless he had done something to forfeit his rights; but that there was no forfeiture, certain grounds of avoidance set up by the defendants not being tenable. *Klein v. Union Fire Ins. Co.*, 3 O. R. 234 followed, and *Omniun Securities Co. v. Canada Fire and Marine Ins. Co.*, 1 O. R. 494, observed upon in the Court of Appeal. *Bull v. North British Canadian Investment Co.*, 14 O. R. 322.—C. P. D.; 15 A. R. 421.

A mortgagor insured his mill against fire with the defendants, the policy being payable on its face, to the extent of one-half, to the mortgagee. Attached to the policy was a separate slip called a "mortgagee clause," by which it was provided that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor; and, also, that whenever the company should pay the mortgagee any sum for loss under the policy, and should claim that, as to the mortgagor, no liability existed therefor, it should, to the extent of such payment, be subrogated to all the rights of the party to whom such payment should be made. Proofs of loss were not made by the mortgagor and mortgagee until within sixty days of the end of the year after a fire had occurred; and within sixty days after the proofs were delivered, an action was commenced by the mortgagor and the representatives of the

mortgagee:—Held (affirming the judgment of Boyd, C., at the trial), that the mortgagee was not bound as "the assured," under statutory condition 12, to make proofs of loss, and that here the person assured, the mortgagor, was the person to make them, under conditions twelve and thirteen:—Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss, within which an action had to be brought under condition twenty-two, was a neglect from the consequences of which the mortgagee was relieved by the mortgage clause, and that, as far as he was concerned, the action was not brought too soon:—Held, also, that the words "shall claim that, as to the mortgagor, no liability exists," in the mortgage clause, meant "and as to the mortgagor no liability exists;" and that, as the policy was valid at the time of the fire, and nothing was shown to have taken place since to render it invalid, there was a liability to the mortgagor: that condition 22 barred the remedy and not the right, and the defendants were not entitled to subrogation:—Held, also, that the mortgagor was bound to make the proofs in such time, that the sixty days would elapse before the expiration of the year limited for bringing the action and his remedy as to the other half of the policy was barred. *Anderson v. Sawjeen Mutual Fire Ins. Co. of Mount Forest*, 18 O. R. 355.—Chy. D.

See *Hovess v. Dominion Fire and Marine Ins. Co.*, 8 A. R. 644, p. 961.

#### 8. Form of Policy.

Necessity of seal to policy. See *Wright v. London Life Ass. Co.*, 5 A. R. 218; *S. C. sub nom. London Life Assurance Co. v. Wright*, 5 S. C. R. 466, p. 933; *Burnett v. Union Mutual Fire Ins. Co.*, 32 C. P. 134, p. 976.

Printing statutory conditions. *May v. Standard Fire Ins. Co.*, 5 A. R. 605, p. 944; *Citizens' Ins. Co. of Canada v. Parsons*; *Queen Ins. Co. v. Parsons*, 7 App. Cas. 96, *infra*.

Printing additional conditions. See *Sands v. Standard Ins. Co.*, 27 Chy. 167; 26 Chy. 115.

Omission to fill up blank in a condition. See *Sears v. Agricultural Ins. Co.*, 32 C. P. 585, p. 945.

#### 9. Varying Statutory Conditions.

Held, that according to the true construction of the Act, 39 Vict. c. 24 (Ont.), whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act. The penalty for not observing that manner is that the policy becomes subject to the statutory conditions, whether printed or not. *Citizens' Ins. Co. of Canada v. Parsons*; *Queen Ins. Co. v. Parsons*, 7 App. Cas. 96.

Where a company has printed its own conditions and failed to print the statutory ones it is

not the case that the policy must be deemed to be without any conditions at all. *Id.*

Compliance with statutory enactment as to printing. See *Sands v. Standard Ins. Co.*, 27 Chy. 167.

Action on a fire policy, upon which the statutory conditions were not indorsed, but which was on its face declared to be subject to the company's conditions indorsed, the eleventh of which was that the insured should do all in his power to save and protect the insured property, and prevent injury thereto. By the seventeenth condition the non-fulfilment of these conditions entailed the forfeiture of the policy. The jury found specially, amongst other things, that the plaintiff wilfully neglected to save, and prevented others from saving, the insured property, whereby his goods were prevented from being saved, but they disagreed as to the defence of fraudulent over-valuation:—Held, that under the decision of the Privy Council in *Parsons v. Citizens' Ins. Co.*, 7 App. Cas. 96, the policy must be taken to be a policy with the statutory conditions only; and a new trial was granted that the case might proceed as upon such a policy. *Derlin v. Queen Ins. Co.*, 46 Q. B. 611.—Q. B. D.

By an additional condition of a policy of insurance, it was provided that if the insured property should be levied upon, or taken into possession or custody under any legal process, or the title should be disputed in any proceeding in law or equity, the policy should cease to be binding upon the company. After the insurance was effected an execution issued against the goods of the insured, under which the bailiff made a formal seizure, but did not deprive the insured of their possession or custody, or place any one in possession, and upon a bond being given a day or two afterwards, the seizure was withdrawn. The Court of Common Pleas, 30 C. P. 51, held that this was a valid seizure, and that the plaintiff, who was mortgagee of the goods, and to whom the loss was payable, could not therefore recover:—Held, reversing this judgment, that the plaintiff was entitled to recover. Per Burton, Patterson, and Morrison, J.J.A., that there had not been a seizure within the meaning of the condition, which refers to an actual custody and change of possession. Per Armour, J., that the condition was not birding on the insured, as it was not printed in compliance with R. S. O. (1877), c. 162, s. 4. *Wilson v. The Standard Fire Ins. Co.*, 29 C. P. 308, followed and approved of. Semble, per Patterson, J. A., that the condition was void, as being unjust and unreasonable. Remarks by Patterson, J. A., as to the principle and considerations upon which the validity of a variation of or addition to the statutory conditions should be tested and determined. *May v. Standard Fire Ins. Co.*, 5 A. R. 605.

The defendant, a mutual insurance company, was incorporated by an Act of the Dominion Parliament, 41 Vict. c. 40, by section 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any insurance on the insured property, or the failure to notify the company of any change in the



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title or ownership of the insured property, and to obtain the written consent of the company thereto shall render the policy void:—Held, on demurrer, that the matters provided for by the above section were subject matters of the "Fire Insurance Policy Act" of Ontario, over which the province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act per se, but only by being used as required or modified by said Ontario Act, namely, in the manner provided for variations to the conditions therein contained. *Citizens' Ins. Co. v. Parsons and Queen Ins. Co. v. Parsons*, 7 App. Cas. 96, commented upon. *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82.—O'Connor.

#### 10. Reasonableness of Conditions.

A premium note, dated the 24th May, 1880, given on effecting an insurance with the defendants company, stated that the insured for value received on policy No. 1,405, dated the 6th May, 1880; promised to pay the company \$14.50 on the 24th of December, 1880, with interest at seven per cent., and contained an agreement that if the note were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy should be null and void so long as the note remained unpaid. Upon the policy, which was dated the 14th May, 1880, and took effect from the 24th May, 1880, was endorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given for it; and in that case it was a condition of the contract "that if such premium be not paid — 18 —, the whole amount of premium shall then be considered as earned, and the policy shall be null and void, so long as any part thereof remains unpaid." The application, which was made a part of the policy, stated that the premium was due on the 24th December, 1880:—Held, that the omission to fill up the blank in the condition, did not prevent its operating, for the condition would be perfect without the figures "18," which might be rejected as surplusage; but that the condition could be reformed by inserting the words and figures evidently intended—namely, the 24th December, 1880; or might have been filled up by the parties:—Held, also, that the condition was not unreasonable, being in effect the same as that provided for in the case of mutual insurance companies by R. S. O. (1877) c. 161. *Sears v. Agricultural Ins. Co.*, 32 C. P. 585.—C. P. D.

Per Burton, J. A.—That a clause in the application, in this case, stating that the agent of the company filling up the application should be regarded as the agent of the applicant was not, by reason of its being made part of the policy, a condition thereof, and subject to the determination of the judge as to whether it was just and reasonable; and if it were it was not unreasonable. *Swenden v. Standard Fire Ins. Co.*, 5 A. R. 290.

By a condition in a policy of insurance additional to the statutory conditions, it was provided, that "when property insured \* \* or any part thereof shall be alienated, or in case of any transfer or charge of title to the property in-

sured, or any part thereof, or of any interest therein without the consent of this company indorsed hereon, or if the property hereby insured, shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company":—Held, affirming the decree of Proudfoot, V. C., (26 Chy. 115), that such condition was not just or reasonable, and that it was not binding. *Sands v. Standard Ins. Co.*, 27 Chy. 167.—Chy. D.

Under the statutory conditions indorsed on a mutual fire insurance policy the words, prescribed by section 4 of R. S. O. (1877), c. 162, except the heading, "Variations in conditions," were printed in ink of a slightly different colour, but in the same sized type, and after certain conditions varying the statutory conditions, and under the heading, "Additional conditions," there was the following condition in type of the same size and colour, "In case any promissory note for a cash premium or for any premium note \* \* given to the company, or to any officer or agent thereof, be not paid when due, the policy \* \* shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note." The note in this case, payable to defendants' agent or bearer, for \$12, the first payment on the premium undertaking, which was for \$15.62, fell due on the 15th of April, 1878, and the loss, exceeding the amount insured \$500, occurred on the 23rd of March. This note was not paid, the plaintiff alleging that he omitted to pay it, assuming that the defendants would deduct it in settling the loss, which had not been adjusted:—Held, that the Uniform Conditions' Act, R. S. O. (1877), c. 162 (excepting section 2), does not apply to mutual insurance companies; but that if it did the condition would have been clearly void for non-compliance with section 4 of that Act:—Held, also, reversing the judgment of the Queen's Bench, 44 Q. B. 70, that the condition was not just or reasonable, as it was required to be by the express contract, and by section 35 of the Mutual Insurance Act, R. S. O. (1877), c. 161; and that the plaintiff was entitled to recover. The reasonableness of a condition is to be tested with relation to the circumstances of each case at the time the policy was issued. But quare, per Moss, C. J. A., whether in the abstract such a condition could be regarded as reasonable, and per Patterson, J. A., it could not. Per Patterson, J. A., the condition was also unreasonable, because more stringent than the statutory provisions upon the same subject, section 48 of the Mutual Act. Quare, whether this was a note which the company had power to take, or one within the condition. *Ballagh v. Royal Mutual Fire Ins. Co.*, 5 A. R. 87.

The plaintiff applied for an insurance upon his stock-in-trade with the defendant company. Pending the negotiations the company's agent told the plaintiff he thought the company's condition was to allow twenty-five pounds of powder to be kept, and the plaintiff said he did not keep more than ten pounds. The insurance was then effected by an interim receipt, and on the same night the premises were burned. The plaintiff had more than ten pounds, but less than



twenty-five pounds of powder in stock when the fire occurred. The statutory condition prohibited more than twenty-five pounds being kept in stock without permission, and the company's variation of their condition relieved them from liability if more than ten pounds were "deposited on the premises, unless the same be specially allowed in the body of the policy and suitable extra premium paid." The case having been dealt with on other grounds, on an appeal to the Privy Council, was remitted to this court to try whether the variation of the condition was a just and reasonable one. The judge at the trial found it to be reasonable:—Held, Hagarty, C. J., dissenting, that under the circumstances of this case, inasmuch as the company's agent had represented that twenty-five pounds of gunpowder were allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one to be set up by the company, or one which they could have inserted in the policy, and was therefore void, and that the plaintiff should recover. Per Armour, J.—The condition being more onerous than the statutory condition relating to the same subject matter, was for that reason to be deemed not just or reasonable. Per Hagarty, C. J., and Galt, J.—The variation was not necessarily unjust or unreasonable. Per Hagarty, C. J.—The statutory condition exempting the company from liability if more than twenty-five pounds of powder were kept without permission, does not preclude or prohibit the insurers from bargaining that they will not be liable if more than ten pounds be kept, except on certain conditions as to extra premiums, etc.; and as the plaintiff at the trial did not in his evidence mention the representation of the agent, or allege that it influenced him, and it was not relied upon there, it should not now be given effect to. *Parsons v. Queen Ins. Co.*, 2 O. R. 45.—Q. B. D.

Per Armour, J.—Following *Parsons v. Queen Ins. Co.*, 2 O. R. 45, any variation of the statutory condition is *prima facie*, unjust and unreasonable. *Smith v. City of London Ins. Co.*, 11 O. R. 38.

Variation of statutory condition as to time within which loss payable. See *Smith v. City of London Ins. Co.*, 14 A. R. 328; 15 S. C. R. 69, p. 971; *Peoria Sugar Refining Co. v. Canada Fire and Marine Ins. Co.*, 12 A. R. 418, p. 970.

See *May v. Standard Fire Ins. Co.*, 5 A. R. 605, p. 944; *Graham v. Ontario Mutual Ins. Co.*, 14 O. R. 358, pp. 954, 959; *Reddick v. Scruggen Mutual Ins. Co.*, 15 A. R. 363, p. 955; *Pick v. Agricultural Ins. Co.*, 19 O. R. 494, p. 950.

#### 11. Description of Property and Premises.

The plaintiff, describing himself in the application as a grocer, and his store as being used as a grocery, insured with defendants his stock of groceries, etc., therein, and without the knowledge or assent of the defendants habitually retailed liquor there; but the jury found that the risk was not thereby increased:—Held, that there was no misrepresentation or concealment of a material fact; that in insuring a "grocery," defendants knew that liquor might be sold there; and that the plaintiff was entitled to recover. *Nicholson v. Phoenix Ins. Co.*, 45 Q. B. 359.—Q. B. D.

It was provided by one of the conditions in the policy sued on that if any one should insure his building or goods and cause the same to be described otherwise than they really were, to the prejudice of the company, or should misrepresent or omit to communicate any circumstance which was material to be made known to the company in order to enable them to judge of the risk, such insurance should be void. The plaintiff signed a printed form of application in blank for an insurance on a block of five buildings, and told defendant's agent to make his own measurements and description. The agent filled up the application from an examination and diagram which he had made on a previous occasion, and in answer to the question: "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted," replied, "No, it is a first-class building in every respect; although one roof covers all, there is a solid brick fire-wall between each store." The application contained an agreement that if the agent of the company filled up the application, he should, in that case, be the agent of the applicant, and not of the company. There was not a solid brick wall between the stores, and the jury found that this was a misdescription of a fact material to the risk:—Held, affirming the judgment of the Queen's Bench, 44 Q. B. 95, that the plaintiff could not recover. *Sorden v. Standard Fire Ins. Co.*, 5 A. R. 290.

The first statutory condition endorsed on a policy provided that if the insured misdescribed his buildings or goods to the prejudice of the company, or misrepresented, or omitted to communicate any material circumstance, the insurance relating thereto should be void. The second statutory condition provided that the policy was intended to be in accordance with the application unless the company should point out the difference relied on, with a variation added thereto, that such application or any survey, plan or description of the property to be insured should be considered a part of the policy and every part of it a warranty by the insured, but that the company would not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. The twentieth statutory condition as varied, provided that in case any agent of the company took part in the preparation of the application, he should, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant. By the application, which was signed, not by the insured in person, but through the agent of the company, the insured was required to make known the existence of all buildings within 100 feet of the insured premises; and it appeared that the insured had omitted to make known the existence of a small building used for storing coal oil, and material to be made known, within such distance, but of the existence of which the applicant was not at the time aware. A diagram was made and filled in by the agent and signed by him in his own name as well as that of the applicant, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection and the knowledge thereby acquired, as also an intimate knowledge of the property, which he passed three times each day;

and the agent at the foot of the application stated that he had made a personal survey of the risk:—Held, reversing the judgment of the court below, (31 C. P. 618), that under the conditions and circumstances above set forth the insured was relieved from the effect of his omission to make known the existence of such coal oil shed; that the inspection by the agent need not be one made for the purpose of such insurance, provided a personal inspection did take place; and that under the facts and circumstances appearing in the case the company could not dispute the correctness of the answers given by the insured, whether his answers upon the application for insurance were to be treated as warranties or representations only. *Quintan v. Union Fire Ins. Co.*, 8 A. R. 376.

A tug is not a building within the meaning of clause 7 of the tenth statutory condition. *Mitchell v. City of London Fire Ins. Co. (Limited)*, 12 O. R. 706.—O'Connor.

On the argument of the appeal the defendants for the first time set up that by the application the plaintiff had described the building insured as occupied by himself and his tenants as a dwelling-house, thereby contracting with the defendants that it was so occupied; whereas, in fact, it was then vacant, and that there being thus an entire misdescription of the subject matter of the insurance, the risk never attached. On the pleadings and at the trial, this misdescription was relied upon merely as being a material misdescription avoiding the policy under the first statutory condition. This issue was found in favour of the plaintiff, it being proved that the policy had been issued in substitution of a former policy in the defendant company, the risk on which they had continued after accepting notice that the building had become vacant, and the application for the substituted policy had been filled up by their general manager, to whom the plaintiff had given all the information he asked for, and had told him that the building was then unoccupied:—Held, that under the circumstances, the knowledge of their general manager was the knowledge of the company; that the misdescription was immaterial, and that the defendants could not be permitted at that stage of the cause to shift their ground, and set it up as a warranty or part of the contract. *Reddick v. Sauguen Mutual Fire Ins. Co.*, 15 A. R. 363.

The agent of an insurance company filled in an application for insurance on a building built with boards, and fixed the premium at the rate demanded on brick buildings, there being no tariff value for board buildings. The word "boards" was so badly written that it was difficult to decipher it, but the character of the building was designated on a diagram on the back of the application, which the agents were instructed to mark with red in case of a brick, and black in case of a frame building. In this case it was in black. At the head office the word intended for boards was read "brick," and the policy issued as on a brick building. A loss having occurred the company, under a clause in the policy, caused an arbitration to be had, but afterwards refused to pay the amount awarded to the insured, claiming that by reason of the error in the policy there was no existing contract of insurance:—Held, affirming the judgment of

the courts below (11 O. R. 38; 14 A. R. 328), that as there had been no misrepresentation by the assured, and no mutual mistake, the parties were ad idem, and the contract was complete; and even if it were otherwise, the company could not set up this defence after treating the contract as existing by the reference to arbitration under the policy. *City of London Fire Ins. Co. v. Smith* 15 S. C. R. 69.

The defendants issued a policy of insurance against fire, dated 23rd April, 1889, upon a house of the plaintiff. The application signed by the plaintiff, stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date and for six months previously, the house had been unoccupied. One of the special conditions indorsed upon the policy, was that if a building became vacant or unoccupied and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application, he asked the plaintiff if there was any one in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application, the plaintiff agreed that no statement made or information given by him prior to issuing the policy to any agent of the defendants, should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice shewing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies:—Held, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed. The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff, for the purpose of shewing that the plaintiff, having become aware of them before the application made by him, was justified in believing that the defendants did not regard the condition as to occupation as a material one:—Held, that this evidence was properly rejected. *Peck v. Agricultural Ins. Co.*, 19 O. R. 494.—Q. B. D.

## 12. Property Covered.

In an action on a fire insurance policy, application was made at the trial to set up the first statutory condition as a defence, in that a threshing machine insured as plaintiff's own property, was partnership property; and also to set up the fifteenth condition, in that there was fraud and false statement, for the like reason, in the proofs of loss:—Held, that the application must be refused, the first condition having no reference to title; and as to the fifteenth, the statement was not proved to be wilfully false and fraudulent, and the fact that the threshing machine was partnership property, was not material, no question as to title having been in the application for insurance asked. As the terms of the policy limited the

right of the plaintiff to recover to the extent of his own interest only, the damage was reduced to the extent of that interest. The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 Barn." The machine was in No. 2 barn, though the horse power was outside. The plaintiff applied to the company, and an endorsement was made on the policy stating that the machine should be covered "while in any one of the outbuildings insured," Barn No. 2 was insured though not by the defendants' company:—Held, that the machine was covered by the policy, and that the plaintiff was entitled to recover in respect of it. An objection was also made that a reaper, destroyed by the fire, was not covered by the policy:—Held, on the evidence, that the objection was not tenable. *Stillman v. Agricultural Ins. Co.*, 16 O. R. 145.—C. P. D.

### 13. Risks Insured—Explosives.

A policy of insurance against fire contained a condition that "the company will make good a loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning." A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion:—Held, reversing the decision of the Court of Appeal (11 A. R. 741), which affirmed the decision of the C. P. D. (7 O. R. 634) and the Q. B. D. (8 O. R. 343), Taschereau J. dubitante, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion. *Hobbs v. Northern Assurance Co.*; *Hobbs v. Guardian Fire and Life Assurance Co. of London*, 12 S. C. R. 631.

See *Mitchell v. City of London Fire Ins. Co. (Limited)*, 12 O. R. 706, p. 985.

### 14. Valuation of Property.

In effecting insurances in all to the amount of \$5,200, the plaintiff represented the property as being of the "cash value" of \$5,339 on two occasions, and \$5,500 on a third occasion. In an action on the policies the jury found that the value was \$4,000 when first insured, and \$4,200 when the additional insurance was effected; that the plaintiff had misrepresented the value, but not intentionally or wilfully; that it was not material that the true value should be made known to the company, and that the company intended that the goods should be insured to their full value, and rendered a verdict in favour of the plaintiff for \$3,100, which the Divisional Court subsequently refused to set aside:—Held (in this reversing the judgment of the court below), that under the circumstances and in view of the nature of the goods insured, the over-valuation was such, as under the first statutory condition in the policy, rendered the same void. *Moore v. Citizens' Fire Ins. Co.*, 14 A. R. 582.

### 15. Title and Incumbrances.

In answer to the questions, "(1) Are the premises occupied by owner or tenant? (2) If by tenant, give name of owner." A party seeking to effect an insurance against fire answered: (1) Tenant—as boarding-house. (2) Applicant. And another question (the 11th) was: "If the applicant is the owner of the said building—state the value of the building and land;" and he answered \$800. In fact the applicant did not own the land, having a lease of it which had only a short time to run, with the right to remove the building the subject of insurance:—Held, that this was such a misrepresentation of the interest of the applicant as rendered the policy void under the first of the statutory conditions in the policy. *Compton v. Mercantile Ins. Co.*, 27 Chy. 334.—Chy. D.

The plaintiff and his brother, being joint owners of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense, built a dwelling-house for his own use, on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood, and was held by its own weight on them. The plaintiff, in his application for insurance on the house and contents, in answer to the question—"Title, held in fee, or how?" answered, "In fee;" and to the question—"Incumbered or not?" If yea, to what amount—how much land does incumbrance cover, and for what purpose erected?" He answered, "None." But he stated to the agent that there was on the land a mortgage, but nothing against the house, which he held in fee unincumbered. There was a condition on the policy that the incumbrance should be disclosed, and that the failure to do so would avoid the policy. The verdict was for the plaintiff:—Held (Armour, J., dissenting), that the house was not insured as a chattel, but as realty; and that the failure to disclose the incumbrance was fatal. Per Cameron, J., that the house was a fixture, and subject to the mortgage. The condition was, that in case of any misrepresentation or omission to communicate any material circumstance, the insurance should be of no force "in respect to the property in regard to which the misrepresentation or omission is made." Per Cameron, J. The policy was avoided only as to the insurance on the house. The directors passed a resolution to pay the loss, in ignorance of the fact that the incumbrance existed, and made an assessment to meet it, but on discovery rescinded this resolution:—Held, that the defendants had not by the resolution waived their right to set up the defence. Per Armour, J. The house was a chattel, and there was nothing in the application to estop the plaintiff from asserting that it was not insured as part of the land. *Phillips v. Grand River Farmers' Mutual Fire Ins. Co.*, 46 Q. B. 334.—Q. B. D.

A fire policy contained a condition, in addition to the statutable conditions, to the effect that if the property were alienated, or any

transfer or incumbered, the company upon underwriting the property value of \$5,000 to time, in fact on which mortgage was discharged plaintiff to firm, but the jury found incumbrance, and that C.J. The levying mortgage the remaining divisible. 115.—Q. B.

The plaintiff and his brother, being joint owners of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense, built a dwelling-house for his own use, on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood, and was held by its own weight on them. The plaintiff, in his application for insurance on the house and contents, in answer to the question—"Title, held in fee, or how?" answered, "In fee;" and to the question—"Incumbered or not?" If yea, to what amount—how much land does incumbrance cover, and for what purpose erected?" He answered, "None." But he stated to the agent that there was on the land a mortgage, but nothing against the house, which he held in fee unincumbered. There was a condition on the policy that the incumbrance should be disclosed, and that the failure to do so would avoid the policy. The verdict was for the plaintiff:—Held (Armour, J., dissenting), that the house was not insured as a chattel, but as realty; and that the failure to disclose the incumbrance was fatal. Per Cameron, J., that the house was a fixture, and subject to the mortgage. The condition was, that in case of any misrepresentation or omission to communicate any material circumstance, the insurance should be of no force "in respect to the property in regard to which the misrepresentation or omission is made." Per Cameron, J. The policy was avoided only as to the insurance on the house. The directors passed a resolution to pay the loss, in ignorance of the fact that the incumbrance existed, and made an assessment to meet it, but on discovery rescinded this resolution:—Held, that the defendants had not by the resolution waived their right to set up the defence. Per Armour, J. The house was a chattel, and there was nothing in the application to estop the plaintiff from asserting that it was not insured as part of the land. *Phillips v. Grand River Farmers' Mutual Fire Ins. Co.*, 46 Q. B. 334.—Q. B. D.

A fire policy contained a condition, in addition to the statutable conditions, to the effect that if the property were alienated, or any

transfer or change of title occurred, or if it were incumbered by mortgage, without the consent of the company, or if the property should be levied upon under process of law, the policy should cease. In answer to the question whether the property was mortgaged, the assured answered "\$5,000 to F. L. & S. Co." There were at the time, in fact, two mortgages to that company, on which \$6,160 were due. After the policy a mortgage was given to secure endorsements and was discharged, and another was given by the plaintiff to his partners who retired from the firm, but the company was not apprised of either. The jury found that the representations as to incumbrances were false, but not made fraudulently, and a verdict was entered for the defendants.—Held, that the representation as to incumbrances was a violation of the condition, and that the verdict was right. Per Hagarty, C. J. Though that part of the condition as to levying might be unreasonable (5 A. R. 605), the remainder was not, and the condition was divisible. *Wilby v. Standard Ins. Co.*, 3 O. R. 115.—Q. B. D.

The plaintiff effected an insurance on buildings and the chattels therein, specific amounts being placed on each. By the application in answer to questions to that effect, the plaintiff stated that the premises were held in fee simple and were unencumbered; and at the end thereof there was a provision that where property was heavily encumbered, or the value of buildings as compared with the amount insured on ordinary contents was small, the manager, etc., was authorized to insert the two-third's clause. The application was made part of the policy, which contained the statement that the premises were represented in the application as being held in fee simple and unencumbered. It was also so stated in the proofs of loss. By the first statutory condition, if the insured misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be of no force as respects the property misrepresented, etc. The property herein had been conveyed to the plaintiff by his father in consideration of natural love and affection, but subject to a charge to support the father and a brother and to other charges, and on default the plaintiff was to stand seised to the use of the father of the land, which should immediately revert in him as before.—Held, that under the first statutory condition, in order to cause the misrepresentation as to the property to avoid the policy, it must be material, which was a question for the jury to decide; and that the misrepresentation only applied to the buildings and not to the chattels.—Held, also, that the fifteenth statutory condition which provides that "all frauds or false swearing in relation to any of the above particulars, shall vitiate the claim," did not apply to the statements as to title or encumbrances, for it referred to the particulars contained in the thirteenth statutory condition, items (a) to (e) which had no relation whatever to such statements. The judge at the trial having entered a verdict for the defendants, on the ground that the misrepresentation itself avoided the policy, a new trial was directed. *Goring v. London Mutual Fire Ins. Co.*, 10 O. R. 236.—C. P. D. See S. C., 11 O. R. 82, p. 980.

In the application for a policy of insurance against fire, it was stated that there was no incumbrance. The application was filled in by the company's agent. The insured informed him of the existence of a mortgage on the property when the agent told plaintiff that if there was nothing overdue thereon it was not an incumbrance, and, under this belief, there being nothing overdue, the statement was made. A policy was afterwards issued with conditions and variations. The fourteenth variation was, that if any agent, etc., of the company shall have written or filled up any part of the application, he shall for that purpose be deemed the agent of the insurer and not of the company; and no statement, written or verbal, made to such agent, etc., as to any matter to which the enquiries in the application extend should bind the company or affect the company with notice thereof unless stated in the application. The fifteenth variation was, that any fraudulent misrepresentation contained in the application, or any false statement therein respecting the title or ownership of the applicant or his circumstances, or the concealment of any incumbrance, or the failure to notify the company of any mortgage or incumbrance upon or other change in the title or ownership of the insured property rendered the policy void.—Held (Galt, J., dissenting), that the defendants were estopped from setting up the avoidance of the policy. *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450, and *Hastings Mutual Fire Ins. Co. v. Shannon*, 2 S. C. R. 394, followed. Per Galt, J.—That irrespective of the agent's representation before the issue of the policy, the plaintiff after the issue thereof should, under the fifteenth variation, have notified the defendants of the mortgage. Per Rose, J.—The fourteenth variation was unjust and unreasonable on the facts of the case, and possibly generally; and the fifteenth variation did not apply; but, even if applicable, it was similar in terms to section 36 of 36 Vict. c. 44 (Ont.), which was considered in *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450. Per Cameron, C. J.—Whether the fourteenth variation was or not just and reasonable need not be considered, for it did not profess to provide that the company should not be bound by the agent's representation as to the meaning and effect of the questions in the application; and as to the fifteenth variation, it was competent for the parties to define what they understood was meant by incumbrance. *Graham v. Ontario Mutual Ins. Co.*, 14 O. R. 358.—C. P. D.

The defendants, in the prescribed manner, indorsed upon the plaintiff's policy as an addition to the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement representing the title or ownership of the applicant, or the concealment of any mortgage or execution or any incumbrance on the property or on the land on which it was situate, should avoid the policy unless the directors in their discretion should see fit to waive the defect. In his application the plaintiff stated that the land on which the building proposed to be insured was situated was incumbered by a mortgage for \$1,500, but omitted to disclose that it was also charged, together with other property, with a small annuity in favour of his

father. The omission was not explained, but it was not attributed to any fraudulent intent. The defendants pleaded that the non-disclosure of that charge avoided the policy under the first statutory condition, or the above addition thereto. The jury found that the existence of the annuity was not material to be made known to the defendants:—Held, affirming the judgment of the Q. B. D. (14 O. R. 506): (1) That the non-disclosure of the annuity was the concealment of an incumbrance within the meaning of the added condition. (2) That the added condition was not a just and reasonable one because it was not limited to such facts or matter as were material to be made known to the company. (3) That the Divisional Court might determine whether the condition was a just and reasonable one, and that it was not necessary that it should first have been raised at the trial. *Reddick v. Saugen Mutual Fire Ins. Co.*, 15 A. R. 363.

Semble, the first statutory condition applies to matters of title or incumbrances, or relating to the "moral" as well as the "physical" risk where the policy is based upon an application in which the insured is interrogated as to such matters. *Klein v. The Union Fire Ins. Co.*, 3 O. R. 234, approved and distinguished. *Id.*

See *Klein v. Union Fire Ins. Co.*, 3 O. R. 234, p. 941; *Ottawa Agricultural Ins. Co. v. Sheridan*, 5 S. C. R. 157, p. 938.

#### 16. Assignment, Alienation, or Incumbrance of the Property Insured or of the Policy.

Held, that the usual covenant to insure contained in a mortgage executed under the Act respecting Short Forms of Mortgages, operates as an equitable assignment of the insurance when effected. *Greef v. Citizens' Ins. Co.*; *Greef v. Royal Ins. Co.* 5 A. R. 596; 27 Chy. 121.

Held, affirming the judgment of Proudfoot, V. C. (26 Chy. 115) that the fourth statutory condition does not apply to an alienation by way of mortgage, but only to an absolute transfer. *Sands v. Standard Ins. Co.*, 27 Chy. 167.—Chy. D.

The appellant, being indebted to certain persons and desiring to have his stock of goods insured, applied to the agents of respondents for insurance to the amount of \$2,000 for three months, "loss if any to be payable to his creditors of whom G. McK. is one and McM. & Co. are second." An interim receipt was issued by the company, dated 10th of November, 1877, which stated the insurance to be subject to the conditions contained in and endorsed upon the printed form of policy in use by the company, one of which conditions (No. 4) stated, that if the property insured should be assigned without a written permission endorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void. On the 28th November the appellant transferred the insured property to the said G. McK., in trust for his creditors, the balance, if any, to be payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire

on the 15th January, 1878. The policy sued upon was dated the 12th December, 1877, but was not delivered until the morning after the fire. By it the loss was made "payable to G. McK. and McM. & Co." and others as creditors, as their interests may appear." After the fire the inspector of the company wrote twice to McK. calling for proof of loss:—Held, reversing the judgment of the Court of Appeal for Ontario (4 A. R. 289), which reversed the judgment of the Common Pleas (29 C. P. 511),—that the notice of the trust assignment to the company's agent was sufficient, that the company must be considered as having assented to such assignment, and to have executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition on the policy. 2. That the words "loss payable, if any, to G. McK." etc., operated to enable the respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and the respondent's covenant was made, the action for a breach of that covenant, was properly brought by him alone. *McQueen v. Phoenix Mutual Fire Ins. Co.*, 4 S. C. R. 660.

The fourth statutory condition provides that if the property insured is assigned without the written permission of the company the policy shall be avoided:—Held, affirming the C. P. D. (14 O. R. 322) that the assignment meant by this condition is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an incumbrance, and therefore a mortgage by the person named is not a breach of the condition: *Sands v. Standard Ins. Co.*, 26 Chy. 131, 27 Chy. 167, approved:—Held, also, that an agreement for sale by the mortgagees under their power of sale, which was never carried out by conveyance, was not within the condition. *Bull v. North British Canadian Investment Co.*, 15 A. R. 421.

Where a policy of insurance against loss or damage by fire contained the following provision: "If the property insured is assigned without the written consent of the company at the head office endorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease." Held, affirming the judgment of the court below, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition. *Sovereign Fire Ins. Co. v. Peters*, 12 S. C. R. 33.

See *May v. Standard Fire Ins. Co.*, 5 A. R. 605, p. 944.

#### 17. Prior and Subsequent Insurance.

The plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendants' company, through one S., their agent at D., authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed S. that there were other insurances on the property, but not knowing the amount that there was in the Gore Mutual, requested him to ascertain it, and signed the application partly in



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failed to do what he promised to do, and what  
plaintiff had entrusted him to do, and forwarded  
the application to the head office at T., making  
no mention of the insurance in the Gore Mutual.  
The company accepted the risk, and, in accord-  
ance with their practice, where the risk ex-  
tended only over a short period, instead of a  
formal policy, they issued a certificate, which  
stated that the plaintiff was insured subject to  
all the conditions of the company's policies, of  
which he admitted cognizance, and that in the  
event of loss it would be replaced by a policy.  
The machinery was subsequently destroyed by  
fire, after the thirty days, but within the two  
months, and a policy was thereupon issued, en-  
dorsed with the ordinary conditions, one of  
which was that notices of all previous insur-  
ances should be given to the company and en-  
dorsed on the policy, or otherwise acknowledged  
by them in writing, or the policy should be of  
no effect; and another was, that all notices for  
any purpose must be in writing. The insurance  
in the Gore Mutual was not endorsed on the  
policy:—Held, (affirming 2 A. R. 158, which re-  
versed 24 Chy. 290), that as the application in  
writing did not contain a full and truthful state-  
ment of previous insurances, the verbal notice  
to the agent of the existing policy in the Gore  
Mutual, without stating the amount, was inoper-  
ative to bind the company; the plaintiff was  
not entitled to have the policy reformed by the  
endorsement of the Gore Mutual policy thereon,  
and could not recover. *Billington v. Provincial  
Ins. Co. of Canada*, 3 S. C. R. 182; 2 A. R.  
158.

Held, upon the evidence set out in these  
cases, that the policies were avoided by the  
non-disclosure of a previous insurance. *Greet v.  
Citizens' Ins. Co.*—*Greet v. Royal Ins. Co.*, 5 A.  
R., 596.

The plaintiff, who was insured in the defen-  
dants' company under a policy containing a con-  
dition that the "company is not liable \* \* \*  
if any subsequent insurance is effected in any  
other company, unless and until the company  
assent thereto by writing, signed by a duly  
authorized agent, effected an insurance with the  
Mercantile Insurance Company, which was void  
at their option on account of a similar condition,  
the policy with the defendant not having ex-  
pired as a matter of fact, though the plaintiff  
was led by the agent of the other company to  
believe it had:—Held, affirming the judgment  
of the Queen's Bench (44 Q. B. 490), that the  
plaintiff could not recover, for the insurance in  
the Mercantile Company, being not void, but  
only voidable, was a subsequent insurance  
within the meaning of the condition. *Gauthier  
v. Waterloo Mutual Ins. Co.*, 6 A. R. 231.

The appellant sued upon a policy of insurance  
made by the respondents on the 28th April,  
1877. On the face of the policy it appeared that  
there was "further insurance, \$3,000," and the  
policy had endorsed upon it the following con-  
dition, being statutory condition No. 8, R. S. O.  
(1877) c. 162: "The company is not liable for  
loss if there is any prior insurance in any other  
company, unless the company's assent thereto  
appears herein or is endorsed hereon, nor if any  
subsequent insurance is effected in any other

company, unless and until the company assent  
thereto by writing signed by a duly authorized  
agent." Among the insurances, which formed  
a portion of the "further insurance" for \$3,000  
mentioned in the policy, was one for \$2,000 in  
the Western Insurance Company, which appel-  
lant allowed to expire, substituting a policy for  
the same amount in the Queen Insurance Com-  
pany, without having obtained the consent of or  
notified the respondents:—Held, reversing the  
judgment of the Court of Appeal for Ontario,  
4 A. R. 326, which reversed 43 Q. B. 603, that  
the condition as to subsequent insurance must  
be construed to point to further insurance beyond  
the amount allowed by the policy, and not to a  
policy substituted for one of like amount allowed  
to lapse, and therefore the policy sued upon was  
not avoided by the non-communication of the  
\$2,000 insurance in the Queen Insurance Com-  
pany. *Parsons v. Standard Fire Ins. Co.*, 5 S.  
C. R. 233.

Held, following *Parsons v. Standard Ins.  
Co.* (5 S. C. R. 233), that a change in the com-  
pany in which another insurance has been effect-  
ed, not increasing the amount insured, did not  
avoid the policy. *Lowson v. Canadian Farmers'  
Mutual Fire Ins. Co.*, 6 A. R. 512.

A policy of insurance against loss by fire con-  
tained the following conditions: "In case of  
subsequent assurance on any interest in property  
assured by this company (whether the interest  
assured be the same as that assured by this com-  
pany or not), notice thereof must be given in  
writing at once, and such subsequent assurance  
endorsed on the policy granted by the company,  
or otherwise acknowledged in writing; in default  
whereof such policy shall thenceforth cease and  
be of no effect." The insured effected subse-  
quent insurance and verbally notified the agent,  
but there was no indorsement made on the  
policy, nor any acknowledgment in writing by  
the company. A loss having occurred, the dam-  
age was adjusted by the inspector of the com-  
pany, and neither he, nor the agent, made any  
objection to the loss on the ground of non-com-  
pliance with the above condition. In a suit to  
recover the amount of the policy, the company  
pleaded breach of the condition, in reply to  
which the plaintiff set up a waiver of the con-  
dition, and contended that by the act of the  
agent and inspector the company were estopped  
from setting it up:—Held, reversing the judg-  
ment of the court below, that the insured not  
having complied with the condition, the policy  
ceased and became of no effect on the subse-  
quent insurance being effected, and that neither  
the agent nor the inspector had power to waive  
a compliance with its terms. *Western Assur-  
ance Co. v. Doull*, 12 S. C. R. 446.

To an action on a fire policy in a mutual in-  
surance company, the defendants set up as a de-  
fence the eighth statutory condition, that the  
company were not to be liable for any loss "if  
any subsequent insurance be effected in any  
other company, unless and until the company  
assents thereto by writing, signed by a duly  
authorized agent." By 44 Vict. c. 20, s. 28  
(Ont.), the Fire Insurance Policy Act is made  
applicable to mutual fire companies, except  
where the provisions of the Mutual Act are in-  
consistent with, or supplementary, or in addi-  
tion thereto. Section 39 of the Mutual Act en-



acts in substance, that if a double insurance subsists in defendants' company and another company, the defendants' policy should be void, unless such double insurance subsists with the directors' assent endorsed on the policy, signed by the secretary, etc., or otherwise acknowledged in writing; and section 40, that whenever the company, receives notification in writing of an additional sum being assessed on the same property in another company, the same shall be deemed assented to unless the company within two weeks after the receipt of such notice signify their dissent in writing. The defendants' policy was effected on the 31st July, 1884. On 4th January, 1886, the plaintiff effected a further insurance in another company for \$1,000. On 8th March, 1886, the plaintiff wrote defendants: "I hereby notify you that I have put a second insurance on my stock and farm implements." On 10th March the defendants replied, informing plaintiff that he had not "given the number of the policy or the amount of the insurance, or the name of the company." The plaintiff did not reply to this, because, as he said, he was away from home. The loss occurred on the 16th March. The jury found that the plaintiff did not, within a reasonable time after effecting the further insurance, notify the defendants; but that the notice was reasonably sufficient as far as he knew:—Held, that under section 39, the insurance was void; and that under the circumstances, there could be no implied assent under section 40; and further, that the notice was not sufficient. Per Galt, J.—The insurance was also avoided under the eighth statutory condition; and if section 40 could be held to be supplementary thereto, the plaintiff by reason of the defective notice, did not come within it. *Graham v. London Mutual Fire Insurance Co.*, 13 O. R. 132.—C. P. D.

The fourth variation was, that in no case should the insured be entitled to recover more than two-thirds the actual value of any building or contents or other property insured; nor in case of further insurance by the insured or other party more than the ratable proportion of two-thirds of the actual value without reference to the date of the different policies; that any general policy on different properties shall be treated as a special policy on each property for the whole amount thereby insured. The insurance was \$100 on barn and stables valued at \$1,200, and \$900 on contents valued at \$3,000. Per Cameron, C. J., and Rose, J.—That as to the latter part of the condition referring to further insurance by the insured or other party, it was unjust and unreasonable; but as to the former part thereof, as to the payment of not more than two-thirds of the value of the property insured—which meant at the time of loss—it was just and reasonable. *Graham v. Ontario Mutual Insurance Co.*, 14 O. R. 358.—C. P. D.

The plaintiff being the owner of a quantity of railway ties and lumber, effected insurance thereon with three companies to the amount of \$4,000, and subsequently, with the knowledge and through the agency of H., the person acting on behalf of the several companies, effected an additional insurance of \$1,200 on the same property in "The Fire Insurance Association." H. acted as agent for that company also, and he made the necessary entries thereof on the

three first policies. In consequence of "The Fire Association" having ceased to take risks on that kind of property, H. asked the plaintiff for the interim receipt of that company which he gave up accordingly, and H. substituted one in the Gore District Company for it, he being agent for that company also, but omitted to give any notice or make any entry as to the substitution of the Gore insurance for that of "The Fire Association." In an action to recover the amount of the insurances, after a destruction of the property by fire:—Held (affirming the judgment of the court below), that this was not such an omission on the part of the plaintiff as invalidated the policies, in this following *Parsons v. Standard Ins. Co.*, 43 Q. B. 603; 4 A. R. 326; 5 S. C. R. 233. *Moore v. Citizens' Fire Ins. Co.*, 14 A. R. 582.

The plaintiff who was insured against fire with the defendants for \$1,000, effected a change of mortgages on the insured property. The new mortgagees refused to accept the defendants' policy, and insured the property for the same amount with another company, notifying the plaintiff of the fact by letter. The plaintiff shewed the letter to the defendants' secretary-treasurer, asking him to bring the matter before the board, and was then informed by him that it would be all right and that there was nothing further to do. Subsequently the plaintiff paid an assessment on defendants' policy, which accrued after the notification of the double insurance, and which was received by defendants and entered in their books. It did not appear that this payment was on account of losses incurred by defendants previous to the double insurance. The plaintiff's property was destroyed by fire the day the "Ontario Insurance Act, 1887," came into force:—Held, that the R. S. O. (1877), c. 161, in force at the time insurance was effected, applied to the policy:—Held, also, that the showing of the letter to the secretary-treasurer was not a notification in writing as required by R. S. O. (1877), c. 161, s. 40; but:—Held, that the policy being voidable at the defendants' option, the receipt and entry in their books of the assessment after the secretary-treasurer was aware of the double insurance, operated as an estoppel upon them. *McIntyre v. East Williams Mutual Fire Ins. Co.*, 18 O. R. 79.—Chy. D.

See *Klein v. Union Fire Ins. Co.*, 3 O. R. 234, p. 941; *Cockburn v. British America Assurance Co.*, 19 O. R. 245, p. 937.

#### 18. Alteration of Premises—Increase of Risk—Change of Occupation.

The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were relet to his son-in-law, who used them for dealing in furniture, and had a small room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. D., the defendant's local agent, was notified of this change, and went on the premises and saw the tenant at work making a desk. He wrote to the head office at plaintiff's request, notifying them of this, and they answered that if the policy were sent, with a letter of explanation, they would consent in writing on it, adding, "Is there woodwork done on the premises?" The matter was then allowed to

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drop. The policy contained a condition that "any change material to the risk and within the control or knowledge of the assured, shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent, and the company so notified may \* \* \* cancel the policy. \* \* \* "The jury were asked whether the change was material, and whether it was fairly communicated to the defendants; and they found for the plaintiff:—Held, that the verdict should not be disturbed. Semble, that the transmission of the policy for endorsement was not essential. *Peck v. Phoenix Mutual Ins. Co.*, 45 Q. B. 620.—Q. B. D.

Where the words in a condition in a policy are, "if the risk be increased or changed by any means whatever," the term "change" must be held to be used rather as a synonym of "increase," than as a word of different signification. *Ottawa Co. v. Liverpool Ins. Co.*, 28 Q. B. 522, approved. *Gill v. Canada Fire and Marine Ins. Co.*, 1 O. R. 341.—Boyd.

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The plaintiff having created a mortgage in favour of a loan company, whereby he covenanted to insure the buildings on the property, failed to insure, but assented to an insurance effected by the company in their own name, and repaid them the premium. The premises insured were described as a "two story house, shingle roofed building \* \* \* owned and occupied \* \* \* as a steam bending factory." The property having been destroyed by fire, the insurance company paid to the loan company the amount due to them, and took an assignment of their mortgage, whereupon the plaintiff instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due on the mortgage after crediting the amount of insurance. It was shewn that the premises, instead of being used as a steam bending factory, had been converted into a door and sash factory; of which change no notice had been given to the insurance company:—Held, reversing the judgment of the court below (2 O. R. 89), that the special survey set out in the report in which the intention to use the premises as a factory was mentioned, did not form part of the application or policy and could not be construed as an assent by the defendants to such occupation: that the statutory condition as to change of occupation or use of the buildings without notice to the insurance company had therefore been broken, thus invalidating the policy; and that the plaintiff was not entitled to any benefit thereunder:—Held, also, that the insurance company were at liberty to set up this defence, though between them and the mortgagees the policy was, by a subrogation clause therein made unconditional. *Hovea v. Dominion Fire and Marine Ins. Co.*, 8 A. R. 644.

A policy on a building described in the application for insurance as a spool factory contained the following conditions: "That in case the above described premises shall at any time during the continuance of this insurance, be appropriated or applied to or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or for the purpose of storing, using or vending therein any of the goods, articles or merchandise denominated hazardous or

extra hazardous unless otherwise specially provided for, or hereafter agreed to by the defendant company in writing or added to or endorsed on this policy, then this policy shall become void. Any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent"—Held, reversing the judgment of the court below, that the introduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly and there being no evidence to the contrary, that such manufacture in itself was a hazardous, if not an extra hazardous business, notwithstanding that on the trial of the action on the policy the jury found, in answer to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured. *Norman v. Fire Ins. Co. v. Moir*, 14 S. C. R. 612.

#### 19. Danger from Incendiarism.

Action on a fire policy, dated 21st May, 1879, on the ordinary contents of a barn, which was at the time of the insurance empty, and on a reaping and threshing machine. This barn was on the east half of the lot, the plaintiff's home- stead and home buildings being on the west- half, some distance across the road. In the application for the insurance, dated 13th May, 1879, plaintiff answered "No" to the question, "Is there reason to fear incendiarism, or has any threat been made?" On the same day the plaintiff had obtained another policy from defendants on his dwelling-house and home build- ings, the same question and answer being con- tained in his application therefor; and the thresher and reaper in question were then in the home buildings. The fire occurred on the 28th October, 1879. At the trial it appeared that one M., the plaintiff's hired man, about the 8th of May had threatened to beat the plaintiff, and the latter, who was a nervous, timid man, be- ing alarmed, had had the premises insured; that he had sat up and watched for a night, and that he believed the premises had been set on fire. He denied having any reason for fear, ex- cept as to his home buildings. At the time of the fire the barn contained some grain and hay, and the threshing and reaping machine, for the loss of which this action was brought. One of the conditions on the policy was, that if the assured misrepresented or omitted to commu- nicate any circumstances material to be made known to the company, in order to enable them to judge of the risk, the policy would be avoid- ed:—Held, Armour, J., dissenting, that the plaintiff could not recover, for the plaintiff hav- ing admitted his own belief in the danger and acted upon it, his answer to the above question was untrue. Per Cameron, J.—The question was equivalent to "Have you reason to fear, or do you fear, incendiarism?" and though the bodily threat did not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the in- surance was effected on account of such fear, there was a clear misrepresentation in answer-

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ing the question; and it made no difference that the property to be covered by the policy was not in existence.—Per Armour, J. The word "incendiarism" commonly applies to buildings only, and should not be extended in this case to cover personal property. The question should be construed strictly with reference to some particular ground of fear, otherwise the answer "No," referring to the first part only, viz: "Is there reason to fear incendiarism" would be in every instance untrue; for every insurance is effected because the assured fears the happening of fire by accident, neglect or design. And the evidence in this case showed that there was no such reason as, operating on the minds of a majority of prudent men, would cause them to fear incendiarism; and therefore the question was truly answered. The question was also properly answered as to the property covered by this policy, for the fear extended only to the home property; and as to the property intended to be covered by the policy but not then in existence, such as the crops, as to which no fear could exist. *Campbell v. Victoria Mutual Fire Ins. Co.*, 45 Q. B. 412.—Q. B. D.

In answer to the question put by one company in an application for insurance on a mill, "Have you any reason to believe that your property is in danger from incendiarism?" and by another, "Have you any reason to suppose that your property is in danger from incendiarism?" the applicant, B., replied to each in the negative. It appeared that the mill had been burnt some months previously, and that the origin of the fire was unknown; and that threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid any attention, to burn down the mill. An anonymous letter had also been received threatening incendiarism. Persons supposed to be tramps had been seen about the premises, and B. had warned the watchman to be careful, and mentioned that he had received the anonymous letter:—Held, affirming the decree of Spragge, C., (27 Chy. 121), that the answers were such a misrepresentation as avoided the policy. *Greet v. Citizens' Ins. Co.—Greet v. Royal Ins. Co.*, 5 A. R. 596.

The question put by the company in this case was, "Is there any incendiary danger threatened or apprehended?" which B. answered in the negative:—Held, affirming the decree of Spragge, C., (27 Chy. 121), a misrepresentation, which avoided the policy. *Greet v. Mercantile Ins. Co.*, 5 A. R. 596.

## 20. Notice, Account and Proof of Loss.

By the policy it was provided that the loss or damage should be "estimated according to the actual value of the property insured, that is, what it could have been actually sold for in cash at the time of the loss;" and the condition on the policy required that the affidavit of loss should state the actual cash value of the property. In the printed proofs of loss, which were used, the words, "actual cash value were struck out, and a statement substituted giving the cost of the property in 1880, a year previous to the insurance being effected.—Held, that this was not a compliance with the policy and condition:—Held, therefore, there could be no

recovery on the policy. *Cameron v. Canada Fire and Marine Ins. Co.*, 6 O. R. 392.—Osler.

One of the conditions of a policy of insurance against fire on ice and packing, contained in an ice house situated in the state of Wisconsin, provided that the proofs of loss should be delivered "as soon after the loss as possible." The fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to and returned to the insured, who redelivered them in the same state in the month of July following. The only reason given for not delivering them sooner was, that it was not convenient to do so:—Held, that the condition was not complied with. *Ib.*

Upon a policy issued by a mutual company the statutory conditions were indorsed with variations, one of which was (being the same as section 56 of the Mutual Act, R. S. O. (1877) c. 161), that the proofs, declarations, etc., called for by the statutory conditions should be furnished to the company in writing within thirty days after the loss. The loss occurred on the 2nd October, 1878, and on the 5th, the plaintiff notified the defendants by letter. A few days after the plaintiff saw one S., an agent of the defendants for obtaining applications, though not for collecting claims, but who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion and do what was proper, which S. promised to do. On 17th October the defendants' president came up and saw plaintiff, who informed him of the loss, and of all the circumstances relating thereto, and plaintiff was told by him in answer to his enquiry that nothing further need be done. The plaintiff in consequence did nothing; but subsequently, on hearing that the defendants disputed the claim some correspondence took place, which resulted in the plaintiff employing a solicitor, and proofs were thereupon put in, but after the lapse of thirty days:—Held, affirming the judgment of the Court of Common Pleas (31 C. P. 562), Burton, J., dissenting, that section 2 of R. S. O. (1877) c. 162, relieving the insured under certain circumstances from forfeiture for nondelivery of the proofs of claim, applies to Mutual Insurance companies, and to the time of delivery as well as to insufficiency in the proofs:—Held, also, Burton, J., dissenting, under the facts set out in the report, that the omission to deliver the proofs in proper time arose from accident or mistake, within the meaning of that clause. Remarks as to the construction and effect of this clause, and the extent of the discretion given by it to the court or judge. *Robins v. Victoria Mutual Fire Ins. Co.*, 6 A. R. 427.

By the thirteenth statutory condition, "Any person entitled to make a claim under a policy is \* \* \* to deliver \* \* \* as particular account of the loss as the nature of the case permits," and is also to furnish therewith a statutory declaration declaring: (1) that the said account is just and true; and by the fifteenth condition: "Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim." The plaintiff by a policy of insurance against fire effected an insurance on buildings and contents, by separate amounts being placed

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on each, the amount on contents being \$200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated in the statutory declaration furnished by her, that she had suffered loss on the contents to the amount of \$1,665.50; whereas the contents were proved to be worth only \$150: Held, that the misstatement vitiated the whole claim, and not merely the claim in respect to the particular property as to which it was made. *Harris v. Waterloo Mutual Fire Ins. Co.*, 10 O. R. 718.—C. P. D.

A. effected insurance on C.'s property, on which he held a mortgage, under authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took the policy to agent of insurers, who was also agent of the W. Ins. Co., and left it with him, directing him to put the risk in the latter company. No receipt was given, and the property was destroyed by fire immediately after. The company resisted payment on the ground that the policy was surrendered, and contended on the trial, in addition, that C. had parted with his interest in the property by giving a deed to one B. who had reconveyed to C.'s wife, and that the proper proofs of loss had not been given, claiming in reply to a plea of waiver in regard to such proofs, that such waiver should have been in writing, according to a condition in the policy. They had refused to return the policy on demand:—Held, that the company, by wrongfully withholding the policy, were estopped from claiming that proofs of loss had not been given according to the endorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing if such condition applied to waiver of proofs of loss. Per Fournier, J., dissenting, that the sending of the circular by the company that insurance would be terminated, and compliance with its terms by the assured in giving up the policy to the company's agent, was a surrender of the policy, and plaintiff therefore could not recover. *Caldwell v. Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

Held in this case: 1. That the tug was at the time of the fire at one of the localities permitted by the policy. 2. That the proofs of loss furnished were a sufficient compliance with the statutory conditions. (Wilson, C. J., dissenting.) Per Wilson, C. J.—The proofs of loss were not sufficient, but the refusal of the defendants to recognize the plaintiff M. in any way, and their retention of the policy were an answer to the imperfect compliance with the condition requiring full particulars of the loss to be stated. *Mitchell v. City of London Fire Ins. Co. (Limited)*, 12 O. R. 706.—Q. B. D.

A policy of insurance against fire contained the following conditions:—"The assured must procure a certificate, under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or assurance as creditors or otherwise, or related to the assured or sufferers, that they are acquainted with the character and

circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured really, by misfortune and without fraud or evil practice, hath or have sustained by such fire, loss or damage to the amount therein mentioned." "No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by indorsement upon this policy, signed by the agents of the company at Halifax, N.S." The insured premises having been destroyed by fire the assured applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused, and he finally obtained such certificate from two magistrates residing at a distance from such place. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that if such offer was not accepted the claim would be contested. The agent, on a subsequent occasion told the assured that he objected to the claim, as he "did not think it was a square loss:"—Held, affirming the judgment of the court below, that the non-production of the certificate required by the above condition prevented the assured from recovering on the policy:—Held, also, that even if such condition could be waived without endorsement on the policy, the acts of the agent did not amount to a waiver. Semble, that the condition could not be so waived. *Lojan v. Commercial Union Ins. Co.*, 13 S. C. R. 270.

Action on a policy of insurance against fire on a stock of goods. M., the local agent, through whom the insurance was effected, stated that he had at the time examined the premises, and considered, from the size of the store, the appearance of the goods, and the stock book, there were goods to the amount insured. The fire occurred on the 20th October, and all the goods on the premises were destroyed. On the same day the defendants' inspector came and saw plaintiff, who furnished him with a statement shewing the amount of the stock in May—the insurance having been effected in June—the sales since then, and the invoices of goods purchased up to the fire. The inspector gave plaintiff a form from which he was to, and did fill in, the proof papers sent him by the inspector; and which plaintiff enclosed to defendants in a letter of 27th October, informing them that, if not correct, he would have same made out to their satisfaction. On 31st October defendants replied that they thought the loss, in place of \$13,005, the amount claimed by plaintiff, should be \$11,734.90; adding: "This sum, we consider, not only reasonable, but liberal, and which we are liable for, without any prejudice to or waiver of, any condition of the policy." The plaintiff replied that his claim was a just and honest one, but if settled at once he would accept a deduction of \$400. The defendants then wrote that theirs was a fair and liberal offer, and pointed out what they considered objectionable items in plaintiff's claim. The plaintiff then made and sent to defendants a statutory declaration of loss according to the above form. The defendants then replied, stating that without admitting, but denying any liability, they drew attention

to alleged informalities in not specifying the items of loss in detail, and in not giving a detailed statement of the claim. The plaintiff then furnished defendants with a statutory declaration, giving such detailed statement. Nothing further was done, and this action was brought. The defendants set up a number of defences, amongst which was arson, and imputing fraud and misconduct to the plaintiff, but no evidence was given in support of them:—Held, there was sufficient evidence of the amount of the goods at the time the insurance was effected; that the goods insured were those destroyed by the fire; and that under section 2 of the Fire Insurance Policy Act, R. S. O. (1877), c. 162, no objection could be raised to the proofs; and in any event the proofs were sufficient:—Held, also, that the letter of the 31st October, was properly admitted in evidence, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants by the letter merely claiming that it should not be deemed a waiver of any condition of the policy, and both parties acted on this view. *Hartney v. North British Fire Ins. Co.*, 13 O. R. 581.—C. P. D.

The plaintiff did not in his declaration of loss disclose the incumbence in favour of his father. The jury did not find, nor were they asked to find that there was any fraud or false statement in the plaintiff's statutory declaration:—Held, that fraud or a wilful false statement should have been proved, and that it was not the place of the court to infer it. *Mason v. Agricultural Ins. Co.*, 18 C. P. 19, followed. *Reddick v. Saugeen Mutual Fire Ins. Co.*, 14 O. R. 506.—Q. B. D.; 15 A. R. 363.

After the loss the insurance company received certain proofs of loss from the mortgagees. They made no objection to them for many months after, and gave no notice that further proofs were required. When paying the loss they alleged that they were entitled to be subrogated to the rights of the mortgagees, and that they objected to recognize any claim by the mortgagor, by reason of non-compliance with the statutory conditions as to proof of loss:—Held, that they must be taken to have dealt with the mortgagees as agents of the mortgagors, and that they had waived further proofs of loss; and that the payment ensured to the benefit of the latter. *Bull v. North British Canadian Investment Co.*, 15 A. R. 421; 14 O. R. 322. Affirmed by the Supreme Court.

See *Anderson v. Saugeen Mutual Fire Ins. Co. of Mount Forest*, 18 O. R. 355, p. 943.

## 21. Waiver of Conditions.

See *Watts v. Atlantic Mutual Life Ins. Co.*, 31 C. P. 53, p. 995; *Phillips v. Grand River Farmers' Mutual Fire Ins. Co.*, 46 Q. B. 334, p. 952; *Fire Ins. Association (Limited) v. Canada Fire and Marine Ins. Co.*, 2 O. R. 481, p. 972, 973; *Klein v. Union Fire Ins. Co.*, 3 O. R. 234, p. 941; *Smith v. City of London Ins. Co.*, 11 O. R. 38; 15 S. C. R. 69, p. 950; *Milville Mutual Marine and Fire Ins. Co. v. Driscoll*, 11 S. C. R. 183, p. 988; *Hartney v. North British Fire Ins. Co.*, 13 O. R. 581, *supra*; *Bull v. North British Canadian Investment Co.*, 15 A. R. 421, *supra*; *Cousineau*

*v. City of London Fire Ins. Co.*, 15 O. R. 329, p. 971; *Logan v. Commercial Union Ins. Co.*, 13 S. C. R. 270, p. 906; *McIntyre v. East Williams Mutual Fire Ins. Co.*, 18 O. R. 79, p. 960; *Allen v. Merchants' Marine Ins. Co.*, 15 S. C. R. 488, p. 991.

## 22. Misrepresentation as to Loss.

Action to recover from defendant a sum of money paid him in settlement of a loss by fire on a stock of goods, by reason, as was urged, of a misrepresentation as to the value of such stock, at a date prior to the fire. The statement of claim alleged that defendant had falsely and fraudulently represented his net loss to be the amount so paid, whereby the plaintiffs were induced to pay the same; and that defendant falsely and fraudulently represented that at the date prior to the fire his stock on hand was of a certain value, whereas it was of a much less value; and that it was on the basis of such value that the calculation was made as to the amount of such net loss; also setting up the statutory conditions whereby, as alleged, the claim was vitiated for fraud and false swearing as to the amount of the loss:—Held, on the issue as raised, the plaintiffs must fail, for the issue was as to the amount of the net loss which the evidence shewed had been misrepresented; and also that there could be no recovery on the record as framed, for—plaintiffs having accepted a surrender of the policy—they had not offered to, and possibly could not, place defendant in his original position; that no amendment would avail, for to maintain an action of deceit, not only must there be misrepresentation, but it must be to the damage of the plaintiffs, which the evidence failed to shew; that the statutory conditions could hardly be invoked, for no proofs of loss had been required; but, even if invoked they would afford no defence, as there was no misrepresentation as to the amount of loss:—Held, also, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of the loss was based, would make no difference so long as it was shewn that the loss itself was within the true amount; and also the plaintiffs were estopped from setting it up, as the evidence shewed that they did not rely upon it, but on the knowledge acquired as independent information obtained by the plaintiffs' agent in the course of his investigation. Semble, that on the evidence there was no misrepresentation at all. *Royal Ins. Co. v. B. & S.*, 9 O. R. 120.—C. P. D.

## 23. Liability for Losses.

Held, that the measure of damages recoverable by a tenant for life of the insured premises is the full value of such premises to the extent of the sum insured. *Caldwell v. Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

By by-laws printed on the policy the defendants' liability was limited to two thirds of the actual loss sustained, and the amount to be taken on one risk was restricted to \$2,000. The plaintiff's loss was \$2,200, and the other insurance company paid the full amount of their



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liability, \$1,000.—Held (affirming the judgment of Falconbridge, J.), that the plaintiff was entitled to recover as damages, two-thirds of the balance of his loss after deducting the amount of the other insurance. *McIntyre v. East Williams Mutual Fire Ins. Co.*, 18 O. R. 79.—Chy. D.

See *Graham v. Ontario Mutual Ins. Co.*, 14 O. R. 358, p. 954.

#### 24. Damage by Removal of Goods.

See *McLaren v. Commercial Union Ass. Co.*, 12 A. R. 279, *infra*.

#### 25. Neglect to Save Property Insured.

Semble, that a fire policy, which is a contract of indemnity, carries with it, even irrespective of conditions to that effect, a provision that the insured shall not, with the fraudulent intention of throwing the loss on the insurer, wilfully cause, or refrain from taking means within his power to prevent, the destruction of the insured property. *Devlin v. Queen Ins. Co.*, 46 Q. B. 611.—Q. B. D.

#### 26. Salvage.

Held, affirming the decision of the Q. B. D., 7 O. R. 64, that the plaintiff was entitled to recover under a policy of insurance against fire, damages resulting from bona fide efforts to save the insured property by removal:—Quære, whether the fifth statutory condition, which declares that in case of removal of property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage, creates an independent obligation upon the company to contribute ratably over and above the amount insured as for direct loss. Per Burton, J. A.—The fifth statutory condition does create such obligation. *McLaren v. Commercial Union Ass. Co.*, 12 A. R. 279.

See *Devlin v. Queen Ins. Co.*, 46 Q. B., 611, *supra*.

#### 27. Payment of Losses.

##### (a) Time of Payment.

Appellants, a mutual insurance company, insured in favour of J. F., a policy of insurance, insuring him against loss by fire on a general stock of goods in a country store, and under the terms of the policy, the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 Vict. c. 44, s. 52 (Ont.) now R. S. O. (1877), c. 161, s. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences and examination called for by or under the policy must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st of May, 1877. On the next morning J. F. advised the

insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to J. F.'s attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, J. F. furnished the company with the claim papers, or proofs of loss, and on the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, J. F. brought this action upon the policy. The appellants pleaded inter alia that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit:—Held, reversing the judgment of the Court of Appeal, 4 A. R. 293, that the appellant company under the policy in this case were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought. *Mutual Fire Insurance Co. of the County of Wellington v. Frey*, 5 S. C. R. 82.

Semble, per Hagarty, C. J. O.—A condition that any action on the policy should be barred, "unless commenced within the term of six months next after the loss or damage should have occurred" was an unreasonable one, as another condition provided that the company should have sixty days for payment after the completion of proofs of loss. *Peoria Sugar Refining Co. v. Canada Fire and Marine Ins. Co.*, 12 A. R. 418.

A fire insurance policy contained a condition that any action upon it should be barred "unless commenced within the term of six months next after the loss or damage shall have occurred:—Held, affirming the decision of Boyd, C., that this condition must be considered to refer to the date of the destruction by fire, and not to the date at which the cause of action arose. *Ib.*

It was objected that this action was premature, because, by a condition of the policy sixty days was given for the payment of a claim, and the action was brought within such period; but held, that as the policy herein was only subject to the statutory conditions by which the period is thirty days, the objection could not be sustained. *Hartney v. North British Fire Ins. Co.*, 13 O. R. 581.—C. P. D.

The company having refused payment of the insurance, an action was commenced to recover the amount after a lapse of more than thirty days from completion of the proofs of loss, but less than sixty days thereafter which, by a variation and addition to the statutory conditions, indorsed on the policy, was stipulated for:—Held, that the stipulation that no action should be brought until the expiry of sixty days after proof of loss was not a just or reasonable variation of the statutory conditions. Per Burton, J. A.—The words of the seventeenth statutory condition being that the loss should not be payable until thirty days after completion of the proofs of loss created a privilege in favour



of the companies, and the statute does not contemplate any further extension, but simply that the company shall be entitled to that delay unless under their charter or by agreement that period is shortened. *Smith v. City of London Ins. Co.*, 11 O. R. 38; 14 A. R. 328.

By the seventeenth condition in R. S. O. (1877), c. 162, a loss is not payable until thirty days after the proofs of loss are put in unless otherwise provided by statute or agreement of the parties:—Held, per Ritchie, C. J. and Fournier, Henry and Gwynne, J. J., that this is a privilege accorded to the company, and while the time may be further limited by agreement it cannot be extended.—Per Strong, J.—That a variation of the condition by inserting a clause in the policy extending the time to sixty days is not a variation by agreement of the parties, nor is such varied condition a just or reasonable one. *S. C.*, *sub nom. City of London Fire Ins. Co. v. Smith*, 15 S. C. R. 60.

The plaintiff sued upon an insurance policy for a loss occasioned by a fire, which took place on the 28th March, 1886. One of the statutory conditions of the policy provided that every action thereunder should be absolutely barred unless commenced within one year after the loss occurred. The action was not commenced till the 11th July, 1887. After the plaintiff had put in proof papers in reference to the loss, the defendants from time to time up to 11th May, 1887, requested the plaintiff to procure and furnish, and the plaintiff did so procure and furnish additional particulars concerning the claim, and the claim was completed more than sixty days prior to the commencement of the action, as required by one of the conditions in variation of the statutory conditions, which provided that the loss should not be payable until sixty days after the completion of the claim:—Held, per Armour, C. J., that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars and thereby putting him to loss of time, trouble, and expense, was a waiver of and precluded the defendants from setting up the statutory condition limiting the time for bringing the action. Per Street, J., that in the absence of any agreement not to insist upon the condition, there could be no waiver unless the defendants had so acted as to estop themselves from taking advantage of the condition; there was nothing in the conduct of the defendants equivalent to an assertion on their part that they would not insist upon their rights under the condition; and they were, therefore, entitled to the benefit of it. *Cornish v. Abington*, 4 H. & N. 548, and *Thomas v. Brown*, 1 Q. B. D. 714, discussed. *Coincneau v. City of London Fire Ins. Co.*, 15 O. R. 329.—Q. B. D.

See *McIntyre v. National Ins. Co.*, 5 A. R. 580, p. 974; *Anderson v. Sauguen Mutuel Fire Ins. Co. of Mount Forest*, 18 O. R. 355, p. 943.

#### (b) Other Cases.

Where no place of payment of a policy of insurance is mentioned in the policy it must be assumed that the place of payment is where the head office of the insurance company is situated, and this fact may determine the question of the *lex loci contractus*. *Clarke v. Union Fire Ins.*

*Co.*, 10 P. R. 313—Hodgins, *Master-in-Ordinary*. See S. C. 6 O. R. 223.

Payment of money into court by insurance company. See *Merchants' Bank v. Monteith—Ex parte Standard Life Ins. Co.*, 10 P. R. 588, p. 1004; *Peoria Sugar Refining Co. v. Canada Fire and Marine Ins. Co.*, 12 A. R. 418, p. 970.

#### 28. Subrogation.

There can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied. *National Fire Ins. Co. v. McLaren*, 12 O. R. 682.—Boyd.

In case of partial insurance where a third party is liable to make good the loss, the assured is not clothed with the full character of trustee quoad the insurance companies until he has recovered sufficient from the wrongdoers to fully satisfy all his loss as well as expenses incurred in such recovery. In other words, when the assured is put in as good a position by the recovery from the wrongdoer, as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over and above that, the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies. *Ib.*

See *Hovew v. Dominion Fire and Marine Ins. Co.*, 2 O. R. 89; 8 A. R. 644, p. 961. *Clarke v. Union Fire Ins. Co.—Claim of the Agricultural Fire Ins. Co. of Watertown, New York*, 6 O. R. 640, p. 1006.

See also Subhead III. 7, p. 939.

#### 29. Re-Insurance.

The Dominion Insurance Co. insured one H. against loss by fire to the amount of \$5,000, and under a contract of re-insurance made between the defendants and the Dominion Company, the latter company re-insured \$2,500 with the defendants. Subsequently the Dominion Company entered into an agreement with the Fire Association, whereby, after reciting that the Dominion Company desired to be relieved from and guaranteed against loss on existing risks, and that the Fire Association had agreed to do so and to re-insure said risks, the company transferred all their business and the goodwill thereof to the association, who thereby re-insured all the existing risks, subject to the terms of the policies, etc.; the association to take and accept all re-insurances made with other companies, with power to use the company's name. A loss occurred on H.'s policy which was adjusted and paid by the association. In an action against the defendants to recover the amount of the re-insurance:—Held, that the defendants could not escape liability for either one or the other of the plaintiffs was entitled to recover; and that there was nothing in an objection raised as to double indemnity:—Held, also, that the statutory conditions could not be imported into and read with either the agreement between the plaintiffs, or that be twen the Dominion Company and the defendants. *Fire Ins. Association (Limited) v. Canada Fire and Marine Ins. Co.*, 2 O. R. 481.—Q. B. D.

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Held, that the defendants' contract of re-insurance did not prevent the plaintiffs from assenting to any reasonable and proper waiver of conditions made in good faith, and not shewn to influence the loss or increase the burden of the re-insurers; and therefore an assent given by the Dominion Company to a chattel mortgage on some of the insured goods, without the defendants' knowledge and assent, did not release the defendants. *Ib.*

Under a state of facts similar to those stated in the preceding case, except that the insurance was of one C.'s property:—Held, that the plaintiffs were entitled to recover, for treating the agreement between the plaintiffs as a re-insurance, (though more properly a transfer of business with its liabilities and collateral securities), if it was of the whole amount of the Dominion Company's liability, the association having paid the whole loss to the company, or which was the same thing, to C., were entitled irrespective of any assignment to contribution from defendants: if, however, it was only of the residue of C.'s risk the defendants were still liable to the company on their policy, and by the very terms of the agreement it was effectually assigned to the association, who acquired all their co-plaintiffs' rights and interest in it:—Held, also, that the statutory conditions were not applicable to such a contract of re-insurance as in this case. *S. C.*, 2 O. R. 495.—C. P. D.

See *Clarke v. Union Fire Ins. Co.—Claim of the Agricultural Fire Ins. Co. of Watertown, New York*, 6 O. R. 640, p. 1006; *S. C.—McPhee's Claim, Ib.* 635, p. 1005.

### 30. Terminating Policy.

A notice by an insurance company to terminate a fire policy, under statutory condition No. 19 of the Ontario Insurance Act (R. S. O. (1887), c. 167, s. 114), should be wholly in writing, and should inform the assured that the policy will be terminated at the expiration of the prescribed statutory period after the service of the notice; and when on the cash plan a ratable proportion of the premium returned should be calculated from the termination of the notice. Where, therefore, a company gave a notice which was in effect an immediate cancellation with a return of the unearned premium from the date of the notice:—Held, (Galt, C. J., dissenting), that the policy had not been cancelled. *Bank of Commerce v. British America Assurance Co.*, 18 O. R. 234.—C. P. D.

See *Caldwell v. Stadavona Fire and Life Ins. Co.*, 11 S. C. R. 212, p. 965.

### 31. Reference to Arbitration.

The condition by which the defendants sought to defeat the action provided that all disputes touching loss or damage, should, after proof thereof, be submitted to arbitrators to determine the amount, but not the liability, and that an action against the company should not be sustainable until after an award had been obtained fixing the amount, or unless such action should be commenced within twelve months after the loss; and the defendants covenanted, in the body of the policy, to pay the loss within

sixty days after the loss had been ascertained and proved in accordance with the terms of the policy. It appeared that the assured had furnished the defendants with proof of the loss on the 5th of April, to which the defendants made no objection until the 11th of June following, when they served a written request for an arbitration upon the assured, who refused to arbitrate, and the plaintiff, to whom the claim was assigned, brought this action:—Held, that even if the condition were available as a defence, it had not been broken, as in the absence of a request to arbitrate within the sixty days, the loss must be considered as "ascertained and proved," and the plaintiff therefore, had a right of action on the expiration of that period. *McIntyre v. National Ins. Co.*, 5 A. R. 580.

The defendants required the plaintiff to proceed to arbitration to ascertain the amount of loss under a policy issued by the defendants in favour of the plaintiff, which contained the statutory condition as to reference to arbitration. The plaintiff was willing to arbitrate as to amount provided the defendants would admit liability for the loss. This the defendants refused to do:—Held, affirming the order of Armour, J., reversing the order of the Master in Chambers, that the defendants were not entitled to a stay of proceedings until the amount had been ascertained by arbitration. *Hughes v. London Assurance Co.*, 4 O. R. 293.—Q. B. D.

After an action had been commenced on a policy of insurance the defendants gave notice of arbitration under the statutory condition, when the court made an order that, on the defendants abandoning all defences and admitting their liability under the policy sued on, all proceedings in the action should be stayed, the plaintiff to sign final judgment and proceed in the action for the amount which might be awarded him, together with the costs of the action, etc. And it was further ordered, without the consent of the defendants, that either party, after the making of the award, might apply to a judge in chambers in respect of the payment of the costs of the reference and award. The arbitrators awarded to the plaintiff the full amount of his claim. On application to Rose, J. (7 O. R. 465), an order was made directing the defendants to pay the costs of the reference and award. On appeal to the Divisional Court, Cameron, C. J., was of opinion that the appeal should be allowed, there being no jurisdiction over the costs on such a reference, and Galt, J., that it should be dismissed. The court being equally divided, the judgment was affirmed. *Hughes v. Hand in Hand Ins. Co.*, 7 O. R. 615.—C. P. D.

After action the company, under the sixteenth statutory condition, demanded an arbitration as to the value of the premises destroyed, the result of which was an award finding the value to have been \$2,500, and the loss payable to the plaintiff \$1,700; while the jury at the trial of the action found that the plaintiff had truly represented the property as having been worth \$3,500, and estimated his loss at that amount:—Held, that there having been no misrepresentation on the plaintiff's part, no mutual mistake, and the defendants not having proved that they granted the policy in consequence of any mistake on their part the parties were ad idem and

the plaintiff was entitled to judgment for the amount of the award. *Smith v. City of London Ins. Co.*, 14 A. R. 328. See *S. C.*, 11 O. R. 38.

Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but the defendants disputed their liability, and issues of fraud, misrepresentation, and concealment of facts were raised upon the pleadings:—Held, that an order referring all the issues in the action to a referee for inquiry and report was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way. *Clarry v. British America Assurance Co.*, 12 P. R. 357.—*Chy. P.*

A church was insured under a three years' policy on November 14th, 1885, and was destroyed by fire May 31st, 1888. The insurance company admitted the loss, but required the damages to be proved, and a submission to appraisers was entered into by the parties, in which it was provided that the award made by them, (the appraisers) or any two of them, shall be binding upon both of said parties as the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company," etc. Two of the appraisers joined in an award giving the insured the full amount claimed, and ordered the company to pay the costs of the reference and award. The company refused to pay any costs over and above half the arbitrators' fees:—Held, (affirming the Master in Chambers), that R. S. O. (1887), c. 167, s. 114, was applicable to the policy in question, and that the legislature intended, by the use of the words, "or otherwise in force in Ontario, with respect to any property therein," that section to be applicable to all policies existing at the time the Act came into force, and that costs were properly awarded under sub-section 16 of that section. *Re St. Philip's Church, Weston, and Glasgow and London Ins. Co.*, 17 O. R. 95.—*Ferguson.*

See *Anchor Marine Ins. Co. v. Corbett*, 9 S. C. R. 73, p. 984.

### 32. Interest on Claims.

In an action upon fire insurance policies, a referee was directed to inquire, ascertain, and report the amount of the loss:—Held, having regard to the provisions of sections 87 and 103 of R. S. O. (1887), c. 44, that the referee had authority to allow interest on the amount of the loss as ascertained by him. *Attorney-General v. Etina Ins. Co.*, 13 P. R. 459.—*Galt.*

### 33. Pleading in Actions on Policies.

To a declaration on a policy of insurance made by defendants, but not averring that it was under the corporate seal, the defendants pleaded non est factum:—Held, plea good: for that the declaration set forth a complete instrument, a policy of insurance made by defendants, a corporation, which ex vi termini, imported a seal; and in any event the plaintiff could not be embarrassed by the plea, as it must under the O. J. Act, Rules 141 (Con. Rule 413), and 493, be treated as a mere denial of the making of the contract of insurance in fact, and not of

its legality or sufficiency in law. *Burnett v. Union Mutual Fire Ins. Co.*, 32 C. P. 134.—*Osler.*

Where a right of suit exists in a body of persons too numerous to be all made parties, the court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the waterworks branch, the plaintiff insured, giving his promissory note or undertaking to pay \$168, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the Division Courts had not the machinery necessary for that purpose:—Held, that according to the statements of the bill the policy-holders in the waterworks branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs. *Thomson v. Victoria Mutual Fire Ins. Co.*, 29 Chy. 56.—*Ferguson.*

G. insured a tug when navigating the rivers Sydenham, St. Clair, Detroit, and Thames and Lake St. Clair, loss, if any, payable to M., as his interest might appear. M. at the time of insurance and down to the happening of the loss was mortgagee. The tug was libelled in the American Admiralty Court, and to avoid the claim thereon G. used the proceedings therein upon a claim for wages to have a fraudulent sale thereof made to J. Afterwards G. procured a renewal of the policy without disclosing the sale, of which, however, defendants were subsequently notified. G., with defendants' assent, assigned the policy to M., but before that assent was put in writing the tug was burned in the Chenail Ecarti, one of the channels of the St. Clair. M. and J. delivered proof papers of claim, which were objected to. G. did not deliver any. At the trial leave was given to add G. and J. as co-plaintiffs, and judgment was directed to be entered for the plaintiffs for the full amount of the insurance. The Q. B. D. (12 O. R. 706):—Held, that the action was properly constituted, and gave judgment in favour of the plaintiff. On appeal that judgment was affirmed with costs on the ground that the relation of trustee and cestui que trust had been created between G. and the plaintiff in respect of the policy moneys. *Burton, J.A.*, dissenting. *Per Armour J.*—The sale of the tug was by operation of law. *Mitchell v. City of London Ass. Co.*, 15 A. R. 262.

See *Howes v. Dominion Fire and Marine Ins. Co.*, 8 A. R. 644, p. 961; *Royal Ins. Co. v. Bjers*, 9 O. R. 120, p. 968.

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### 35. Mutual Insurance Companies.

#### (a) Premium Notes and Assessments.

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The defendants, a mutual insurance company, in existence at the time of the passing of the Mutual Companies' Act of 1873, 36 Vict. c. 44 (Ont.), had divided their business into several branches, and had also raised a guarantee capital fund, out of which the losses in all the branches as they arose were paid. The by-law for raising the guarantee fund, passed on the 12th January, 1874, contained a provision that from the surplus profits of the company from year to year, and by assessment on premium notes, a reserve fund should be created for the purpose of paying off the guarantee capital. In a suit by a creditor to realize the assets of the company, it appeared that the amounts to be collected on the premium notes in two branches, would not suffice to pay the losses in those branches, and that the amounts to be collected on such notes in the other two branches were sufficient for that purpose.—Held, by Proudfoot, V. C., on appeal from the master (27 Chy. 391), that the policy-holders in the solvent branches were liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stockholders so far as might be necessary to discharge losses paid in those particular branches from the guarantee fund.—Held, on appeal to this court, that whatever might be the power of the directors, the Court of Chancery had no jurisdiction to make the assessment. *Duff v. Canadian Mutual Ins. Co.*, 6 A. R. 238.

Quære, per Burton, J. A., as to the effect of section 75 of R. S. O. (1877), c. 161, and its inconsistency with the clauses of the Act relative to branches and the exemption of the members of one branch from liability for claims on another. *Ib.*

Where an application was made to the court to add the persons who had signed premium notes as parties in the master's office, and to direct the master to assess the amounts due upon the notes, and to order payment of the same to the receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R. S. O. (1877), c. 161, s. 45 et seq.—Held, that as the liability attached only upon such assessment by the directors, the court could not add to, or alter the liability of the parties who had made the notes by referring it to the master or a receiver to do that which the directors only could do, clause 75 of 36 Vict. c. 44, which gave power to a receiver to do this, having been omitted from the statute on revision. *Hill v. Merchants' and Manufacturers' Ins. Co.*, 28 Chy. 560.—Blake.

Quære, whether the note given for the premium in this case was negotiable notwithstanding the special agreement in it, and as to the effect of the defendants being described therein as the "Watertown Insurance Company," while their real name was "The Agricultural Insurance Company of Watertown, N.Y." *Sears v. Agricultural Ins. Co.*, 32 C. P. 585.—C. P. D.

Held, affirming (32 C. P. 476), that an assessment for the purpose of paying promissory notes given by a mutual insurance company must be confined to the premium notes or undertakings

current at the time the loss occurred in respect of or to meet which the company's notes were given. New members cannot be assessed to pay notes given previously to their joining the company. *Victoria Mutual Fire Ins. Co. of Canada v. Thomson*, 9 A. R. 620.

The directors of the plaintiff company assessed the defendant, a policy holder, for several sums, one of which was illegal, and they sent one notice to him, claiming the amount of all the assessments, including the illegal one, in one sum.—Held, overruling (32 C. P. 476), that the plaintiffs were not entitled to recover any of the assessments. *Ib.*

The defendants claimed the right, under R. S. O. (1887), c. 167, s. 131, to retain the amount of the premium note given to the mortgagor until the time had expired for which the insurance was made to cover any assessments that might be made thereon.—Held, that, as against the mortgagee, they were not entitled to retain the amount. *Anderson v. Saenger Mutual Fire Ins. Co. of Mount Forest*, 18 O. R. 355.—Chy. D.

Held, that 53 Vict. c. 44, s. 4 (Ont.), substituting a new section for R. S. O. (1887), c. 167, s. 132, is retrospective in its operation, and applies to premium notes given before its passing as well as to those given afterwards. *Re Saenger Mutual Fire Insurance Co.—Knechtel's Case*, 19 O. R. 417.—Robertson.

See *Anchor Marine Ins. Co. v. Corbett*, 9 S. C. R. 73, p. 984.

#### (b) Other Cases.

Held, that a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O. (1877), c. 162. *Ballagh v. Royal Mutual Fire Ins. Co.* 5 A. R. 87, approved of. *Mutual Fire Ins. Co. of the County of Wellington v. Frey*, 5 S. C. R. 82.

The defendants were authorized by their charter to carry on both proprietary and mutual insurance business; but they were debarred from taking risks which were extra-hazardous in the mutual branch. The plaintiffs' property falling within the prohibited class, was insured with the defendants by a policy which was not on its face a mutual one, but an absolute undertaking to pay the loss, but instead of making a cash payment they gave a premium note, upon which they paid several assessments. The application also was headed: "Premium Note System."—Held, reversing the judgment of the Court of Chancery, 28 Chy. 525, that the policy was not a mutual one, there being nothing except the premium note, which was not conclusive, to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch. Quære, per Cameron, J., whether the risk was sufficiently shewn to be one which defendants could not insure in their mutual branch. *Louison v. Canada Farmers' Mutual Fire Ins. Co.*, 6 A. R. 512.

Held, (reversing the decision reported 9 P. R. 185, which followed *Lount v. The Canada Farmers' Ins. Co.*, 8 P. R. 433, that R. S. O. (1877), c. 161, s. 61, providing as to mutual insurance

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companies, that no execution shall issue against such company upon any judgment until after the expiration of three months from the recovery thereof, does not apply where the judgment has been recovered on a policy issued by the company on the cash principle. *S. C.*, 8 A. R. 613.

Held, that the directors of a mutual insurance company may, under R. S. O. (1877), c. 161, s. 29, borrow money on promissory notes or debentures without passing a by-law under seal. *Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476.—Cameron.

Trustees being indebted to the plaintiffs and holding stock in the defendants' company assigned the stock to the latter in consideration of a sum expressed to be paid by them for the trustees to the plaintiffs. The sum was paid by the issue of the defendants' debenture to the plaintiffs:—Held, that the transaction did not constitute a "loan of money" from the plaintiffs to the defendants within the meaning of 31 Vict. c. 52, s. 12 (Ont.), and that the issue of the debenture was therefore ultra vires. *Bank of Toronto v. Beaver and Toronto Mutual Ins. Co.*, 28 Chy. 87.—Spragge.

Held, that the defendants as a mutual insurance company, were capable of granting insurances in Quebec as well as in Ontario. *Duff v. Canadian Mutual Fire Ins. Co.* 27 Chy. 391.—Proudfoot.

The claim being one of B. & D., for costs after a retainer by a mutual fire insurance company, B. assigned his interest in it to D., upon certain trusts in which, however, B. had no interest:—Held, that the assignment was absolute, and D. entitled to sue:—Held, that B. having been president of the company when the costs were incurred was no objection. *S. C.*, 9 P. R. 292.—Proudfoot. But see *S. C.* 2 O. R. 560, *infra*.

Held, reversing the decision of Proudfoot, V. C., (9 P. R. 292), Osler, J., dissenting, that under the Mutual Insurance Act, R. S. O. (1877) c. 161, the cost of a solicitor for services rendered to a mutual insurance company, are chargeable not against the general assets of the company, but against the respective branches for which the services were in fact rendered, and in case of deficiency of assets of any of the branches the other branches are not liable for the claims thereon. Per Osler, J.—A creditor of the company, for a debt incurred as part of the necessary expenses of the company, though in relation to the business of some of its branches only, is entitled to be paid out of moneys derived from assessments for losses and expenses on policy holders in other branches. *S. C.*, 2 O. R. 560.—C. P. D.

The 28th section of the Mutual Fire Insurance Companies' Act, 1881, makes the Fire Insurance Policy Act applicable thereto, "except where the provisions of the Act respecting Mutual Fire Insurance Companies are expressly inconsistent with, or supplementary and in addition to the provisions of the said Fire Insurance Policy Act:—Held, this includes all mutual insurance companies doing business in the province; and it was not alleged in the pleadings herein, that there was anything in the defendants' Act "expressly inconsistent with" the Fire Insurance Policy Act, but merely that the matters were

variations of the statutory conditions. Held, also, that the questions so far as raised, were not of a constitutional character so as to require notice to the Attorney-General of the Province, and the Minister of Justice of the Dominion. *Goring v. London Mutual Fire Ins. Co.*, 11 O. R. 82.—O'Connor.

See *Robins v. Victoria Mutual Fire Ins. Co.*, 31 C. P. 562; 6 A. R. 427, p. 964; *Ballagh v. Royal Mutual Ins. Co.*, 5 A. R. 87, p. 946.

#### IV. MARINE INSURANCE.

##### 1. Insurable Interest.

C. made advances to B. upon a vessel, then in course of construction, upon the faith of a verbal agreement with B., that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When the vessel was well advanced C. disclosed the facts and nature of his interest to the agent of the respondent's company, and the company issued a policy of insurance, against loss by fire, to C. in the sum of \$3,000. The vessel was still unfinished, and in B.'s possession when she was burned:—Held, reversing the judgment of the court below, that C.'s interest, relating as it did to a specific chattel, was an equitable interest which was insurable, and therefore C. was entitled to recover. *Clark v. Scottish Imperial Ins. Co.*, 4 S. C. R. 192.

The part owner of a vessel may insure the shares of other owners with his own, without disclosing the interest really insured, under a policy issued to himself insuring the vessel "for whom it may concern." *Merchants' Marine Ins. Co. v. Barss*, 15 S. C. R. 185.

See *Merchants' Marine Ins. Co. v. Runsey*, 9 S. C. R. 277, p. 982; *Anchor Marine Ins. Co. v. Keith*, 9 S. C. R. 483, p. 987.

##### 2. Seaworthiness.

It appeared that the vessel was driven ashore on the 6th September, and that the plaintiffs got her off and towed her to Detroit, where she was put into dry dock and repaired. The salvage charges amounted to \$4,000. On 26th September, the owner gave notice of abandonment, and claimed as for a total loss, and the plaintiffs settled with him for \$3,000. On 29th September the vessel while lying at the port of Detroit was labelled for seamen's wages and salvage charges, and was subsequently sold to pay same. The actual damage done to the vessel only amounted to \$175. At the time of the accident the vessel had only one anchor, having a short time previously lost a second one she had. There was no express warranty of seaworthiness:—Held, that the policy being a time policy there was no implied warranty of seaworthiness. *Phoenix Ins. Co. v. Anchor Ins. Co.*, 4 O. R. 524.—Osler.

##### 3. Warranty of Safety.

See *Anchor Marine Ins. Co. v. Keith*, 9 S. C. R. 483, p. 987.



#### 4. Delay in Prosecuting Voyage.

A vessel insured for a voyage from Charlotte-town to St. Johns, Nfld., left the wharf at Charlottetown on December 3, with the bona fide intention of commencing her voyage. After proceeding a short distance she was obliged, by stress of weather, to anchor within the limits of the harbour of Charlottetown and remained there until 4th December, when she proceeded on her voyage:—Held, that this was a compliance with a warranty in the policy of insurance to sail not later than 3rd December, but a breach of a warranty to sail from the Port of Charlottetown not later than 3rd December. *Robertson v. Pugh*, 15 S. C. R. 706.

There is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss. *Spinney v. Ocean Mutual Marine Ins. Co.*, 17 S. C. R. 326.

#### 5. Deviation.

The voyage specified in a marine policy included "loading port on the western coast of South America," and payment of a loss under the policy was resisted on the ground of deviation, the vessel having loaded at Lobos, one of the Guano Islands, from twenty-five to forty miles off the coast. On the trial of an action to recover the insurance, evidence was given by shipowners and mariners to the effect that, according to commercial usage, the description in the policy would include the Guano Islands, and there was evidence that when the insurance was effected a reduction of premium was offered for an undertaking that the vessel would load guano. The jury found, on an express direction by the court, that the island where the vessel loaded was on the western coast of South America within the meaning of the policy:—Held, affirming the judgment of the Supreme Court of New Brunswick, that the words in the policy must be taken to have been used in a commercial sense and as understood by shippers, shipowners and underwriters; and the jury having based their verdict on the evidence of what such understanding would be, and the company being aware of a guano freight being contemplated, the finding should not be disturbed. *Providence Washington Ins. Co. v. Gerow*, 17 S. C. R. 387.

In case of deviation by delay, as in case of departure from the usual course of navigation, it is not necessary to shew that the peril has been enhanced in order to avoid the policy. *Spinney v. Ocean Mutual Marine Ins. Co.*, 17 S. C. R. 326.

#### 6. Goods Insured.

The respondents (plaintiffs), by an arrangement with M., who had chartered the schooner Mabel Claire for a trading voyage from Nova Scotia to Labrador and back, were to furnish the greater part of the cargo, and were to have

complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advance, and pay over any balance remaining to S. and others. In trading on the voyage S. and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding \$8,000, and after having done so, and upon the day on which the vessel sailed from Halifax, effected with the appellants (defendants), the policy sued upon, and an extract from which is as follows:—"Rumsey, Johnson & Co. have this day effected an insurance to the extent of \$2,000 on the undermentioned property, from Halifax to Labrador, and back to Halifax on trading voyage. Time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner Mabel Claire, whereof Mouzar is master, this present voyage. Loss, if any, payable to Rumsey, Johnson & Co. Said insurance to be subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed on the back hereof. Description of goods insured, merchandise under deck, amount \$2,000, rate five per cent., premium \$100 to return two (2) per cent., if risk ends 1st October, and no loss claimed; additional insurance of \$5,000, warranted free from capture, seizure and detention, the consequences of any attempt thereat." Against the respondents' right to recover, it was contended that they were merely unpaid vendors and had no insurable interest, and that goods previously put on board at Liverpool, N.S., were not covered by this policy, and that it was not to recover the return cargo:—Held (affirming the judgment of the court below, discharging a rule nisi to set aside a verdict for the plaintiffs), that the policy covered not only goods put on board at Halifax, but all the merchandise under deck shipped in good order on board said vessel during the period mentioned in the policy:—Held, also, that there was sufficient evidence to shew that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel. *Merchants' Marine Ins. Co. v. Rumsey*, 9 S. C. R. 577.

#### 7. Recovery for Loss of Freight.

The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and damaged the grain. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original destination. M., however, refused to deliver it to the plaintiffs until his freight was paid in full, and the plaintiffs thereupon paid it, and took an assignment of his policy on the freight, on which they now sued the defendants. It was found as a fact at the trial that the cargo might have been taken to its destination in specie, and the freight earned:—Held, affirming the decision of the Common Pleas, 30 C. P. 570, that the plaintiffs were not entitled to recover; for their only rights were those of M., who had suffered no loss for which



the defendants were liable, inasmuch as the freight had not only not been lost by the perils insured against, but had not been lost at all, he having received it in full. *Anchor Marine Ins. Co. v. Phoenix Ins. Co.*, 6 A. R. 567.

### 8. Perils of the Sea.

A vessel on her way to Miramichi, N. B., was chartered for a voyage from Norfolk, Va., to Liverpool with cotton. She arrived at Miramichi on 25th November, and sailed for Norfolk on the 29th. Owing to the lateness of the season, however, she could not get out of the river, and she remained frozen in the ice all winter, and had to abandon the cotton freight.—Held, reversing the judgment of the Supreme Court of New Brunswick, Henry, J., dissenting, that the loss occasioned by the detention from the ice was not a loss by "perils of the seas," covered by an ordinary marine policy. *Great Western Ins. Co. v. Jordan*, 14 S. C. R. 734.

See *O'Connor v. Merchants' Marine Ins. Co.*, 16 S. C. R. 331, p. 989.

### 9. Conditions.

The appellants issued a marine policy of insurance at Toronto, dated the 28th November, 1875, insuring, in favour of the respondent, \$3,000 upon a cargo of wood goods laden on board of the barque *Emigrant*, on a voyage from Quebec to Greenock. The policy contained the following clause: "J. C., as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance and cause three thousand dollars to be insured, lost or not lost, at and from Quebec to Greenock, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near Indian Cove, which forms part of the harbour of Quebec, and was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the Traverse. On an action upon the policy it was:—Held (Fournier and Henry, JJ., dissenting), that the words "from Quebec to Greenock, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of Quebec on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty. Per Ritchie, C. J. The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of Quebec, if any existed in relation thereto. Per Gwynne, J. The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the Traverse, but ordinarily at the date of the departure of the plaintiff's vessel, at least as far as the Traverse. *Provincial Ins. Co. of Canada v. Connolly*, 5 S. C. R. 258.

W. et al. effected in A. M. Ins. Co. a policy of insurance on a ship. The policy, among other clauses, contained the following: "In case the premium, or the note or other obligation given for the premium, or any part thereof, should not be paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." There was also in the policy an arbitration clause, by which arbitrators were to decide any difference which might arise between the company and the insured "as to the loss or damage or any other matter relating to the insurance," in accordance with the terms and conditions of the policy and the laws of Canada; and the obtaining of the decision of the arbitrators was to be a condition precedent to the maintaining of an action by the insured against the company. W. et al. gave a promissory note for the premium which was not yet due when they became insolvent; and C., the respondent, was appointed assignee. A guarantee was then given and accepted by the company as a satisfactory security for the premium. The note became due on the 30th September, 1878, and was not paid but remained overdue and unpaid at the date of the loss, on the 12th of October, 1878. After the loss, the matters in dispute arising out of the policy were submitted to three arbitrators, who awarded \$5,769.29. An action was then brought on the policy, the declaration containing a count on the award:—Held (affirming the judgment of the court below), 1. That the premium having, on the insolvency of the insured, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect, and did not become void on non-payment of the premium note at maturity. (Strong, J., dissenting.) 2. That the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be bad from any mistake of law or otherwise. *Anchor Marine Ins. Co. v. Corbett*, 9 S. C. R. 73.

Where, by a certificate of marine insurance, effected in this province on cattle, representing and taking the place of a policy, it was provided, as the condition of payment, that all claims should be reported to the M. Insurance Company of Liverpool, as soon as the goods were landed or the loss known, to be adjusted according to usages there, and the special condition of the contract of insurance:—Held, that the adjustment by the M. Insurance Company was not a condition precedent to the plaintiffs' right to recover. All that was required to be done by the insured was duly to report to that company the claim to be adjusted. *Bank of British North America v. Western Assurance Co.*, 7 O. R. 166.—Proudfoot.

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In an action on a voyage policy containing this clause, "warranted not to enter or attempt to enter or to use the Gulf of St. Lawrence prior to the 10th day of May, nor after the 30th day of October (a line drawn from Cape North to Cape Ray and across the Strait of Canso to the northern entrance thereof shall be considered the bounds of the Gulf of St. Lawrence)," the evidence was:—The captain says: "The voyage was from Liverpool to Quebec, and ship sailed on the 2nd April. Nothing happened until we met with ice to the southward of Newfoundland. Shortened sail, and dodged about for a few days trying to work our way around it. One night ship was hove to under lower main top-sail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in the ice three or four hours. Laid to all the next day. Could not get further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log-book showed that the ship got into the ice on the 7th of May, and an expert examined at the trial swore that from the entries of the 6th, 7th, 8th, and 9th of May, the captain was attempting to enter the Gulf of St. Lawrence. A verdict was taken for plaintiffs by consent, with leave for defendants to move to enter a nonsuit, or for a new trial, the court to have power to mould the verdict, and also to draw inferences of fact the same as a jury. The Supreme Court of New Brunswick sustained the verdict, but on appeal to the Supreme Court of Canada:—Held, (Henry, J., dissenting) that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the gulf contrary to such clause. *Taylor v. Moran*, 11 S. C. R. 347.

A condition of the policy was, that the company should not be liable for any loss occurring while petroleum, rock, earth, or coal oil, burning fluid, naphtha or any liquid product thereof or any of their constituent parts were stored or kept on the property insured:—Held, (affirming 12 O. R. 706), that the fact of there being a small quantity—about a gallon in two small cans—of lubricating oil, used for the purpose of lubricating the engine, was not such a storing of oil, etc., as was contemplated by the condition. *Mitchell v. City of London Ass. Co.*, 15 A. R. 262.

A marine policy insured a ship for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom. The ship went from Valparaiso to Lobos, an island from twenty-five to forty miles off the coast of South America, and was afterwards lost. In an action on the policy:—Held, that whether or not Lobos was a loading port on the western coast of South America within the policy was a question for the jury, and it not having been submitted to them a new trial was ordered for misdirection. *Providence-Washington Ins. Co. v. Gerow*, 14 S. C. R. 731.

See *Robertson v. Pugh*, 15 S. C. R. 706, p. 981.

#### 10. Abandonment and Loss.

T., respondent, was the owner of a vessel called the "Susan," insured for \$800 under a

valued time policy of marine insurance, underwritten by G., the appellant, and others. The vessel was stranded and sold, and T. brought an action against G. to recover as for a total loss. From the evidence it appeared that the vessel stranded on the 6th July, 1876, near Port George in the county of Antigonish, adjoining the county of Guysboro', N. S., where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertised for sale on the following day, and sold on the 11th of July for \$105. The captain did not give any notice of abandonment and did not endeavour to get off the vessel. The purchasers immediately got the vessel off, etc., had her made tight, and taken to Pictou, and repaired, and they afterwards used her in trading and carrying passengers:—Held, on appeal, that the sale by the master was not justifiable, and that the evidence failed to shew any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total. Per Gwynne, J., that it is a point fairly open to enquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts. *Gallagher v. Taylor*, 5 S. C. R. 368.

C. as assignee of W., was insured upon the schooner *Janie R.*, to the amount of \$2,000 by a voyage policy. On the 14th February, 1879, the *Janie R.*, which had been in the harbour of Shelburne since the 7th of February, left with a cargo of potatoes to pursue the voyage described in the policy, but was forced by stress of weather to put back to Shelburne, and on the morning of the 15th she went ashore, when the tide was about its height. On the 17th notice of abandonment was given to the defendants (appellants) and not accepted, and on the 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with the assistance of an American vessel that was in the harbour, and by the use of casks for floating her (appliances which the master did not avail himself of), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after having been repaired, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for \$1,560. In an action brought on the policy against the defendant company, tried before a judge without a jury, a verdict was given in favour of plaintiff for \$1,913, which verdict was sustained by the Supreme Court of Nova Scotia. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the courts below, 1. That the sale by the master was not justified in the absence of all evidence to shew any "stringent necessity" for the sale after the failure of all available means to rescue the vessel. 2. That the undisputed facts disclosed no evidence whatever of an actual total loss and did not constitute what in law could be pronounced either an absolute or a constructive total loss. Per Strong, J., that the right to abandon must be tested by the condition of the vessel at the time of action

brought, and not by that which existed when notice of abandonment was given. *Providence Washington Ins. Co. v. Corbett*, 9 S. C. R. 256.

While the barque Charley was at Cochin, on or about the 12th April, 1879, the master entered into a charter party for a voyage to Colombo, and thence to New York by way of Alippee. The vessel sailed on the 22nd April, 1879, and arrived at Colombo, which place she left on 13th May, and while on her way to Alippee she struck hard on a reef and was damaged and put back to Colombo. The vessel was so damaged that the master cabled to the ship's husband, at New York on the 23rd of May, and in reply received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there, and Bombay, 1,000 miles distant, was the nearest port. After proper surveys and cargo discharged, on the 10th June the vessel was stripped and the master sold the materials in lots at auction. On the 21st May the respondent, a mortgagee in the vessel, which he had assigned to the bank of Nova Scotia by endorsement on the mortgage, as a collateral security for a pre-existing debt to the bank of Nova Scotia, being aware of the charter from Cochin to New York, insured his interest with the appellant company, the nature of the risk being thus described in the policy: "Upon the body, etc., of the good ship or vessel called the barque Charley, beginning the adventure (the said vessel being warranted by the insured to be then in safety), at and from Cochin via Colombo and Alippee to New York." To an action on the policy for a total loss—the defendants pleaded inter alia: 1st. That the plaintiff was not interested; 2nd. That the ship was not lost by the perils insured against; 3rd. Concealment. A consent verdict for \$3,206 for plaintiff was taken subject to the opinion of the court upon points reserved to be stated in a rule nisi, and upon the understanding and agreement that everything which could be settled by a jury should, upon the evidence given, be presumed to be found for the plaintiff:—Held, 1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance; 2nd. That the fact of the plaintiff having assigned his interest as a collateral security to a creditor did not divest him of all interest so as to disentitle him to recover; 3rd. That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary. Per Strong, J., that a mortgagee, upon giving due notice of abandonment, is not precluded from recovering for a constructive total loss. *Anchor Marine Ins. Co. v. Keith*, 9 S. C. R. 483.

On a voyage from Porto Rico to New Haven, respondents' vessel sustained damage and put into St. Thomas. A survey was held by competent persons named by the British consul, and according to their report the cost of putting her in good condition, would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised and sold vessel, and purchaser had her repaired at a cost

much less than the report, and sent her to sea:—Held, that there was no evidence to justify in finding that the vessel was a total loss. *Milwaukee Mutual Marine and Fire Ins. Co. v. Driscoll*, 11 S. C. R. 183.

Owners of the vessel gave notice to agent of underwriters that they would abandon, which agent refused to accept. Owners telegraphed to captain that they had abandoned, and for him to proceed under the best advice:—Held, that this act of telegraphing the captain did not constitute a waiver of the notice of abandonment. *Ib.*

On the 28th September, 1875, a steam barge, loaded with sand, sank while at anchor near Chateauguay, in the river St. Lawrence. The barge was raised and floated within a week after the disaster. It was shown that on the starboard side there was an anger hole in the bilge of the barge which had been plugged up with a little wooden plug, and that the plug had come out. The vessel was raised by the insurers under the salvage clause of the policy. The first October there was a formal proceeding at the request of the master and officers of the barge, setting forth all the details of the wreck. On the 6th December, 1875, the insurers were notified that the vessel was abandoned, the notice of abandonment concluding with the words: "It is hardly necessary for me after your taking possession of the vessel to make any further declaration of abandonment, but I now do so in order to put that fact formally of record, and now again give you notice thereof." The vessel was eventually sold by consent of all parties interested for \$150. In an action on the policy for a total loss:—Held, reversing the judgment of the court below, that there was not sufficient evidence to enable plaintiffs to recover as for a total or constructive total loss of the vessel. Per Fournier, J.:—That the notice of abandonment was not given in conformity with the Art. 2544 of the Civil Code, and not made within a reasonable time. Art. 2541 Civil Code. *Western Assurance Co. v. Scanlan*, 13 S. C. R. 207.

A vessel proceeding on a voyage from Arecibo to Aquim and thence to New York, encountered heavy weather, was dismantled and was towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent, and refused to assist in repairing the damage, and complete the voyage. The agent had the vessel repaired and brought her to New York, with the cargo. On an action to recover the insurance on the freight:—Held, reversing the judgment of the court below, Strong, J., dissenting, that there being a constructive total loss of the ship the action of the underwriters, in making the repairs and earning the freight, would not prevent the assured from recovering. *Troop v. Merchants' Marine Ins. Co.*, 13 S. C. R. 506.

An agent effecting insurance under authority for that purpose only, may, in case of loss, give notice of abandonment to the underwriters without any other or special authority. *Merchants' Marine Insurance Co. v. Barks*, 15 S. C. R. 185.

A policy following usual clauses until after registration will be liable for loss in case of cost of payment of this policy its value being diminished when it is expense the value deductio partial not made affirming Patterson's repairs after all respect usually not the the repairs adjusting therefor half the American Canadian

See P. O. R. 52 Coal Co.

Held, in a marine case, "do not need excepted perils from v. Merch

Per Strong, the loss policy, the primary 1b.

A vessel stressed of loss to the owners on to unload tiffs refused the defence of an agent's signature, and vessel at failed to larger upon adj dants for in excess that the stranded, diture wa

A policy of insurance on a ship contained the following clause:—"In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy." The ship being disabled at sea put into port for repairs, when it was found that the cost of repairs and expenses would exceed more than one-half of the value declared in the policy if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made, but not if it was made:—Held, affirming the judgment of the court below, Patterson, J. dissenting, that the "cost of repairs" in the policy meant the net amount after allowing one-third of the actual cost in respect of new for old, according to the rule usually followed in adjusting a partial loss, and not the estimated amount of the gross costs of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value. *Gerow v. British American Assurance Co.*, and *Gerow v. Royal Canadian Ins. Co.*, 16 S. C. R. 524.

See *Phoenix Ins. Co. v. Anchor Ins. Co.*, 4 O. R. 524, p. 991; *Western Ass. Co. v. Ontario Coal Co.*, 19 O. R. 462; 20 O. R. 295, p. 990.

#### 11. Barratry.

Held, (Strong, J., dissenting) that insurance in a marine policy against loss "by perils of the seas," does not cover a loss by barratry. It is not necessary that barratry should be expressly excepted in a marine policy to relieve the insurers from liability for such a loss. *O'Connor v. Merchants' Marine Ins. Co.*, 16 S. C. R. 331.

Per Strong, J.—If the proximate cause of the loss is a peril of the seas covered by the policy, the under writer is liable, though the primary cause may have been a barratrous act. *Id.*

#### 12. Average.

A vessel loaded with coal stranded under stress of weather, and was abandoned as a total loss to the underwriters, the plaintiffs. The owners of the cargo, the defendants, proposed to unload at their own expense, but the plaintiffs refused to permit this, and would not allow the defendants to get the cargo without signing an average bond. Upon this, the defendants signed a bond which was ex facie imperfect, and the plaintiffs took steps to save vessel and cargo by one expedition. They failed to rescue the vessel, but saved the larger part of the cargo. They now claimed upon adjustment contribution from the defendants for the expenditure incurred, which was in excess of the value of the salvage:—Held, that the vessel and her cargo were not, when stranded, in a common danger, and the expenditure was not for the preservation and safety of

both ship and cargo, but for the deliverance of the vessel alone; that the average bond signed did not bind the defendants to pay more than they were rightfully liable to pay, and the adjustment was no obstacle to the determination of the real liability; and that the defendants were liable only to pay what they would have paid to recover the cargo by their own exertions. *Western Assurance Co. v. Ontario Coal Co.*, 19 O. R. 462.—Boyd. Affirmed 20 O. R. 295.

See *Phoenix Ins. Co. v. Anchor Ins. Co.*, 4 O. R. 524, p. 991.

#### 13. Re-Insurance.

One B., who was the agent at Montreal, of the plaintiff and defendant companies, accepted a risk on a vessel of \$7,700 for the defendants, but as the limit prescribed by them on any one vessel was \$5,000 he had to reinsure for \$2,700 and he immediately directed his clerk to write a memorandum of application and acceptance in the books of the plaintiffs for a re-insurance of \$2,700, which was done; but the clerk whose duty it was to endorse the particulars on the open policy issued by the plaintiffs, prepare the certificate, and report the transaction in the daily return, unintentionally omitted to do so, and no notice of the re-insurance was given to the plaintiffs until after the loss occurred. After they had paid the loss, the plaintiffs discovered the irregularity, and filed a bill to recover the money as paid under a mistake of fact:—Held, affirming the decree of Blake, V. C., 26 Chy. 264, that the plaintiffs were not entitled to recover, as the application and acceptance of the risk were, under the circumstances, sufficient to constitute a binding contract of re-insurance. *Canada Fire and Marine Ins. Co. v. Western Assurance Co.*, 5 A. R. 244.

On 1st September, 1881, the plaintiffs insured the vessel *Mary Merritt* for \$6,000 for fifteen days, by acceptance of an application made to them by M. the owner. On the same day a memorandum was written in the margin of the application and signed by the manager and secretary of the defendant company, that they covered one-fourth, subject to survey and approval at first port of arrival, etc. It was understood that there was an allowance of eight per cent. for particular average. On 4th April, 1881, an agreement had been entered into between the companies, under which defendants were to cover a fourth part of all vessel risks accepted by plaintiffs; but it was expressly agreed that the risks covered were only on hulls of vessels not classed below B. 1. By defendants' Act of Incorporation, 35 Vict. c. 103 (Dom.), all policies, instruments, etc., issued or entered into by defendants, were to be signed by the president or vice-president, and countersigned by the manager and secretary, or as otherwise directed by the rules and regulations of the company in case of their absence, and so signed they should be deemed valid, etc.:—Held, that the plaintiffs could not rely on the agreement of the 4th April, as it was limited to vessels not below B. 1, and the vessel insured had not been classed; but that the contract was contained in the memorandum written in the margin of the application, and that it was so signed as to be binding on the defendants, for that, in the ab-

sence of evidence to the contrary, it must be deemed to be signed in accordance with the rules and regulations of the company:—Held, also, (1), defendants as re-insurers were not bound by the plaintiffs' settlement with the owner or the acceptance of the notice of abandonment, and that as to them there had been no total loss and no valid abandonment; (2) defendants were liable as upon a general average for expenses incurred by plaintiffs as salvors and insurers in saving the ship, after deducting the proportion to be borne by the owners of the vessel and cargo, etc.; (3) there was no particular average loss for which the plaintiffs were responsible or towards which defendants were liable to contribute. The pleadings were directed to be amended according to the findings; and the costs apportioned. *Phoenix Ins. Co. v. Anchor Ins. Co.*, 4 O. R. 524.—Osler.

#### 14. Double Insurance and Contribution.

Defendants insured for the consignor cattle from Boston to London, England, against all risks, except to be free of particular average, unless the vessel be stranded, sunk, or burned, or in collision. The cattle were consigned to F., and the consignor drew for £1,740 upon F., who accepted the bill and insured the cattle in England for £5,000, seventy-five per cent., against all risks, and twenty-five per cent. mortality was not insured against. It was sworn that F. had been told by the consignor to insure in all cases where they had made advances. After the loss F. received £1,500 on account of the English policies, but hearing that an insurance had been effected in Canada, and assuming that it would have the anti-contribution clause, so that the first insurance alone would be liable, they returned the money pursuant to an undertaking which they had given, but the policies were not cancelled:—Held, that there was a double insurance, for the risk, the interest and the subject were the same, and the difference between the several policies as to the extent of liability did not vary the risk:—Held, also, that the defendants were liable to the plaintiffs for the whole amount insured, leaving them to recover contribution from the other insurers, according to the rule in force in England and here; but that they were entitled to deduct the £1,500 paid, and that this sum having been repaid under a mistake of fact and without prejudice, the plaintiffs might have recourse to the underwriters for it. *Bank of British North America v. Western Assurance Co.*, 7 O. R. 166.—Proudfoot.

#### 15. Time for Commencement of Actions.

A condition in a marine policy that all claims under the policy shall be void unless prosecuted within one year from date of loss, is a valid condition not contrary to article 2184 C. O., and all claims under such a policy will be barred if not sued on within one year from the date of the loss.—The plaintiff cannot rely in appeal on a waiver of the condition, unless such waiver has been properly pleaded.—Per Taschereau, J.—The debtor cannot stipulate to enlarge the day to prescribe, but the creditor may stipulate to shorten that delay. *Allen v. Merchants' Marine Ins. Co.*, 15 S. C. R. 488.

A clause in a marine policy required action to be brought out on it within twelve months from the date of depositing claim for loss or damage at the office of the assurers. A protest was deposited accompanied by a demand for the insurance. The protest was defective and some months later an amended claim was deposited:—Held, affirming the judgment of the court below, that an action begun more than twelve months after the original, but less than twelve months after the amended claim, was deposited was too late. *Robertson v. Pugh*, 15 S. C. R. 706.

#### V. LIFE ASSURANCE.

##### 1. The Policy.

Policy not under seal. See *London Life Assurance Co. v. Wright*, 5 S. C. R. 466, p. 933.

##### 2. Insurable Interest.

G. applied to respondents' agent at Quebec for an insurance on his life, and having undergone medical examination, and signed and procured the usual papers, which were forwarded to the head office at New York, a policy was returned to the agent at Quebec for delivery. G. was unable to pay the premium for some time, but L., at the request of the agent at Quebec, who had been entrusted with a blank, executed an assignment of the policy, paid the premium and took the assignment to himself. Subsequently, L. assigned the policy, and the premiums were thenceforth paid by the assignee. Prior to G.'s death, the general agent of the company enquired into the circumstances and authorized the agent at Quebec to continue to receive the premiums from the assignee:—Held (Gwynne J., dissenting), that at the time the policy was executed for G., he intended to effect a bona fide insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy. *Vézina v. New York Life Ins. Co.*, 6 S. C. R. 30.

The statute 14 Geo. III. c. 48 enacts: 1. That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatever, wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning of this Act shall be null and void to all intents and purposes whatsoever. 2. That it shall not be lawful to make any policy or policies on the lives of any person or persons, or other event or events without inserting in such policy or policies, the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwritten. 3. That in all cases when the insured hath an interest in such life or lives, event or events no greater sum shall be recovered or received from the insurer or insurers



than the amount or value of the interest of the insured in such life or lives or other event or events:—Held, affirming the judgment of the court below, that this statute never was intended to prevent a person from effecting a bona fide insurance on his own life, and making the sum insured payable to whom he pleases, such insurance not being "by way of gaming or wagering" within the meaning of the first section of the Act:—Held, also, that section 2 of the said Act applies only to a policy on the life of another, not to a policy by a man on his own life. *North American Life Ass. Co. v. Craigen*, 13 S. C. R. 278.

### 3. Payment of Premium and Delivery of Policy.

J. M. was insured by a life policy, under which thirty days' grace were allowed for payment of premiums, and a lapsed policy might be renewed within a year upon proof of health, payment of arrears, and a fine. S. was the resident secretary in Canada of the defendants, with the powers of a general manager, and there was a local board of directors in Canada, but S. managed all matters connected with the receipt of premiums, communicated directly with the board in England, took "his instructions from them, and laid before them monthly accounts from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to S. asking him to take a note at three months. S. replied: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th of August, 1879, E., the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to S. to be filled up for the renewal of a note about to fall due, and saying that S. was absent from town, and that as the two premiums of November, 1878, and May, 1879, were so long overdue he should have to refer the matter to S. on his return, adding, "until these back premiums are paid the society is off the risk." The death occurred on the 29th October, 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th February, and due 10th August, 1879, which was unpaid, and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death the amount of these two notes were tendered to the defendants and refused. S. being examined, said he did his best to keep the policies alive, and had no doubt at the time of his authority to do so. The jury found that the notes were taken by the defendants' agent as cash payments; that the taking of them was within his authority; and that he had waived payment upon the dates the premiums were due; and a verdict was entered for plaintiff:—Held (Hagarty, C. J., dissenting), that the evidence shewed that it was within the authority of the resident secretary

to accept notes in payment of premiums, and there was nothing shewing notice to the assured of any want of such authority; that the non-payment of the note in August, 1879, while the other note was current, did not determine the policy; and the verdict ought not to be disturbed. Per Armour, J.—The defendants in England had become aware by the returns sent by S. of the forbearance granted by him, and had ratified it. Per Hagarty, C. J.—Admitting that S. might accept payment after the proper time he could not make a binding executory agreement to give further time, extending perhaps beyond the duration of the life. *Mojatt v. Reliance Mutual Life Ass. Society*, 45 Q. B. 561.—Q. B. D.

By a policy of insurance, dated 13th April 1869, for the payment of the annual premium of \$29.56, payable quarterly, the defendants jointly assured the lives of the plaintiff and his wife in \$1,000, and engaged to pay the same on the death of the assured when the event provided for happened, deducting therefrom all notes for premiums on the policy unpaid as that time, together with any balance of the year's premium remaining unpaid. And in case the assured should not pay the said premiums on or before the said several days, etc., and the interest on all notes on account of premiums until the same were paid, the company should not be liable for any sum, "with the exception that in case this policy is allowed to lapse, after one full annual payment has been made, the insurance will be continued in force for the period which the equitable value of the policy at the time of lapse would purchase." Payments of premiums were made in cash from 13th April, 1869, to, but not including 13th January, 1874, upon which day the policy lapsed, being for four years and three-fourths of a year, which, by the company's tables under the equitable and non-forfeiting system, extended the policy after the lapse for a period beyond the 2nd January, 1877, when the plaintiff's wife died. It appeared that on the 28th January, 1875, the plaintiff gave defendant's agent a so called promissory note for the four instalments due in 1874, being up to, but not including 13th January, 1875, which note was payable in three months, and provided that if not paid at maturity with interest at seven per cent., the policy should be null and void. It also appeared that on the 8th April, 1875, during the currency of the note, the plaintiff paid, and the company received payment in cash of the premium which fell due on the 13th January, 1875. In an action by the plaintiff to recover the amount of the policy:—Held, that he was entitled to recover; that by the cash payments made up to the 13th January, 1874, there was a right to the benefits of the policy for such extended period; that it could not be deemed to be the intention of the parties to abridge such rights by the note of the 28th January, 1875, but that the effect of non-payment thereof was merely to put the parties in the same position as if the note had not been given. Per Galt, J.—To work a forfeiture for the non-payment of a promissory note, as the one in this case, the company must demand payment of it on the day it becomes due, and, if not paid, declare the policy forfeited or void. Semble, per Wilson, C. J., the company, by receiving the premium in cash for a period subsequent to that

for which the forfeiture was claimed, had waived such forfeiture, though the receipt was before the forfeiture had accrued. *Watts v. Atlantic Mutual Life Ins. Co.*, 31 C. P. 53.—C. P. D.

By a policy of insurance upon the life of J. N., it was stipulated that if any premium should not be paid when due, the consideration of the contract should be deemed to have failed, and the company released from liability. By another clause, if an overdue premium was received, it was to be upon the express condition that the assured was in good health, etc., and if the fact were otherwise, the policy should not be put in force by such receipt. A cheque was given for a quarterly premium, with the request to hold it for a few days, as there were not then funds, which was received by the agent, but the premium receipt was not given up. It was afterwards presented but not accepted. On the 21st October, funds were provided, but it being then after banking hours, the cheque was not presented. That night J. N. was killed:—Held, affirming the decision of the court below, (45 Q. B. 593) that the policy lapsed the day after the premium fell due; that nothing but payment could then revive the policy, and that there was not any evidence of payment, or of anything dispensing with it. *Neill v. Union Mutual Life Ins. Co.*, 7 A. R. 171.

On an action on a policy, the appellant company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to the agent at Halifax, to receive the premium and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed: "This policy is not valid unless countersigned by —, agent at —, countersigned this — day of —, Agent."

The agent, in his evidence, said that he delivered the policy to W. O'D. (the party assuring) not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death, not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered the year up to the 1st October, 1873. W. O'D. died the 10th July, 1873. The case was tried before McDonald, J., without a jury, and he gave judgment in favour of respondent for the \$3,000, and this judgment was confirmed by the Supreme Court of Nova Scotia. On appeal to the Supreme Court of Canada, it was:—Held, (Fournier and Henry, JJ., dissenting) that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore the company was not liable. Per Gwynne, J., that the instrument was delivered as an escrow to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid, and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an escrow, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed. *Confederation Life Association of Canada v. O'Donnell*, 10 S. C. R. 92.

In an action on a policy of life insurance, which was not countersigned according to the terms of a memorandum on its margin, the defence was that the premium was never paid and the policy was never delivered. On the trial the judge admitted in evidence an entry in the books of his father made by the deceased holder of the policy, showing a payment to the agent of the company of an amount equal to the premium, which the evidence showed was paid by money given to deceased by his father. He also admitted the evidence of the agent, who had since died, taken at a former trial of the cause, to the effect that the premium was not paid, and that he would not countersign the policy until it was paid, and that the policy was only given to the deceased to enable him to examine it, and not as a duly-executed policy. The jury found a verdict for the plaintiff, but stated, in answer to a question submitted by the court, that the agent had been instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia affirmed the verdict. On appeal to the Supreme Court of Canada:—Held, per Ritchie C. J. and Gwynne J., that the policy was only delivered to the agent as an escrow, and as it was never duly executed and delivered the company was not liable. Per Strong J.—That the memorandum as to countersigning was not a condition of the policy, and the plaintiff was not barred by non-compliance with its terms; but the evidence of the entry in the books of the deceased was improperly admitted, and there should be a new trial. Per Fournier and Henry JJ.—That the policy was properly executed and delivered, and as there was sufficient evidence to sustain the verdict independent of the evidence alleged to have been improperly admitted at the trial, the appeal should be dismissed. Per Henry J.—Under the present practice the court is bound to uphold a verdict if there is sufficient legal evidence to sustain it independently of evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. Strong J., contra. The court being thus divided in opinion a new trial was granted. Opinions expressed in *The Confederation Life Association v. O'Donnell* (10 S. C. R., 92), adhered to. *S. C.*, 13 S. C. R. 218.

A policy of life insurance sued on had in the margin the following printed memo.: "This policy is not valid unless countersigned by — agent at —. Countersigned this — day of —, Agent." This memo. was not filled up, and the policy was not, in fact, countersigned by the agent. Evidence was given of the payment of the premium, and rebutting evidence by the company that it had never been paid. The jury found that the premium was paid and the policy delivered to the insured as a completed instrument, and a verdict was entered for the plaintiff and affirmed by the Supreme Court of Nova Scotia:—Held, affirming the judgment of the court below (21 N. S. Rep. 169), Sir W. J. Ritchie, C. J., and Gwynne, J., dissenting, that the necessity of countersigning by the agent was not a condition precedent to the validity of the policy, and the jury having found that the premium was paid their verdict should stand. The judgment on the former appeals in this case was, on this point, substantially adhered to. *S. C.*, 16 S. C. R. 717.

The defendant at the request of the local agent of the plaintiff company applied for a policy of insurance on his life and submitted to the usual medical examination, at the same time telling the agent that he was not then prepared to pay the premium. By the application the defendant agreed to accept the policy when issued, and to pay the premium. The company accepted the application and sent the policy to the agent. It contained an express notice that until payment of the premium it would be considered void; and by the rules of the company the agent had no authority to waive this condition. The agent called upon defendant with the policy, when he said he was still unable to pay the premium, but told him to let it lie, and he would attend to it in a little while. Three or four weeks after this and without further communication with defendant the agent forwarded the policy to him by mail. The defendant took no notice of it and the plaintiffs brought this action: to recover the premium as due upon a completed contract of insurance and a policy duly issued. The jury found that the defendant signed the application not intending it to be used as an application and on the representation by the agent that it would not be used without his consent. The judge of the County Court set aside the finding as being against evidence and directed a new trial:—Held, per Hagarty, C. J. O., that there being ample evidence to sustain the finding of the jury and none to shew that the defendant had finally assented to or perfected the proposed insurance a new trial should not have been granted. Per Burton and Patterson, J. J. A., the action failed because it was brought upon an executed contract and there was no completed contract in fact, as it appeared by the plaintiffs' own declaration on the face of the policy that it was not to be operative until payment of the premium; and no waiver of that condition prior to or contemporaneously with the delivery to the defendant was proved. Judgment of the Judge of County Court of York reversed. *Sun Life Assurance Co. v. Page*, 15 A. R. 704.

#### 4. Misstatements and Suppression of Facts by Assured.

The application contained a number of questions and answers, and at the foot was a declaration, signed by the assured, that to the best of his knowledge and belief the foregoing statements and other particulars were true; that the declaration should form the basis of the contract; and that if any untrue averment had been intentionally made therein or in the replies to the company's medical adviser in connection therewith, the policy should be void. By the policy the declaration and "relative papers" were made the basis of the contract, with the proviso that if any fraudulent or wilfully untrue material allegation was contained in said declaration; or if it should thereafter appear that any material information had been withheld, and any of the matters set forth had not been truly and fairly stated, then the policy should be void. To the questions in the application as to the name and residence of usual medical attendant, and for what serious illness had he attended, the assured answered "none"; and to the ques-

tions by the medical adviser as to what other disease or personal injury and from whom had he received professional assistance, etc., the assured answered "none." It was found that these answers were wilfully untrue, and that the information was wilfully withheld from and was material to be stated to the company:—Held, that these answers constituted a breach of the express contract between the parties, and therefore the policy was void. *Russell v. Canada Life Assurance Co.*, 32 C. P. 256.—C. P. D.

The pleas setting up the above defences were added at the trial, and after the case had been in progress for some time. The action was commenced before the Ontario Judicature Act came in force, but the trial took place thereafter:—Held, that, whether under section 8 of the Administration of Justice Act, or under Rule 128 of the Ontario Judicature Act, the pleas were properly added. *Id.*

A replication to these pleas set up that certain correspondence between the company's general manager and their local agent, but of which the assured had no notice, directing the agent to make enquiries as to habits, etc., of the assured, upon the result of which the agent was to issue the policy, constituted an agreement that the company would rely on the judgment of the agent alone founded on such enquiries:—Held, that the replication could not be supported, either at law or on the facts. *Id.*

Per Wilson, C. J.—Where the materiality of certain enquiries is obvious, and is assumed at the trial—as e. g. with regard to the temperate habits or otherwise of the deceased—there is no need to submit it to the jury. *Id.*

The manager of the defendant company entertaining doubts as to the propriety of accepting A. R.'s application for a risk on his life, caused the local agent of the company to make further enquiries as to A. R.'s habits, etc. On receiving a satisfactory report from the agent a policy was issued:—Held, that the defendants were not thereby precluded from relying upon the written application of A. R. and shewing that it contained wilfully untrue statements, the effect of which was by the express stipulations thereof sufficient to avoid the policy. The judgment of the Common Pleas Division (32 C. P. 256), in other respects affirmed. *S. C.*, 8 A. R. 716.

At the end of questions in an application for insurance, made in December, 1883, and forming part of the application, was an agreement signed by insured stating that he warranted and guaranteed that the answers to the said questions were true to the best of his knowledge and belief, and he also agreed that the application should be the basis of his contract, and that any misstatement or suppression of facts in the answers to said questions, or in his answers to the medical examiner, should render the policy null and void. The proposals and declarations were also made the basis of the contract. Endorsed on said application were answers given to questions by a medical examiner, and at the end thereof a certificate, signed by insured, stating that he had made full, true, and complete answers to the questions propounded by said examiner, and

agreed to accept the policy on the terms mentioned in the application. In answer to a question whether he had had any serious illness, local disease, or personal injury, and if so of what nature, insured answered, "No, except a broken leg in childhood." There was an answer to a question giving one T.'s name as that of his usual medical attendant, and in answer to another question, whether he had consulted any other medical man, and if so for what and when, insured replied "Dr. A., for a cold." Insured had been thrown from a load of hay, and on his examination, in a suit for damages against the municipality, he swore he had been five weeks in bed suffering from his chest and was at that time unfit for work of any kind, and had been attended by three doctors. No mention was made of this accident or of the doctors. In reply to a question whether his grand-parents, etc., brothers, etc., ever had pulmonary or other constitutional disease, he replied, "No;" and he also stated, in reply to questions as to what disease his brother had died from, that he had died from over-growth. It was shewn that an elder brother had been treated by Dr. A., some years before, for pulmonary affection, and that insured had said that the brother who died had bled at the lungs and had been ill for some months before he died. Insured, also, in answer to a question whether any material fact bearing on his physical condition or family history had been omitted, replied "No." Defendants admitted policy, proofs of death, probate, etc., and accepted burden of proof at the trial, and claimed the right to begin which was refused. On motion in term, copies of letters and documents, signed by the insured, sent to the government for leave to remain off a homestead in the North-West, and shewing that he had been suffering from congestion of the lungs and illness, from the spring of 1883 to the spring of 1884, were produced. It was shewn that the existence of some such documents had been suspected and that they had been searched for in the government offices but could not be found, and that defendants received them the day after the trial:—Held, that the plaintiffs had the right to begin, notwithstanding such admissions. Wilson, C. J., reserved the consideration of the admission of the new evidence. Per Armour, J.—It could not be received, as it was merely corroborative, and its suspected existence would have been ground for asking to have the trial postponed. Per Wilson, C. J.—There should be a new trial. There was evidence to go to the jury as to the truth of answer given respecting the health of the deceased brother. The jury should have been asked to say whether the answer as to inquiries was a misrepresentation in fact: that the certificate meant the answers were given upon a knowledge of the facts and upon insured's belief in the truth of those facts; and a statement made without knowledge would not be protected by the formula, "best of knowledge and belief," if insured had no knowledge; nor would such statements be protected if made regardless of the insured's belief in the truth of such knowledge as he had. The proposal was a warranty that the answers were true according to the best of his knowledge. Per Armour J., the direction to the jury, whether insured had stated to the best of his knowledge and belief the truth in regard to deceased's brother was sufficient. As to the accident it

was one which ought to have been mentioned, but it was probably considered of too little importance by insured, or else had escaped his memory at the time of the application, and it was sufficient for the jury to have found insured did not wilfully withhold the facts, but answered to the best of his knowledge and belief; and the proposals were not warranties. The court being equally divided the motion for a new trial was dismissed, with costs. *Miller v. Confederation Life Assurance Co.*, 11 O. R. 120.—Q. B. D. Affirmed 14 A. R. 218; 14 S. C. R. 330.

On an application for insurance in a mutual assessment insurance society, the applicant declared and warranted that if in any of the answers there should be any untruth, evasion or concealment of facts, any bond granted on such application should be null and void. In an action against the company on a bond so issued, it was shown that the insured had misstated the date of his birth, giving the 19th instead of the 23rd February, 1836, as such date; that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the company contended that it was, in fact, a severe attack; that he had stated that he was in "perfect health" at the date of the application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose, and that the attack of apoplexy which he had admitted, occurred five years before the application, when the fact was that it had occurred within four years. The trial judge found that the mis-statement as to the date of birth, was immaterial, as it could not have increased the number of years on which the premiums were calculated; that the attack of apoplexy was a slight, not a severe attack; that the applicant was in "good" if not "perfect" health when the application was made; that the bleeding at the nose, to which the insured was subject, was not a disease, and not dangerous to his health; but that the misstatement as to the time of the occurrence of the attack of apoplexy, was material, and on this last issue he found for the society, and on all the others for the plaintiff. The court in banc reversed the decision and gave judgment for the plaintiff on all the issues, holding that as to the issue found by the trial judge for the society, there was a variance between the plea and the application which prevented the society from taking advantage of the misstatement. On appeal to the Supreme Court of Canada:—Held, Gwynne and Patterson, JJ., dissenting, that the decision of the court in banc, (20 N. S. Rep. 347) was right, and should be affirmed. *Mutual Relief Society of Nova Scotia v. Webster*, 16 S. C. R. 718.

The bond of membership in an insurance society, insured the member holding it "in consideration of statements made in the application hereof," etc., and in a declaration annexed to the application, the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue:—Held, that the application was part of the contract for insurance and incorporated with the bond. The said declaration warranted the truth of the answers to the questions and of the statements therein, and agreed that if any of them were not true, full and complete, the bond should be null and void. One of the questions

to be answered was: "Have you ever had any of the following diseases? Answer opposite each, yes, or no." The names of the diseases were given in perpendicular columns, and at the head of each column the applicant wrote "no," placing under it, and opposite the diseases named, marks like inverted commas. On the trial of an action to recover the insurance on a bond issued pursuant to this application, it was found that the applicant had had a disease opposite to which one of these marks was placed:—Held, affirming the judgment of the court below, that whether the applicant intended this mark to mean "no," and thus to deny that he had had such disease, or intended it as an evasion of the question, the bond was void for want of a true answer to the question. *Fitzrandolph v. Mutual Relief Society of Nova Scotia*, 17 S. C. R. 333.

An unconditional life policy of insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that if any misrepresentation was made by the applicant or untrue answers given by him to the medical examiner of the company, then in such a case the premiums paid would become forfeited and the policy be null and void. Upon the death of the assured the person to whom the policy was made payable sued the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that the insured was a life not insurable:—Held, 1st, that the policy was thereby made void ab initio, and the insurer could invoke such nullity against the person in whose favour the policy was made payable and was not obliged to return any part of the premium paid. *Venner v. Sun Life Ins. Co.*, 17 S. C. R. 394.

Held, that the statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of sections 27 and 28 R. S. C. c. 134, could not be relied on to validate the policy, assuming such enactments to be intra vires of the Parliament of Canada, which point it was not necessary to decide. *Id.*

Held, that the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation; Art. 1174 C. C. and the provisions contained in Art. 1180 C. C. are not applicable in such a case. *Id.*

##### 5. Avoiding Policy by Intemperance.

An application for life insurance signed by the applicant contained in addition to the question and answer, viz.: Are your habits sober and temperate? A. Yes, An agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated that "if any of the declarations or statements made in the application of this policy upon the faith of which this policy is issued shall be found in any respect untrue, in such case the policy shall be null and void." On an action on the policy by

an assignee, it was proved that the insured became intemperate during the year preceding his death, but medical opinion was divided as to whether his intemperate habits materially increased the risk:—Held on the merits per Ritchie, C. J., and Strong, J., (Fournier and Henry, JJ., contra,) that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract. *Boyce v. Phoenix Mutual Life Ins. Co.*, 14 S. C. R. 723.

##### 6. Payment in Case of Total Disability.

The plaintiff, who was a farmer, had his life insured by the defendants, and there was a clause in the policy or certificate of insurance providing that in case of "total disability" of the insured the insurers would pay him one-half of the amount of the insurance. About two years after effecting the insurance the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma. In an action to recover one-half the amount of the insurance the evidence showed that the plaintiff was totally disabled, permanently and for life, from doing manual labour, and that the diseases from which he suffered were the proximate and immediate cause of his disability. A medical witness said that he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy:—Held, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence showed that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son after the certificate was issued could have no effect upon the prior contract of insurance. *Dodds v. Canadian Mutual Aid Association*, 19 O. R. 70.—Q. B. D.

##### 7. Assignment of.

The appellant's interest in the policy was as assignee of Dame M. H. B., the wife of one Charles L., to whom the insured had transferred his interest in the policy on 27th October, 1876:—Held, per Strong, Taschereau and Gwynne, JJ., that the appellant had no locus standi, there being no evidence that M. H. B. had been authorized by her husband to accept or transfer said policy. *Boyce v. Phoenix Mutual Life Ins. Co.*, 14 S. C. R. 723.

See *Vézina v. New York Life Ins. Co.*, 6 S. C. R. 30, p. 992.

##### 8. Rectifying Mistake in Policy.

Action to recover the amount of a policy of insurance issued by the appellants for the sum of \$2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of \$163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants by their plea alleged that the insurance had been effected for \$1,000 only, and that the policy had by mis-



take been issued for \$2,000; that as soon as the mistake had been discovered, they had offered a policy for \$1,000, and that previous to the institution of the action, they had tendered to the respondent the sum of \$432.97, being the amount due, which sum, with \$25.15 for costs (which had not been tendered), they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice, to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred, and it was established that the premium paid was in accordance with company's rates for a \$1,000 policy:—Held, that the insurance effected was for \$1,000 only, and that the policy had by mistake been issued for \$2,000. *Etna Life Ins. Co. v. Brodie*, 5 S. C. R. 1.

See *Wright v. Sun Mutual Life Assurance Co.*, 5 A. R. 218; 5 S. C. R. 466, p. 933.

### 9. For Benefit of Wife and Children.

In 1868, M. effected a policy on his life for the benefit of his daughter, who intermarried with the plaintiff, and predeceased her father, having bequeathed her interest in such policy to the plaintiff (her executor) in trust for her only child. M.'s wife died, and in 1877, prior to the marriage of his daughter, he married the defendant. In 1884 M. died intestate, leaving the defendant, his widow and one child surviving, without making any other disposition of his life policy. In an action by plaintiff against defendant, the widow and administratrix of M., it was:—Held (affirming 10 O. R. 283), that the insurance money formed part of the personal estate of M., and as such was payable to defendant. *Wicksteed v. Munro*, 13 A. R. 486.

A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after her death, the corpus to his son. The executors renounced probate, and after revocation of a prior grant to the son, who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act, 47 Vict. c. 20 (Ont.), provides that such policy moneys to which infants are entitled, shall be payable to a "trustee, executor, or guardian." P. claimed the moneys as administrator, whereupon the insurance company under section 15 of the Act, and G. O. 197, and Rule 541a O. J. Act, applied to the Master-in-Ordinary in Chambers for leave to pay the money into court. The Master held (1) that voluntary applications to pay in money may be made in chambers; (2) That under Rule 541a O. J. Act, he had jurisdiction by virtue of the administrator proceedings before him, to make the order; (3) That by the renunciation of the executors, there was no "trustee, executor, or guardian competent to receive the share of the infant;" (4) That the Act excluded the administrator from any claim to the fund, and his re-

ceipt would not be within the protection of the statute; (5) That the administrator was not a trustee by the will, except as holding surplus assets, after administration with notice of trust; (6) That the money was no part of the estate subject to the control of creditors, and when paid in, should be "ear marked," and not mixed with the other funds of the estate. On appeal by the administrators P., Proudfoot, J., made an order directing that the money in court be paid out to the insurance company. *Merchants' Bank v. Monteith—Ex parte Standard Life Assurance Co.*, 10 P. R. 588.—Hodgins, Master. Proudfoot.

The husband of the defendant, while a bachelor domiciled in this province, had, in the years 1871 and 1876, effected three policies of insurance on his life with companies whose head offices in Canada were at M., in the Province of Quebec, where the insurance moneys were payable. After his marriage, while still domiciled in this province, he endorsed declarations on the policies in favour of defendant, and handed them to her. After his death the insurance moneys were claimed by the defendant and by the plaintiffs as administrator of his estate, against which there were creditors:—Held, that the endorsements on the policies were governed by the law of this province. *Lee v. Abdy*, 17 Q. B. D. 309, followed:—Held, however, that as defendant's husband was not a "married man" at the time he effected the policies, he could not (not being within the exception provided in 47 Vict. c. 20, s. 2) withdraw from the claims of his creditors the benefit of the policies effected before marriage by endorsements or declarations after marriage for the benefit of his wife, and the plaintiffs were entitled to the insurance moneys. *Toronto General Trusts Co. v. Sewell*, 17 O. R. 442.—Ferguson. See 53 Vict. c. 39.

The "Act to secure to Wives and Children the Benefit of Life Insurance," 47 Vict. c. 20 (Ont.), applies to insurances in societies incorporated under the Benevolent Societies Act, R. S. O. (1877) c. 167. *Re O'Heron*, 11 P. R. 422, overruled. Judgment of Proudfoot, J., reversed. Burton, J. A., dissenting. *Swift v. Provincial Provident Institution*, 17 A. R. 66. See 51 Vict. c. 22.

### VI. ACCIDENT LIFE ASSURANCE.

In an accident policy, it was provided that the insurance should not extend to any bodily injury where the death or injury might have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation, etc., or while engaged in, or in consequence of any unlawful act; that the insured should use all due diligence for personal safety and protection, etc.; and that standing or walking on a railroad track, were hazards not contemplated or covered by the contract. The insured was killed by being run over by an engine while, contrary to the rules of the Northern Railway Company, and the statute 42 Vict. c. 8, s. 16, sub-s. 5, 6 (Dom.), driving a horse and buggy on the private grounds of the railway company at a place where there was a network of tracks, and where it was most dan-

gerous to be:—Held, that there could be no recovery, and a non-suit was entered. *Neill v. Travellers' Ins. Co.*, 31 C. P. 304.—C. P. D.

On appeal the decision of the Court of Common Pleas, supra, the court being equally divided, was dismissed, with costs. Per Hagarty, C. J., and Cameron, J. The evidence shewed that the deceased had voluntarily gone unnecessarily into a place of danger. Per Burton and Patterson, J.J. A. In an action upon an accident policy the plaintiff having proved a claim prima facie within the policy, it was for the defendants to shew that the deceased voluntarily exposed himself to unnecessary danger or one of the other defences set up. The nonsuit therefore was improper and a new trial should have been granted. One of the conditions of the policy was that the insured should not stand or walk on a railway track. Per Cameron, J., and semble per Hagarty, C. J. Such condition was broken by the insured driving on, not simply crossing, a railway track in a buggy. Per Burton, J. A. Such condition was intended to apply to the case, common in Canada, of persons using the railway tracks as roadways, and could not be considered as applying in every case of an accident to the insured while on such track. *S. C.*, 7 A. R. 570. Affirmed in the Supreme Court 12 S. C. R. 55.

#### VII. ADMINISTRATION OF INSURANCE COMPANY'S DEPOSIT.

J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under R. S. O., (1877) c. 160, ss. 21, 22. On 4th February, J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on 27th February, sent J. M. and the other policy holder a circular notifying them of an agreement for re-insurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before 15th March. On 24th February the property was burnt, and J. M. forthwith claimed for the whole loss:—Held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred. Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. Union Fire Ins. Co.—McPhee's Claim*, 6 O. R. 635.—Proudfoot.

Pending administration of the deposit of the U. Insurance Company under R. S. O. (1877) c. 160, ss. 21, 22, and after the completion of the receiver's schedule prescribed by the Act, a re-insurance was effected with the A. Insurance company of all the U. company's risks, in consideration of which the U. company gave the A. company its note. This note not being paid at maturity, the A. company sought to be placed on the dividend sheet of the U. company for dividends accrued or to accrue:—Held, that

it was entitled to the relief asked, for properly viewed the subject of the claim existed before the schedule, though in a different shape, since by the arrangement with the A. company, made with the assent of persons entitled to rebates, the liability of the U. company in respect to rebates was greatly reduced, and to that extent the A. company should be taken to be subrogated to the position of the policy-holders of the U. company. *Clarke v. Union Fire Ins. Co.—Claim of the Agricultural Fire Ins. Co. of Watertown, New York*, 6 O. R. 640.—Proudfoot.

Canadian policy holders petitioned for distribution of the deposit made by the company, a foreign corporation, with the Minister of Finance under 31 Vict. c. 48 (Dom.) and 34 Vict. c. 9 (Dom.), the company being insolvent:—Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English courts. The above Acts are not ultra vires of the Dominion Parliament. For any balance of their claims not covered by the deposit, Canadian policy holders would be entitled to rank upon the general assets of the company. *Re Briton Medical and General Life Assn. (Limited)* (2).—12 O. R. 441.—Proudfoot.

The definition of "Canadian policy" and "policies in Canada" in 34 Vict. c. 9, s. 1 (Dom.) is not to be interpreted to mean that the deposit is only for the security of policy-holders whose policies were issued after the deposit was made and license to transact business in Canada obtained. *Ib.*

#### IX. ESTOPPEL IN CONTRACTS OF INSURANCE.

See *Quinlan v. Union Fire Ins. Co.*, 31 C. P. 618; 8 A. R. 376, p. 949; *Wright v. London Life Ass. Co.*, 5 A. R. 218, 5 S. C. R. 466, p. 933; *McIntyre v. National Ins. Co.*, 5 A. R. 580, p. 974; *Onnum Securities Co. v. Canada Fire Mutual Ins. Co.*, 1 O. R. 404, p. 940; *Phillips v. Grand River Farmers' Mutual Ins. Co.*, 46 Q. B. 334, p. 952; *Fire Ins. Ass. (Limited) v. Canada Fire and Marine Ins. Co.*, 2 O. R. 481, p. 972; *Russell v. Canada Life Ass. Co.*, 8 A. R. 716, p. 998; *Caldwell v. Stadcona Fire and Life Ins. Co.*, 11 S. C. R. 212, p. 965; *Royal Ins. Co. v. Byers*, 9 O. R. 120, p. 968; *National Fire Ins. Co. v. McLaren*, 12 O. R. 682; *Graham v. Ontario Mutual Ins. Co.*, 14 O. R. 358, p. 954; *City of London Fire Ins. Co. v. Smith*, 15 S. C. R. 69, p. 950; *Convincan v. City of London Fire Ins. Co.*, 15 O. R. 329, p. 971; *Horton v. Provincial Provident Institution*, 16 O. R. 382; 17 O. R. 361, p. 153; *Wymun v. Imperial Ins. Co.*, 16 S. C. R. 715, p. 939; *McIntyre v. East Williams Mutual Fire Ins. Co.*, 18 O. R. 79, p. 960; *Wells v. Supreme Court of the I. O. of Foresters*, 17 O. R. 317, p. 152; *Cockburn v. British America Ass. Co.*, 19 O. R. 245, p. 937.

#### X. MISCELLANEOUS CASES.

Defendants were a foreign insurance company doing business in Ontario and having a head office for the province in Toronto. The writ of summons was served on the local agent of the defendants' company at Ottawa:—Held, that the service was good. *Wilson v. Aethna Life Ass. Co.*, 8 P. R. 131.—Dalton, Q.C.

Appointment of trustee to receive insurance moneys for infants. See *Re Thin*, 10 P. R. 490.

Right of defendants to deduct amount of insurance money from damages assessed in actions of negligence. See *Grand Trunk R. W. Co. v. Beckett*, 16 S. C. R. 713; 13 A. R. 174; 8 O. R. 601; *Grand Trunk R. W. Co. v. Jennings*, 15 A. R. 477; 13 App. Cas. 800; *Brown v. McRae*, 17 O. R. 712.

## INTEREST ON MONEY.

### I. RECOVERY OF INTEREST.

1. *Generally*, 1007.
2. *From What Time*, 1008.
3. *At What Rate*, 1009.
4. *Under Insolvent Acts*—See BANKRUPTCY AND INSOLVENCY.
5. *On Bills or Notes*—See BILLS OF EXCHANGE AND PROMISSORY NOTES.
6. *On Insurance Policies*—See INSURANCE.
7. *On Costs*—See COSTS—SOLICITOR.
8. *On Judgments*—See JUDGMENT.
9. *On Mortgages*—See MORTGAGE.
10. *On Debts Barred by Time*—See LIMITATION OF ACTIONS.
11. *On Money in Court*—See PAYMENT.
12. *On Sale of Land*—See SALE OF LAND—SALE OF LAND BY ORDER OF THE COURT.
13. *On Lands Expropriated by Railway Companies*—See RAILWAYS AND RAILWAY COMPANIES.

### II. LIABILITY OF EXECUTORS AND ADMINISTRATORS FOR—See EXECUTORS AND ADMINISTRATORS.

### III. LIABILITY OF TRUSTEES FOR—See TRUSTS AND TRUSTEES.

### I. RECOVERY OF INTEREST.

#### 1. *Generally*.

Interest on arrears of annuity. See *Crone v. Crone*, 27 Chy. 425, p. 23; *Snarr v. Badenach*, 10 O. R. 131.

Interest on improvements made under a mistake in title. See *Fuwcett v. Burwell*, 27 Chy. 445, p. 896; *Munsie v. Lindsay*, 11 O. R. 520, p. 899.

The circumstances under which interest on a claim ought to be allowed or refused in the master's office considered and acted on. See *Re Ross*, 29 Chy. 385.

In an action against the sureties of an absconding assignee in insolvency on the assignee's bond a verdict was entered for \$800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed that in case of such a decision, the verdict should be entered for \$700:—Held, that the verdict was not for a debt or sum certain within R. S. O. (1877), c. 50, s. 269, and that it should not carry interest from its entry. *Woodruff v. Canula Guarantee Co.*, 8 P. R. 532.—Hagarty.

It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office. *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4.—Hodgins, *Master-in-Ordinary*.

The plaintiffs were sureties to a bank for a debt due by a company, and for which the bank held other notes as collaterals. Under a special agreement made in a prior suit, the receiver in such suit deposited the proceeds of such collaterals in such bank subject to the order of the court. The plaintiffs claimed to apply the proceeds so deposited to reduce the debt of the company, but the bank refused so to apply them without an order of court:—Held, (1) that the bank was constituted a stakeholder of such moneys, and could not so apply them without the sanction of the court: (2) that the bank was not chargeable with interest on the moneys so deposited, even though it might have made a profit on such moneys. *Hulton v. Federal Bank*, 9 P. R. 558.—Hodgins, *Master*.

Held, following *Quinlan v. Gordon*, 20 Chy. App. I., that overcharges beyond the lawful rate of interest, if paid, cannot be recovered back, or applied in reduction of a debt claimed to be due. *Ib.*

In a foreclosure suit a decree was made in November, 1877, and a final order of foreclosure obtained in June, 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed, (2 O. R. 348.) The Court of Appeal reversed this decision making an order to open the foreclosure on the usual terms of paying principal, interest and costs, including the plaintiffs' costs of opposing the petition, (10 A. R. 99):—Held, affirming the decision of the master-in-ordinary, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs as found by the decree of November, 1877:—Held, also, reversing the decision of the master-in-ordinary, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recoverable by force of the order made on the petition, which was reversed, but simply owing to the direction of the Court of Appeal. *Trinity College v. Hill*, 8 O. R. 286.—Boyd.

Interest as damages. See *Mennie v. Leitch*, 8 O. R. 397, p. 476.

A taxing officer has no authority to charge a solicitor with interest upon moneys in his hands belonging to his client. *Re O'Donohoe, A Solicitor*, 12 P. R. 612.—Armour.

Interest on charges on land paid by occupant under mistake of title. See *Munsie v. Lindsay*, 11 O. R. 520, p. 899.

See *Windsor Hotel Co. of Montreal v. Cross*, 12 S. C. R. 624, p. 495.

#### 2 *From What Time*.

Interest allowed from the time when the last call on stock became due. See *Provincial Ins. Co. v. Cameron*, 31 C. P. 523, p. 252.

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Interest on legacy. See *Toomey v. Tracey*, 4 O. R. 708.

Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered. *Wiley v. Ledger*, 10 P. R. 182.—Hodgins, *Master-in-Ordinary*.

The bond contained a stipulation that in the event of any sum being found due by M. to the bank interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty.—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank v. Springer*; *Exchange Bank v. Barnes*, 13 A. R. 390.

Held, that the defendants, a guarantee company, were liable for interest for the amount due from them from three months after the proofs of loss were delivered. *City of London v. Citizens' Ins. Co.*, 13 O. R. 713.—Ferguson.

### 3. At What Rate.

The rate of interest on certain municipal debentures was seven per cent.:—Held, that section 217 of 29-30 Vict. c. 51 has not been repealed, though marked effete in the schedule prefixed to and not re-enacted in 36 Vict. c. 48 (Ont.), and that the above rate was therefore lawful. *Scottish American Investment Co. v. Village of Elora*, 6 A. R. 628.

A pawnbroker, under Con. Stat. C. c. 61, may legally charge any rate of interest that may be agreed upon between him and the pledgor. *Regina v. Adams*, 8 P. R. 462.—Cameron.

A note dated 11th January, 1862, payable to and endorsed by one S. H., was for \$3,000 with interest at the rate of two per cent. per month till paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment:—Held, that the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John v. Rykert*, 10 S. C. R. 278. See *Grant v. Peoples' Loan and Deposit Co.*, 17 A. R. 85; 18 S. C. R. 262.

### INTERIM ALIMONY.

See HUSBAND AND WIFE.

### INTERLOCUTORY JUDGMENT.

See JUDGMENT.

### INTERNATIONAL BRIDGE COMPANY.

An information alleged that the International Bridge Company had constructed and completed the said bridge, and the same was adapted to the passage of railway trains and foot passengers; but that the defendants prevented "persons on foot to cross the said bridge, although willing and offering to pay the lawful tolls provided by the said Act," and that the defendants' intention was "to maintain the said bridge as a railway bridge only, and not as a carriage or foot bridge;" and prayed an injunction to restrain the defendants "from preventing Her Majesty's subjects from using the footway of the said bridge at their will and pleasure on the payment of lawful tolls," or preventing them from using in the same manner the footpaths thereof. The information also prayed the removal of the bridge in the event of its not being constructed in the manner contemplated in the Act of incorporation. In view of the fact that a large sum of money had been expended in the construction of the bridge so far as it was built, and which had been so built in accordance with the provisions of their Act of incorporation, the court (Blake, V. C.) allowed a demurrer for want of equity; but, in so far as the information shewed an unlawful exclusion of the public from the use of the footpaths of the bridge, the demurrer was overruled; but, under the circumstances, without costs to either party. To such an information a railway company who had become lessees of the bridge were held to be proper parties. *Attorney-General v. International Bridge Co.*, 27 Chy. 37.

The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States, across the Niagara river, which was to be as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge owing, it is said, to engineering difficulties, could not be adapted to the use of carriages and foot passengers:—Held, reversing the judgment of Spragge, C. (28 Chy. 65), that the abandonment of that portion of the work relating to foot passengers and carriages was not a public nuisance, and the Act of incorporation was not a contract with the public, but merely gave conditional powers creating correlative duties, and was permissive; and that specific performance thereof would not be enforced. *Attorney-General v. International Bridge Co.*, 6 A. R. 537.

Held, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such contract existed, had no locus standi. The work being one within the jurisdiction of the parliament of Canada, that parliament, presumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it:—Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information. *Ib.*

Held, also, that as the bridge extended beyond the limits of the province, part only being therein, it would be unavailing for the court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason also, the court would not interfere. *Ib.*

Held, that the International Bridge Company was under Canadian Act, 20 Vict. c. 227, s. 16, entrusted with a general and unqualified power of making by-laws and regulations as to the use of its bridge and the terms on which it should be used in point of payment; and that there is nothing in section 2 of the amending Act (22 Vict. c. 124), when read and construed together with the principal Act, which cuts down that power as to the regulation of the use of the bridge and as to the terms on which it may be used by railway trains. As to the reasonableness of charges, the principle is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. *Canada Southern R. W. Co. v. International Bridge Co.*, 8 App. Cas. 723; *S. C.*, 7 A. R., 226; 28 Chy. 114.

## INTERNATIONAL LAW.

I. DOMICILE—See DOMICILE.

II. FOREIGN LAW—See FOREIGN LAW.

III. EXTRADITION—See EXTRADITION.

Where the defendants in a suit reside in this country and the principal office of the plaintiffs is in England and a contract is entered into there between the parties which is to be executed in New York a suit in respect thereof may be instituted in this province. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.—Blake, 8 A. R. 416.

A., being domiciled and carrying on business in Montreal, in 1875, executed at Toronto, where he was temporarily resident, a deed entered into between B., his wife, of the first part, and himself and C. of the second part, whereby A., B. and C. covenanted that certain Ontario Bank stock, which had been bought with certain moneys received by B. after her marriage, and which were then held in the name of A. in trust for B., should be duly transferred into the names of C. and A., and that this stock, as well as a sum of \$4,000, which B. had received from her mother at the time of the marriage, and which had been put into the commercial business of A. in Montreal, should, with \$2,000, the value of some furniture received by B., be held by C. and A. in trust to invest as therein mentioned, and to permit B., during her life, to receive the

income to her own use, and after her death in trust for the children of the marriage, and in default of surviving issue over. In 1877 the bank stock was transferred in Montreal in trust pursuant to the deed. The head office of the Ontario Bank is in Toronto, but they have a stock registry in Montreal for convenience:—Held, that inasmuch as all the property settled appeared on the evidence to have become, and to have been "community property," and inasmuch as, although the bank stock must be held to have been at the time of the execution of the deed and of the transfer situate in Ontario, yet the deed not purporting to be a complete transfer of the property in the stock, but containing only a covenant to transfer, which was consummated afterwards, not in Ontario, but in Montreal, the case fell under the law of the owner's domicile, and applying that law, there was not a good transfer by the husband of the right of property in the stock:—Held, also, as to the money, that being at the time of the deed in Quebec, the validity of the transfer of it must depend on the law of that province, under which the transfer both as to wife and the children was void; for even if the wife's signing the deed amounted, as contended, to an acceptance by the children, it was only the acceptance of a promise and not of a gift: Held, on the whole case, that no property passed into the hands of the trustees by the transactions set forth. *Hughes v. Rees*, 5 O. R. 654.—Ferguson.

When the husband's domicile is in the province of Quebec, and there is no ante-nuptial settlement, the law there upon marriage makes a settlement of the property of the parties, wherever situate, including that acquired subsequently, though the ceremony of marriage may take place out of the province. This is called "community property," and it is not in the power of the husband, during the coverture, to make a gift of it, directly or indirectly, to his wife, although he is the administrator of it, and may make gifts to the children, if the gifts are properly accepted. *Ib.*

The fact that a suit for the same matter is pending in Quebec cannot be urged as a plain bar to a suit for the same cause in this province. *Ib.*

Although in an action on a mortgage of lands situate out of the province judgment of foreclosure will be granted against a defendant residing therein, such judgment merely operating in personam as an extinguishment of a personal right, yet the court will not extend the doctrine by ordering a sale of land over which it has not territorial jurisdiction, not being able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale. *Strange v. Radford*, 15 O. R. 145.—Boyd.

Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The domicile of the defendant was, at the time, in Ontario, and the drawees were also domiciled there. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York Stock Exchange, and that, as

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such, it was under the law of New York, an illegal contract and invalid.—Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario; for the contract of the drawer was to pay the money at the place where he entered into the contract, in default of the drawee paying, and the domicile of the drawer did not affect the rule as stated. *Story v. McKay*, 15 O. R. 169.—Falconbridge.

Held, per Gwynne, J., dissenting, that the comity of nations does not require the courts of this country to enforce, in favour of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land. *Canadian Pacific R. W. Co. v. Western Union Telegraph Co.*, 17 S. C. R. 151.

Held, upon the facts set out in the judgment in this case, that although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U.S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors. *McConnell v. McConnell*, 18 O. R. 36.—Robertson.

See *Hanrahan v. Hanrahan*, 19 O. R. 396, p. 909.

## INTERPLEADER.

### I. JURISDICTION OF COUNTY AND DISTRICT COURTS, 1014.

#### II. WHEN RELIEF GRANTED.

##### 1. To Sheriff, 1014.

##### 2. Other Cases, 1016.

#### III. SUMMARY DISPOSITION OF CLAIM, 1018.

#### IV. DIRECTING ISSUE, 1019.

#### V. SHERIFF'S CHARGES, 1020.

#### VI. LIABILITY OF SHERIFF, 1020.

#### VII. PRACTICE, 1020.

#### VIII. APPEALS, 1022.

#### IX. COSTS.

##### 1. Security for Costs, 1023.

##### 2. Scale of Costs, 1023.

##### 3. Other Cases, 1025.

#### X. EFFECT OF JUDGMENT, 1026.

#### XI. NEW TRIAL IN CASES OF—See NEW TRIAL.

#### XII. IN DIVISION COURTS—See DIVISION COURTS.

#### XIII. UNDER CREDITORS' RELIEF ACT—See EXECUTION.

## XIV. DIRECTING ISSUE IN APPLICATIONS TO ATTACH DEBTS—See ATTACHMENT OF DEBTS.

### I. JURISDICTION OF COUNTY AND DISTRICT COURTS.

Held, that interpleader being a proceeding in the action, a County Court judge under Rule 422, O. J. Act (See Con. Rule 41), has jurisdiction to entertain it, but in this case the judge having disposed of the matter summarily without the consent of the parties, an issue was directed. *Conlon v. Spiers*, 9 P. R. 491.—Osler. See *Straun v. Stoddart*, 12 P. R. 490, p. 1022.

The District Court of the Provisional Judicial District of Thunder Bay has jurisdiction in interpleader under R.S.O. (1887) c. 91, s. 53; for it has "the jurisdiction possessed by County Courts," which is by R. S. O. (1877), c. 45, s. 19, sub-s. 6, "interpleader matters as provided by the Interpleader Act"; and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the District Court, and not by the amount for which the recovery was had or the process issued. *Ishiter v. Sullivan*, 16 O. R. 418.—Q. B. D.

See *Barker v. Leeson*, 9 P. R. 107, p. 398; *Re Anderson and Barber*, 13 P. R. 21, p. 1018.

### II. WHEN RELIEF GRANTED.

#### 1. To Sheriff.

At the instance of a sheriff, an interpleader order was granted and issues tried to determine the rights of certain claimants to goods seized by him in execution. Previously to the order being granted, the landlord of the premises laid claim to the goods, which claim the sheriff did not mention when applying for the order.—Held, that after the trial of the issues, the sheriff was not entitled to a second interpleader to test the landlord's claim, as this should have been disposed of on the first application. *Clarke v. Farrell*, 8 P. R. 234.—Dalton, Q.C.

The sheriff seized the goods in question on the 31st day of January, 1883, and on the 1st of February was notified of a claim by an assignee of the judgment debtor (the assignee being an officer employed by the sheriff), and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th of February, and on the 13th of February the sheriff received the money arising therefrom. On the 26th of February, the sheriff informed the plaintiff's solicitors that the solicitors for the assignee forbade him to pay over the proceeds, and on the 2nd of March the plaintiff received a notice from the assignee's solicitors that they were instructed to sue him. On the 5th of March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and his affidavit, filed on the interpleader application, referred to a conversation which he had had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods, or interfere with their sale, but would contest the right of the plaintiff to the money arising from the sale, which was to

remain in the sheriff's hands. The sheriff also swore that he related what the claimants' solicitors had said to the plaintiff's solicitor. The sheriff's excuse for his delay from the 13th of February to the 5th of March was, that he did not understand that it was his duty to take the initiative:—Held, that the sheriff sold with the consent of both parties and did not, therefore, improperly exercise his own discretion, so that the contest properly arose as to the proceeds of the sale:—Held, that the delay from the 13th February to the 5th March, no opportunity of trial being lost, was not unreasonable:—Held, that the fact of the claimant being an officer in the employment of the sheriff made no difference. *Per Boyd, C.* The disposition of the court is to be more liberal in relieving the sheriff now than formerly. *Darling v. Collatton*, 10 P. R. 110.—Mr. Winchester, sitting for the Master-in-Chambers.—Proudfoot.—Chy. D.

The sheriff having seized goods of much greater value than the amount of plaintiffs' execution, which were claimed by a third party, received from the claimant the amount due on the execution in cash, and withdrew from the seizure:—Held, that the sheriff had not thereby disentitled himself to relief by interpleader. *Paris Manufacturing Co. v. Walls*, 10 P. R. 138.—Dalton, Master.

S. placed an execution in the sheriff's hands on the 11th December, and A. one on the 12th December. On the 20th December the landlord put in a claim for rent. The sale took place on the 21st, and the sum of \$1,707.06 was realized. On the 24th one H. notified the sheriff that he claimed all the money in his hands, and not to pay any over to any one else. On the 27th December the sheriff paid S. in full, and took a bond of indemnity from him:—Held, that the sheriff was not entitled to an interpleader against H. the landlord. *Adams v. Blackwell*, 10 P. R. 168.—Dalton, Master.

A mortgagee, under a mortgage which, from certain irregularities in it, was void against subsequent mortgagees or purchasers in good faith for value, took possession of the chattels mentioned in it, and secreted them. An execution was afterwards issued, and the sheriff endeavoured but was unable to seize the goods. It was alleged, and not contradicted, that the execution creditor and defendant were colluding to defeat the mortgagee's claim:—Held, that the sheriff was not entitled to an interpleader. *Ogden v. Craig*, 10 P. R. 388.—Dalton, Master.—Rose.

Where a sheriff intends to take goods under an execution, the court has jurisdiction to grant him an interpleader, but this jurisdiction will be rarely exercised, and never unless it is shewn that the property or possession in the goods is in the defendant. *Ib.*

Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. (1877), c. 66, by a sheriff under a fi. fa. goods, and he is entitled to an interpleader under section 10 of the Interpleader Act, R. S. O. (1877), c. 54, where an adverse claim to the stock is advanced. The trial of the issue was, however, stayed until after the trial of an action between the same parties attacking the conveyance from the judgment debtor.

*Brown v. Nelson*, 10 P. R. 421.—Dalton, Master.—Cameron.

Interpleader orders should be granted with extreme caution, and only after strong presumptive evidence of the goods being the debtors, which should ordinarily appear by his being in possession, by an affidavit of the belief of the sheriff, if he has such belief, and by a similar affidavit of the execution creditor. *Duncan v. Tees*, 11 P. R. 66.—Rose.

A sheriff, instructed by the execution creditor went to the store which had been the defendants, found the claimants in possession and their name over the door, and notwithstanding this, and without further inquiry made a seizure. Upon a claim to the goods being made, the sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure:—Held, that an interpleader order should not have been granted, and an order was made barring the execution creditor. *Ib.*

This order was varied on appeal by the Q. B. D. by directing the parties to proceed to the trial of an issue at the next assizes, the execution creditors to be the plaintiffs and the claimants to be defendants, and the question to be tried to be, whether at the time of the seizure the goods in question were exigible under the creditors' execution, or the execution of either of them, as against the claimants. *S. C.*, 11 P. R. 296.

See *Pardee v. Glass*, 11 O. R. 275, p. 343.

## 2. Other Cases.

Quere, whether interpleader is a proper remedy for trying the right to securities as between co-sureties. See *Trevise v. Burkett*, 1 O. R. 80.

The master-in-chambers made an order directing an interpleader issue to be tried between the plaintiff and certain attaching creditors as to the validity of the plaintiff's judgment and execution:—Held, that the order directed was warranted by section 10 of R. S. O. (1877), c. 54 (the Interpleader Act). *Leach v. Williamson*, 10 P. R. 226.—Rose.

The order provided for the trial of the question of the validity of the plaintiff's judgment as against creditors generally, and also provided that on the trial of the issue it should be open to the attaching creditors to shew that the plaintiff's judgment was void as against the attaching creditors for fraud or as being a preference:—Held, that these provisions were warranted by section 3, R. S. O. (1877), c. 54. *Ib.*

Held, following *Leach v. Williamson*, 10 P. R. 226, that attaching creditors may be "claimants" within the meaning of the Interpleader Act. Although *Macfie v. Pearson*, 8 O. R. 745, in effect decides that the execution creditor, who has seized before process against the defendant as an absconding debtor has issued, is to be paid in priority, yet that decision having been rendered by consent in a summary way, is not binding upon the claimants in this case, who may choose to litigate upon issues which can be car-

ried to ap-  
P. R. 220.

The plaintiff claimed from the money due on the partnership account, the plaintiff's certificate of the partnership account, and that a duplicate of the same should be issued upon his application, and that he should be allowed to pay upon this interpleader order. The plaintiff's application for money order was refused. The order was varied on appeal by the Q. B. D. by directing the parties to proceed to the trial of an issue at the next assizes, the execution creditors to be the plaintiffs and the claimants to be defendants, and the question to be tried to be, whether at the time of the seizure the goods in question were exigible under the creditors' execution, or the execution of either of them, as against the claimants. *S. C.*, 11 P. R. 296.

Where the sheriff's hands in a case upon the law on said interpleader sheriff as a where he had enable the was to receive Semble, that the nor sold within the of Canada C. R. 38.

Rent being garnishee and G., each refusing to from these full amount fore this ad an order up rent due. Court of Justice order. The entitled "H. A., application Held, that ling on the procedure is and an object

ried to appeal. *Standard Ins. Co. v. Hughes*, 11 P. R. 220.—Boyd.

The plaintiff, J. P., and one E. T., severally claimed from the defendants payment of the moneys due under a certain certificate of membership issued by the defendants to T. P. deceased, the plaintiff claiming as administrator pendente lite of T. P., J. P. claiming that the certificate had been endorsed to her by the deceased, and E. T. as administrator. It appeared that a duplicate certificate had issued to T. P. upon his alleging that he had lost the one originally issued. The defendants were always willing to pay any one who might be entitled, and upon this action being brought applied for an interpleader order in respect of the adverse claims. J. P. did not appear to answer to the application, and her claim was barred, and the money ordered to be paid to E. T. upon certain terms. Upon an appeal by E. T. from this order it was:—Held, that there was a right to interpleader upon a summary application, either under section 17, sub-section 6, O. J. Act, or under the former practice of the Court of Chancery. Rule 2, O. J. Act, does not extinguish any right to interplead that formally existed; it regulates the practice only, and enables a defendant to obtain relief upon a summary application, where formerly it would have been necessary to file a bill:—Held, also, that the defendants were entitled to their costs of the action and application, and to retain them out of the funds in their hands, and that the balance should be paid to E. T. instead of into court, as the other claimant had withdrawn, upon E. T. indemnifying the defendants against the production of the original certificate, and that the action should be stayed. *McElheran v. London Masonic Mutual Benefit Association*, 11 P. R. 181.—Proudfoot.

Where the purchaser of land voluntarily paid to the sheriff the amount of an execution in his hands in a bona fide belief that it was a charge upon the land:—Held, that a party having a lien on said land could not, under the Manitoba Interpleader Act, claim the money so paid to the sheriff as against the execution creditor, even where he had relinquished his title to the land to enable the owner to carry out the said sale, and was to receive a portion of the purchase money. Semble, that as the lands were neither "taken nor sold under execution," the case was not within the said Interpleader Act. *Federal Bank of Canada v. Canadian Bank of Commerce*, 13 S. C. R. 38.

Rent being due by A. to B., A. was served as garnishee with Division Court summonses by E. and G., each claiming part of the rent. A. refusing to pay his rent unless he was protected from these claims, he was sued by B. for the full amount of the rent in a county court. Before this action was begun, G. presented to A. an order upon him signed by B. for part of the rent due. A. applied to a judge of the High Court of Justice in chambers for an interpleader order. The affidavits on which he moved were entitled "In the H. C. J., Chy. Div., between A., applicant, and B. and others, claimants:—Held, that A. was entitled to be relieved by calling on the rival parties to interplead, under the procedure indicated by Con. Rules 1141 et seq.; and an objection to the manner of entitling the

affidavits was overruled. There was no jurisdiction in the County Court to give relief by way of interpleader in the action brought by B.; the jurisdiction in that court being limited by Con. Rules 1162 et seq. to proceedings against absconding debtors, and after judgment when execution has issued. G.'s claim might have been litigated in the County Court, and would not have been the subject of interpleader proceedings; but the order made being for a stay of the County Court action and payment into court by A. of the rent, G.'s claim should be the subject of inquiry in the High Court:—Held, also, that A.'s costs of the application should be borne by E. and G., who submitted to have their claims barred, and who had been the cause of the expense and delay, and that there should be no costs to either party of the County Court action. *Re Anderson and Barber*, 13 P. R. 21.—Boyd.

By an ante-nuptial settlement executed 25th March, 1885, made between J. C. of the first part, M. H. (the plaintiff) his intended wife of the second part, and one M. of the third part, in consideration of the intended marriage certain lands and the goods in question were conveyed and assigned to M. to hold to the use of J. C. until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators, and assigns. The marriage took place on the 27th of March, and the goods were afterwards seized by the execution creditor of the husband; the plaintiff claimed them and an interpleader issue was directed by the High Court to be tried in the County Court. At the trial it was objected that the trustee should have been the claimant and plaintiff in the issue, and on this ground judgment was given for the defendant:—Held (reversing the judgment of the court below), that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. *Schroeder v. Harnott*, 28 L. T. N. S. 702 followed. *Connell v. Hickock*, 15 A. R. 518.

See *Hewitt v. Heise*, 11 P. R. 47; *Stuart v. Grough*, 15 O. R. 66; 15 A. R. 290

### III. SUMMARY DISPOSITION OF CLAIM.

Under an execution issued by the plaintiffs, the sheriff, whilst such execution was the only one in his hands, seized certain goods of the debtor which were claimed by D., whereupon an interpleader summons was obtained by the sheriff which was argued before the chief justice of the Q. B. Division who made an order barring the claimant without any issue being directed. This order did not state that the parties consented to a summary disposal of the matter and the facts did not clearly appear. The sheriff proceeded and sold the property and made an entry under the Creditors' Relief Act. The appellants and several other creditors delivered certificates to the sheriff within the proper time, who framed a scheme for the distribution of the money as if no interpleader proceedings had been had. On appeal from him the County Court judge gave the whole fund to the plaintiffs under sub-section 4, section 3 of the Creditors' Relief Act. On appeal from such order to this court the appeal was dismissed, the court being equally

divided. Per Burton and Patterson, J.J. A. As there was a contest between the execution creditor and claimant and an adjudication in favour of the former the proceedings which took place upon the interpleader summons came within sub-section 4, section 3 of the Act, and entitled the plaintiffs to the whole proceeds of the property and the order appealed from was correct. Per Hagarty, C. J. O. The circumstances of this case do not bring it within that section and the appeal should be allowed and the moneys distributed as if no interpleader proceedings had been taken. Per Osler, J. A. The order disposing of the interpleader summons was not a proceeding under the Interpleader Act because it did not shew on its face the consent of parties to the summary disposition of the claim; but even if it was an interpleader proceeding it was not within the mischief of the Act which intended to provide only for the case where an issue has been directed. *Bank of Hamilton v. Durrell*, 15 A. R. 500.

See *Coyne v. Lee*, 14 A. R. 503, p. 1021.

#### IV. DIRECTING ISSUE.

An interpleader order had been made, which directed the sheriff to pay over to the claimants \$1,000 and interest, the proceeds of the sale of goods claimed by them under a chattel mortgage, which was not impeached. The order directed an issue as to a second chattel mortgage held by the claimants, the execution creditors contending that it was fraudulent. A. & Co. obtained judgment in a Division Court against the execution debtors after the date of the order, and moved to vary it by directing that the amount of their execution should be retained by the sheriff out of the \$1,000, until garnishee proceedings against the debtor in the Division Court, in which the sheriff was garnishee, should be disposed of:—Held, that the moneys in the sheriff's hands belonged to the claimants, the chattel mortgagees, as on a sale of the mortgaged chattels by them as mortgagees: that there being no want of bona fides in the mortgage, no want of formalities in it would make it invalid as between the parties to it, so as to entitle the debtor to claim the money secured by it, or to entitle A. & Co. to claim it under their execution. *Macfie v. Hunter*, 9 P. R. 149.—Cameron.

Upon an interpleader application by the sheriff of York there were two execution creditors, viz., the Merchants' Bank of Canada and one James Walsh, and three claimants, viz., one Clarkson, the assignee of the execution debtor, for the general benefit of creditors, the Imperial Bank of Canada and the Standard Bank of Canada, both claiming under warehouse receipts. The master in chambers directed the trial of four issues, viz., (1) The Merchants' Bank and Clarkson, plaintiffs, against the Imperial Bank, defendants; (2) The Standard Bank, plaintiffs, against the Merchants' Bank and Clarkson, defendants; (3) The Standard Bank, plaintiffs, against the Imperial Bank, defendants; (4) The Merchants' Bank, plaintiffs, against James Walsh, defendant (as to priority of execution). Wilson, C. J., varied the order of the master by substituting for the above first three issues a single issue, viz., the Merchants' Bank plaintiff v. the Imperial Bank, Standard

Bank and Clarkson, defendants. *Merchants' Bank v. Herson*, 10 P. R. 117.

See *Barker v. Leeson*, 9 P. R. 107, p. *infra*; *Leech v. Williamson*, 10 P. R. 226, p. 1016; *Standard Ins. Co. v. Hughes*, 11 P. R. 220, p. 1017; *Duncan v. Tees*, 11 P. R. 66, 296, p. 1018.

#### V. SHERIFF'S CHARGES.

The gross proceeds of a sale of goods in an interpleader matter, should be paid by the sheriff into court without deducting anything for his expenses. *Ontario Bank v. Revell*, 11 P. R. 249.—Dalton, Master.

After an interpleader order is made at the instance of a sheriff, the special jurisdiction of the court under the Act relating to interpleading arises, by which the writ of execution, as such, ceases to operate, and the sheriff in selling the goods seized thereunder, acts not for the execution creditor but for the court under the interpleader order. Where, therefore, a sheriff, under such circumstances, sold goods which were found by the event of an interpleader issue not to have been the goods of the execution debtor, but of the claimant, and paid the proceeds into court less his charges for possession money and expenses of sale, etc.:—Held, that he was not liable to refund to the claimant the amount deducted for such charges. The claimant's remedy is to recover the amount of such charges from the execution creditor, which he can do in a summary way. The decision of Proudfoot, J., 12 P. R. 246, reversed. *Reid v. Murphy*, 12 P. R. 338.—Chy. D.

#### VI. LIABILITY OF SHERIFF.

Liability of sheriff to attachment for disobedience of interpleader order. See *Maclean v. Anthony*—*Slater v. Anthony*, 6 O. R. 330.

#### VII. PRACTICE.

Held, that in case of interpleader by a sheriff between two claimants, one a plaintiff in a Superior Court suit, the other a plaintiff in a County Court suit, the application for an interpleader order was properly made in the Superior Court, although the seizure was made under the County Court writ before the Superior Court writ came into the sheriff's hand. *Strange v. Toronto Telegraph Co.*, 8 P. R. 1.—Dalton, Q. C.

In an interpleader issue the claimant claimed under his purchase from the chattel mortgagee, and the issue was found against him:—Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the court. *Barker v. Leeson*, 1 O. R. 114.—Boyd.

Where there has been a trial by jury in an interpleader issue directed from the Chancery Division, an application for a new trial must be made to the Divisional Court, and not to a single judge. *Cole v. Campbell*, 9 P. R. 498.—Boyd.

Where, after judgment in an action in the Common Pleas Division, an issue on a garnishee application was directed to be tried under Rule 373, O. J. Act (Con. Rule 39), by a County

*Merchants*

7, p. *infra*;  
s. p. 1016;  
R. 220, p.  
1016.

Court judge and jury:—Held, that such judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochrane v. Morrison*, 10 P. R. 606.—Rose.

Semble, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue. *Duncan v. Tees*, 11 P. R. 66.—Rose.

An interpleader issue arising out of an action in the High Court of Justice, was directed to be tried in a County Court pursuant to 44 Vict. c. 7, s. 1 (Ont.):—Held, that a motion to postpone the trial of the issue should have been made in the County Court. *London and Canadian Loan and Agency Co. v. Morphy*, 11 P. R. 86.—Dalton, Master.

Remarks by Armour, J., on the inconvenience of the practice of making the execution creditor the plaintiff in interpleader where the goods when seized are in the possession of the claimant. *Winfield v. Fowlie*, 14 O. R. 102.

In an action pending in the High Court, an interpleader issue and all subsequent proceedings were transferred under the 44 Vict. c. 7, s. 1 (Ont.), to the county court of Middlesex. By a subsequent order made on consent, the trial of such issue was withdrawn from Middlesex, and a special case was agreed on, and the venue changed from Middlesex to York, where the special case was argued:—Held, (per Patterson and Osler, J.J.A.), that in strictness the appeal should be quashed. The transfer to the Middlesex County Court was final, and there was no jurisdiction under the statute or otherwise to transfer the issue or any part of it, or to change the venue to any other County Court. The proceedings in the County Court of York could therefore only be regarded as a summary trial by consent from which no appeal lay. *Coyne v. Lee*, 14 A. R. 503.

After delivery of an interpleader issue a party to it may take out a precept order for production by the opposite party. Such order should be issued and the record passed in the principal office of the court in Toronto, as no locality is pointed out by the usual proceedings in interpleader. *Dominion S. & I. Co. v. Kilroy*, 12 P. R. 19.—Dalton, Master.

A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained he has the ordinary rights of solicitors as in other contested cases. *Hackett v. Bible*, 12 P. R. 482.—Boyd.

Where solicitors properly representing the claimant and the execution creditors in an interpleader made an arrangement by which \$441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both the solicitors, in good faith distributed \$441 among the creditors entitled, and paid only the balance into court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended:—Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting upon it; and it made no difference that the interpleader order was a con-

sent order, for it was an interlocutory order, and the variation did not affect third parties. *Id.*

A local judge in whose county the proceedings in an action out of which an interpleader arose were carried on, and who himself made the interpleader order, has power to make an interlocutory order in the issue thereby directed. *Coulson v. Spiers*, 9 P. R. 491, followed. *Sicain v. Stoddart*, 12 P. R. 490.—Galt.

See *Canadian Bank of Commerce v. Tasker*, 8 P. R. 351, p. 1025; *Barker v. Leeson*, 9 P. R. 107, p. 398; *Duncan v. Tees*, 11 P. R. 66, 296, p. 1016; *Connell v. Hickock*, 15 A. R. 518, p. 1018; *Re Anderson and Barber*, 13 P. R. 21, p. 1018.

#### VIII. APPEALS.

Appeal to judge in chambers from master's decision as to costs. See *Christie v. Conway*, 9 P. R. 529, p. 1025.

An interpleader issue arising out of an action in the Chancery Division of the High Court of Justice was sent to a County Court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7 (Ont.), rather than under the interpleader jurisdiction of the old Court of Chancery; and that being so, that a Divisional Court of the High Court of Justice had no jurisdiction to hear an appeal from the judgment of the County Court on such issue, and that such appeal should have been to the Court of Appeal under R. S. O. (1877) c. 54, s. 23. *Close v. Exchange Bank*, 11 P. R. 186.—Chy. D.

A motion to quash an appeal to this court from the judgment of Ferguson, J. (9 O. R. 314), upon the trial of an interpleader issue, upon the ground that the decision was interlocutory, and not appealable under section 35, O. J. Act, was dismissed without costs, the members of the court being divided in opinion. Per Hagarty, C. J. O., and Osler, J. A.—The decision in question was an interlocutory order within the meaning of section 35, O. J. Act, and one from which there would have been no relief before the passing of the O. J. Act by a direct appeal to this court; and section 35 precludes such an appeal under the O. J. Act, though there is the right to have the order reheard by a Divisional Court, and an appeal lies from the order on rehearing, which is not less interlocutory than the order at the trial, because an appeal lay in such case before the O. J. Act. Per Burton and Patterson, J.J. A.—The decision is a final adjudication on the question of property, and is only interlocutory in the sense of being a step in the interpleader proceedings which, as a whole, are interlocutory with relation to the original action. But an appeal lay before the Judicature Act from the decision of an interpleader issue notwithstanding its interlocutory character. Therefore, this decision being the decision of a judge in court is appealable under section 37 and is not within the restriction of section 35. Per Curiam.—Rule 510 does not give a right of appeal from the decision in question, for it is in terms limited to the trial of actions, and cannot be extended to the trial of interpleader issues. Quære, per Patterson, J. A., whether the term "inter-



locutory" in section 35 is not used in the same sense as in 45 Vict. c. 6, s. 4 (Ont.), as denoting the character of the decision, and not the stage at which it is pronounced. *McAndrew v. Barker*, 7 Chy. 701, discussed. On appeal to the Supreme Court it was:—Held, that an interpleader issue to try the title to property taken under execution on a final judgment in the suit in which it is issued is not an interlocutory order within the meaning of that expression in section 35 of the Judicature Act, or if it is it is such an order as was appealable before the passing of that Act and in either case it is appealable now. *Whiting v. Hovey*, 12 A. R. 119; *S. C.*, *sub nom.* *Hovey v. Whiting*, 14 S. C. R. 515.

The High Court of Justice has no jurisdiction, by virtue of R. S. O. (1887) c. 91, s. 56, sub-s. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in the District Court in an interpleader issue. *Isbiater v. Sullivan*, 16 O. R. 418.—Armour.

#### X. COSTS.

##### 1. Security for Costs.

Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her. *Mullin v. Pascoe*, 8 P. R. 372.—Dalton, Q. C.

Section 10 of the Interpleader Act, R. S. O. (1877) c. 54, does not place a sheriff in a more advantageous position than an ordinary suitor, and the fact that a claimant is a married woman and in financial straits, is not a ground for ordering security for the sheriff's costs. *Sweetman v. Morrison*, 10 P. R. 446.—Boyd.

Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 (Con. Rule 945) to order security for costs but:—Sembles, owing to there being no rule in Ontario similar to the English Rule 864 (1883), there is no power to make such an order in an interpleader issue. *Belmont v. Aynard*, 4 C. P. D. 352, and *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539, discussed. *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121.—Dalton, Master. But see next case.

A party to an interpleader issue may be ordered to give security for costs. The dictum of the master-in-chambers, in *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121, not approved. *Williams v. Crosling*, 3 C. B. 956, followed. *Swain v. Stoddart*, 12 P. R. 490.—Galt.

In an issue between a judgment creditor and a garnishee as to the liability of the latter to the judgment debtor:—Held, that there was power to order security for costs. The refusal of the solicitor for the judgment creditor to disclose his client's place of abode was not sufficient evidence of his living out of the jurisdiction to support such an order. *Edwards v. Edwards*, 12 P. R. 593.—Ferguson.

##### 2. Scale of Costs.

Several executions from different county courts having been placed in the sheriff's hands:—Held,

on an interpleader application to the superior court, that all costs, including those of the sheriff, should be taxed on the county court scale. *Masuret v. Lansdell*, 8 P. R. 57.—Dalton, Q. C. See next case.

In an interpleader matter where several writs were placed in the sheriff's hands, one from a county court, the others from the superior courts, a successful claimant was held entitled to superior court costs, as against the county court execution creditor:—Held, also, that where all the writs are from county courts, the sheriff is entitled to county court costs only; but a successful party to the issue is entitled to superior court costs. *Masuret v. Lansdell*, 8 P. R. 57, remarked upon and modified. *Phipps v. Beamer*, 8 P. R. 181.—Dalton, Q. C.

An execution for \$105, issued from the Chancery Division, and certain goods were seized, which the plaintiff herein claimed, but on an interpleader issue he failed to establish his claim:—Held, that costs on the lower scale only should be taxed by the successful party to the issue. The effect of Rule 2, O. J. Act, is to apply to all divisions the practice which existed as to interpleader in the former Common Law Courts, plus the special power conferred on these latter courts by 44 Vict. c. 7 (Ont.). And all interpleader issues involving under \$400, in whatever division arising, are now to be disposed of by reference to county courts, and costs awarded according to 44 Vict. c. 7, s. 3 (Ont.). The judge who settles the question of these interpleader costs may direct what scale shall be followed. *Beatty v. Bryce*, 9 P. R. 320.—Dalton, Master.—Boyd. See the two next cases.

Where execution issued out of the High Court of Justice, C. P. D., and the sheriff under R. S. O. (1877), c. 54, s. 10, obtained an interpleader order, under which an issue between the parties was directed to be tried in the County Court, under 44 Vict. c. 7 (Ont.):—Held, that the sheriff was entitled to his costs under the interpleader order to be taxed on the scale of the court out of which the process under which he seized the goods issued. Semble, that the parties to the issue should also have their costs prior to the order directing the issue on the superior court scale. *Beatty v. Bryce*, 9 P. R. 320, explained. *Arkell v. Geiger*, 9 P. R. 523.—Cameron.

Under an execution issued from the Queen's Bench Division, a sheriff seized certain goods, some of which, valued at \$110, were claimed by the plaintiff. The master-in-chambers, on the application of the sheriff, directed an interpleader issue in the Queen's Bench Division, reserving the question of costs, which he subsequently directed to be taxed on the County Court scale following *Beatty v. Bryce*, 9 P. R. 320:—Held, (1) That the master's discretion, exercised under the jurisdiction derived from R. S. O. (1877), c. 39, s. 29, and Rule 420, O. J. Act (Con. Rule 30), is open to review by an appeal to a judge in chambers, under Rule 427 O. J. Act (Con. Rule 846). (2) That the scale of costs after the issue on an interpleader, must be determined by the scale applicable to the forum in which the issue has to be tried, and before the issue, on the scale of the court

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to which the sheriff is compelled to resort to obtain relief. *Beatty v. Bryce*, 9 P. R. 320, not followed. *Christie v. Conway*, 9 P. R. 529.—Cameron.

### 3. Other Cases.

A sheriff having made a seizure of goods under a writ of execution, which seizure the execution creditor had not specially directed, and a claimant to the goods having appeared, the execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff, the execution creditor abandoned his claim:—Held, that the execution creditor might abandon at that stage of the proceedings without costs, and no order was made as to the costs of the sheriff. *Canadian Bank of Commerce v. Tasker*, 8 P. R. 351.—Osler.

A successful party in an interpleader issue moving for an order barring the execution creditors, having given the sheriff notice of the motion, was ordered to pay the sheriff's costs of appearing on the motion, for such notice is unnecessary. *O'Brien v. Bull*, 9 P. R. 494.—Dalton, Master.

Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the execution creditors that some of the goods seized amounting to one-sixth of the total value were not covered by the mortgage:—Semble, although the mortgagee was entitled to the general costs of the issue, a deduction of one-sixth should be made in respect of the goods as to which he failed. *Segsworth v. Meriden Silver Plating Co.*, 3 O. R. 413.—Boyd.

Held, on the facts stated in the special case, that the plaintiff and defendants should each pay their own costs of the interpleader, and each one moiety of the costs of the railway company and of the sheriff. *McLaren v. Canada Central R. W. Co.*, 10 P. R. 328.—Dalton, Master.

On appeal by a sheriff from the order of the master-in-chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by the claimant, in an interpleader for a final order barring the execution creditor for default in giving security for costs, as directed by the order granting the interpleader:—Held, that the sheriff was properly served with notice of such motion, and was entitled to his costs thereof. *Gray v. Alexander*, 10 P. R. 358.—Osler.

When a writ of fi. fa. goods is placed in a sheriff's hands, and special directions are given to him to seize particular goods, though not in contemplation of an adverse claim, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's and claimant's costs. *VanStaden v. VanStaden*, 10 P. R. 428.—Osler.

Where the special directions were sworn to on one side and denied on the other, it was:—Held, that the sheriff must be assumed to have acted only under the writ, without such directions, and an appeal from the master's order refusing costs to the sheriff was dismissed, but without

costs, as the affidavit in denial contained impertinent and scandalous matter. *Id.*

A sheriff had seized goods under writs of fi. fa. in his hands, when the goods were claimed by a chattel mortgagee. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into court, which was done:—Held, upon a liberal construction of section 35 of 49 Vict. c. 16 (Ont.), that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to their costs of the interpleader as "costs of the execution" if they failed to recover them from the claimant. *Levy v. Davies*, 12 P. R. 93.—Dalton, Master. But see also *Reid v. Gowans*, 13 A. R. 501.

A banking corporation, one of several execution creditors made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant, in the event of the latter not succeeding in the issue:—Held, that the corporation was not, under these circumstances, liable to contribute to the costs of the issue; but, nevertheless, was properly made a party to the issue, and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods. *Dundas v. Darvill*, 12 P. R. 347.—C. P. D.

See *McElheran v. London Masonic Mutual Benefit Association*, 11 P. R. 181, p. 1017; *Anderson and Barber*, 13 P. R. 21, p. 1018.

### X. EFFECT OF JUDGMENT.

See *Farrow v. Tobin*, 10 A. R. 69, p. 1089.

## INTERPRETATION OF WORDS AND TERMS.

See WORDS AND TERMS.

## INTERROGATORIES.

See EVIDENCE.

## INTESTATE.

I. ADMINISTRATION OF ESTATES OF—See EXECUTORS AND ADMINISTRATORS.

II. STATUTE OF DISTRIBUTIONS—See DISTRIBUTION OF ESTATE.

III. ESCHEAT—See ESCHEAT.

## INTIMIDATION.

See DURESS—PARLIAMENTARY ELECTIONS.

Injunction to restrain intimidation of workmen. See *Hynes v. Fisher*, 4 O. R. 60, 78, p. 921.

## INTOXICATING LIQUORS.

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## II. CANADA TEMPERANCE ACT.

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2. *Liability of Purchaser*, 1028.
3. *Localities Affected*, 1029.
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1. *Application of*, 1051.
2. *By-laws and Resolutions Relating to Taverns and Shops*.
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## V. SALE OF LIQUOR NEAR PUBLIC WORKS, 1062.

## VI. SALE OF LIQUOR OR TREATING AT ELECTIONS—See PARLIAMENTARY ELECTIONS.

## II. CANADA TEMPERANCE ACT.

1. *Operation of Statutes*.

On an application to quash a conviction under the Temperance Act, 1878:—Held, that the adoption of the Act is on the day of polling. *Regina v. Halpin*—*Regina v. Daly*, 12 O. R. 330.—Galt.

The information and conviction were drawn up for an offence against the Canada Temperance Act, 1878, while the Revised Statutes of Canada were in force before and at the time the information and proceedings thereon were had. An offence was proved to have been committed both before and after the revised statutes came into force:—Held, that the charge as laid and proved must be treated as if under the original Act, which by 49 Vict. c. 4, s. 7 (Dom.), was not absolutely repealed so as to affect any penalty, etc., incurred before the time of such repeal. *Regina v. Durnion*, 14 O. R. 672.—Wilson.

The effect of the revision of the Statutes of Canada, brought into force by Royal Proclamation, March 1st, 1887, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity, and the adoption of the Canada Temperance Act, 1878, by municipalities prior to that revision, has not been changed or interfered with by it. The alterations made in the phraseology of the Act by the revision are not vital, and do not materially change its character or effect. *License Commissioners for Frontenac v. County of Frontenac*, 14 O. R. 741.—Boyd.

2. *Liability of Purchaser*.

The provisions of 32 & 33 Vict. c. 31 (Dom.), apply to the Canada Temperance Act, 1878, except in so far as the provisions of the latter

Act show that they were not intended to apply thereto:—Held, that a buyer of liquor cannot in respect of a sale thereof made to him, be regarded in point of law as an aider, abettor, counsellor, or procurer, so as to come within section 15 of 32 & 33 Vict. c. 31 (Dom.), and render that section applicable to an offence under section 99 of the Canada Temperance Act, 1878. A conviction of a buyer of liquor as such aider, etc., was therefore quashed. *Regina v. Heath*, 13 O. R. 471.—Armour.

### 3. Localities Affected.

Defendant was, in the village of Parry Sound, convicted by the stipendiary magistrate for the District of Parry Sound for a sale in the township of Humphrey of intoxicating liquor contrary to the Canada Temperance Act, 1878:—Held, that the township of Humphrey was within the territorial limits of the county of Simcoe, and that the Canada Temperance Act being in force in the County of Simcoe, was in force in the township of Humphrey. *Regina v. Shavelear* 11 O. R. 727, *infra*, qualified. *Regina v. Monteith*, 15 O. R. 290.—Q. B. D.

The Canada Temperance Act can have no operation where the Indian Act is in force. *Re Metcalfe*, 17 O. R. 357.—Boyd.

See *Regina v. Higgins*, 18 O. R. 148, p. 1033.

### 4. Submission to Electors.

#### (a) Generally.

The defendant was convicted of having sold intoxicating liquors on 16th December, 1884, at the township of Oakland, in the county of Brant, being the day on which the vote for the passage of the C. T. Act, 1878, for the county of Brant was taken. The townships of Oakland and Burlington, in the county of Brant, had been for the purposes of Dominion elections separated from the county of Brant and annexed to the adjoining county:—Held, that the word "county," as used in the Canada Temperance Act, 1878, means county for municipal and not for electoral purposes. *Regina v. Shavelear*, 11 O. R. 727.—Q. B. D. See *Regina v. Monteith*, 15 O. R. 290, *supra*.

Certain portions of the county of Brant consist of Indian lands, and the sale of liquor in those lands is regulated by the Indian Act of 1880, and amendments thereto:—Held, under the eighth objection to the conviction—that it did not appear that the votes of the electors on the Indian lands in the county were taken upon the petition for the Act, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it—the present proceedings did not properly bring the matter before the court. *Regina v. Shavelear*, 11 O. R. 727.—Q. B. D.

Held, that Indian electors resident in the township of Tuscarora, in the county of Brant, being an Indian reserve, had no right to vote upon the question of repeal of the Canada Temperance Act in that county. Semble, that *J. S. O.* (1887), c. 5, s. 1, is to be interpreted as meaning that the townships named shall be townships for municipal purposes, when it becomes possible to make them such, as e. g., in such a

case as the present, when the Indians become enfranchised. *R. S. C.*, c. 106, s. 12, refers to white men, but not to Indians. *Re Metcalfe*, 17 O. R. 357.—Boyd.

### (b) Scrutiny of Votes.

A judge of the county court, in holding a scrutiny of the votes polled at an election under the C. T. Act, 1878, has only to determine the majority of votes cast, on one side or the other, by inspection of the ballots used in the election, and has no power to inquire into offences against the Act, and allow or reject ballots as a result of such inquiry. (Henry, J., dubitante). *Chapman v. Rand*, 11 S. C. R. 312.

Held, affirming the judgment of Rose, J. (9 O. R. 154), that a county court judge will not be compelled by mandamus to inquire, on a scrutiny of ballot papers, under sections, 61, 62, 63, of the Canada Temperance Act, 1878, (1) as to personation; (2) bribery; (3) the status on the voters' list of persons voting. *Re Canada Temperance Act*, 12 A. R. 677.

### 5. Jurisdiction of Magistrates.

#### (a) Police Magistrates.

The defendant was convicted at the town of Perth by the police magistrate for the south riding of the county of Lanark for selling, in the said town of Perth, intoxicating liquor contrary to the Canada Temperance Act, 1878. The authority of the police magistrate was derived from a commission appointing him for the south riding of Lanark as constituted for purposes of representation in the Legislative Assembly of Ontario. The same magistrate had been a few weeks previously by a separate commission appointed for the north riding of Lanark. The town of Perth was situate wholly within the said south riding:—Held (Armour, J., dissenting), that said magistrate was not a police magistrate for the town of Perth within the meaning of the 103rd section of the Canada Temperance Act, 1878, and that Perth could not by virtue of the said commission appointing a police magistrate for the south riding of the county be held to be a town having a police magistrate. Per Armour, J., that Perth was under the circumstances a town having a police magistrate, and the said police magistrate had therefore in this case jurisdiction to convict. *Regina v. Young*, 13 O. R. 198.—Q. B. D.

The town of Paris is an incorporated town wholly within the county of Brant. The defendant was convicted before a police magistrate, whose commission was for the county of Brant, exclusive of the city of Brantford, for that she did at the town of Paris, in said county of Brant, unlawfully sell intoxicating liquor contrary to the Canada Temperance Act, 1878:—Held, that said magistrate was not, within the meaning of section 103 of the Canada Temperance Act, 1878, a police magistrate for the town of Paris, and that the town of Paris could not, by virtue of the said commission appointing a police magistrate for the county of Brant, be held to be a town having a police magistrate. *Regina v. Young*, 13 O. R. 198, followed. *Regina v. Bradford*, 13 O. R. 735.—O'Connor.

The magistrate had a commission as a police magistrate for the county of Halton and an independent and subsequent commission for the town of Oakville; and he took the information and part of the evidence at Georgetown, and then adjourned to Oakville and subsequently from Oakville back to Georgetown, where he adjudicated upon the evidence and made the conviction:—Held, following *Regina v. Riley*, 12 P. R. 98, that the magistrate had jurisdiction to sit in Oakville under his commission as police magistrate for the county, and he consequently had jurisdiction to adjourn as he did. *Regina v. Clark*, 15 O. R. 49.—Rose.

The police magistrate for the county of Brant, whose commission excluded the city of Brantford, convicted the defendant of an offence against the C. T. Act, 1878, committed at a place in the county outside of the city. The information was laid, the charge was heard and adjudicated upon, and the conviction was made in the city of Brantford:—Held, that the magistrate had no jurisdiction to adjudicate in the city of Brantford, and that what he did was not authorized by 41 Vict. c. 4, s. 9 (Ont.). *Regina v. Becker*, 15 O. R. 266.—Q. B. D.

An information was laid before K., who described himself as "one of Her Majesty's police magistrates in and for the county of Oxford;" and he was similarly described in the summons and conviction. K.'s commission was issued on the 12th January, and appointed him police magistrate in and for the county of Oxford. It was urged that Woodstock and Ingersoll were two towns in the county, and that each had, at the time of information laid, a population of more than 5,000 inhabitants, so as to have, by law, each a police magistrate, which it must be presumed was the case here, and therefore K. could not be police magistrate for the county which included these towns as there could not be more than one police magistrate for the same county. On motion to quash the conviction:—Held, that the application must be refused: that there was no judicial knowledge of the fact of such towns containing such population, and no knowledge of it by affidavit or otherwise: that even if there were more than one police magistrate, the other might have been appointed subsequently to K.; and the appointment of such other, and not K., would be void; and under R. S. C. c. 106, s. 17, the conviction must be deemed sufficient. *Regina v. Atkinson*, 15 O. R. 110.—Wilson.

On 17th November, 1886, G. was appointed by the Lieutenant-Governor of Ontario, police magistrate for the county of Brant, exclusive of the city of Brantford, during pleasure. On 14th March, 1887, an information was laid before him, as such police magistrate, charging that defendant at the township of South Dumfries, in the county of Brant, on 31st day of January, 1887, contrary to the C. T. Act, 1878, did unlawfully sell intoxicating liquors, etc., upon which G. issued, at the city of Brantford, a summons requiring defendant to appear at his (G.'s) office, "Court House, Brantford," before him, or such justices of the peace for the said county as may then be there, to answer said charge. On an application for a prohibition to prohibit G. from hearing the complaint:—Held, that under 41 Vict. c. 4, s. 9 (Ont.), and sub-

sections, G. had authority to hear, adjudicate and determine the matter of the complaint at the city of Brantford. *Regina v. Lee*, 15 O. R. 353.—Robertson—C. P. D.

Held, that G.'s commission was properly issued during pleasure; and that it was not necessary under sub-section b of section 103 of the Canada Temperance Act, that the town of Paris should be excluded from the operation of the commission; but quære, whether the police magistrate could try an offence arising within the said town. *Id.*

Held, that there was nothing in the statute which required the police magistrate to exercise the functions of his office at a police court set apart and appointed by law therefor, and under 48 Vict. c. 17, s. 4 (Ont.), G. had the right to occupy the court-room. *Id.*

Quære, whether it was intended that G. should hear the complaint, or whether there was power to give alternative jurisdiction to do so; but this was not a ground for prohibition. *Id.*

Having regard to the provisions of section 103 b. of the Canada Temperance Act, R. S. C. c. 106, as interpreted by section 2, an union of counties united for municipal purposes cannot be said to have a police magistrate by reason of one of the counties so united having one; and a conviction by a person commissioned as police magistrate for the county of Dundas for an offence against the Act, committed in that county, being one of the united counties of Stormont, Dundas and Glengarry, was quashed for want of jurisdiction. *Regina v. Abbott*, 15 O. R. 640.—Q. B. D.; See 51 V. c. 34, s. 6 (Dom.).

A person having a commission as police magistrate for the county of H., such commission not excluding the town of W., and also having a separate commission as police magistrate for the town of W., C., G., and S., respectively, all being in the county of H., convicted the defendant at W., of an offence against the Canada Temperance Act committed at W., but upon an information taken and summons issued by him at the town of C.:—Held, that having regard to the provisions of section 103 b. of the Canada Temperance Act, R. S. C. c. 106, and R. S. O. (1887) c. 72, s. 11, the magistrate had jurisdiction by virtue of his commission for the county over the offence committed at W., and had also jurisdiction by virtue thereof to take the information and issue the summons at C.; and the fact that he described himself in the information and summons as police magistrate for the town of W. did not deprive him of the jurisdiction which he had as police magistrate for the county. *Regina v. Young*, 13 O. R. 198, not followed. *Regina v. Roe*, 16 O. R. 1.—Q. B. D. See 51 Vict. c. 34, s. 6 (Dom.).

See *Regina v. Doyle*, 12 O. R. 347, p. 1044; *Regina v. Brown*, 16 O. R. 41; *Regina v. Edgar*, 17 O. R. 188, p. 1039.

#### (b) Stipendiary Magistrates.

Held, that the township of Humphrey formed part of the district of Parry Sound for certain judicial purposes, and that the stipendiary ma-



magistrate for the district of Parry Sound had jurisdiction to try offences against the Canada Temperance Act committed in that township. *Regina v. Monteith*, 15 O. R. 290.—Q. B. D.

(c) *Justices of the Peace.*

There being no evidence that any beverage of an intoxicating character had been sold and therefore no evidence to support a conviction under the Canada Temperance Act, 1878, for selling intoxicating liquors:—Held, that the magistrates had no jurisdiction, and the conviction was therefore quashed, and, under the circumstances shewn, with costs against the prosecutor. *Regina v. Beard*, 13 O. R. 608.—Robertson.

The words "being within the jurisdiction of such justice" in section 13 of the Summary Convictions Act, R. S. C. c. 178, are to be read as referring to the time when the offence or act was committed, and not to the time when the information was laid; and an order nisi to quash a conviction for an offence against the second part of the Canada Temperance Act on the ground that the defendant not being within the territorial jurisdiction of the convicting magistrate at the time the information was laid, having left such jurisdiction after the offence was committed, the magistrate had no jurisdiction to take such information nor to summon the defendant from without his jurisdiction, was discharged with costs. *Regina v. Bachelor*, 15 O. R. 641.—Q. B. D.

The defendant was convicted by two justices of the peace of the district of M., for a breach of the second part of the Canada Temperance Act for selling liquor at the village of B., in the district of M. The Act was in force in the village of B. only by reason of its being for municipal purposes within the county of V., within which county the Act was in force, and there was no evidence to shew that the Act was in force in the district of M. within which B. was situated:—Held, that the justices of the peace of the M. district had no jurisdiction to convict the defendant, for he could only be convicted by justices of the peace whose commission ran into V. county. *Regina v. Higgins*, 18 O. R. 148.—C. P. D.

See *Regina v. Ramsay*, 11 O. R. 210, p. 1037; *Regina v. Brown*, 16 O. R. 41, p. 1040.

6. *Disqualification of Magistrates.*

It was alleged that the prosecution for offences against the Act were taken before the magistrates in this case because it "was notorious that they were thorough-going Scott-Act men," and that they had said that in no case of conviction would they inflict a less fine than \$50. It was also alleged that one of the justices was a member of a local committee for prosecuting offences against the Act, but it appeared he had resigned from the committee before the Act came into force in the county:—Held, that there was no disqualifying interest in the magistrates, nor any real or substantial bias attributable to them, nor any reason why they should not lawfully adjudicate in the case. The cases relating to disqualification by reason of favour or interest in a judge or

magistrate discussed. *Regina v. Klemp*, 10 O. R. 143.—Wilson. Followed in *Regina v. Ellis*, 10 O. R. 727, p. 1037.

The calling as a witness of a magistrate sitting on the case does not of itself disqualify him from further acting in the case. *Regina v. Sproule*, 14 O. R. 375.—C. P. D.

Upon a motion to quash a conviction by a police magistrate for a second offence against the Canada Temperance Act:—1. It was contended that a magistrate had a disqualifying interest in the prosecution, because he had employed and paid agents to secure convictions under the Act, and because he was a strong temperance advocate, with an alleged bias in favour of the prosecution in cases under the Act. It was not shewn that the magistrate was interested or engaged in promoting or directing the prosecution of this offence, or defraying the expenses of it, or paying agents for evidence to be given upon it:—Held, that it was not to be inferred from anything alleged to have been done by the magistrate in other prosecutions, that the same was done by him in this; and that the statements were of too loose and vague a character to support a finding that the magistrate was disqualified from sitting. *Regina v. Brown*, 16 O. R. 41.—Q. B. D.

At the hearing the defendant attempted to shew by witnesses that the magistrate had a disqualifying interest in the case, but the magistrate refused to admit such evidence:—Held, that the evidence was inadmissible, and, even if admissible, the rejection of it would not afford ground for quashing the conviction. *Regina v. Sproule*, 14 O. R. 375, not followed. *Id.*

7. *Informations.*

(a) *Amendment of.*

Held, that an information which includes the three distinct offences of keeping for sale, selling, and bartering, intoxicating liquors, which are prohibited by section 90 of the Canada Temperance Act, 1878, contravenes 32-33 Vict. c. 31, s. 25, which provides that every information shall be for one offence only:—Held, that such information may be amended by striking out all the offences charged except one; and that such an amendment may be made after the case has been closed and reserved for decision. *Regina v. Bennett*, 1 O. R. 445.—Cameron.

An information was laid against the defendant on 28th December, for having on 25th December sold intoxicating liquor, in violation of the Canada Temperance Act, 1878. Upon a search made, intoxicating liquor was found on the premises on 1st January, 1883, in the bar of the hotel. On this evidence the information was amended at the hearing on the 5th January, so as to charge the keeping and not the selling. The defendant was present at the amendment, and objected to it, but waived an adjournment and entered upon his defence. The magistrate having found the defendant guilty, drew up a conviction for keeping intoxicating liquor, which was returned to the clerk of the peace, and filed on 17th January, 1883. On the 27th January, 1883, he drew up a second conviction, the same in all respects as the first, with the exception

that it was for keeping for sale intoxicating liquor. This was also returned and filed:—Held, that he had power to draw up and return the second conviction, which was warranted by the evidence set out in the report of the case:—Held, also, that there was no variance between the evidence and the information to warrant an amendment, but that the evidence disclosed a new offence, and the amended information became in fact a new one, and the defendant, by his presence and by entering on his defence, had waived the service of a summons upon him:—Held, also, that it was no objection to the conviction that it was for keeping and selling, while the information charged the keeping only. *Regina v. Bennett*, 3 O. R. 45.—Q. B. D.

Held, in this case that there was no variance between the information and conviction because the former used the expression "disposal," and the latter "sale," and that if there had been, an amendment of the information would have been made under sections 116, 117, 118 of the Canada Temperance Act, 1878. *Regina v. Hodgins*, 12 O. R. 367.—Wilson.

There was an amendment of the original information by changing the date of the offence from the 10th to the 23rd of February, and the parties agreed that the evidence taken should stand for the purposes of the amended charge instead of having a needless repetition of it:—Held, that this course was unobjectionable. The defendant's application for a certiorari was refused, with costs. *Regina v. Hall*, 12 P. R. 142.—Boyd.—Q. B. D.

#### (b) Other Cases.

Section 91 of the "Liquor License Act, 1883," 46 Vict. c. 30 (Dom.), amended by 47 Vict. c. 32, s. 16 (Dom.), applies only to localities in which the C. T. Act, 1878, is not in force. In this case, the information was for selling liquor, and the conviction was for "selling intoxicating liquor and having hotel appliances in the barroom and premises":—Held, that even if a double offence had been charged in the information the magistrate had power to drop one and proceed on the other; but that in this case a second offence under section 118 of the Canada Temperance Act was not embraced in the words used. *Regina v. Klemp*, 10 O. R. 143.—Wilson.

An information under the "Scott Act" can be laid before one justice, although two must try the case. *Ib.* But see next case.

It is imperative, under section 105 of the Canada Temperance Act, 1878, that an information thereunder be laid before two justices, and that they both be named in the summons. *Regina v. Ramsay*, 11 O. R. 210.—Galt.

Held, following *Regina v. Ramsay*, 11 O. R. 210, that a conviction under the Canada Temperance Act, 1878, upon an information laid before one magistrate only, was bad, and must be quashed. *Regina v. Johnson*, 13 O. R. 1.—O'Connor. But see *Regina v. Durnion*, 14 O. R. 172, p. 1037; *Regina v. Sproule*, 14 O. R. 375, p. 1037; *Regina v. Collins*—*Regina v. Gontais*, 14 O. R. 613, p. 1037.

Informations should be drawn with care so as to specify that the offence is against the second

part of the Canada Temperance Act. *Regina v. Edgar*, 15 O. R. 142.—Ross.

Quere, whether the defendant could object to the regularity of the information and summons, he having appeared in obedience to the summons, and pleaded not guilty. *Regina v. Roe*, 16 O. R. 1.—Q. B. D.

An information for an offence against the Canada Temperance Act charged that it was committed "within the space of three months last past," and did not state that the Act was in force in the place where the defendant was alleged to have committed the offence. No objection to the jurisdiction was taken before the police magistrate who tried the defendant; the defendant appeared, submitted to the jurisdiction, was called as a witness for the prosecution, gave evidence as to the offence alleged against him, and was convicted. The conviction shewed that the Act was in force where the offence was alleged to have been committed:—Held, that it was no objection to the information that it did not state the particular date of the offence, or, under the above circumstances, that the Act was in force in the place where it was alleged to have been committed; in any case these defects in the information were mere irregularities and were cured by R. S. C. c. 178, s. 87. *Regina v. Collier*, 12 P. R. 316.—MacMahon.

See *Regina v. Kennedy*, 10 O. R. 396, p. 1044.

#### S. Summons and Service.

When the information was amended so as to become, in effect, a new one, the defendant, by appearing and entering upon his defence and giving evidence thereby waived the necessity for a summons. *Regina v. Bennett*, 3 O. R. 45.—Q. B. D.

Defendant was steward of a "social club" in Walkerton. The members were elected by ballot, and upon paying an entrance fee of \$1 and subscription of \$25 per month, were entitled to use the club-room and buy from the steward spirituous liquors. The members were not responsible for goods ordered or for any general expenses. An information was laid against defendant on 10th September, 1885, for an offence against the second part of the Canada Temperance Act, 1878, and on the 21st September, 1885, he was, about 4 p.m., served with a summons to appear at 8.30 a.m. next day, before two magistrates. On the 22nd day of September informations were, in two other cases, laid against him for similar offences, and he was in each, at 8.15 a.m., served with a summons to appear before the magistrate at 9 a.m., that day. When the magistrates' court met the first case was partially gone into, and before it was closed the prosecution asked the magistrates to take up the second and third cases. The defendant stated that he had not understood what the summonses meant, and by advice of counsel he refused to plead. The magistrates entered a plea in each case of not guilty, and went on with both cases. The evidence in both showed that the offences charged in each case occurred on dates different from those laid in the information. The magistrates amended the dates in the information. The defendant and his counsel were in court all the time awaiting completion of the evidence in the first, but refused in any

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way to plead or to take part in the second and third cases, or to ask adjournment thereof. The magistrates, after taking all the evidence therein, at request of defendant, adjourned the first case, and in the second and third cases convicted the defendant of the offences as charged in the amended informations. It was shown by affidavits that the magistrates were willing in these cases, had defendant pleaded, to adjourn after taking the evidence of the witnesses present. There were also affidavits shewing that the magistrates had been before the "Scott Act" interested in promoting prohibition:—Held, that the proceedings were contrary to natural justice, as the summonses were served almost immediately before the sittings of the court which defendant was called to attend. The convictions were therefore quashed, with costs against the complainant. *Regina v. Eli*, 10 O. R. 727.—O'Connor.

Where a summons stated that an information had been laid only before the justice who signed it, and yet called upon the defendant to appear before another named justice as well:—Held, that the justices had no jurisdiction, and that the defendant's appearing before them did not confer it. *Regina v. Ramsay*, 11 O. R. 210.—Galt. See the following cases.

The omission of the names of the justices from the summons was held to be no objection as the complaint was tried before the justices before whom the information was laid. *Regina v. Ramsay*, 11 O. R. 210, distinguished. *Regina v. Sprout*, 14 O. R. 375.—C. P. D.

A summons under the C. T. Act, 1878, recited the information, which was taken by two justices, to have been "laid before the undersigned," who was one of the justices only, and required the defendant to appear before him, or before the justices who should be at the time and place named to hear the complaint:—Held, that the name of the justice who was not a party to the summons need not be stated in it. *Regina v. Ramsay*, 11 O. R. 210, not followed on this point:—Held, also, that although the summons did not conform to the facts, yet, as the two justices who took the information were both present at the hearing, and the defendant was convicted on the merits, the objection to the summons was not entitled to prevail under R. S. C. c. 178, s. 28. *Regina v. Durnion*, 14 O. R. 672.—Wilson.

The summons for an offence under the C. T. Act, 1878, stated that the defendant was charged with an offence before one justice. The information was laid before two justices, one of whom issued the summons. The defendant appeared on the summons, when two justices were present, and cross-examined the witnesses for the Crown, and called witnesses on his own behalf:—Held, that the fact of so issuing the summons was a mere irregularity, which was waived by appearing on the summons:—Held, also, that the justices before whom the case was to be tried need not be named on the summons. *Regina v. Collins*—*Regina v. Goudais*, 14 O. R. 613.—O'Connor.

See *Regina v. Clarke*. 19 O. R. 601, p. 1057.

#### 9. Proceeding in Absence of Defendant.

For the offence of selling liquor contrary to the provisions of the "Canada Temperance Act

of 1878," a summons was issued under 32 & 33 Vict. c. 31 (Dom.), made applicable to prosecutions for such an offence, but which was not personally served on the defendant, being merely left at his place of abode. The defendant did not appear before the magistrate at the time and place mentioned in the summons, whereupon the magistrate proceeded ex parte and convicted him:—Held, that the conviction must be quashed; and, as it appeared that the defendant had attempted to tamper with the informant, without costs. *Regina v. Ryan*, 10 O. R. 254.—Rose. But see next case.

A summons was issued for selling liquor contrary to the Canada Temperance Act, which was served by leaving it with defendant's wife at his hotel. The defendant not appearing at the time and place mentioned in the summons for the hearing, and on the constable proving on oath the manner in which the summons had been served, the police magistrate proceeded ex parte to hear and determine the case and convicted the defendant of the offence charged, and imposed a fine. At the time of the service of the summons the defendant was absent in the States as a witness at a trial there, and there was no evidence that his wife was informed by the constable of the purport of the summons, while defendant stated that he knew nothing of the matter until four or five days after the conviction had been made, when he received a letter from his wife stating that some magistrate's papers had been left for him at the hotel:—Held, that under section 39 of R. S. C. c. 178, there must in such cases be evidence before the magistrate that a reasonable time has elapsed between the service of the summons and the day appointed for the hearing, and there being no such evidence here, the magistrate acted without jurisdiction and the conviction must be quashed. *Regina v. Ryan*, 10 O. R. 254, overruled. *Regina v. Mabey*, 17 O. R. 194.—C. P. D.

The defendant, having been summoned for selling liquor contrary to the second part of the Canada Temperance Act, appeared with his counsel at the hearing and pleaded not guilty, when evidence was given for the prosecution justifying a conviction; but, at the defendant's request, an adjournment was granted. At the adjourned hearing, at which neither the defendant or his counsel appeared, evidence was given of the service of the summons and of the facts that transpired at the prior hearing, and certificates of two prior convictions were put in, and the identity of the defendant proved. The defendant was found guilty and convicted of a third offence against the said Act:—Held, that the defendant, having once had the opportunity to defend, could not, by his failure to appear at the adjourned hearing, defeat the administration of justice; and therefore he was properly found guilty in his absence. *Regina v. Kennedy*, 17 O. R. 159.—C. P. D.

The defendant, who was summoned to appear before the police magistrate on 14th April at F. for unlawfully selling liquor contrary to the Canada Temperance Act, instructed C. to go to W., where the police magistrate resided, to try and arrange the matter by paying such sums as should be demanded by the magistrate. On 13th April C. went to W. and settled the case by paying \$50, and at the same time C., without

authority and without the paper having been read to him, signed in defendant's name, as his agent, an endorsement on the information, which stated that the information had been read over to the defendant who pleaded guilty to the same. On 14th April the police magistrate at W., without holding any court or calling any witnesses in support of the charge, and without defendant being present, convicted him of the offence charged and fined him \$50 and costs, drawing up a formal conviction, which was returned. Subsequently he returned another conviction for the same offence, reciting that the conviction was made on 14th April at F. by defendant admitting the charge:—Held, that under the circumstances the conviction could not be supported, and must be quashed. *Regina v. Edgar*, 17 O. R. 188.—C. P. D.

See *Regina v. Clarke*, 19 O. R. 601, p. 1057.

### 11. Evidence.

#### (a) Prior Convictions.

Per Armour, J. The omission of the magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction. *Regina v. Wallace*, 4 O. R. 127.

The defendant was convicted of having sold intoxicating liquor contrary to the provisions of the Canada Temperance Act, the conviction stating that the defendant was formerly convicted of a first and second offence against said Act, and that this was the third offence. The certificate produced to prove the prior convictions simply stated that Elias Clark was convicted as for a first and second offence against the Canada Temperance Act, 1878, setting forth the dates of the convictions, but not stating the nature of the offences, or whether against the first or second part of the Act:—Held, that there is no power to punish as for a third offence unless there have been two prior convictions for offences of the same nature, and as neither the record of conviction nor the evidence shewed this, the conviction must be quashed. *Regina v. Clark*, 15 O. R. 49.—Rose.

Semble, that if the conviction were well drawn the similarity of name of the person mentioned in the certificate and the defendant would afford proof of identity. *Id.*

Section 115 of the Canada Temperance Act, which provides for the case of a previous conviction requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted," etc.:—Held, that the language of the section is peremptory; and therefore to give a magistrate jurisdiction thereunder to enquire as to a previous conviction he must first find the accused guilty of the alleged subsequent offence. In this case, which was a conviction for a second offence, this was not done; and the conviction was therefore quashed. *Regina v. Edgar*, 15 O. R. 142.—Rose.

Quere, whether a certificate of a previous conviction is sufficient *prima facie* evidence of

identity of the accused with the person of the same name so previously convicted. *Id.*

Held, that section 122, sub-section 2, of the C. T. Act, 1878, does not dispense with strict proof by production of the original record or otherwise of previous convictions where it is sought to impose the increased penalty under section 100, and that the certificate mentioned in the section can only be admitted as proof of the number of such convictions. *Regina v. Kennedy*, 10 O. R. 396.—O'Connor.

Held, that the proof of the former convictions by the certificates in this case was sufficient. *Regina v. Kennedy*, 10 O. R. 396, at p. 402, not followed. *Regina v. Kennedy*, 17 O. R. 150.—C. P. D.

The defendant was charged with selling liquor contrary to the provisions of the second part of the Canada Temperance Act, 1878. The information charged a previous conviction for an offence under the said Act, as follows: "The informant says that the said James Kennedy was previously convicted of an offence against the said Act." A certificate by the convicting magistrate of a prior conviction was put in at the trial under section 122, sub-section 2, of the Act, for the purpose of proving such previous conviction:—Held, that proof of the fact set out in the report constituted no evidence of any offence, and that the police magistrate had therefore no jurisdiction, and the right to certiorari was therefore not taken away by section 111 of the Act. *Id.*

The information specifically charged that the defendant had been previously convicted under the Act, and the affidavit filed by the defendant did not deny the facts, but only the evidence of it:—Held, that the question whether the defendant had been previously convicted or not was a matter within the jurisdiction of the magistrate, and his finding as to it was conclusive:—Held, also, that the provisions of section 115 of the Canada Temperance Act are directory only. *Regina v. Brown*, 16 O. R. 41.—Q. B. D.

#### (b) Other Cases.

The defendant swore that he did not sell any intoxicating liquors on the day charged. The recipient of some liquor sold on that day named it in his evidence for the defence, but there was no evidence that it was an intoxicating drink, the evidence for the Crown only shewing that it resembled intoxicating liquor:—Held, that there was no reasonable evidence on which to found a conviction for selling intoxicating liquor. *Regina v. Bennett*, 1 O. R. 445.—Cameron.

Held, that a magistrate cannot take judicial notice of orders in council or their publication without proof thereof by production of the Official Gazette, and therefore that a conviction was bad, which was made without such evidence that the Canada Temperance Act, 1878, was in force in the county pursuant to the terms of section 96 thereof. *Id.*

The Canada Temperance Act, 1878, does not per se make the selling of intoxicating liquor an offence; it is only after the second part of the Act has been brought into force by the proceedings

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indicated for that purpose in the first part, which proceedings cannot be judicially noticed but must be proved, and in the absence of such proof the magistrate acts without jurisdiction:—Held, therefore, that the convictions were bad, for they did not allege that the Act was in force, nor was it proved otherwise, and therefore, as the jurisdiction of the magistrate did not appear, the writ of certiorari was not taken away by section 111 of the Act. *Regina v. Walsh*, 2 O. R. 206.—Cameron.

The defendant was charged with the offence of keeping liquor for sale contrary to the provisions of the second part of the C. T. Act, 1878. Evidence was given of the finding of certain of the appliances mentioned in section 119: Held, that apart from the presumption created by that section upon the finding of such appliances, such finding was evidence of a keeping for sale, of the weight of which the magistrate was the proper judge. *Regina v. Brady*, 12 O. R. 358.—Wilson.

The fact that the Canada Temperance Act, 1878, (second part) is in force in any county, etc., must be proved like any other fact necessary to give jurisdiction. *Regina v. Elliott*, 12 O. R. 524.—Rose.

Evidence obtained under a search warrant illegally issued. See *Regina v. Doyle*, 12 O. R. 347, p. 1042; *Regina v. Walker*, 13 O. R. 83, p. 1043.

Held, that under section 123 of the C. T. Act, 1878, by which the accused is made a competent and compellable witness, he is not bound to criminate himself. *Regina v. Halpin*, 12 O. R. 330.—Galt. But see next case.

Held, that under section 123 of the C. T. Act, 1878, a defendant is compellable, when called as a witness, to answer questions, even though tending to criminate himself. Review of legislation on the subject of such evidence. *Regina v. Halpin*, 12 O. R. 330, not followed. *Regina v. Fee*, 13 O. R. 590.—Chy. D.

On a prosecution under the Canada Temperance Act, 1878, for selling liquor the information on its face purported to be laid before D. and A., two justices of the peace, and both signed the summons. The summons to the defendant was to appear before two justices of the peace for the county as may be there to answer the information. The hearing was before D. and A. It was claimed that C. and M. were members of an association for the enforcement of the Act, and that they were instrumental in laying the charge and in selecting the magistrates; and that A. was also a member of the association and had been present at a meeting thereof. At the hearing S., the license inspector who had laid the information, gave evidence in support of the charge. On cross-examination he was asked whether the license commissioners were consulted before laying the charge, whether he laid it of his own accord or had consulted with any person outside of the commissioners; his reasons for suspecting and believing that liquor was sold, etc.? Whom did he see before laying the information? Did he see A., C., or M.? Had C. and M. anything to do with the selection of the magistrates, etc.? The magistrates ruled that he was not bound to answer the questions, and he refused to do so. For the de-

fence, with alleged view of shewing the interest of A., he was called as a witness, but he refused to be sworn and give evidence. The defendant was convicted:—Held, that the justices properly refused to allow the disclosure of the source of information on which the complaint was founded, but by their refusal to allow the cross-examination of S. in reference to his communication with A. and the other alleged members of the association, and the refusing to allow A. to be sworn as a witness, the defendant was deprived of making a full defence as authorized by section 30 of 32 & 33 Vict. c. 31 (Dom.); and the conviction therefore could not be maintained, and must be quashed. *Regina v. Spraul*, 14 O. R. 375.—C. P. D.

At the trial a lease from defendant to one J. was put in and the execution proved by a witness, of two rooms in defendant's hotel, being where the bar was kept and liquor sold, but neither defendant nor J. appeared as a witness at the trial, and there was no evidence as to its bona fides:—Held, that this was a matter for the magistrate, and as he had found against it the court could not interfere. *Regina v. Alexander*, 17 O. R. 458.—C. P. D.

See *Regina v. Heffernan*, 13 O. R. 616, p. 1043.

## 12. Search Warrants.

Before any complaint or charge was made against the defendant, a search warrant was issued and executed, and evidence obtained upon his premises, under which he was convicted:—Held, that a search warrant under the C. T. Act, 1878, is a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises:—Held, however, that although the search warrant was illegally issued the evidence obtained under it was admissible against the defendant. *Regina v. Doyle*, 12 O. R. 347.—Wilson.

An information charging defendant with having sold intoxicating liquor was laid before two justices of the peace, and immediately afterwards a further information to obtain a search warrant was sworn by the same complainant before the same two justices. Thereupon a warrant to search the premises of defendant was issued under the hand and seal of one only of the two justices. Upon the search being made three bottles were found, each containing intoxicating liquor, and it was sworn that there were also found in defendant's house other bottles, some decanters and glasses, and a bar or counter. On the day following the search the complainant laid a new information before the same two justices of the peace, charging the defendant with keeping intoxicating liquor for sale. Upon the hearing the constables who executed the search warrant were the only witnesses examined, and on their evidence the defendant was convicted. Upon motion to quash the search warrant and conviction:—Held, that sections 108 and 109 of the Act were intended to provide process in rem for the confiscation and destruction of liquor in respect of which a use prohibited by the statute was being made, and not to provide a means of obtaining evidence on



which to found a prosecution or support one already begun.—Held, also, that the warrant in this case was illegal because issued by one justice of the peace only. *Regina v. Walker*, 13 O. R. 83.—Cameron.

As it appeared that in this case the search warrant had been issued, and the defendant's premises searched, for the mere purpose of possibly securing evidence upon which to bring a prosecution, the justices of the peace and the informant were ordered to pay the defendant's costs. *Ib.*

Held, that the presumption of keeping liquor for sale created by section 119 of the C. T. Act, 1878, arises only where the appliances for the sale of liquor, mentioned in the section, together with the liquor, are found in municipalities in which a prohibitory by-law passed under the provisions of the Canada Temperance Act is in force. *Ib.*

Pending a prosecution against defendant for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act, 1878, an information was laid by the prosecutor to obtain a search warrant, and upon search a barrel of beer connected with a beer-pump, and all the usual appliances for sale of liquor, were found on defendant's premises. An amendment of the charge was afterwards made altering it into an information for unlawfully keeping for sale; a new information was sworn, and defendant was convicted of the latter offence.—Held, that before a search warrant can issue under section 108 of the Act some offence against the provisions of the Act must be shown to have been committed, and that the information for a search warrant and the evidence in this case shewed such a previous offence to have taken place. *Regina v. Heffernan*, 13 O. R. 616.—Robertson.

Held, in this case that the evidence given before the police magistrate, shewed a keeping for sale, without reference to the special provisions of section 119 of the Act. *Ib.*

The fact that the search warrant was executed by the informer who was also chief constable was held not to be a ground for quashing the conviction. *Ib.*

### 13. Convictions.

#### (a) Form of.

The magistrate at the close of the case made a minute of adjudication, in which he stated that he found the defendant guilty and imposed a fine of fifty dollars and costs, to be paid by a date named, and awarded imprisonment for thirty days in default of payment. Afterwards when drawing up the formal conviction, the magistrate adopted the form I 1, in the schedule to the Summary Convictions' Act, directing that in default of payment by the day named, the penalty should be levied by distress and sale, and awarding imprisonment for thirty days in default of sufficient distress.—Held (1) that the conviction in the form I 1 was the proper conviction to be made under the combined provisions of section 107 of the Canada Temperance Act, 1878, and sections 42 and 57 of the Summary Convictions Act, and not the form I 2, to which form the minute of adjudication apparently pointed. *Regina v. Brady*, 12 O. R. 358.—Wilson.

#### (b) Amendment of.

Where a conviction did not on its face shew that the C. T. Act, 1878, was in force, the court on the merits allowed the return to be amended so as to shew jurisdiction, and for this purpose allowed a further return of the "Gazette" produced as an exhibit, but not filed. *Regina v. Elliott*, 12 O. R. 524.—Rose.

See *Regina v. Bennett*, 3 O. R. 45, p. 1033.

#### (c) Other Cases.

Quere, whether the convictions in this case were not open to objection on the ground that the information embraced more than one offence, and whether the magistrate having, in this respect, disregarded the express directions of the Act, 32-33 Vict. c. 31, s. 25, made applicable by the Canada Temperance Act, 1878, he might not be said to have acted without jurisdiction. *Regina v. Walsh*, 2 O. R. 206.—Cameron.

The convictions in this case were held bad for not alleging that the Canada Temperance Act, 1878, was in force within the county. *Ib.* See also *Regina v. Bennett*, 1 O. R. 445, p. 1040; *Regina v. Elliott*, 12 O. R. 524, p. 1041.

Held, in this case that it was no objection to the conviction that it was for keeping and selling while the information charged the keeping only. *Regina v. Bennett*, 3 O. R. 45.—Q. B. D.

The allegation in the conviction that the offence was committed between the 30th June and the 31st July, was held a sufficiently certain statement of the time. *Regina v. Wallace*, 4 O. R. 127.—Q. B. D.

Held, that the conviction in this case could not stand, inasmuch as it did not appear by the information on which it was founded what the nature of the previous offence was, or where it was committed or that it was of a similar nature to the fresh offence charged by the information. *Regina v. Kennedy*, 10 O. R. 396.—O'Connor.

Held, that the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it. *Regina v. Brady*, 12 O. R. 358.—Wilson.

The defendant was convicted before the police magistrate of the town of S., for unlawfully keeping for sale intoxicating liquor, etc., at the said town contrary to the Canada Temperance Act, 1878. The depositions were to that effect, and the evidence shewed that the liquor was found upon the premises of the defendant in the said town.—Held, that the local jurisdiction of the police magistrate sufficiently appeared. *Regina v. Doyle*, 12 O. R. 347.—Wilson.

Held, that an objection that the conviction did not shew upon its face the absence of either of the justices before whom the information was laid, nor the assent of the other of them that another justice should act or take part in the prosecution was one of form merely, against which ss. 117, 118 sufficiently provided; and, even without the aid of such sections, it was doubtful whether the objection could prevail. *Regina v. Collins*, *Regina v. Goulais*, 14 O. R. 613.—O'Connor.

It is not necessary to charge that the offence was committed through the instrumentality of a clerk, servant, or agent, as the defendant is guilty under section 100 of the Canada Temperance Act (R. S. C. c. 106), and liable to the penalties imposed, if the offence is committed by himself or any one within the class of persons above mentioned. *Regina v. Alexander*, 17 O. R. 438.—C. P. D.

Convictions should be drawn with care so as to specify that the offence is against the second part of the statute. *Regina v. Edgar*, 15 O. R. 142.—Rose.

(d) *Fine.*

Quere, whether upon a conviction for a third offence under the Canada Temperance Act, 1878, a fine of \$100 cannot also be imposed in addition to imprisonment. *Regina v. Doyle*, 12 O. R. 347.—Wilson.

The magistrate ordered the defendant to pay \$1 for the use of the hall for trying the case, and condemned the defendant, in default of distress, to imprisonment:—Held, that in ordering payment of this sum there was a clear excess of jurisdiction, and that ordering distress, etc., was a further excess, and that the matter was one of principle and not of form, and the conviction was quashed. *Regina v. Walsh*, 2 O. R. 206, commented on. *Regina v. Elliott*, 12 O. R. 524.—Rose.

It was contended that the magistrate acting under the Canada Temperance Act exceeded his jurisdiction by ordering the defendant to pay \$3 as inspector's fee, \$2 for an interpreter, and \$1 justice's costs:—Held, that the fees to be paid to witnesses in prosecutions such as this are not established by any law, and such are to be allowed, under section 58 of the Summary Convictions' Act, as to the justice seems reasonable; and an interpreter may properly be treated as a witness. *Regina v. Brown*, 16 O. R. 41.—Q. B. D.

In any case, however, the award of costs was within the jurisdiction of the magistrate, and certiorari would not therefore lie (being taken away by the statute under which the conviction was made) on the ground of want of jurisdiction; and the erroneous allowance of certain items of costs would not warrant the quashing of the conviction. *Id.*

Quere, whether there was power under the Canada Temperance Act to order defendant to pay a sum for two days' attendance of the inspector and his mileage. *Regina v. Tucker*, 16 O. R. 127.—C. P. D.

Under the Canada Temperance Act, section 100, convicting justices may inflict a reasonable penalty in excess of \$50. Remarks as to their discretion in so doing. A penalty of \$60 allowed to stand. *Regina v. Cameron*, 15 O. R. 115.—Rose.

The words "not less than \$50" and "not less than \$100," in the Canada Temperance Act, R. S. C. c. 106, s. 100, should be construed as "\$50 and no less" and "\$100 and no less;" and a summary conviction by a police magistrate for a first offence against the Act was quashed because the penalty imposed, \$75, was beyond the jurisdic-

tion of the magistrate; *Falconbridge, J.*, dissenting. *Regina v. Cameron*, 15 O. R. 115, not followed; *Simpson, qui tam, v. Pond*, 2 Curtis 502, referred to, and approved. *Regina v. Smith*, 16 O. R. 454.—Q. B. D.

A conviction for a breach of the second part of the Canada Temperance Act, imposed a fine of \$100, and directed distress on non-payment of the fine, and in default of sufficient distress imprisonment in the common jail for two months unless the fine and costs, including the costs of commitment and conveying to jail, were sooner paid:—Held, there was no power under the Act to include the costs of commitment and conveying to jail; and the conviction was therefore bad, and must be quashed. The reasoning in *Regina v. Tucker*, 16 O. R. 127, and *Regina v. Good*, 17 O. R. 725, followed. *Regina v. Ferris*, 18 O. R. 470.—C. P. D.

See *Regina v. Brady*, 12 O. R. 358, p. 1043; *Regina v. Ambrose*, 16 O. R. 251, p. 1047.

(e) *Distress and Imprisonment.*

The defendant was convicted of selling intoxicating liquor contrary to the Canada Temperance Act, 1878, upon an information charging him with keeping, selling, bartering and otherwise unlawfully disposing of liquor. He was adjudged to pay a fine of \$50, and \$5.20 costs, and in default of payment and of sufficient distress, he was adjudged to be imprisoned in the common goal at hard labour. A second record of the conviction, bearing the same date as the first, was filed, differing in some minor points from the first, and omitting the adjudication as to hard labour, and adjudging the payment of \$5.27 costs. The proceedings having been removed by certiorari:—Held, that the first conviction was bad for want of jurisdiction to impose hard labour, which was not authorized by the Act, and that the second was bad in not following the actual adjudication as to costs, which were, as shewn by the magistrate's minute, \$5.20, and not \$5.27. *Regina v. Walsh*, 2 O. R. 206.—Cameron.

Held, that when a distress warrant has been issued and returned, the truth of the return cannot be tried upon affidavits. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

It was alleged but denied, that the bailiff had refused to receive the penalty and costs:—Held, however, that his duty was to execute the warrant of commitment, and that he had no authority to receive such payment. *Id.*

The warrant of commitment which was not issued until after the return of the distress warrant, was dated the 14th June, and the distress warrant was not returned before the 17th June:—Held, that the warrant of commitment need not be dated at all if not issued too soon. *Id.*

The conviction in this case was for a second offence and imposed imprisonment in default of payment of the fine and no distress:—Held, that sections 57 and 62 of the Summary Convictions' Act, which form a part of the Canada Temperance Act, 1878, authorized imprisonment not exceeding three months in default of sufficient distress. *Regina v. Doyle*, 12 O. R. 347.—Wilson. See also, *Mechiam v. Horne*, 20 O. R. 267.

Under the Canada Temperance Act there is no power to order imprisonment at hard labour. *Regina v. Tucker*, 16 O. R. 127.—C. P. D.

Held, that the conviction in this case was bad and must be quashed, because in the award of punishment it was directed that each of the defendants should pay half the fine and costs, and that in default of distress the defendants should be imprisoned, and under such award one of the defendants, having paid his half of the fine and costs, might be imprisoned for the other's default; and this defect was not cured by sections 87 and 88 of the Summary Convictions' Act, R. S. C. c. 178. *Regina v. Ambrose*, 16 O. R. 251.—Q. B. D.

The adjudication and minute of conviction did not award distress, but provided that in default of payment forthwith of fine and costs, imprisonment, while the conviction ordered that in default of payment forthwith, distress, and in default of sufficient distress, imprisonment:—Held, following *Regina v. Brady*, 12 O. R. 358, 360-1, that the conviction was bad. *Regina v. Higgins*, 18 O. R. 148.—C. P. D. See, also, *Regina v. Hartley*, 20 O. R. 481.

Held, that it was no objection to a warrant of commitment in default of distress that it was issued prior to the expiration of a warrant of remand, provided that it was issued after the return of the distress warrant:—Held, also, that the commitment of the defendant to the gaoler of the common gaol of the county in which the defendant was convicted was proper. *Regina v. Collier*, 12 P. R. 316.—MacMahon.

#### (f) Costs.

See *Regina v. Walsh*, 2 O. R. 206, p. 1046; *Regina v. Brown*, 16 O. R. 41, p. 1045; *Regina v. Tucker*, 16 O. R. 127, p. 1045.

#### (g) Application for Release.

A prisoner having been convicted of an offence under the Canada Temperance Act, 1878, an application for her release was made under a habeas corpus, and a writ of certiorari was also issued:—Held, that it was not necessary to serve a minute of the conviction on the defendant, as section 52 of 32 & 33 Vict. c. 31 (Dom.), only requires such service in case of an order, and that defendant must take notice of the conviction at her peril. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

It was alleged that too large a sum had been charged for costs, but, held, that the conviction being regular on its face, and not shewing any excess of jurisdiction, such an irregularity (even if it existed) could not be inquired into on an application for prisoner's release. The prisoner was therefore remanded. *Ib.*

#### (h) Removal by Certiorari.

Quære, whether section 111 of the Canada Temperance Act, 1878, takes away the certiorari in all cases, or only in cases coming under section 110. *Regina v. Walsh*, 2 O. R. 206.—Cameron. But, see next case.

Held, Cameron, J., dissenting, that section 111 of the Canada Temperance Act, 1878, 41 Vict. c. 16 (Dom.), taking away the right to certiorari, applies to convictions for all offences against the preceding sections of the Act, and does not relate merely to offences against section 110. *Regina v. Wallace*, 4 O. R. 127.—Q. B. D.

Per Hagarty, C. J., and Armour, J. An erroneous finding on the evidence by the magistrate, which was all that was shewn in this case, is not such a want of jurisdiction as warrants the issue of a certiorari. *Ib.*

Per Cameron, J. There was on the facts set out in the report of the case no evidence of the commission of the offence charged in this case, and therefore the magistrate acted without jurisdiction, and a certiorari would lie. *Ib.*

Held, that the conviction not having been made by a stipendiary magistrate, etc., under section 111 Canada Temperance Act, 1878, was appealable or removable by certiorari. *Regina v. Kemp*, 10 O. R. 143.—Wilson.

In cases under the Canada Temperance Act, 1878, where a magistrate has jurisdiction, certiorari is absolutely taken away, but an appeal to the sessions still exists which, however, is itself also taken away by section 111 of the Canada Temperance Act, 1878, when the conviction is before the stipendiary magistrate. *Regina v. Ramsay*, 11 O. R. 210.—Galt.

Held, that the operation of section 111 of Canada Temperance Act, 1878, in taking away the right to certiorari, is confined to the case of convictions made by the special officials named in the section. *Regina v. Walker*, 13 O. R. 83.—Cameron.

A prisoner having been convicted of an offence under the Canada Temperance Act, 1878, an application for her release was made under a habeas corpus, and a writ of certiorari was also issued:—Held, that the writ of certiorari must be superseded, and following *Regina v. Wallace*, 4 O. R. 127, that such writ cannot issue merely for the purpose of examining and weighing the evidence taken before the magistrate. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

Held, that the defendants were not entitled to certiorari to remove the conviction on the ground that the Act was not proved to be in force in Peterborough, because on their application for the certiorari they did not shew affirmatively that the Act was not in force there. *Regina v. Ambrose*, 16 O. R. 251.—Q. B. D.

See *Regina v. Walsh*, 2 O. R. 206, p. 1041; *Regina v. Elliott*, 12 O. R. 524, p. 1045; *Regina v. Brown*, 16 O. R. 41, p. 1045; *Regina v. Kennedy*, 17 O. R. 159, p. 1040.

#### (i) Quashing.

Held, that under sections 117 and 118 Canada Temperance Act, 1878, the court, upon the motion to quash, might dispose of the case upon the merits upon the material returned with the certiorari, and that in this case the conviction, being warranted by the evidence, ought to be affirmed and the minute of adjudication amended so as to conform to it. *Regina v. Brady*, 12 O. R. 358.—Wilson.

The defence magistrate finding intoxicating provisions was contumacious. It was contumacious. It was made in sale took place of evidence undisputed. U. borough. U. —Held, that place was found, as shew defendants had borough, the *Regina v. A.*

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(j) *Costs* ag.  
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#### (k) Appeal.

The defence conviction quashed (10). —Held, that court to he therefore qu informant.

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The defendants were convicted by the police magistrate of the town of Peterborough, of selling intoxicating liquor in that town, contrary to the provisions of the Canada Temperance Act. It was contended that only the contract for sale was made in Peterborough, but that the actual sale took place in Port Hope; there was no conflict of evidence; the magistrate held upon the undisputed facts that the sale was in Peterborough. Upon a motion to quash the conviction:—Held, that the question where the sale took place was one of fact, and the magistrate having found, as shewn by the conviction, that the defendants had sold intoxicating liquor in Peterborough, the court could not review his decision. *Regina v. Ambrose*, 16 O. R. 251.—Q. B. D.

See *Regina v. Young*, 7 O. R. 88, r. 1057; *Regina v. Heffernan*, 13 O. R. 616, p. 1043; *Regina v. Alexander*, 17 O. R. 458, p. 1042.

#### (j) Costs of Quashing Convictions.

Costs against magistrates and prosecutor. See *Regina v. Walker*, 13 O. R. 83, p. 1043; *Regina v. Beard*, 13 O. R. 608, p. 1033; *Regina v. Eli*, 13 A. R. 526, *infra*.

See *Regina v. Ryan*, 10 O. R. 254, p. 1038.

#### (k) Appeal from Quashing Convictions.

The defendant who was convicted by two justices under the C. T. Act, 1878, removed the conviction by certiorari, and the same was quashed (10 O. R. 727). On appeal to this court:—Held, that there was no jurisdiction in this court to hear the appeal and the same was therefore quashed with costs to be paid by the informant. *Regina v. Eli*, 13 A. R. 526.

See *Regina v. Fee*, 13 O. R. 590, p. 856; *Regina v. McAuley*, 14 O. R. 643, p. 1062.

#### 14. Application of Fines.

Seemle, that notwithstanding Fitzgerald v. McKinlay, 21 C. L. J. 299, the informer, under C. T. Act, 1878, may be entitled to half of the fine. *Regina v. Klemp*, 10 O. R. 143.—Wilson.

The C. T. Act, 1878, came into force in the united counties of L. & G. on 1st May, 1886. On 3rd June, 1886, the Parliament of Canada passed the Act 49 Vict. c. 48, s. 2 of which provided that the governor-in-council might from time to time direct that any fine, etc., which would otherwise belong to the crown for the public uses of Canada, should be paid "to any provincial, municipal, or local authority which, wholly or in part, bore the expenses of administering the law under which such fine, etc., was enforced, or that the same should be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration." On 29th September, 1886, an order-in-council was passed directing that all fines, etc., recovered or enforced under the C. T. Act, 1878, within any city or county which had adopted the Act, which would otherwise belong to the crown for the public uses of Canada, should be paid to the treasurer of the city or county, as the case might be, for the purposes of the Act.

On the 15th November, 1886, a second order-in-council was passed directing that the first should be cancelled, and that all fines, etc., recovered or enforced under the Act within any city or county or any incorporated town separated for municipal purposes from the county, should be paid to the treasurer of the city, incorporated town, or county, as the case might be, for the purposes of the Act. The town of B. was at the time the Act was brought into force an incorporated town separated from the counties of L. and G. for municipal purposes; and between the dates of the two orders-in-council the police magistrate of the town paid to the treasurer of the counties \$750, the amount of fines recovered and enforced by him for violations of the C. T. Act, 1878, within the town:—Held, Street, J., dissenting, that, in the absence of any application by the treasurer of the counties of the money so paid to him, the town of B. was entitled to recover it from the counties. The passing of the second order-in-council was a complete revocation of the first, and the second was retroactive in the sense that it provided for the application of all fines, etc., theretofore recovered or enforced. Per Street, J.—The first order-in-council operated as a gift from the crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no legal obligation that it should be applied in any particular manner. It was a complete gift; the money was finally at home, so far as the crown was concerned, when the municipality received it, and the revocation of the order could not revoke a completed transaction, nor retract that which had been done under it. *United Counties of Leeds and Grenville v. Town of Brockville*, 17 O. R. 261.—Q. B. D.

#### 15. Expenses of Carrying out Act.

Held, that the Ontario legislation, R. S. O. (1877), c. 181, ss. 92, 93, 105, 106; 41 Vict. c. 14, ss. 6, 8; 44 Vict. c. 27, ss. 11, 12, 13, 14, 16; 47 Vict. c. 34, s. 34; 50 Vict. c. 33, which represent a body of legislation relating to municipalities brought under the Canada Temperance Act, by which ways and means are provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county, are not ultra vires the local legislature; and that the plaintiffs were entitled to recover from the defendants the expenses of carrying out the provisions of the Temperance Act in the license district of F. formed out of a part of the county of F. *License Commissioners for Frontenac v. County of Frontenac*, 14 O. R. 741.—Boyd.

The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the province, within the meaning of B. N. A. Act, s. 92, item 16, and it may be enforced through the medium of provincial officers, to be appointed and paid for according to provincial legislation under B. N. A. Act, s. 92, item 4. The legislation in question might also fall within the scope of B. N. A. Act, s. 92, item 8, as pertaining to municipal institutions in the province. License Commissioners of

Prince Edward v. County of Prince Edward, 26 Chy. 452; License Commissioners of the North Riding of the county of Norfolk v. The Corporation of Norfolk, 14 O. R. 749, concurred in. *Ib.*

A portion of the sum claimed in this action, was alleged to be a deficit brought forward from the previous year. It appeared, however, that the amount was the whole sum estimated for that year:—Held, that this was a matter of form only, as it could be sued for as a substantive debt upon the estimates of the former year. *Ib.*

### III. LIQUOR LICENSE ACT.

#### 1. Application of.

Defendant was convicted for selling liquor without a license on Dickinson's Island, in Lake St. Francis:—Held, on an application for a certiorari: 1. That the island was part of the county of Glengarry, and therefore within the jurisdiction of the police magistrate; 2. That the Liquor License Act applies to Indian land under lease from the crown to a private individual. *Regina v. Duquette*, 9 P. R. 29.—Osler.

The defendant, a brewer licensed to manufacture ale, etc., at Palmerston, under a dominion license, had a cellar or vault at Brantford, where he stored such ale, etc., and sold it in quantities not less than allowed to be sold by wholesale:—Held, that the sale was authorized under the dominion license, and that a provincial license was not required. *Regina v. Young*, 8 O. R. 476.—Rose. See *Molson v. Lambe*, 15 S. C. R. 253.

As the Quebec License Act does not interfere with the existing rights and powers of incorporated cities, a by-law passed by the corporation of the city of Three Rivers, on the 3rd April, 1877, in virtue of its charter (20 Viet. c. 129, and 38 Viet. c. 76), imposing a license fee of \$200 on the sale of intoxicating liquors, is within the powers of the said corporation. *Sulte v. City of Three Rivers*, 11 S. C. R. 25.

See *Re Croome and the City of Brantford*, 6 O. R. 188, p. 1053.

#### 2. By-laws and Resolutions Relating to Taverns and Shops.

##### (a) Submission to Electors.

Quere, whether several matters, each of which requires the assent of the electors, can be enacted in one by-law, or whether there must be separate by-laws separately submitted to the electors. *Re Croome and the City of Brantford*, 6 O. R. 188.—Rose.

The electors entitled to vote upon a by-law under the Liquor License Act, R. S. O. (1887) c. 194, s. 42, to increase the amount payable for license duty, are those entitled to vote at municipal elections. Judgment of Rose, J. (17 O. R. 522), affirmed on other grounds. *In re Croft and the Town of Peterborough*, 17 A. R. 21.

A by-law requiring amounts to be paid for tavern license fees in excess of \$200, directed, as required, the votes of the electors to be taken

thereon. The by-law was passed on the 25th of February, 1889, and on 8th April, 1890, a motion was made to quash it on the ground that the votes of all the duly qualified electors had not been taken thereon, but only those of free-holders. By reason of the by-law the number of licenses was decreased, and had the motion been allowed it would have been too late for the corporation to make any change, by increasing the number of licenses so as to make up the deficiency, or to submit a new by-law. The only evidence in support of the motion was weak and no person whose vote had been rejected complained. The applicant himself was a tavern-keeper who obtained a license for the year 1889, under the by-law without any objection, and had applied again for the current year:—Held, the by-law being valid on its face the court, under the circumstances, considering the lapse of time before motion made, in the exercise of its discretion would not interfere. *Bann v. Brockville*, 19 O. R. 409.—Galt.

See *Davies v. City of Toronto*, 15 O. R. 33, p. 919.

##### (b) Other Cases.

The commissioners in good faith, intending to act within the scope of their powers, passed a resolution, "That no intoxicating liquors shall, under any pretence, be sold in any tavern, etc., to any person who has the habit of drinking intoxicating liquors to excess, or the wife, etc., of such person, or any person concerning whom notice had been given to the landlord by the husband, etc., of such person, or any justice of the peace or inspector, that such person is in the habit of drinking," etc.: the licenses were issued to the persons to whom the notices were addressed, subject to the right of suspending them for breach of the resolution. The defendant justified upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution:—Held, that the license commissioners had no power to pass the resolution. *Roberts v. Clinie—Murphy v. Clinie*, 46 Q. B. 264.—Osler.

Held, that a by-law passed by a city respecting saloon and shop licenses did not require to state the number of inhabitants of the city so as to shew on its face that the number of licenses fixed was within the statutory limit. *Re Croome and City of Brantford*, 6 O. R. 188.—Rose.

A provision in the by-law limited the number of licenses "for the ensuing year, beginning on 1st May, 1884, or for any further license year until this by-law is altered or repealed:—Held, valid. *Ib.*

A further provision was, being merely a re-enactment of the statute, that the by-law should remain in force until altered or repealed:—Held, unobjectionable. *Ib.*

An objection that the by-law provided for a duty in excess of \$200, which, it was urged, should have been submitted to the electors by separate by-law, was overruled, because in fact the by-law contained no such provision. *Ib.*

The by-law did not state whether it was passed under the dominion or local legislation:—Held, that as it stated no particular power as its basis

it must be that power. *Ib.*

Seemingly, the Act, under which the regulating were to be in force was section, and could Ontario Act that Act the by-law sub-section entitled to the Act.

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O. R. 33, p.

it must be judicially regarded as emanating from that power which would authorize its passage. *Id.*

Semble, if the dominion legislation was in force, then, even if passed under the Ontario Act, under section 146 of the Dominion Act, which provided that all local laws passed for regulating or restraining the traffic in liquors were to be in force until 1st May, 1881, it was in force when passed and until repealed by that section, and if so repealed was no longer in force and could not be quashed; if however the Ontario Act was in force then it was valid under that Act; and the sending a certified copy of the by-law to the inspector under section 44, sub-section 2 of the Dominion Act did not disentitle the applicant to invoke the aid of the Ontario Act in its support. *Id.*

Another provision was, that "Every person receiving a shop license shall confine the business of his shop solely and exclusively to the keeping and selling of liquor."—Held, that this was not ultra vires and in restraint of trade. *Id.*

It was also objected that section 35 of the License Act of 1884, 47 Vict. c. 35 (Ont.), in effect repealed the by-law as it made the duty more than \$300, and the council had not submitted the question to the electors:—Held, that if repealed it could not be quashed; but Semble, that the effect of the section was to add the increased duty to the amount already provided for by the by-laws previously passed unless the council saw fit prior to the 15th April, 1884, to amend the by-law as to the license duty payable thereunder. *Id.*

Held, that the council of the corporation of the city of Toronto had the power under R. S. O. (1877) c. 181, s. 17, to pass a by-law limiting the number of tavern licenses, and that power is not interfered with or diminished by the law (39 Vict. c. 26 Ont.) granting limited powers to the board of license commissioners. *Re Boylan and the City of Toronto*, 15 O. R. 13.—Q. B. D.

Held, that though the by-law contained on its face no description of the local limits of its operation, the fact that it was passed by the council of the city and could have had no operation elsewhere than in the city, shewed that it must, by reasonable intentment, be held operative there. *Id.*

Held, that the by-law was not unreasonable or oppressive, or in restraint of trade, having been passed under a power expressly given by the legislature to the city to pass the same. *Id.*

### 3. Petitions Against Issue of Licenses.

The Liquor License Act R. S. O. (1887) c. 194, s. 11, sub-s. 14, provides that "No license shall be granted to any applicant for premises not then under license or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the legislative assembly, petition against it, on the grounds hereinafter set forth, or any of such grounds." More than one-half of the electors in a certain polling sub-division petitioned the licensed commissioners of the district "against the issue of

any license within the bounds of said polling sub-division" for reasons specified in section 11, sub-section 8, of the Liquor License Act, R. S. O. (1887), or for one or more of such reasons—not otherwise specifying any grounds or referring to any applicant or premises. The plaintiff was an applicant for a license for premises not under license situate in the sub-division, and the question stated for the opinion of the court was whether under section 11, sub-section 14, the presentation of the petition precluded the defendants, the license commissioners, from certifying for a license to the plaintiff:—Held, that the petition did not conform to the statute, which requires that the objection shall be to the granting of a particular license, and also that some one or more of the reasons given in sub-section 8 shall be set forth, or all of them specifically alleged; and, therefore, the defendants were not precluded from certifying for a license. *Pizer v. Fraser*, 17 O. R. 635.—Q. B. D.

### 4. Transfer of Licenses.

The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before:—Held, affirming the decision of the master-in-chambers, that a license cannot lawfully be transferred except in the cases mentioned in R. S. O. (1877), c. 181, s. 28, none of which had occurred here; that the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor. *Per Armour, J.* The Act disqualifying a licensee should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name. *Regina ex rel. Brine v. Booth*, 3 O. R. 144.—Q. B. D.; 9 P. R. 452. See also *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85.

### 5. Jurisdiction of Magistrates.

The defendant was convicted by the police magistrate of the city of Toronto for an offence committed at Toronto against the Liquor License Act, R. S. O. (1877), c. 181, s. 39. Section 68 of that Act makes such magistrate the proper tribunal for the trial of such offence; but the information was taken before a single justice of the peace, who was acting for the police magistrate in his absence and at his request, and upon such information the defendant was brought before two justices of the peace and remanded till the day on which he was convicted:—Held, that the information was properly taken before one justice under the provisions of section 6 of the Summary Convictions Act, which is made applicable both by R. S. O. (1877), c. 181, s. 68, and R. S. O. (1877), c. 74, s. 1; and two justices being the tribunal substituted for the police magistrate in the case of absence, by 41 Vict. c. 4, s. 7, the defendant was legally convicted. *Regina v. Gordon*, 16 O. R. 64.—Q. B. D.

## 6. Selling Liquor on Prohibited Days.

## (a) Sunday.

In proceedings for selling liquor on Sundays, it was not shewn that the defendant had a license, or that the place in which the liquor was sold was one where intoxicating liquors were or might be sold by wholesale or retail, pursuant to section 48 of the Liquor License Act:—Held, that the conviction was bad. *Regina v. Rodwell*, 5 O. R. 186.—Rose.

Under the authority of the Act of the Legislature of Quebec, 42 & 43 Vict. c. 4, s. 1, a penal suit was on the 20th of January, 1880, instituted against P. in the name of the corporation of Q., before the Recorder's Court of the city of Q., alleging that "on Sunday, the 18th day of January, 1880, the said defendant had not closed, during the whole of the day, the house or building where he, the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate etc." P. was convicted. A writ of prohibition, to have the conviction revised by the Superior Court, was subsequently issued, and upon the merits was set aside and quashed:—Held (per Ritchie, C. J., and Strong and Fournier, JJ.), that the provisions of the provincial statute, 42 and 43 Vict. c. 4, ordering houses in which spirituous liquors, etc., are sold, to be closed on Sundays, and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations, within the power of the legislature of the Province of Quebec, and as the complaint was clearly within the Act, the recorder could not be interfered with on prohibition:—Held, per Henry, Taschereau, and Gwynne, JJ., that the penalty imposed upon P. by the recorder was not authorized by the statute, even if such statute was intra vires of the provincial legislature, and that the prohibition was therefore rightly granted. The court being equally divided, the appeal was dismissed without costs. *Poulin v. Corporation of Quebec*, 9 S. C. R. 185.

Held, that only the holder of a license can be prosecuted under section 43 of R. S. O. (1877), c. 181, for selling liquor on prohibited days. *Regina v. Duquette*, 9 P. R. 29.—Osler.

## 7. Selling Liquor Without a License.

## (a) Persons and Premises Licensed.

The defendant was licensed to sell "in and upon the premises known as the Palmer House." The Palmer House stood upon the front part of a deep lot owned by the defendant, the rear part of which had been for many years enclosed and used as a fair ground, immediately within which enclosure the defendant sold liquor, for which he was convicted:—Held, that as the fair ground, though part of the lot on which the hotel stood, was not used in connection with or for the enjoyment of the hotel, it was not covered by the license, and the conviction was right. *Regina v. Palmer*, 46 Q. B. 262.—Osler.

Under section 12 of R. S. O. (1887), c. 194, the person receiving a tavern license is assumed to have satisfied the license commissioners that he is the true owner, but, notwithstanding, it can

be shewn that the licensee was merely the agent of another who was the real owner of the business. *Huffman v. Walterhouse*, 19 O. R. 186.—C. P. D.

## (b) Clubs.

Held, that the meaning of section 53, subsection 3, of the Liquor License Act (R. S. O. 1887, c. 194), is that where in a club or society incorporated under the Benevolent Societies' Act, liquor is sold or supplied to members, but such sale or supplying is not the special or main object of the club, etc., but is merely an incident resulting from its principal object, there is no violation of the License Act, but it is otherwise if the sale or supplying the liquor is the main object of the incorporation. The question however is for the decision of the magistrate on the evidence, and there being evidence in this case which was that of a club purporting to be a gun club, to support the finding of the magistrate that the sale of liquor was the special or main object of the club with the intent to evade the Liquor License Act, the court refused to interfere with the finding, and dismissed a motion to quash a conviction made by him against defendant. *Regina v. Austin*, 17 O. R. 743.—C. P. D. See 53 Vict. c. 56, s. 4.

## (c) Who Liable.

A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. (1877), c. 181:—Held, that she was liable to be fined under section 83 of the Act, although the sale of liquor took place in her absence. *Regina v. Campbell*, 8 P. R. 55.—Hagarty.

The defendant, a servant of one Ward, the keeper of an unlicensed tavern, was convicted of selling liquor in her master's absence. Cameron, J., held the conviction good, the case being undistinguishable in principle from *Regina v. Williams*, 42 Q. B. 462, though he would otherwise have held the master alone responsible, under the Liquor License Act, R. S. O. (1877), c. 181. *Regina v. Howard*, 45 Q. B. 346.

See *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85.

## 8. Convictions.

## (a) Amendment of.

Amendment of conviction by striking out the part imposing hard labour. See *Regina v. Allbright*, 9 P. R. 25.

See *Regina v. Menary*, 19 O. R. 691, pp. 1057, 1058; *Regina v. Cantillon*, 19 O. R. 197, p. 1059.

## (b) Other Cases.

Section 51 of the Liquor License Act, R. S. O. (1877), c. 181, which imposes the penalties, omits all reference to a third offence (which was provided for in the enactments of which it is a consolidation), though such an offence is referred to in section 73, which deals with the procedure, and in the forms of conviction given by the Act. A conviction for a third offence was therefore quashed, although the penalty imposed

thereby offence.

Convicted where t Young,

A conviction made by only, was an objection to the conviction. *Regina v.*

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The defence charge was summons other offence. The intention he pleaded caution had and obtained when, on in his absence default of treas have awarded the issuing v. Clarke,

The defence of the license, conviction Act drawn up in which should pay paid forth made to a defendant that sums imprisoned for the costs it should be was afterwards the parts conveying commitment defendant unless the conveying Upon a warrant:—bringing the not a ground, sensible, also him instead v. Menary.

Held, that remanded the conviction.

Semble, R. S. O. (1877) warrant or dependent

thereby might have been inflicted for a second offence. *Regina v. Frawley*, 45 Q. B. 227.—Osler.

Conviction held bad for not shewing the place where the offence was committed. *Regina v. Young*, 5 O. R. 184 a.—Rose.

A conviction under R. S. O. (1877), c. 181, for selling liquor without a license, purporting to be made by three magistrates, but signed by two only, was returned with a certiorari:—Held, if an objection at all, a ground for sending back the writ, that the third magistrate might sign the conviction, but not a ground for quashing it. *Regina v. Young*, 7 O. R. 88.—Osler.

By R. S. O. (1877) c. 181, s. 86, where the act or omission complained of is one for which, if the defendant were not duly licensed, he would be liable to a penalty under the Act, the burden of proving that he is licensed is on the defendant:—Held, no objection to a conviction that it did not shew defendant was not licensed. *Ib.*

The defendant, being present in court on a charge which was disposed of, was, without any summons having been issued, charged with another offence, namely, of selling without a license. The information was read over to him, to which he pleaded not guilty, and evidence for the prosecution having been given, he thereupon asked for and obtained an enlargement till the next day, when, on his not appearing, he was convicted in his absence, and fined \$50 and costs, and in default of payment forthwith, without any distress having been directed, imprisonment was awarded:—Held, that under the circumstances the issuing of a summons was waived. *Regina v. Clarke*, 19 O. R. 601.—MacMahon.

The defendant was convicted before two justices of the peace for selling liquor without a license, contrary to section 49 of the Liquor License Act (R. S. O. 1887, c. 194). A conviction was drawn up and filed with the clerk of the peace in which it was adjudged that the defendant should pay a fine and costs, and if they were not paid forthwith, then, inasmuch as it had been made to appear on the admission of the defendant that he had no goods whereon to levy the sums imposed by distress, that he should be imprisoned for three months unless these sums and the costs and charges of conveying him to gaol should be sooner paid. An amended conviction was afterwards drawn up and filed, from which the parts relating to distress and the costs of conveying to gaol were omitted. A warrant of commitment directed the gaoler to receive the defendant and imprison him for three months unless the said several sums and the costs of conveying him to gaol should be sooner paid. Upon a motion to quash the convictions and warrant:—Held, that the mode adopted for bringing the defendant before the justices was not a ground for quashing the conviction; and semble, also, that it was not improper to arrest him instead of merely summoning him. *Regina v. Menary*, 19 O. R. 691.—Q. B. D.

Held, that the fact that the defendant was remanded by only one justice could not affect the conviction. *Ib.*

Semble, that the justices had no power under R. S. O. (1887), c. 194, s. 70, to issue a distress warrant or to make the imprisonment imposed dependent upon the payment of the fine and

costs; but as this objection was not taken by the defendant, no effect was given to it. *Ib.* See *Regina v. Clarke*, 19 O. R. 601, p. 1059.

Held, that the justices had the right to draw up and return an amended conviction in a proper case. *Regina v. Menary*, 19 O. R. 691.—Q. B. D.

Held, that if the justices were bound to issue a distress warrant, the insertion of the words relating to the admission of the defendant that he had no goods was proper; and if they had no power to issue a distress warrant, these words were mere surplusage and did not vitiate the conviction. *Ib.*

Held, that if the justices had no power to require the costs of conveying him to gaol to be paid by the defendant, the conviction was amendable, as and when it was amended; for the amendment was not of the adjudication of punishment. *Ib.*

Held, that having regard to section 105 of R. S. O. (1887), c. 194, and to the evidence before the justices, the convictions and warrant should not be quashed. *Ib.*

#### (c.) Penalty.

The defendant was convicted under section 41 of the Liquor License Act, R. S. O. (1877), c. 181, for selling liquor without a license, and under section 46 for allowing liquor sold by him to be consumed on the premises; and one penalty was inflicted "for his said offence":—Held, bad, in not showing for which offence the penalty was imposed. *Regina v. Young*, 5 O. R. 184 a.—Rose.

Convictions imposing the increased penalties for second and third offences, under the Liquor License Act, R. S. O. (1877), c. 181, section 52, are bad unless proceedings have been taken for the first offence. *Regina v. Rodwell*, 5 O. R. 186.—Rose.

See *Regina v. Frawley*, 45 Q. B. 227, p. 1057; *Regina v. Young*, 7 O. R. 88, p. 1059.

#### (d) Distress and Imprisonment.

Defendant was convicted for a third time of having sold liquor without a license, and was sentenced to three months' imprisonment with hard labour:—Held, following *Regina v. Frawley*, 46 Q. B. 153, that the magistrate had not power to impose hard labour, and the conviction was therefore invalid. *Regina v. Albright*, 9 P. R. 25.—Osler. But see *Hodge v. The Queen*, 9 App. Cas. 117, p. 311.

Semble, that in such a case a judge has no power to amend the conviction under R. S. O. (1877), c. 181, s. 77, as amended by 44 Vict. c. 27, by striking out the part imposing hard labour. *Regina v. Albright*, 9 P. R. 25.—Osler.

Held, that the punishment for offences against section 43, of R. S. O. (1877), c. 181, must be either imprisonment with hard labour or a fine; and that such imprisonment in the event of nonpayment of the fine could not be awarded, but only imprisonment without hard labour. *Regina v. Rodwell*, 5 O. R. 186.—Rose.

A penalty of thirty days' imprisonment in default of sufficient distress for the fine was imposed:—Held, good under R. S. O. (1877), c. 181, ss. 51 and 59. *Regina v. Young*, 7 O. R. 88.—Osler.

The adjudication on a second offence under the "Liquor License Act," R. S. O. (1887), c. 194, without providing for distress, directed immediate imprisonment in default of the payment of the fine and costs; and the conviction drawn up under it was in similar terms. After the issue of a writ of certiorari, but before its return, an amended conviction was returned providing for distress being first made:—Held, that the adjudication and conviction made under it were void for not providing for distress; and that the amended conviction could not be supported, because it did not follow the adjudication. Semble, that had the amended conviction been in other respects good, it would not have been void under the Liquor License Act for including the costs of conveying to jail. *Regina v. Cantillon*, 19 O. R. 197.—C. P. D.

Held, that the conviction in this case in awarding imprisonment in default of payment, was properly drawn, for by s. 70 of R. S. O. c. 194, under which the conviction was made, there is no power to direct distress. *Regina v. Clarke*, 19 O. R. 601.—MacMahon.

See *McLellan v. McKinnon*, 1 O. R. 219; *Regina v. Menary*, 19 O. R. 691, p. 1058.

#### (e) Removal by Certiorari.

A certiorari will not lie to remove a conviction under the Liquor License Act, R. S. O. (1877), c. 181, s. 48, which has been affirmed and amended on appeal to the sessions, for issuing a license contrary to the Act, the procedure being regulated by 32-33 Vict. c. 31, s. 71 (Dom.), as amended by 33 Vict. c. 27, s. 2 (Dom.). *Regina v. Grainger*, 46 Q. B. 198.—Armour.

#### (f) Quashing.

The court refused to quash a conviction under the Liquor License Act affirmed on appeal, on the ground among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina v. Grainger*, 46 Q. B. 382.—Q. B. D.

See *Regina v. Menary*, 19 O. R. 691, p. 1058.

#### 9. Civil Remedies Against Tavern-keepers.

R. S. O. (1887), c. 194, s. 122, which imposes a liability in certain eventualities on innkeepers who give liquor to persons who thereby become intoxicated, is a remedial measure and should receive a liberal construction. *Price v. Robinson*, 16 O. R. 433.—Chy. D.

#### 10. Restrictions on Sale to Intemperate.

The plaintiff, whose husband was in the habit of drinking intoxicating liquors to excess, gave notice to the defendant, a duly licensed innkeeper, forbidding him to supply liquor to her

husband; in consequence of which the defendant forbade his barkeeper (his son) furnishing liquor to the husband, but the barkeeper notwithstanding did serve the plaintiff's husband with liquor in the tavern kept by defendant. R. S. O. (1877), c. 181, s. 90, enacts that if the person so notified delivers or suffers to be delivered any such liquors to the person named in the notice, the person giving such notice, may recover from him not less \$20, nor more than \$200, to be assessed by the court or jury as damages:—Held, that defendant was liable. *Hugill v. Merrifield*, 12 C. P. 264, overruled. *Audin v. Davis*, 7 A. R. 478.

In an action by a married woman against an innkeeper, under R. S. O. (1877), c. 181, s. 90, for having supplied liquor to her husband, after a notice, as follows: "I hereby forbid you or any one in your house, giving my husband William Northcote any liquor of any kind from this day," \* \* \* the jury found that the husband was an habitual drunkard, and that intoxicating liquor had been furnished to him after such notice by the defendant, who knew the husband well, as also the reason for giving the notice, and rendered a verdict in favour of the plaintiff for \$20. In the following term the defendant moved to set aside that verdict, and to enter a nonsuit or grant a new trial. After argument, the judge ordered the verdict to be set aside and a nonsuit entered which, on appeal to the Court of Appeal, by reason of an equal division of the judges, was affirmed. Per Hagarty, C. J. O., and Osler, J. A., the notice was insufficient in omitting to state that the plaintiff's husband had the habit of drinking to excess. Per Burton and Patterson, J.J.A.—The notice as given was sufficient. Per Burton, Patterson, and Osler, J.J.A.—It was not necessary to forbid the supplying of "intoxicating liquor," the words used "liquor of any kind," being sufficient. *Northcote v. Branker*, 14 A. R. 364.

The plaintiff, a married woman, brought an action under R. S. O. (1887), c. 194, s. 125, to recover from the defendant, an hotel-keeper, damages because of the sale by him to her husband of intoxicating liquor after notice not to sell. The notice was signed by the plaintiff and served by her agent. Per Hagarty, C. J. O., and Burton, J. A. The right of action for damages depends on the notice being given by the person filling the public position of inspector, though the liability as far as the penalties are concerned, will be incurred upon notice being given by the private individual. Per Osler, and MacLennan, J.J.A. The notice must in all cases be signed by the private individual, and whether served by the inspector or not, the private individual gives the notice, so that the words may fairly be construed to mean "person requiring to give notice," and there is a right of action whether the notice is served in one way or the other. *Thorntley v. Reilly*, 17 A. R. 204.

#### 11. Proceedings Against License Commissioners.

A mandamus will not be granted to compel a board of license commissioners to issue a license to a person to whom one has been granted, but not issued, by the retiring commissioners, where they have not completed their functions, their acts having been reversed by their successors in

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Chy. D.

A notice of action is necessary in an ac-  
tion for damages against a board of license  
commissioners acting under R. S. O. (1887),  
c. 194. *Ib.*

#### IV. SALE TO INDIANS.

A conviction under the Indian Act, 1880, for  
giving intoxicating liquor to an Indian imposed  
a fine and costs, and in default of immediate  
payment, imprisonment:—Held, that the con-  
viction was invalid and must be quashed, for  
while section 90 provides as punishment for the  
offence, imprisonment or fine, or fine and im-  
prisonment, it does not authorize a fine, and in  
default of payment imprisonment; and that the  
defect was not remedied by section 98, which  
enacts, that no prosecution, conviction, etc.,  
under the Act shall be invalid on account of  
want of form, so long as the same is according  
to the true meaning of the Act:—Held, also,  
that the conviction was invalid because it did not  
negative that the liquor was made use of under  
the sanction of a medical man or minister of religion.  
*Regina v. MacKenzie*, 6 O. R. 165.—Rose.

The offence was selling liquor to an Indian:—  
Held, no objection to a conviction under R. S.  
O. (1877), c. 181, for if so the defendant was  
guilty of two offences, one under the latter  
Act, and one under the Indian Act. *Regina v.  
Young*, 7 O. R. 88.—Osler.

The words "appeal brought" in section 198 of  
the Indian Act, R. S. C. c. 43, are satisfied by  
the giving of notice and perfecting the appeal  
by the giving of the security provided for by  
the Summary Convictions Act; and it is not  
necessary for an appellant from a conviction  
under that Act to bring his appeal to a hearing  
within the time limited by section 108. In re  
*Hunter v. Griffiths*, 7 P. R. 86, not followed:—  
Semble, merely giving notice of appeal within  
the thirty days would have satisfied the words  
of the statute. *Regina v. McGauley*, 12 P. R.  
259.—Armour.

A summary conviction by the police magis-  
trate of the county of Brant, for selling intoxi-  
cating liquor to an Indian in the township of  
Tascara, contrary to R. S. C. c. 43, stated  
that the offence was committed on the 29th  
September, 1887, but the information stated and  
the evidence disclosed that the offence was  
committed on the 27th September, 1887:—Held,  
that the date was not under the circumstances  
material, there being no suggestion that any  
wrong or injustice was caused by the mistake,  
and that section 87 of R. S. C. c. 43, operated  
to cure this irregularity, as also certain other  
irregularities complained of, the offence having  
been clearly proved, the police magistrate hav-  
ing express jurisdiction by section 96 of the  
Act, and the punishment imposed being within  
the power conferred upon him. *Regina v. Green*,  
12 P. R. 373.—Street.

An information for selling liquor to certain  
named Indians, but without describing them as  
of any particular tribe or locality, was laid by  
R. of the township of Rama, before D. M.,  
described as "an Indian agent by royal author-

ity duly appointed," and alleged that defendant  
and Fanny, his wife, or one of them, did on,  
etc., sell, etc., to the said Indians spirituous  
liquors contrary to the statute, etc. The sum-  
mons issued thereon described D. M. as Indian  
agent, and shewed it was issued at Rama town-  
ship. It was directed to the defendant and his  
wife, described as of Rama township, and was  
personally served on the wife and a copy left  
with her for her husband at their most usual  
place of abode. This was proved by affidavit  
of service. The enquiry was held at Rama be-  
fore D. M. as Indian agent, and he subscribed  
the different depositions as "Indian agent of the  
Chippewas of Rama," ex officio justice of the  
peace. The conviction was that on, etc., "at  
Rama Indian Reserve, in the township of Rama,"  
the defendant "is convicted before D. M., In-  
dian agent for the Chippewas at Rama, ex officio  
justice of the peace for the purpose and under  
the Indian Act, 1880, for that he did on, etc.,  
at the township of Rama, unlawfully sell to cer-  
tain Indians, etc." The warrant of commitment  
recited that the conviction was before D. M.,  
as Indian agent of the county of Ontario. The  
liquor was sold at defendant's hotel, in the  
township of Rama, by the defendant's wife, the  
husband being away at the time and for some  
time afterwards. There was nothing said to D.  
M. to shew why defendant was not present at  
the enquiry; and D. M. had no reason to be-  
lieve that the case was other than a neglect or  
refusal to attend. In support of this applica-  
tion, defendant stated that he knew nothing of  
the summons having been issued, or of the pro-  
ceedings thereon, and never authorized any one  
to act for him:—Held, per Wilson, C. J., that  
the service was regularly made, and duly proved  
before the Indian agent, and he was justified in  
proceeding to investigate the charge; and that  
the act of the wife was in law that of the hus-  
band, and that he could be convicted therefor.  
Quere, whether D. M.'s appointment was as an  
Indian agent of the Chippewas of Rama, or for  
the county of Ontario, but the latter might in-  
clude the former and so give jurisdiction:—Held,  
however, the conviction could not be supported,  
for none of the proceedings shewed that the In-  
dians to whom the liquor was sold were Indians  
over whom the agent had jurisdiction, as it did  
not appear that they were Chippewa Indians, or  
Indians residing within the township, or even  
in the county. The discharge of the defendant  
was granted, but the Chief Justice directed that,  
so far as necessary, and he had power to do so,  
no action should be brought against the Indian  
agent. A substantive motion was made before  
Armour, J., to quash the conviction which was  
granted, he also directing that no action be  
brought against the Indian agent. On appeal  
to the Divisional Court against so much of the  
judgments as prevented an action being brought,  
the appeals were quashed. *Regina v. McAuley*,  
14 O. R. 643.—C. P. D.

See *Regina v. Duquette*, 9 P. R. 29, p. 1051;  
*Regina v. Shavelear*, 11 O. R. 727, p. 1029.

#### V. SALE OF LIQUOR NEAR PUBLIC WORKS.

The defendant C. and others were contractors  
employed in constructing a portion of the line  
of the Canadian Pacific Railway on the north



shore of Lake Superior, fifty miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company and a small collection of houses and stores known by the name of the village of Michipicoten River. At this place the defendant C. and his co-contractors had their headquarters, and had constructed a supply road to the line of the railway where their operations were being carried on. The plaintiff brought to this village in a small sailing vessel a quantity of intoxicating liquors, intending to sell them there. The defendant C. and his co-defendant R., who were justices of the peace, having jurisdiction in the district of Algoma, assuming to act under R. S. O. (1877) chapter 32, "An Act Respecting the Sale of Intoxicating Liquor near Public Works," caused the liquors to be seized and destroyed, and the plaintiff to be arrested, fined and imprisoned:—Held, that this was a village within the meaning of R. S. O. (1877) c. 32, s. 1, and therefore the prohibition contained in the Act did not apply and that the justices had no jurisdiction. The plaintiff was discharged upon a writ of habeas corpus, the justices having returned to the certiorari issued in aid of the habeas corpus, a paper purporting to be the conviction signed by them but not under their seal. The conviction was not quashed:—Held, that after the return to the certiorari, a new conviction could not be returned, and that as the conviction returned was not sealed, it was a nullity and need not be quashed before an action was brought. *Bond v. Connee*, 15 O. R. 716. — C. P. D. Affirmed 16 A. R. 398.

### INVENTION.

See PATENT OF INVENTION.

### INVESTMENT OF MONEY.

- I. BY AGENT—See PRINCIPAL AND AGENT.
- II. BY EXECUTORS AND ADMINISTRATORS—See TRUSTS AND TRUSTEES.
- III. BY SOLICITOR—See SOLICITOR.
- IV. BY TRUSTEES—See TRUSTS AND TRUSTEES.

### JOINDER OF CAUSES OF ACTION.

See EJECTMENT—PLEADING.

### JOINDER OF ISSUE.

See PLEADING.

### JOINDER OF PARTIES.

See PLEADING.

### JOINT STOCK COMPANY.

See COMPANY.

### JOINT TENANTS.

See ESTATE—WILL.

### JUDGE.

- I. OF HIGH COURT—See HIGH COURT OF JUSTICE.
- II. OF COUNTY COURT—See COUNTY COURT.
- III. OF DIVISION COURT—See DIVISION COURT.
- IV. IN CHAMBERS—See PRACTICE.

A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered to do so. In *re Queen City Refining Co.*, 10 P. R. 415.—Hodgins, Master-in-Ordinary.

The cases relating to disqualification by reason of favour or interest in a judge or magistrate discussed. *Regina v. Kemp*, 10 O. R. 143.—Wilson.

### JUDGE'S REPORT.

See PARLIAMENTARY ELECTIONS.

### JUDGMENT.

- I. SETTLING MINUTES, 1065.
- II. SIGNING AND ENTERING UP.
  1. Generally, 1065.
  2. *Nunc pro Tunc*, 1066.
- III. MOTION FOR JUDGMENT, 1066.
- IV. IN DEFAULT OF APPEARANCE, 1067.
- V. IN DEFAULT OF DEFENCE, 1068.
- VI. UNDER CON. RULE 739.
  1. Against Married Women, 1068.
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- VII. UNDER CON. RULE 744, 1073.
- VIII. UNDER CON. RULE 755, 1075.
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- X. INTERLOCUTORY JUDGMENTS, 1077.
- XI. JUDGMENT ON DEMURRER, 1077.
- XII. DECLARATORY JUDGMENTS, 1077.
- XIII. SET OFF OF JUDGMENTS, 1078.
- XIV. INTEREST ON, 1079.
- XV. TIME OF TAKING EFFECT, 1086.
- XVI. ASSIGNMENT OF, 1080.
- XVII. RIGHT OF SURETY ON ASSIGNMENT OF JUDGMENT—See PRINCIPAL AND SURETY.
- XVIII. AMENDMENT OF, 1081.
- XIX. SETTING ASIDE.
  1. Delay in Applying, 1082.
  2. Other Cases, 1083.

## XX. EFFECT OF JUDGMENTS.

1. *Estoppel.*(a) *Effectment*, 1085.(b) *Other Judgments*, 1086.

## XXI. PROOF OF—See EVIDENCE.

## XXII. ENFORCING JUDGMENT OF COURT OF APPEAL—See COURT OF APPEAL.

## XXIII. APPEALS FROM FINAL JUDGMENTS TO SUPREME COURT—See SUPREME COURT.

## XXIV. FRAUDULENT JUDGMENT—See FRAUDULENT JUDGMENT.

## XXV. AGAINST ASCENDING DEBTOR—See ASCENDING DEBTOR.

## XXVI. IN EJECTMENT—See EJECTMENT.

## XXVII. FOREIGN JUDGMENTS.

1. *Actions on.*(a) *Generally*, 1093.(b) *Validity of*, 1093.

## XXVIII. AGAINST MARRIED WOMEN—See SUBHEAD VI. 1, p. 1068—HUSBAND AND WIFE.

## XXIX. TRANSCRIPT OF JUDGMENT—See DIVISION COURTS.

## XXX. BARRED BY TIME—See LIMITATION OF ACTIONS.

## XXXI. REVIVING JUDGMENTS—See SCIRE FACIAS AND REVIVOR.

## I. SETTLING MINUTES.

The entry of judgment, the minutes of which have been settled by a local registrar, does not preclude a party who, at the time of such settling has given notice that he desires the minutes settled at Toronto, from afterwards obtaining a reference under Rule 416, O. J. Act (see Con. Rule 22). The court will rather encourage (at all events for some time) the settling of judgments such as are not included in the forms at the head office, because of the well understood phraseology in use by the two officers whose function it is to frame the terms of such judgments. *Holden v. Smith*, 10 P. R. 369.—Boyd.

See *Macdonald v. Worthington*, 7 A. R. 531.

## II. SIGNING AND ENTERING UP.

1. *Generally.*

When an action is commenced in a local office, judgment for default of appearance or pleading must be entered in the local office. *Chamberlain v. Armstrong*, 9 P. R. 212.—Boyd.

An action was transferred from the Chy. Div. to the C. P. Div. by an order of the judges, but the plaintiff not having notice of the transfer, signed judgment in the Chy. Div. An order was made retransferring the case to the Chy. Div., and allowing the judgment entered to stand and be in force from its entry, without costs. *Patterson v. Murphy*, 9 P. R. 306.—Dalton, Master.

In an action on a promissory note the plaintiffs, in their statement of claim, claimed interest at the rate of seven per cent., without shewing any legal right to more than six per cent. The statement of defence having been held bad on demurrer, and leave to amend not having been asked or granted, the plaintiffs entered judgment for default of defence for the full amount of the principal and interest claimed:—Held, that it was the duty of the deputy clerk at the office where judgment was signed not to permit judgment to be entered for what the plaintiffs were not entitled to, and that there was no objection to the plaintiffs limiting their claim to six per cent. on signing judgment. *Bank of Hamilton v. Harvey*, 11 P. R. 145.—Osler.

Where, after a verdict, the judge presiding at the trial died before giving judgment thereon, it was directed that an order for judgment should be drawn up in the High Court, before the three judges who composed the Divisional Court of the Common Pleas Division, as judges of the High Court. *Wellbanks v. Conger*, 12 P. R. 354.—C. P. D.

Although by Rule 527 (b.) O. J. Act (see Con. Rules 767, 768), judgment is not to be signed in cases tried by a jury till the time thereby prescribed, yet, when signed, the entry of it, if the Divisional Court pronounces no different judgment from that of the trial judge, ought to be dated as of the day on which it was pronounced by the trial judge. *Beckett v. Grand Trunk R. W. Co.*, 12 P. R. 377.—Dalton, Master.—Armour.

Rule 326 (Con. Rule 764; see also Con. Rule 765) applies to all cases, whether tried by a judge, jury, or otherwise, in which the judgment is pronounced by the court or a judge in court, and Rule 327 (see Con. Rule 765a) applies to cases in which the judgment has not been pronounced by the court or a judge in court. *Ib.*

Where the judgment pronounced by the trial judge upon the verdict of a jury was varied by a Divisional Court:—Held, that judgment should be entered as of the date on which the Divisional Court pronounced judgment. *Ib.*

Since the O. J. Act damages should be assessed up to the date of judgment. *Stalker v. Township of Dunwich*, 15 O. R. 342.—Q. B. D.

2. *Nunc pro Tunc.*

Where the losing party in a suit died after verdict and before judgment on a rule for a new trial, and judgment nunc pro tunc was entered, by order of a judge, as of a day prior to such death and a suggestion of the death entered on the record, the court refused to quash an appeal by his executors. *Muirhead v. Shirreff*, 14 S. C. R. 735.

See *Quinlan v. Union Fire Ins. Co.*, 8 A. R. 376, p. 1079; *McEwan v. McLeod*, 10 A. R. 96, p. 1079; *Glass v. Cameron*, 9 O. R. 712, p. 1082.

## III. MOTION FOR JUDGMENT.

Where a defendant does not appear, notice of motion for judgment must nevertheless be

served or posted in the proper office under Rule 131, O. J. Act. (See Con. Rule 461.) *Burritt v. Murdoch*, 9 P. R. 191.—Proudfoot.

G. O. Chy. 418 (see Con. Rule 537) is controlled by the conflicting provisions of Rule 406, O. J. Act (see Con. Rule 474 et seq.), hence two clear days' notice of motion for judgment under Rule 324, O. J. Act (Con. Rule 744), is sufficient. *Martens v. Birney*, 10 P. R. 368.—Boyd.

The court may upon motion enter judgment upon the verdict given at the trial, where the trial judge has not done so. Quare, whether such motion should be to the Divisional Court. "The Court," in Rules 315, 321 (Con. Rules 748, 775), means the High Court of Justice: whether as distinguished from its Divisions or not. *Wellbanks v. Conger*, 12 P. R. 354.—C. P. D.

Upon a motion to the court for judgment on the statement of claim in default of defence, the plaintiffs asked for an order dispensing with service of notice of the motion upon the defendant under Con. Rule 407. It was not shewn that the defendant could not be served. The order was refused:—Held, that the fact that the defendant had been personally served with the writ of summons and statement of claim and had not appeared was not "sufficient cause" within the meaning of the Rule. *Dominion Bank v. Doddridge*, 12 P. R. 655.—Robertson.

Where the court at the trial of a partnership action, after declaring that a partnership existed and adjudging that it be dissolved and wound up, ordered that all other matters in dispute in the action be referred for inquiry and report to a master under section 101 of the Judicature Act:—Held, that the report of the master under such reference was not subject to the provisions of Con. Rule 848 as to confirmation by filing and lapse of time; but that any time after it was made, a motion for judgment upon it was in order under Con. Rule 753, and upon such motion the court could adopt it wholly or in part, and any party dissatisfied with it might before or on the return of the motion for judgment move to set it aside or vary it. *Raymond v. Little*, 13 P. R. 364.—Robertson.

#### IV. IN DEFAULT OF APPEARANCE.

An action for foreclosure of a mortgage is governed by Rule 78 (Con. Rule 718), and no order allowing service is necessary, and on default of appearance judgment may be entered on præcipe according to the former practice in chancery. *Chamberlain v. Armstrong*, 9 P. R. 212.—Boyd.

Where the only property the defendant owned was the equity of redemption in certain lands, on motion for judgment for the amount of the plaintiff's claim and for a decree for sale of the equity of redemption:—Held, on the authority of *Kerr v. Styles*, 26 Chy. 309, that the plaintiff could have judgment as asked notwithstanding that in this case there were no *fi. fas.* in the sheriff's hands. *Johnson v. Bennett*, 9 P. R. 337.—Ferguson.

The writ of summons was specially indorsed with a money demand, besides which the in-

dorsement claimed damages for waste, etc. The plaintiff obtained an *ex parte* order amending the indorsement by striking out the claim for damages:—Held, that judgment by default could not be entered after the amendment without reversing the writ on the defendant. *Guesz v. Perry*, 12 P. R. 400.—MacMahon.

Where a writ of summons is indorsed with the particulars of a liquidated demand, and also with a claim for unliquidated damages, the plaintiff may, without an order, sign a combined final and interlocutory judgment upon default of appearance; Rules 72 and 75 (Con. Rules 705, 708) may be combined in a proper case, and justify such a judgment. *Bissett v. Jones*, 32 Ch. D. 635, followed in preference to *Standard Bank v. Wills*, 10 P. R. 159. *Huffman v. Doner*, 12 P. R. 492.—Boyd.

Judgment may be signed under Con. Rule 281, for default of appearance where an appearance has been entered after the time limited, if notice, which means "notice in writing," has not been given as required by the Rule. Knowledge of the fact that an appearance has been entered does not constitute such notice as the Rule requires. *Smith v. Dobbin*, 3 Ex. D. 338, followed. *Lanark and Drummond Plank Road Co. v. Bothwell*, 2 U. C. L. J. O. S. 229, not followed. *Hudson Bay Co. v. Hamilton*, 13 P. R. 461.—Rose.

See *Burritt v. Murdoch*, 9 P. R. 191, p. 1067; *McCallum v. McCallum*, 11 P. R. 16, p. 1077.

#### V. IN DEFAULT OF DEFENCE.

In an action for foreclosure the defendant entered an appearance under Rule 68 O. J. Act (Con. Rule 299) limiting his defence to one item in the particulars endorsed on the writ of summons. The appearance did not state that the defendant did not require the delivery of a statement of claim:—Held, that after such appearance a statement of claim was unnecessary and a judgment signed upon it for default of a statement of defence was set aside with costs. *Peel v. White*, 11 P. R. 177.—Dalton, *Master*.

Seem, that where in an action on a guaranty the writ of summons is not specially endorsed, but full particulars are set out in the statement of claim, final judgment may be signed upon default of defence. *Molson's Bank v. Dillabaugh*, 13 P. R. 312.—Boyd.

See *Feurick v. Donohue*, 8 P. R. 116, p. 1077.

#### VI. UNDER CON. RULE 739.

##### 1. Against Married Women.

Judgment may be obtained against a married woman under Con. Rule 739, but execution thereunder must issue against her separate estate only. *Kinnear v. Blue*, 10 P. R. 465.—Rose.

Judgment was granted under Con. Rule 739, in an action on a promissory note against one of the defendants, a married woman, as indorser, where the note matured after the passing of the Married Woman's Property Act, 1884 (47 Vict. c. 19 (Ont.)), and where there was no allegation that the married woman was possessed of separate estate. The order provided that the

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judgment should be levied out of the defendant's separate property (if any) which she was possessed of or entitled to at the time of the making of the note, or which she may thereafter acquire or have acquired, and which she was not restrained from anticipating. *Quebec Bank v. Radford*, 10 P. R. 610.—Dalton, Master.

Judgment was granted under Con. Rule 739, in an action on a note against one of the defendants, a married woman, where the marriage and the maturity of the note were before the "Married Woman's Property Act, 1884"; following *Burall v. Tanner*, 13 Q. B. D. 691. *Cameron v. Rutherford*, 10 P. R. 620.—Dalton, Master.

Held, that the "Married Woman's Property Act, 1884" is not retrospective. A motion under Con. Rule 739, for judgment upon a note against a married woman was dismissed in April, 1883, and was now renewed, fourteen months after the passing of the Act:—Held, that the Act made no change in the law which could assist the plaintiff, even if the matter were res integra. *Turnbull v. Forman*, 15 Q. B. D. 234, followed. *Scott v. Wye*, 11 P. R. 93.—O'Connor.

A prima facie case for judgment under Con. Rule 739, was made by the plaintiff in an action upon two bills of exchange accepted by a married woman who, in her defence, alleged, amongst other things, that she accepted the bills as agent of her husband, but there being evidence on which the jury might have been justified in finding that the business, in which such acceptances were given, was hers, the court refused to interfere with the discretion of the judge in directing judgment to be entered for the plaintiff, the defendant having declined to comply with the condition of paying the amount of the claim into court to abide the result of a trial. *Nelson v. Thorner*, 11 A. R. 616.—Osler.

Upon a motion by the plaintiffs for summary judgment against a married woman under Con. Rule 739, an officer of the plaintiffs swore that the married woman was made a party to the note sued on because he, the deponent, was informed by her husband and believed, and had no doubt, that she had separate estate of her own, and that there was no doubt, so far as she was concerned, that she contracted with respect to her separate estate when she endorsed the note. The note was made and matured and all the material facts occurred before the passing of the Married Woman's Property Act, 1884:—Held, following *Moore v. Jackson*, 16 A. R. 431, that the plaintiffs were bound to prove the existence of some separate property at the time of entering into the alleged contract, and that this was not shewn by the affidavit; and the motion for judgment was refused. *Canadian Bank of Commerce v. Woodcock*, 13 P. R. 242.—Ferguson.

## 2. Other Cases.

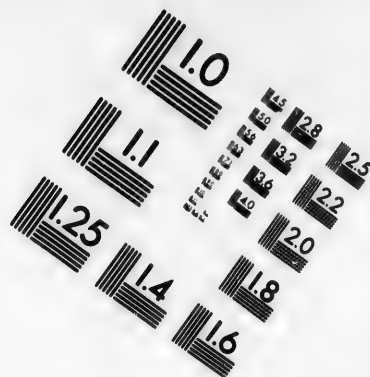
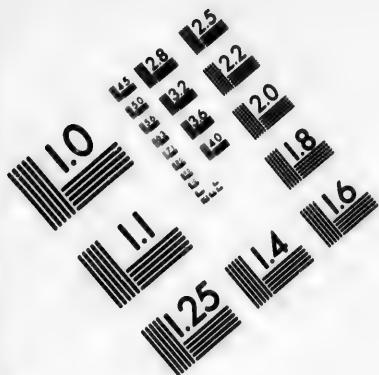
In an action against the maker and endorsers of a promissory note, in answer to a motion under Con. Rule 739, for judgment, the defendants, the endorsers of the note, who it was said were accommodation endorsers, swore that they had received no notice of dishonour. The protest of the note was not produced by the plaintiffs on the first return of the motion:—

Held (on appeal from the master-in-chambers who ordered judgment), that as there was no evidence that the defendants had received notice of dishonour, and a distinct denial by them of such notice, the motion should have been refused. The protest having been produced after an enlargement:—Held, that being only presumptive evidence of the posting of the notice, it was not sufficient in the face of the denial. The note was dated "Prince Arthur's Landing," and since the making of the note the place so called was incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. One of the endorsers, C. C. B., resided at Bowmanville:—Held, that the sufficiency of a notice addressed to C. C. B. at Port Arthur, was open to argument, upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered. *Ontario Bank v. Bucke*, 10 P. R. 561.—Rose.

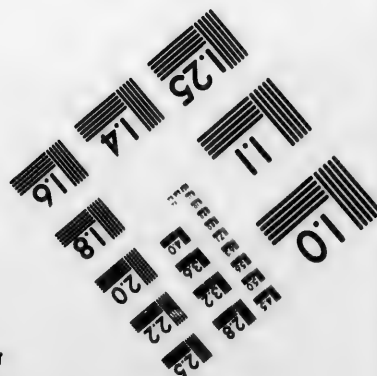
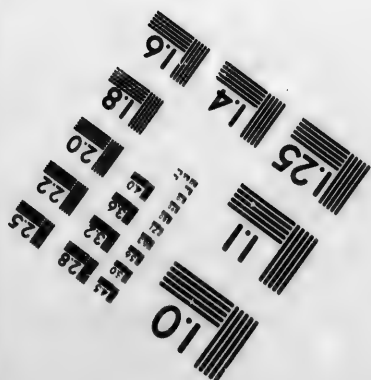
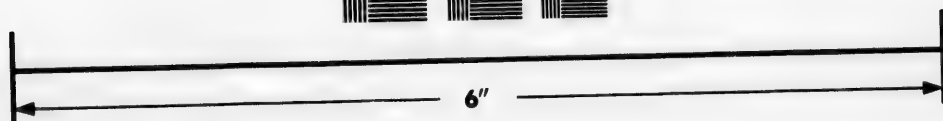
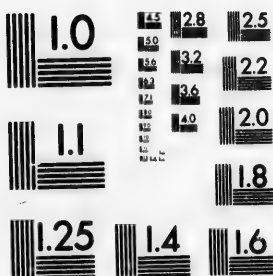
On a motion for judgment under Con. Rule 739, in an action on a promissory note the defendant filed an affidavit shewing that he was an accommodation maker and stating his information and belief to be, that the plaintiffs were aware of the fact that they held the note as collateral security, and that they never gave any value for it, and further that since the making of the note M., the payee, had become insolvent and made an assignment, and that there was litigation pending between the plaintiffs and his assignee in respect of certain securities alleged to be held by the plaintiffs on account of his indebtedness. An affidavit of the plaintiffs' manager was filed denying knowledge that the note was an accommodation one, and stating that it was discounted by the plaintiffs and the proceeds placed to M.'s credit:—Held, not a case in which judgment could be ordered. *Hughson v. Gordon*, 10 P. R. 565.—Rose.

At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due, and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque:—Held, by Street, J., in chambers, refusing a motion for judgment under Con. Rule 739 that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it, stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn:—Held, by the Q. B. D. on appeal, that on the state of facts presented, the plaintiffs were not entitled to the indulgence of a speedy judgment and execution. *Lowden v. Martin*, 12 P. R. 496.

Where the defendant was sued as administratrix of her late husband upon a promissory note made by him, and upon a motion by the plaintiff for judgment under Con. Rule 739 filed an affidavit in which she did not set up any defence:—Held, nevertheless, that there was no



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discretion to refuse her an opportunity of cross-examining the plaintiff; and upon an appeal from the decision of a local judge refusing an enlargement for such purpose and allowing the plaintiff to sign judgment, a direction was given that the plaintiff attend at his own expense for cross-examination; and although upon such cross-examination the defendant could not shew that she had any defence, and the order for judgment was affirmed, she was allowed a portion of the costs of a successful appeal. *Kingsley v. Dunn*, 13 P. R. 300.—MacMahon.

Upon a motion for judgment under Con. Rule 739, the defendant may satisfy the judge that there is a good defence otherwise than by affidavit; and one means of doing so is by cross-examination of the plaintiff on his affidavit filed in support of the motion. *Id.*

A writ was endorsed as follows:—"The plaintiff's claim is for the price of goods supplied." The following are the particulars:—"£621.06 for money payable by the defendant to the plaintiff for goods bargained and sold, and sold and delivered by the plaintiffs to the defendant, and interest thereon from the 25th of July, 1882";—Held, that the endorsement was not a sufficient special endorsement to entitle the plaintiff to ask for judgment under Con. Rule 739. *Lucas v. Ross*, 9 P. R. 251.—Dalton, *Master*.

The endorsement on the writ was as follows:—"The plaintiffs claim \$2,000 being the amount of the defendant's overdrawn account with the plaintiffs' bank on the 18th September, 1882";—Held sufficient. *Imperial Bank v. Britton*, 9 P. R. 274.—Dalton, *Master*.

The writ was endorsed for the price of land which the plaintiff had agreed to sell to the defendant. A motion for judgment under Con. Rule 739 was refused. Such a claim cannot be specially endorsed. *Hood v. Martin*, 9 P. R. 313.—Dalton, *Master*.

A writ of summons was specially endorsed under Rule 14, O. J. Act (see Con. Rule 245), "The plaintiffs' claim is \$1,702.72 for money lent by the plaintiffs to the defendants, the same being the amount due to the plaintiffs' branch or agency office at P., and interest thereon from the 1st day of December, 1884, until judgment." On motion for judgment under Con. Rule 739:—Held, that it was necessary for defendant's information to state the date at which his account was overdrawn to the amount specified, and that this endorsement was therefore insufficient. *Ontario Bank v. Burk*, 10 P. R. 648.—Dalton, *Master*.

The writ of summons was indorsed as follows: "The plaintiff's claim is for \$213.90, balance due for sawing wood by the plaintiff for the defendant."—Held, not a sufficient special endorsement to admit of the plaintiff moving for judgment under Con. Rule 739. *Villeneuve v. Wait*, 12 P. R. 505.—Street.

The power given by Con. Rule 739, to sign judgment should be most carefully and sparingly exercised in cases where the defendant makes an affidavit of merits, and disputes the claim, and should never be exercised unless it is shewn that the plaintiff may be seriously prejudiced by the delay in awaiting the ordinary modes of trial, nor in any case in which, under

the old practice, final judgment could not have been signed for want of appearance. On the facts stated in the report, an order of the master-in-chambers, directing the entry of final judgment under such rule, was set aside on appeal. *Barber v. Russell*, 9 P. R. 433.—Dalton, *Master*.—Cameron.

Rule 422 O. J. Act (see Con. Rules 41, 138), and its sub-section (a) must be read together, and hence the limitation in the sub-section of the jurisdiction of the county judge in certain cases curtails that of local masters in similar cases. The local master at Hamilton, in the county of Wentworth, gave leave to sign final judgment under Con. Rule 739, in an action in which the solicitor for the defendant had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton:—Held, that under Rule 422 O. J. Act (see Con. Rules 41, 138), the local master had no jurisdiction to make the order. *Freel v. MacDonald*, 10 P. R. 170.—Boyd.

Held, that an order for judgment under Con. Rule 739 cannot be made except in an action where the plaintiff merely seeks to recover a debt or liquidated demand in money. *Standard Bank v. Wills*, 10 P. R. 159.—Ferguson. See *Huffman v. Doner*, 12 P. R. 492, p. 1068.

The practice of moving under Con. Rule 739, for leave to enter final judgment after delivery of a statement of claim is not one to be encouraged, although in cases of necessity it may be allowable. Under the circumstances of this case, motion for judgment was refused. *Woodruff v. McLennan*, 11 P. R. 22.—Rose.

Where on moving for immediate judgment under Con. Rule 739, the plaintiff makes out a *prima facie* case for granting an order therefor, it is not sufficient for the defendant, in opposing the application, to swear that he has a good defence on the merits;—he must shew the nature of his defence, and give some reason for thinking that such defence exists in fact. *Collins v. Hickok*, 11 A. R. 620.

Leave was given to sign final judgment under Con. Rule 739, against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario. *Plummer v. Lake Superior Native Copper Co.*, 10 P. R. 527.—Rose.

On an application, which was granted under Con. Rule 739, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve:—Held, that since the repeal of C. S. C. c. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, s. 77 (Dom.), the judgment will not bind any property of the Indian except that described in section 75. *Bryce, McMurrich & Co. v. Salt*, 11 P. R. 112.—Dalton, *Master*.

There may be two judgments in one action. Leave was given to the plaintiff to sign judgment under Con. Rule 739, for the amount of a money demand, and to proceed upon another claim in the same action. *Hay v. Johnston*, 12 P. R. 596.—Boyd.

Leave to sign judgment under Con. Rule 739 should not be granted save where the case is clear

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and free from doubt, and under the circumstances of this case an order for such leave, made by the judge of the District Court of Thunder Bay, was reversed. *Bank of Minnesota v. Page*, 14 A. R. 347.

An order for leave to sign judgment under Con. Rule 739, is in its nature final and not merely interlocutory, and therefore such an order if made in a county court, would be appealable by virtue of 45 Vic. c. 6, s. 4 (Ont.), and is also appealable when made in a District Court. *Id.*

When the facts are not clear and free from doubt leave to sign judgment under Con. Rule 739 should not be granted. *Bank of Minnesota v. Page*, 14 A. R. 351, followed. But where a distinct defence is not made out, terms should be imposed upon the defendant upon his being allowed to defend, as a pledge of his bona fides; and in this case the defendant was required to pay into court or secure one-half of the amount claimed. *Stephenson v. Dallas*, 13 P. R. 450.—Boyd.

The order for security for costs under Rule 431, O. J. Act (Con. Rule 1242), is a stay of proceedings, and a judge has no power to set it aside when once properly issued and sign final judgment under Con. Rule 739. *Bank of Nova Scotia v. LaRoche*, 9 P. R. 503.—Cameron.

Since the passing of Con. Rule 1251, the practice sanctioned by *Doer v. Rand*, 10 P. R. 165, and *Anglo American Casings Co. Limited v. Rowlin*, *Id.*, 391, is no longer applicable, and where a plaintiff against whom a precept order for security for costs had been obtained, moved to set it aside and for judgment under Con. Rule 739, without paying \$50 into court under Con. Rule 1251, his motion was dismissed. *Payne v. Newberry*, 13 P. R. 354.—Falconbridge.

Where the plaintiff's motion for judgment under Con. Rule 739 was dismissed because he had not observed the practice under Con. Rule 1251 of partly complying with an order upon him for security for costs by paying \$50 into court, and he subsequently paid the money in and renewed the application upon the same material:—Held, that the dismissal of his first application was no bar to the second one. *Semle*, it would have been otherwise had the plaintiff failed in his first application by reason of defects in his material, and made a second one upon new material supplying the defects. *Payne v. Newberry*, (No. 2) 13 P. R. 392.—Dalton, Master.

#### VII. UNDER CON. RULE 744.

The judge sitting in chambers has no jurisdiction to order judgment to be signed under Con. Rule 744, but a motion for judgment thereunder must be made to the court. *Morrison v. Taylor*, 46 Q. B. 492.—Wilson.

Where it appears that defendant has no defence, and has made, or is intending to make a fraudulent disposition of his property, or is so dealing with it as to embarrass the plaintiff in reaching it by execution, the court will, on motion, under Con. Rule 744, upon a proper case being made, order judgment and immediate execution. In the event of other executions being obtained against the debtor's property

before the time at which the plaintiff would be entitled to issue execution as on a judgment in default of appearance, and the amount realized being insufficient to satisfy all parties, a ratable division should be made. *Kinloch v. Morton*, 9 P. R. 38.—Osler.

Where there were cross-actions, in one of which a sum had been reported due and a claim of set-off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was held entitled to move for judgment under Con. Rule 744. But the affidavits filed on the motion being conflicting:—Held, the action must be entered for trial at the sittings for the examination of witnesses, but the amount found due in the first action was ordered to be paid into court, to abide the result of the second action. *Francis v. Francis*, 9 P. R. 209.—Proudfoot.

In an action for the rectification of a deed and for a declaration that the plaintiff was entitled to a right of way, and for an injunction restraining defendant from interfering therewith. The endorsement stated the relief claimed. The defendant who did not appear within the time limited, subsequently entered an appearance, but did not serve any notice thereof:—Held, on motion for judgment under Con. Rule 744, that a statement of claim must be filed. *Hunter v. Wilcockson*, 9 P. R. 305.—Ferguson.

A person of the same name as the defendant served by mistake with the writ in the action was held entitled to his costs of opposing a motion for judgment under Con. Rule 744. *Lucas v. Fraser*, 9 P. R. 319.—Dalton, Master.

Leave was given to the plaintiff under Con. Rule 744 to sign final judgment, where the claim was upon a covenant by the defendant with the plaintiff upon lands sold by him to the defendant, and for indemnity, and where the plaintiff was being sued for payment of four of the mortgages, but had not actually paid them. It was directed that the judgment to be entered should be for the amount of the four mortgages and interest (to be computed by the registrar), and costs. Leave was reserved to the defendant to apply to be relieved from the judgment upon his satisfying the claim of the holder of the mortgages. *Clendeman v. Grant*, 10 P. R. 593.—Rose.

During the currency of a promissory note it was agreed between the indorsee and indorser that the note should be renewed at maturity, and from time to time on payment of a named sum, "if the renewal notes are continued in the same firm or names as at present." Before the maturity of the note the maker died. After its maturity in an action on the note against the indorser the defendant set up such agreement as a defence, and alleged that he duly offered to perform it so far as lay in his power, by leaving the said note and liability of the maker and giving his note in renewal as agreed as collateral to the said note, which tender the plaintiff refused to accept, and which the defendant is at all times ready and willing to carry out. A motion for immediate judgment under Con. Rule 744, was dismissed, the judge refusing to decide as to the legality of the defence on such motion. *Federal Bank v. Hope*, 6 O. R. 209.—Rose.

Held, that where an order for the signing of a judgment under Con. Rule 744, was made in chambers instead of in court, it must be taken advantage of by a summary application, and that its invalidity could not be set up in an action founded on it. *Martin v. Evans*, 6 O. R. 238.—Boyd.

In order to obtain under Con. Rule 744 a speedy judgment before the time for appearance in an action has expired, a plaintiff must shew that some injury or injustice is likely to happen or to be done to him if he is not awarded immediate relief. *Greene v. Wright*, 12 P. R. 426.—Rose.

Where the affidavit of a plaintiff stated that he verily believed it was necessary for the plaintiffs to get immediate judgment in order to protect their interests and prevent any disposition of the estate that might be prejudicial to the creditors, but no facts were set out upon which such belief was founded, and the utmost shewn was that the defendant was in financial straits, and had refused to submit his affairs to investigation or to make an assignment:—Held, that a motion under Con. Rule 744 for judgment before appearance must be refused. *Ib.*

Notice of motion. See *Martens v. Birney*, 10 P. R. 368, p. 1067.

#### VIII. UNDER CON. RULE 755.

Under Con. Rule 755, the court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the materials necessary for finally determining the question in dispute \* \* give judgment accordingly, but Per Wilson, C. J.—Unquestionably that power must be most sparingly and cautiously exercised. *Stewart v. Rounds*, 7 A. R. 515.

Held, that the business in this case was not one protected by R. S. O. (1877), c. 125, s. 7 (see R. S. O. 1887, c. 132, s. 5); that the verdict could not be sustained; and under Con. Rule 755, and R. S. O. (1877), c. 50, s. 283 (see Con. Rule 798), it was set aside and judgment entered for the defendant. *Murray v. McCullum*, 8 A. R. 277, referred to and distinguished. *Campbell v. Cole*, 7 O. R. 127.—Chy. D.

At the trial the jury answered all the questions left to them in favour of the plaintiff and judgment was entered for him, which the County Court judge subsequently set aside, and entered judgment for the defendants:—Held, that under Rule 400, O. J. Act (Con. Rule 1257), the same power is extended to the County Courts as is possessed by the High Court under Con. Rule 755, and that the judge of the County Court was right in giving judgment in favour of the defendants instead of submitting the question to another jury. See, also, on the same point, *Stewart v. Rounds*, 7 A. R. 575, and *Williams v. Crow*, 10 A. R. 301. *McConnell v. Wilkins*, 13 A. R. 438.

Semble, if the evidence given will not warrant the granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Con. Rule 755. *Hislop v. Township of McGillivray*, 12 O. R. 740.—Q. B. D.

#### IX. UNDER CON. RULE 756.

The defendant in an action on a judgment obtained in Iowa, U. S. A., pleaded denying the recovery of the judgment. Upon a motion for judgment under Con. Rule 756, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment:—Held, affirming the opinion of the master, that judgment could not be ordered on these materials under Con. Rule 756 the defendant having put the judgment distinctly in issue. *Henebery v. Turner*, 2 O. R. 284.—Q. B. D.

In proceeding under Con. Rule 756 it is not sufficient to produce a document on which the plaintiff relies, without any proof to connect the defendant with it or to support its genuineness. *Ib.*

In an action for the recovery of land the plaintiff may obtain an order to sign final judgment under Con. Rule 756, upon an admission of the defendant in his examination. *Trust and Loan Co. v. Hill*, 9 P. R. 8.—Dalton, Master.

In an action for the recovery of land the plaintiffs moved under Con. Rule 756, for final judgment upon the pleadings, the depositions of the defendant, taken on his examination for discovery, and upon an affidavit verifying a lease of the land in question to the father and brother of the defendant:—Held, affirming the decision of the master-in-chambers, that much care must be taken in such cases not to take away the right of trial on viva voce evidence; and that as the plaintiff's case was not conclusively made out, the motion was properly refused. *Cook v. Lemieux*, 10 P. R. 577.—Dalton, Master.—Rose.

Quere, whether the lease in question was a document that under Con. Rule 756, could be proved on this motion by an adverse affidavit without cross-examination. *Ib.*

The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this action, asking for sale, payment, and possession. After service of the writ of summons, the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third person, for execution by the plaintiff, under 49 Vict. c. 20, s. 7 (Ont.). The plaintiff refused to execute this because of his second mortgage, although he was willing to execute a discharge; and the defendants moved for a mandamus to compel him to execute an assignment. This motion having been dismissed a statement of claim was filed, and a statement of defence in which the first mortgage was admitted, and the tender and the refusal were set up. The plaintiff then joined issue. There was no reference in the pleadings to the second mortgage. On motion for judgment under Con. Rule 756:—Held, that the admissions in the affidavit of the defendant filed on the former motion, could be used upon this motion; and that in view of what was held upon the former motion, there must be judgment for the plaintiff upon the pleadings and affidavit. *Rogers v. Wilson*, 12 P. R. 322, 545.—Rose.—C. of A.

Held, that a motion under this rule is properly a court motion. *Ib.*

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An application for judgment under Con. Rule 756 cannot be made until the right of the party applying for the relief claimed has appeared from the pleadings. *McLeod v. Seasmith*, 12 P. R. 606.—Armour.

An order made under Con. Rule 756, before the delivery of any pleading in the action, based on admissions in letters, was set aside. *Ib.*

#### X. INTERLOCUTORY JUDGMENTS.

Held, that in an action commenced by a writ not specially endorsed, where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages. *Fenwick v. Donohue*, 8 P. R. 116.—Dalton, Q.C.

The endorsement on the writ of summons claimed, in addition to pecuniary damages, an injunction restraining the defendants from disposing of certain goods:—Held, that interlocutory judgment signed by the plaintiff for default of appearance was irregular, and should be set aside. *McCallum v. McCallum*, 11 P. R. 16.—Dalton, Master.

See *Johnston v. Christie*, 31 O. P. 358; *Shaw v. S. Louis*, 8 S. C. R. 385; *Huffman v. Doner*, 12 P. R. 492, p. 1068.

#### XI. JUDGMENT ON DEMURRER.

A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence enter it for argument and give notice, nor serve an order for leave to amend, as required by Rule 195, O. J. Act (Con. Rule 539):—Held, on an ex parte motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a judge in court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading. *Livingston v. Trout*, 10 P. R. 493.—Rose.

When a final judgment for the purpose of appeal to the Supreme Court of Canada. See *Shields v. Peak*, 8 S. C. R. 579; *Roblin v. Rankin*, 11 S. C. R. 137.

#### XII. DECLARATORY JUDGMENTS.

The plaintiff set up a verbal agreement made in 1873, between himself and the defendant C., they being adjoining proprietors of land, to the effect that C. should build a house with its southern wall encroaching nine inches upon the plaintiff's land, and the plaintiff should be allowed at any time to use that wall as a party wall upon payment of half the expenses of its original erection by C.; and the plaintiff alleged that shortly afterwards C. erected his building as agreed upon, and the plaintiff claimed to have the agreement put into writing, and executed by C., so as to enable him to register it; and he asked a judgment declaring him entitled to all the rights and privileges contained in the verbal agreement. C. in his pleadings conceded the

rights and privileges demanded by the plaintiff under the agreement:—Held, nevertheless, affirming the decision of Ferguson, J., that the action must be dismissed, for there is no jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. *Brooks v. Conley*, 8 O. R. 549—Chy. D. But see R. S. O. (1887), c. 44, s. 52 (5).

#### XIII. SET-OFF OF JUDGMENTS.

The plaintiff had recovered a verdict for \$800 against defendant for malicious prosecution, but judgment had not been signed thereon. At the same assizes the defendant recovered a verdict against the plaintiff for \$380 on promissory notes, and signed judgment. The plaintiff almost immediately after its recovery assigned his verdict to his brother, but the court held this to be a device to prevent a set-off:—Held, that the defendant was entitled to have the plaintiff's verdict set-off pro tanto by entering satisfaction upon his judgment to the extent of the verdict, and paying the costs of suit; and it made no difference that the judgment had not been entered by the plaintiff. *Grant v. McAlpine*, 46 Q. B. 284.—Osler.

Where judgments were recovered in the same action by the plaintiff on his claim with general counter-claim, and the defendant on his counter-claim, with costs thereof, such claim and counter-claim, arising out of the same subject matter, the judgment for counter-claim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendants' counter-claim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff:—Quere, when a judgment, as in this case, has been framed without directing a set-off, whether a judge in chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the court, *Brown v. Nelson*, 11 P. R. 121.—Dalton, Master. Osler.

The plaintiffs sued for freight for the carriage of timber, and the defendant pleaded a counter-claim for neglect and delay in the carriage of the timber. The judgment at the trial was as follows: "The verdict will be for the plaintiffs for \$2,122, and for the defendants upon their counter-claim for \$1,420, and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions, and I direct that judgment be entered accordingly:—Held, reversing the decision of the master-in-chambers, that the judgments recovered by the plaintiffs and defendants must be treated as judgments in separate actions, and, therefore, that in setting off the judgments the claim for costs of the defendant's solicitors upon the judgment against the plaintiffs should be protected. *Canadian Pacific R. W. Co. v. Grant*, 11 P. R. 208.—C. F. D.

The plaintiff recovered judgment against the defendant with costs upon a claim for the value of goods sold under a distress for rent, of which the defendant, the landlord, himself, became



the purchaser; and the defendant recovered judgment against the plaintiff with costs upon a counter-claim for rent and damages to the demised premises. The judgment did not direct any set-off, and the plaintiff's solicitors having asserted a lien upon the judgment for costs against the defendant, the taxing officer refused to allow a set-off of the costs awarded to plaintiff and defendant respectively:—Held, that the claim and counter-claim were separate and distinct, and the judgments must be treated as judgments in separate actions; and Con. Rule 1204 did not apply to enable the taxing officer to deduct or set-off costs. Under the circumstances of this case, the court (Rose, J., dissenting), deprived the plaintiff, who was finally successful upon the appeals as to costs, of the costs of the appeals. *Link v. Bush*, 13 P. R. 425.—MacMahon.—C. P. D.

G. and H. brought counter action for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which were granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to L. all his interest in his suit against H. and gave notice of such assignment in May, 1884. In February, 1885, H. signed judgment against G. on confession:—Held, reversing the judgment of the court below (25 N. B. Rep. 451), Strong, J., dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to L. *Greene v. Harris*, 16 S. C. R. 714.

#### XIV. INTEREST ON.

(See R. S. O. (1887), c. 44, s. 88.)

Section 43 of the Court of Appeal Act, which provides "when on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the court below is in favour of the defendant, and is reversed on appeal. In such case the court, on reversing the judgment, gave liberty to the appellant, the plaintiff in the court below, to move to be at liberty to enter judgment as directed by this court, nunc pro tunc, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favour. *Quintan v. Union Fire Ins. Co.*, 8 A. R. 376.

Where an appeal is brought against a judgment in any personal action which is affirmed on appeal, interest on the judgment is by force of the statute allowed for such time as execution has been stayed by the appeal: but where the plaintiff refrained from entering up his judgment until after the decision in appeal, this court refused to order interest to be allowed on the amount of the verdict; leaving the plaintiff to apply to the court below for relief by entering the judgment nunc pro tunc. *McEwan v. McLeod*, 10 A. R. 98.

In endorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment, not from the day of the formal entry thereof. Rules 326 O. J. Act (see Con. Rules 764, 765) and 351 O. J. Act, (Con.

Rule 889) are not inconsistent. *Keleher v. McGibbon*, 10 P. R. 89.—Dalton, Master.

On the 23rd of January, 1882, the following judgment was pronounced in court by Oaler, J. A.:—"I direct judgment to be entered for the plaintiff against the within named defendants after the fifth day of next Hilary Sittings for \$100,000." Hilary Sittings ended on the 25th February, and judgment was formally entered with the clerk of the court on the 24th March as of the 23rd January:—Held, that Rule 326 (see Con. Rule 765) did not apply to this case; that the judgment should be dated on the day of its entry with the clerk, and from that date only, under Rule 327 (see Con. Rule 765), interest should run. *Keleher v. McGibbon*, 10 P. R. 89 explained. *McLaren v. Canada Central R. W. Co.*, 10 P. R. 328.—Dalton, Master.

See *Exchange Bank v. Springer*, 13 A. R. 390; *Bank of Hamilton v. Hurvey*, 11 P. R. 145, p. 1066; *Dobie v. Lemon*, 12 P. R. 64, p. 1085.

#### XV. TIME OF TAKING EFFECT.

C., being in default on his mortgage of realty to the plaintiffs, in April, 1882, gave them a chattel mortgage, in consideration of which they agreed to allow him to remain in possession and take the year's crop. On the 2nd July, 1882, the plaintiffs took formal possession of the land. On the 17th July, 1882, the defendant, having obtained judgment against C., placed a *fi. fa.* in the hands of the sheriff, who seized the growing crops on the land in question on the same day, and sold them in August. The plaintiffs had commenced ejectment proceedings on the 15th June, and they signed judgment on the 30th September, in the same year. The plaintiffs claimed the crops, and an interpleader issue was tried:—Held, (affirming the judgment of the Common Pleas Division, 5 O. R. 371) that the defendant had the right on the 17th July, by virtue of the agreement made in April, to seize the crops as C.'s property. The seizure and sale having taken place before the judgment in ejectment, the rule that the judgment related back to the day of the commencement of the action, so as to make C. himself a trespasser from that date, could not avail the plaintiffs. *Hamilton Provident and Loan Society v. Campbell*, 12 A. R. 250.

See also previous Subhead.

#### XVI. ASSIGNMENT OF.

M. being seized in fee of land mortgaged to the plaintiff, and then sold to D. expressly subject to the mortgage. D. sold to one Maybe in the same manner, and Maybe sold to defendant, who had notice of the title, covenanting against incumbrances. The plaintiff proceeded against M. and the defendant and obtained judgment for sale on nonpayment and costs, whereupon defendant paid the plaintiff's claim for debt, interest and costs, and took an assignment of the judgment and mortgage:—Held, that the defendant had no right under such judgment to levy from M. any portion of the costs so paid, for if he were allowed to do so, M. by the effect of the conveyances would have a remedy over for them against the land, defendant's property, and

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could then force defendant to pay them back. *Kempt v. Maccauley*, 9 P. R. 582.—Dalton, Master.

Where one having obtained an assignment of a judgment against a mortgagor, brought an action in his own name against the mortgagee, who had sold under the power of sale, to make him account for certain surplus moneys left in his hands after such sale:—Held, that the plaintiff was entitled so to sue, and that such assignment was not in contravention of the law respecting partnership and maintenance. *Harper v. Culbert*, 5 O. R. 152.—Ferguson.

Right of surety against principal upon assignment of judgment. See *Victoria Mutual v. Freel*, 10 P. R. 45.

The plaintiff and defendant were partners, and judgment was recovered against them in 1876 by a bank upon certain promissory notes, of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant. The partnership accounts were taken by a referee, whose finding, approved by the court was, that the defendant should have paid one-half of the judgment:—Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant. Per Armour, C. J.—The Mercantile Amendment Act, R. S. O. (1887), c. 122, ss. 2, 3, 4, applies to the case of partners. *Small v. Riddel*, 31 C. P. 373; *Potts v. Lensk*, 36 Q. B. 376; and *Scripture v. Gordon*, 7 P. R. 164, not followed, in view of the opinions expressed in *London and Canadian L. & A. Co. v. Morphy*, 14 A. R. 577. *Housinger v. Love*, 16 O. R. 170.—Q. B. D.

See *Field v. Galloway*, 5 O. R. 502, p. 261.

#### XVIII. AMENDMENT OF.

At any time before formal judgment issued by the court the judgment or part of it may be recalled and a term imposed or a change made. *Canadian Land and Emigration Co. v. Municipality of Dysart*, 4 O. R. 495, 512.—Ferguson.

An order was made by the master in chambers amending a judgment entered against C. as executrix, so as to make it a judgment against her personally; and also amending the writs of fi. fa. in the sheriff's hands so as to be conformable with the judgment as amended. The order was made nunc pro tunc upon the allegation that all parties interested had consented, and that an execution at the suit of the M. Co. against C. personally had expired. On an application made by the M. Co. to set aside the order, on the ground that their writ had not expired, but was in full force; and that the effect of the amendment was to give plaintiff's writ priority, the master made an order setting aside his previous order, and directing the amendment to make the order to be struck out. On motion by way of appeal to the Divisional court to rescind the last named order:—Held, *Cameron, C. J.*, dissenting, that the motion must be refused; for that though the M. Co. were strangers to the action in which the amendments were made, they had a *locus standi* to

apply to have the same set aside. *Glass v. Cameron*, 9 O. R. 712.—C. P. D.

The plaintiffs signed judgment on default of appearance in an action for a money demand, and the defendant was afterwards, upon application to a local judge, let in to defend upon the merits, upon certain conditions, one of which was, "the judgment and execution (fi. fa. goods) now in force to stand as security to the plaintiffs unless and until the defendant pays into court the amount of the plaintiffs' claim, or gives security therefor." The defendant did not pay into court or give security. The action was tried and a verdict given for the plaintiff; subject to a reference to ascertain the proper amount due to the plaintiffs; and the referee found a less amount due than that for which judgment had originally been entered. After verdict and before the finding of the referee, the plaintiffs issued and delivered to the sheriff a fi. fa. against the lands of the defendant on the original judgment. *Semble*, the original judgment could not stand when the case was reopened, and the defendant let in to defend; but as the parties had treated the judgment as standing:—Held, that it and the fi. fa. goods should be reduced to the sum found by the referee, instead of entering a new judgment; but that the issue of the writ of fi. fa. lands was quite unwarranted. *Hillyard v. Swan*, 12 P. R. 226.—Wilson.

Where the plaintiff in a mortgage action obtained the usual foreclosure judgment and had his account taken thereby without a reference and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under Con. Rules 780, 781, so as to convert it into a judgment under Con. Rule 776 with a reference to the master-in-ordinary to add incumbrancers, take the accounts, etc. *Wilgrens v. Crawford*, 12 P. R. 658.—Street.

Amendment of judgment as to costs. See *Trux v. Dixon*, 13 P. R. 279; *Mardonell v. Baird*, 13 P. R. 331, p. 42; *Brundage v. Howard*, 13 A. R. 337, p. 248.

#### XIX. SETTING ASIDE.

##### 1. Delay in Applying.

Twenty-two months after judgment had been signed in an action on promissory notes for want of a plea and execution issued, and the defendant examined as a judgment debtor, leave was refused to set aside the judgment, and amend the declaration by charging the defendant with fraud within the meaning of the Insolvent Act of 1875. *Lightbound v. Hill*, 9 P. R. 295.—Dalton, Master.

Application to set aside judgment against husband and wife upon application of the wife refused, owing to long delay in making application. See *McLean v. Smith*, 10 P. R. 145.

An order to set aside proceedings must be served forthwith; otherwise the opposite party may treat it as abandoned. And where final judgment was cut down to interlocutory judgment by order of a master, granted on the 9th July, but not issued or served till the 19th November:—Held, that the delay was fatal, and the master was wrong in allowing the stale order

to be used against the judgment as originally signed. *Molson's Bank v. Dillabaugh*, 13 P. R. 312.—Boyd.

See *McLean v. Shields*, 9 O. R. 699, p. 1094.

## 2. Other Cases.

Where in 1875 in an action of ejectment the parties agreed in writing that a verdict be entered for the plaintiff, but not enforced until defendant be paid \$50 for costs and the value of his improvements, said value to be fixed by arbitration; and though the \$50 had not been paid nor the said value so ascertained, plaintiff entered judgment on the verdict and ejected the defendant, whose devisee now filed this bill claiming possession, damages or reference as to improvements, and an order for the payment of the amount found due and of the \$50 for costs:—Held, that though the judgment could not be set aside and possession given to plaintiff the plaintiff was to a reference as prayed with costs. *Watson v. Ketchum*, 2 O. R. 237.—Ferguson.

Semble, the question of the validity of a judgment should not be argued upon the return of a garnishee summons, but should be raised on an application to set aside the execution. *Elliot v. Capell*, 9 P. R. 35.—Dalton, *Master*.—Osler.

In an action for dower and damages for detention of dower, defendants appeared under R. S. O. (1877) c. 55, s. 20, and filed acknowledgment of tenancy, consent to dower, etc. Plaintiff's solicitor thereupon entered judgment of seisin, issued writ of assignment of dower, and proceeded for damages. The judgment of seisin was held at the hearing to be final, and to preclude any proceeding for damages, but leave was given to plaintiff to move in chambers to vacate it. The master-in-chambers made an order vacating the judgment:—Held, on appeal, that the order was one in the discretion of the master, which was properly exercised under the circumstances in the plaintiff's favour, especially as judgment had been signed through mistake of her solicitor. *Ryan v. Fish*, 9 P. R. 458.—Proudfoot.

The plaintiff not appearing at the trial, which took place at the Picton assizes, before Patterson, J. A., judgment was directed to be entered for the defendant, with costs. Application was subsequently made to the judge at the same assizes to set aside the judgment and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the master-in-chambers, under Rule 270 O. J. Act, (Con. Rule 795) to set aside the judgment entered at the trial. This motion was enlarged before Rose, J., in chambers, who:—Held, that Rule 270 O. J. Act, (Con. Rule 795) does not give jurisdiction to the master or a judge in chambers in such cases. *Hilliard v. Arthur*, 10 P. R. 281.—Rose. *Ib.* 426.—Q. B. D.

The judge who presides at the trial, and pronounces judgment by default for the defendant in the absence of the plaintiff, has power, under Rule 270 O. J. Act (Con. Rule 795), when afterwards sitting as the court at Toronto, to set aside such judgment. *Hilliard v. Arthur*, 10

P. R. 281 distinguished. *Ross v. Carscallen*, 11 P. R. 104.—Ferguson.

Where judgment for defendant was given at a trial in consequence of the plaintiff's absence, and an application was afterwards made to the judge at the sittings to reinstate the case, which he refused to entertain:—Held, that the plaintiff might nevertheless apply, under Rule 270 O. J. Act, (Con. Rule 795) to the Divisional Court at its next sittings to set aside the judgment, and for a new trial. *Wilson v. Irwin*, 10 P. R. 598.—Chy. D.

Setting aside judgment in Division Court. See *Re Foley v. Moran*, 11 P. R. 316, p. 551.

An order of the 4th of October, 1886, extended the time for the delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed, with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action:—Held, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462 (Con. Rule 485) vacating the judgment, and further extending the time for delivering the statement, and the master-in-chambers had jurisdiction to make such an order. *Newcombe v. McLuhan*, 11 P. R. 461.—Wilson.

The plaintiff claimed \$923.13, the balance of an account, and interest thereon, and signed judgment for default of an appearance upon the special indorsement of his writ of summons for \$1,253. The defendant moved to set aside the judgment, swearing that he had failed to enter an appearance owing to a misapprehension, denying positively that he owed the plaintiff anything, and alleging that he at one time owed him \$250, but that it had been satisfied by the plaintiff taking one A. as his debtor instead of the defendant, and further, that if the debt had not been satisfied by A., it was barred by the Statute of Limitations. No affidavit was filed on behalf of the plaintiff verifying the debt, and the arrangement as to substituting A. was not denied. A local judge set aside the judgment, but only on the terms that the defendant should give security for or pay into court the sum of \$250:—Held, that if upon an application by the plaintiff, under Rule 80 (Con. Rule 739), or Rule 324 (Con. Rule 744), for leave to enter judgment, such a defence had been sworn to, and such circumstances had appeared, the application would not have been granted, and payment into court or security would not have been exacted from the defendant as a condition of his being allowed to defend. There is no substantial difference between the case where a party seeks the right to defend before judgment signed, and the case where the judgment has been signed on account of a slip or misapprehension, and the defendant makes out a case giving him the right to defend; and therefore terms should not have been imposed upon the defendant. The disposal by the defendant of his property liable to execution since the service of the writ of summons upon him was not a matter to disentitle him to relief that otherwise could not properly have been denied him. *Runnacles v. Mesquita*, 1 Q. B. D. 418, followed. Semble, if the defendant's statements were true, the plaintiff would not be entitled to interest

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on the amount of his claim, and the judgment would have been irregular. *Dobie v. Lemon*, 12 P. R. 64.—C. P. D.

(Objection to application that judgment was obtained by consent. See *Sweeney v. Sweeney*, 16 O. R. 92.

A Divisional Court has no jurisdiction to hear an appeal direct from the master-in-chambers, or a substantive motion to set aside a judgment by default of appearance. *Ball v. Cathcart*, 16 O. R. 525.—C. P. D.

See *Town of Dundas v. Gilmour*, 2 O. R. 463.

## XX. EFFECT OF JUDGMENTS.

### 1. Estoppel.

#### (a) Ejectment.

Where in 1875, in an action of ejectment the parties agreed in writing that a verdict be entered for the plaintiff, but not enforced till defendant be paid \$50 for costs and the value of his improvements, said value to be fixed by arbitration; and, though the \$50 had not been paid, nor the said value so ascertained, plaintiff entered judgment on the verdict, and ejected the defendant, whose devisee now filed this bill, claiming possession, damages, a reference as to improvements, and an order for payment of the amount found due, and of the \$50 for costs:—Held, that though the judgment could not be set aside, and possession given to plaintiff, the plaintiff was entitled to a reference as prayed, with costs. *Watson v. Ketchum*, 2 O. R. 237.—Ferguson.

It was contended that the defendant was estopped from disputing the plaintiff's title by his admissions and by reason of the plaintiff having recovered a judgment in ejectment against the defendant's tenants; but the plaintiff's claim was for damages for pulling down fences and for mesne profits for a period of five or six months prior to the date of the ejectment, and the admission of title did not go further back than the ejectment:—Held, that the judgment against the tenants was evidence against the defendant, at the date of the writ of ejectment, but that title was really in question, and necessary to be proved in respect of the period for which mesne profits were claimed prior to the ejectment. *Seabrook v. Young*, 14 A. R. 97.

Action for breach of an agreement made between plaintiff as mortgagor and defendants as mortgagees, whereby in consideration of the plaintiff having given defendants a chattel mortgage on certain property, defendants agreed to extend the time for payment of the mortgage, etc., one year from 1st of April, 1882. The defence was that on 17th June, 1882, the now defendants brought ejectment against the now plaintiff, setting up that by such mortgage on default of payment of the mortgage moneys the now defendants should be entitled to take possession of said lands; alleging default, and by reason thereof the now defendants claimed possession; that the now plaintiff did not plead any defence to the action; and for default of any defence on 30th September, judgment for possession was recovered:—Held, that the judgment

so recovered estopped the now plaintiff from maintaining the present action. *Cochrane v. Hamilton Provident Loan Society*, 15 O. R. 128.—C. P. D.

Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of res judicata to an action subsequently brought by the defendant to try the same question. *Cochrane v. Hamilton Provident and Loan Society*, 15 O. R. 128 followed. *Ball v. Cathcart*, 16 O. R. 525.—C. P. D.

See *Mitchell v. Strathy*, 28 Chy. 80, *infra*; *Adamson v. Adamson*, 28 Chy. 221, p. 1087.

### (b) Other Judgments.

"Where the cause of action is the same and the plaintiff has an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such a former recovery a bar however, it must be shewn that the plaintiff had an opportunity of recovery, and but for his own fault might have recovered in the former suit that which he seeks to recover in the second action." Per Willes, J., in *Nelson v. Couch*, 15 C. B. N. S. 108, quoted by Patterson, J., in *Davidson v. Belleville and North Hastings R. W. Co.*, 5 A. R. 315.

A judgment in favour of the plaintiff in an action for trespass to lands upon pleas (amongst others) of lands not plaintiff's and liberum tenementum, is not a complete estoppel, preventing the defendant in another suit from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shewn that the defendant had trespassed. *Hunter v. Birney*, 27 Chy. 204.—Blake.

S. being the holder of two mortgages, brought ejectment thereon, when the genuineness of the signatures to the instruments was disputed, notwithstanding which he recovered judgment in that action, and subsequently instituted proceedings in this court seeking to obtain a sale of the mortgaged premises and the usual order for deficiency. Owing to the extremely contradictory evidence adduced at the hearing, the court (Spragge, C.) refused to make the decree as asked, holding the evidence insufficient to establish the execution of the mortgages, as the plaintiff was bound to do, and dismissed the bill, with costs, but without prejudice to S. filing another bill if so advised, within twelve months from the date of that decree. After the lapse of more than twelve months the mortgagor filed a bill seeking to have the mortgages delivered up to be cancelled:—Held, that if the strict construction of such decree was that the point was res judicata it was erroneous, and the court (Spragge, C.) refusing to enforce it in this proceeding by making a decree in favour of the plaintiff, dismissed the bill with costs. *Mitchell v. Strathy*, 28 Chy. 80.

A former suit had been instituted by the plaintiff which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed:—Held, that under such cir-

cumstances the question was not res judicata. *Adamson v. Adamson*, 28 Chy. 221.—Spragge.

D., the purchaser of land, gave a mortgage thereon to secure part of the purchase money, and subsequently allowed taxes to accumulate on the land, which was sold in order to realize such taxes when D. bought it and obtained the usual deed to himself. D. having made default in payment of the mortgage, proceedings at law were instituted thereon, pending which D. conveyed this and other property to his two sons, who gave a mortgage back securing the support and maintenance of D. and his wife, and the plaintiff, after recovering judgment, filed a bill impeaching the transaction for fraud:—Held, (1) that upon the evidence the transaction was fraudulent and void as against creditors; (2) that although ordinarily the production of the exemplification of a judgment at law is admissible, and has been generally received as evidence of a debt due the plaintiff against all parties in suits under the statute of Elizabeth, yet that the judgment so recovered by the plaintiff against D. was in evidence against the sons, being res inter alios judicata. *Allan v. McTavish*, 28 Chy. 539.—Spragge. See S. C., 8 A. R. 440.

On proceeding with the reference under the decree pronounced on the hearing, as reported 28 Chy. 356, the master by his report found that there was due to the plaintiff \$1,104.99, which included a sum of \$171.32 costs incurred in the suit brought by him to redeem:—Held, on appeal,—affirming the report of the master—(1) that the plaintiff was entitled to claim the costs so incurred, that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption with the concurrence of C., through whom the appellant claimed—and, (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as Jarvis under whom they claimed would have been, the proceeding not being in respect of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument, and that therefore the rule as to estoppel by deed applied. *Pierce v. Canavan*, 29 Chy. 32.—Ferguson.

Effect of judgment in appellate court where the judges were equally divided. See *In re Hall*, 32 C. P. 498; 8 A. R. 135 p. 25.

Under 22 Vict. c. 5, s. 58, consolidated in C. S. L. C. c. 83, s. 53, sub-s. 2, a judgment may be recovered in the Province of Quebec, on a personal service in Ontario, in an action in which the cause thereof arose in Quebec, so as to render such judgment conclusive on the merits. A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. c. 57, s. 4, is payable at the place named therein. The C. S. U. C. c. 42, requiring the use of the restrictive words, "not otherwise or elsewhere," applying only to notes made and payable in Ontario. The note in this case was made in Toronto, payable at the Mechanics' Bank Montreal, and was sent to Montreal, and there held until maturity. When it was presented for payment and dishonoured:—Held, that the contract being performable in Quebec, and the breach occurring there, the cause of ac-

tion arose there, so as to bring the defendant within the operation of 22 Vict. c. 5, s. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only. Quere, whether the personal service referred to in R. S. O. (1877), c. 50, s. 145 refers to personal service in Quebec. *Court v. Scott*, 32 C. P. 148.—C. P. D.

Where a judgment has been recovered for a debt without fraud being charged under section 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action against the debtor charging the fraud, even although the judgment was recovered by default, for the plaintiff might have declared, averring such fraud, and had the question tried. *Lightbound v. Hill*, 32 C. P. 249.—Cameron.

The plaintiff, a Division Court bailiff, having seized a quantity of wheat under a warrant of execution against one P. which the defendant claimed, an interpleader summons issued, and on its return was adjourned with leave to the defendant to file his claim in fifteen days. Afterwards the case came up for final hearing, when the judge made this order, "the claimant not having put in his claim or complied with the order above made is barred, and is ordered to pay the costs in fifteen days." The plaintiff, as such bailiff, thereupon brought this action to recover the wheat, which the defendant had obtained possession of pending the summons:—Held, on appeal, affirming the decision of the County Court judge, that the minute so made by the judge in the interpleader issue was equivalent to stating that the claim was dismissed, and was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the wheat. *Hunter v. Vanstone*, 7 A. R. 750.

In an action in the Division Court against the now plaintiff, on notes given by him for the price of a machine, the question of the warranty was tried, and decided against the now plaintiff:—Held, that the matter was res judicata, and the judgment in the Division Court was therefore a good defence, by way of estoppel, to the present action. *Radford v. Merchants' Bank*, 3 O. R., 529.—C. P. D.

The plaintiff company having brought an action against I. on a mortgage, and claiming damages for having made a distress on F., the tenant of the premises, at the request of I., on the reference to ascertain what damage the company had properly sustained by reason of such distress, the master held that the amount of a judgment recovered by F. against the company was the proper measure, and was conclusive evidence of the amount, although it was proved before him that an offer had been made by I. to the company to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined shewed that their evidence might materially have affected the verdict:—Held, that the ruling of the master was erroneous, and that the case must go back to him to revise his report. *Peterborough Real Estate Investment Co. v. Iveton*, 5 O. R. 47.—Proudfoot.

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The plaintiff in this action having a contract with a township corporation for constructing drains, the defendant occasionally cashed checks or orders on the corporation for him, and was also in the habit of supplying him with goods, on account of which the plaintiff gave him two orders. The defendant having sued the plaintiff on the common counts, the plaintiff pleaded payment. By the particulars in that action the now defendant claimed for goods sold and money lent, and gave credit for one item of \$300, received upon an order for that sum. He had a verdict for \$920, and the now plaintiff afterwards brought this action against him to recover back a sum of \$300, which he alleged had been received by the defendant on another order, but had not been credited in the former action:—Held, that the plaintiff was estopped by the former judgment. *Sedden v. Tutop*, 6 T. R. 607; *Chisholm v. Morse*, 11 C. P. 589, distinguished. *Sorenson v. Smart*, 5 O. R. 678.—Osler.—Ferguson.

A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel. *Willcocks v. Howell*, 8 O. R. 576.—C. P. D.

The defendant, a bailiff of a Division Court, under an execution against plaintiff's father, seized two horses, waggon, etc., which, on an interpleader proceeding, were decided to be the goods of the plaintiff, who at the end of three weeks obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damage done to the horses during the time they were in his possession, the jury under the direction of the judge, found a verdict for the plaintiff and \$80 damages, which verdict the judge subsequently refused to set aside:—Held, affirming the judgment of the County Court, that the finding of the judge on the interpleader proceedings formed no ground of defence to the suit for damages for the alleged injury to the property. *Farrow v. Tobin*, 10 A. R. 69.

The letters of administration to an infant as administrator, were revoked after the judgment against him in an action brought by him to recover certain assets of the estate, and new letters were granted to one P., who thereupon obtained an order of revivor in such action, directing the further proceedings to be carried on by P. as administrator and plaintiff. Before P. could move against the judgment the order of revivor was rescinded. P. in this administration action attacked the validity of the securities which the former administrator had impeached in the action referred to, whereupon the plaintiffs (who had been defendants in that action) applied to have it ruled that the judgment in such other action was res judicata against P. in this administration proceeding:—Held, that by the discharge of the order of revivor in the action, in which the plaintiff by revivor was suing in autre droit, such action was left without a plaintiff, and the judgment recovered was not under the circumstances an estoppel against P. *Merchants' Bank v. Monteith*, 10 P. R. 467.—Hodgins, *Master-in-Ordinary*.

In an action on a mortgage from defendant S., the defendant H. being in possession, the latter

claimed that plaintiff was bringing the action for the benefit of S., who was therefore, as well as the plaintiff, bound by a judgment in a former action, in which H., claiming title by possession had succeeded against S. in having a lease from the latter to him set aside, the plaintiff, however, not being a party to the action, and having acquired his title prior thereto. S. pleaded that the judgment in question was obtained by the perjury of H., stating the perjury:—Held, on demurrer, good. *Stewart v. Sutton*, 8 O. R. 341.—Rose.

In an action for alimony, held, that a foreign decree of divorce obtained on an untrue statement of facts, and for a cause not recognized by our law, could not be set up as a bar to the wife's claim for alimony. *Magurn v. Magurn*, 11 A. R. 178.

This action as originally brought was to take the plaintiff's accounts under a postnuptial settlement, in which the plaintiff and the defendant D. J. R. were trustees, but after the hearing and before decree, a question was raised by amendment as to the liability of the defendant D. J. R., to pay certain moneys alleged to have been advanced by the plaintiff for the maintenance of his wife and children, and on the argument of this question, judgment was given directing a reference as to such claim. Before the argument judgment had been rendered in the Superior Court of Quebec, on the same question in D. J. R.'s favour, and on the reference D. J. R. proved this judgment, contending that it concluded the matter, as being res judicata, though not pleaded:—Held, reversing the judgment of the master-in-ordinary (10 P. R. 301), that D. J. R. had had no opportunity of pleading such judgment, and that it was therefore conclusive when set up in the master's office without being pleaded. *Hughes v. Rees*, 9 O. R. 198.—Proudfoot.

The defendant having been paid \$50,000 insurance moneys under various policies effected by him upon certain lumber, which had been burnt by a spark from an engine of the C. C. R. W. Co., afterwards brought action against the railway company and recovered a verdict of \$100,000; the jury finding that that "was the actual value of the lumber destroyed." The insurance companies now brought this action against him claiming that he was trustee for them for so much of the \$100,000 as represented the excess of the total moneys received by him over the amount of his loss, contending that he was estopped by the verdict from asserting his loss to be greater than that amount. The defendant, however, contended that his actual loss had exceeded in the whole \$150,000:—Held, that he was not concluded from so contending by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiffs for insurance in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the master. *National Fire Ins. Co. v. McLaren*, 12 O. R. 682.—Boyd.

S. was an assignee for the benefit of creditors of J. E., and G. was similarly assignee of E. H.

E. Before the assignments J. E. was a creditor of E. H. E. for money lent, and as holder of certain notes. After the assignment S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for payment of the judgment. G. set up the Statute of Limitations. On an appeal from the master, it was:—Held, that the judgment recovered against E. H. E. after his assignment in an action to which G. was not a party, was not even *prima facie* evidence against G. *Eccles v. Lowry*, 23 Chy. 167, considered. *Stewart v. Gage*, 13 O. R. 458.—Proudfoot.

A judgment against an executor upon a debt of the deceased, is conclusive evidence of the indebtedness to the plaintiff as against all other creditors of the deceased, and is so in administration proceedings, though the administration is of goods and lands. Therefore where a judgment had been obtained against the executor of H. on certain promissory notes endorsed by him and maturing after his death, and upon H.'s estate afterwards being administered by the court, the judgment creditor brought the judgment into the master's office and claimed upon it, and other creditors of H., thereupon asked to be allowed to adduce evidence as against the claim on the ground that no proper notice of dishonour had been sent by the holder of the promissory notes, upon which the judgment had been obtained:—Held, reversing the decision of the master-in-ordinary, that they could not be permitted to do so:—Semble, that such judgment is only *prima facie* evidence as against heirs-at-law, and devisees of the deceased. *Eccles v. Lowry*, 23 Chy. 167, commented on. *Re Hague, Traders' Bank v. Murray*, 13 O. R. 727.—Ferguson.

In 1887 the plaintiffs sued the council in the Division Court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the County Court for the surplus received in the five subsequent years. The defendants contended that the claim was *res judicata* by reason of the judgment in the Division Court:—Held, (reversing the judgment of the County Court) (1) That the recovery in the Division Court being for a wholly distinct and separate cause of action, and not upon a balance of account under section 77, or after abandonment of the excess under D. C. Rule No. 8, was no defence to an action for surplus rates received by the defendants in the subsequent years. *Public School Trustees of Section No. 9 Nottawasaga v. Township of Nottawasaga*, 15 A. R. 310.

In the course of proceedings taken in Scotland for winding up the plaintiffs' company, an order was made by a Scotch court for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant, who lived in Ontario, in any court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose:—Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it

against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish court. And an order striking out the defence in the action on the ground that it was *res judicata* by the order of the Scottish court was rescinded. *The British Canadian Lumbering and Timber Co. v. Grant*, 12 P. R. 301.—Boyd.

Plaintiff as assignee for the benefit of creditors under 48 Vict. c. 26 (Ont.), brought this action on behalf of certain creditors under section 7, sub-section 2 of that Act to set aside as fraudulent a mortgage made by his assignor, while insolvent, to the defendants. The defendants set up as a defence, *inter alia*, a judgment for foreclosure on the said mortgage to which the plaintiff as assignee was a party defendant. On demurrer to this it was:—Held, that the judgment of foreclosure was no bar to this action. The plaintiff acted in a dual capacity as assignee of the mortgagor's equity of redemption, and also as a trustee for creditors. It was in the former capacity he was made defendant in the foreclosure action, in which he could not have set up the fraud of his assignor, nor was he bound to have counter-claimed for his present cause of action; while in this action he was suing as trustee for creditors, and in another right. *Gless v. Grant*, 16 O. R. 233.—Robertson.

A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the corpus of said shares nor as to the dividends of other shares claimed under a different title. Art. 1241 C. C. *Muir v. Carter-Holmes v. Carter*, 16 S. C. R. 473.

A condition of a contract for the carriage of goods provided that no claim for damage for loss or detention of goods should be allowed unless notice in writing with particulars was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made:—Held, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to and the plaintiff not having appealed against a judgment overruling the demurrer the question as to the sufficiency in law of the defence was *res judicata*. *Grand Trunk R. W. Co. of Canada v. McMillan*, 16 S. C. R. 543.

The Exchange Bank of Canada, in an action instituted by them against G., filed a withdrawal of a part of their demand in open court reserving their right to institute a subsequent action for the amount so withdrawn. The court acted on this retraction, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved:—Held, reversing the judgment of the court below, Fournier, J., dissenting, that the provisions of Article 451 C. C. P. are applicable to a withdrawal made outside, and without the interference of, the court and cannot affect the validity of a withdrawal made in open court and with its permission. 2.—That

it was too late in the second action to question the validity of the retraxit upon which the court had in the first action acted and rendered a judgment which was final and conclusive. *Exchange Bank of Canada v. Gilman*, 17 S. C. R. 108.

Per Gwynne, J.—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the attorney-general, as representing the government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca v. Attorney-General of Canada*, 17 S. C. R. 612.

See *Bank of Montreal v. Haffner*, 3 O. R. 183; *Canadian Land and Emigration Co. v. Municipality of Dysart*, 9 O. R. 495; 12 A. R. 80, p. 69; *McLean v. Shields*, 9 O. R. 699, p. 1094; *Van Velsor v. Hughson*, 9 A. R. 390, p. 32; *Schroeder v. Rooney*, 11 A. R. 673, p. 829; *Paisley v. Broddy*, 11 P. R. 202, p. 1094; *Woodruff v. McLennan*, 14 A. R. 242, p. 1095; *Beam v. Merner*, 14 O. R. 412; *Mead v. O'Kerfe*, 15 O. R. 84; *Township of Nottawasaga v. Hamilton and North-Western R. W. Co.*, 16 A. R. 62.

## XXVII. FOREIGN JUDGMENTS.

### 1. Actions on.

#### (a) Generally.

The plaintiff sued the defendant on a foreign judgment for \$240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. 1877, c. 50, s. 153, and that the plaintiff was entitled to Superior Court costs. *Davidson v. Cameron*, 8 P. R. 61.—Dalton, Q. C.

To an action on a foreign judgment recovered in the Supreme Court of New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof:—Held, on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation is governed by the lex fori, and not by the lex loci contractus. *North v. Fisher*, 6 O. R. 206.—Rose.

An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed by the foreign court. Terms as to diligence in prosecuting the appeal and preservation of the defendant's property in Ontario in statu quo were annexed to the order. *Huntington v. Attrill*, 12 P. R. 36.—C. P. D.

See *Court v. Scott*, 32 C. P. 148, p. 1088; *Henebery v. Turner*, 2 O. R. 284, p. 1076.

#### (b) Validity of.

To an action on a foreign judgment, the defendant pleaded that he was not at the time of the commencement of the action or previously resident or domiciled within the jurisdiction of

the foreign court, or a subject of that country, and that he was not served with process in the action, and had no notice of it or opportunity of defending himself. On motion to strike out such defence as false defendant admitted in his examination that he had heard of some claim being made by the plaintiff, through a letter from his brother living in the United States, that he wrote to his brother to employ some one to attend to it, and sent a statement of the matter to him, but that he never heard of the action or trial until after judgment, when he was informed of it, and that his property in the United States had been attached to pay it. It appeared that an appearance had been entered for him there by a firm of lawyers. The application was refused. *Schibasy v. Westenholz*, L. R. 6 Q. B. 155, followed. *Beaty v. Cromwell*, 9 P. R. 547.—Winchester, Registrar.—Armour.

To an action on a judgment recovered in the Court of Queen's Bench, Manitoba, the defendant set up as a defence that he was not at or during the time proceedings were taken to recover the said alleged judgment, nor had he been a resident of or domiciled within the said province of Manitoba, and was not served with any process or notice of the said action, nor had he any opportunity of appearing in said action and defending same; and the said judgment was obtained in his absence and without his knowledge:—Held, following *Schibasy v. Westenholz*, L. R. 6 Q. B. 155, a good defence. *McLean v. Shields*, 9 O. R. 699.—C. P. D.

The defendant on hearing of the judgment having been entered against him in the court of Queen's Bench of Manitoba, instructed counsel to move to set the same aside; but the application was refused on the ground that it was too late:—Held, that this did not preclude defendant from disputing the validity of the judgment on the action thereon in this province. *Id.*

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant:—Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action:—Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt shewed no defence, but a mere verbal agreement without consideration:—Held, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of fi. fa. against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, shewed no fraud, and was no answer to the action. Per Wilson, C. J.—The defendant was not at liberty to set up in answer to this action matters which could have been pleaded in the original cause. *Paisley v. Broddy*, 11 P. R. 202.—C. P. D.

In an action upon a foreign judgment, the defence was that the same had been recovered by reason of the plaintiff fraudulently misleading

the court at the trial, by swearing to what he knew to be untrue. The matter in dispute was a claim for extra services in hauling logs for a greater distance than required by a written contract, and the contest was upon the question whether the services were or were not within the terms of that contract. On this question the evidence of the plaintiff and of one of the defendants, and of other witnesses, was given at the trial in the foreign court, when the contract and certain letters were put in, and the judge's charge to the jury shewed that the whole evidence had been clearly brought to the attention of the court, and it was now sought to establish the falsehood of the plaintiff's evidence with regard to the claim for extra services:—Held (affirming the judgment of the Common Pleas Division, Burton, J. A., dissenting), that evidence under the defence was properly rejected at the trial; for what the defendants proposed to do was to try over again the very question which was in issue in the original action. The charge of fraud was superadded, but that charge involved the assertion that a falsehood was knowingly stated, and before the question of scienter was reached, a conclusion of fact adverse to that which had been arrived at by the foreign jury would have to be adopted. Per Burton, J. A. In admitting evidence under the defence, the court would not be assuming to retry the issues disposed of in the foreign court. The finding upon those issues being conclusive, cannot be questioned here; but it can be shewn that the decision arrived at was obtained by fraud practised upon the foreign court, and that right cannot be defeated, because, in order to establish it, it becomes necessary to go into the same evidence as was used on the former trial to sustain or defeat that issue. The issues are not the same, for if the facts now discovered could have been shewn at the former trial, they would have secured a different result. The authority of decisions of the English Court of Appeal, and the case of *Aboulouff v. Oppenheimer*, 10 Q. B. D. 297, discussed. *Woodruff v. McLennan*, 14 A. R. 242.

The defendant was a shareholder and director in a joint stock company, called the "Rockaway Beach Improvement Company," duly incorporated under the laws of the State of New York, having its head office in that State. The plaintiff, a creditor of the company for money loaned to the company, sued and recovered on 15th June, 1886, in the Supreme Court, State of New York, a judgment for \$100,240.03 against defendant for an alleged false certificate given by defendant while such director as to the amount of paid up stock in the company, whereby, under certain statutes of the said State, defendant became liable by way of penalty to all the debts of the company. In an action in this province on the judgment:—Held, that as the only cause of action which the plaintiff alleged, was based on an offence committed against the laws of the State of New York, and the only sum he sought to recover, was the penalty imposed by statute of the said state as the punishment for the offence, the judgment could not be recognized as creating a debt enforceable in this province; otherwise all that would be necessary to give ubiquitous effect to a penal law would be to put it in the shape of a judgment. *Huntingdon v. Attrill*, 17 O. R. 245.—Street; 18 A. R. 136.

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See EXAMINATION OF JUDGMENT DEBTOR —  
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## JUDGMENT SUMMONS.

See DIVISION COURTS.

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- III. OF LOCAL JUDGE—See PRACTICE.
- IV. OF MASTERS—See PLEADING—PRACTICE.
- V. OF REFEREES—See PRACTICE.
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- VIII. WARRANT OF DISTRESS, 1117.
- IX. WARRANT OF COMMITMENT, 1117.
- X. SEARCH WARRANT, 1118.
- XI. PROHIBITION TO, 1118.
- XII. ACTIONS AND PROCEEDINGS AGAINST.
1. *For Not Returning Convictions*, 1118.
  2. *For Wrongful Acts or Acting Without Jurisdiction*, 1119.
  3. *Notice of Action*, 1122.
  4. *Venue*, 1123.
  5. *Costs*, 1123.

- XIII. MANDAMUS TO SESSIONS — See MANDAMUS.
- XIV. POLICE MAGISTRATES — See POLICE MAGISTRATES.
- XV. SESSIONS—See SESSIONS.

II. QUALIFICATION.

Held, that the Legislature of the Province of Ontario had power under No. 14 of section 92 B. N. A. Act to pass R. S. O. (1877), c. 71, providing for the qualification, and appointment of justices of the peace. *Regina v. Bennett*, 1 O. R. 445.—Cameron.

The court refused to quash a conviction under the Canada Temperance Act, 1878, on the ground that one of the convicting magistrates had not the necessary property qualification, the defendant not having negatived the magistrate's being a person within the terms of the exception

or proviso of section 7, R. S. O. (1877), c. 71. *Regina v. Hodgins*, 12 O. R. 367.—Wilson.

III. JURISDICTION.

1. Territorial Jurisdiction.

R. S. O. (1877), c. 72, s. 6, does not limit the territorial jurisdiction of county magistrates, but prohibits them from acting "in any case for any town or city"—the limitation is as to the cases, not as to place, and is only partial, i. e., for a city where there is a police magistrate, and then only when not requested by such police magistrate to act, or when he is not absent through illness or otherwise; and therefore in any case arising in a county, outside of a city, a county justice having jurisdiction to adjudicate while sitting in the county, may adjudicate while sitting in the city. Legislation on the subject reviewed. Owing to changes in the statute law the decisions in *Regina v. Row*, 14 C. P. 307, and *Hunt v. McArthur*, 24 Q. B. 254, are no longer applicable. *Regina v. Riley*, 12 P. R. 98.—Rose.

See *Regina v. Clark*, 15 O. R. 49, p. 1031.

2. Disqualification by Reason of Interest.

Two of the four convicting justices were licensed auctioneers for the county, and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice:—Held, that they were disqualified, and in quashing the conviction on that ground, the court ordered them to pay the costs. *Regina v. Chapman*, 1 O. R. 582.—Osler.

The defendant was convicted of having unlawfully assaulted the complainant, who was the daughter of the convicting justice, where the only evidence was, that the defendant had, in company with one Spragge, gone to the complainant's house, at about the hour of ten o'clock p.m., and Spragge had knocked at the door and told the complainant that he desired to introduce the defendant, whereupon the complainant replied that they had come to insult her, and that she would have them both arrested in the morning:—Held that it was improper for the justice to sit and try the case, the complainant being his daughter; and that this was a good ground for quashing the conviction. *Regina v. Langford*, 15 O. R. 52.—Rose.

In prosecutions under the Canada Temperance Act. See *Regina v. Klemp*, 10 O. R. 143, p. 1034; *Regina v. Eli*, *ib.* 727, p. 1037; *Regina v. Brown*, 16 O. R. 41, p. 1034.

3. Ousting Jurisdiction by Claim of Right or Title.

Where the defendants had been convicted, under 32-33 Vict. c. 22, s. 60 (Dorn), of trespass to land, and it appeared on the evidence before the magistrate, set out in the report of this case, that there was a dispute between the parties as to the ownership:—Held, that it was a case in which the title to land came in question; and that the defendants had been improperly convicted, even though the magistrate did not believe that the defendant had a title, it not being within his



province to decide on the title, but merely on the good faith of the parties alleging it. *Regina v. Davidson*, 45 Q. B. 91.—Galt.

The defendants were convicted of a trespass under C. S. U. C. c. 105, as amended by 25 Vict. c. 22. They appealed to the sessions, which affirmed the conviction. The conviction was then brought into this court, and a motion was made to quash it on the ground of want of jurisdiction in the convicting justice, inasmuch as it appeared by the evidence, and by affidavits filed, that the defendants acted under a fair and reasonable supposition that they had the right to do the acts complained of within the meaning of the above statutes:—Held, that that was a fact to be adjudicated upon by the convicting justice upon the evidence, and, therefore, that a certiorari would not lie for want of jurisdiction. *Regina v. Malcolm*, 2 O. R. 511.—Armour.

S. owned lot 38 in the 8th concession of N. In 1866 he sold the west half of the lot to complainant, reserving a strip of thirty feet along the north line thereof as a road for himself and successors in title to and from the east half of the lot. S. put up a gate at the west limit of the land where it met the highway, which gate had been there from 1866 until removed by the defendants. Defendants were successors in title to S., and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate erected at the west end of said road, as the property of the complainant:—Held, that defendants were acting in good faith in claiming the right to remove the gate, and under fair and reasonable supposition of right, and the conviction was therefore quashed:—Held, also, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not be reviewed, but that this rule did not apply where, as here, all the facts shewed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way and in favour of the defendant. *Regina v. Malcolm*, 2 O. R. 511, distinguished. Quere, whether a gate across a right of way is an obstruction in law. Held also, that the proviso in 32-33 Vict. c. 22, s. 60 (Dom.), is to be read as applicable to section 29 and to the whole Act. *Regina v. McDonald*, 12 O. R. 381.—Wilson.

#### 4. Other Cases.

The defendant was convicted of a common assault, upon the complaint of the prosecutor, who verbally requested the magistrate to proceed summarily:—Held, that the request to proceed summarily need not be in writing. *Regina v. Smith*, 46 Q. B. 442.—Osler.

As to jurisdiction of magistrates to convict for gambling under 27 Geo. III. c. 1. See *Regina v. Matheson*, 4 O. R. 559, p. 832.

Justices of the peace out of session have no jurisdiction to try misdemeanours in a summary manner, except on special statutory authority; and it was:—Held, therefore, that a conviction by two J. P.'s, under 46 Vict. c. 15 (Dom.), for assisting in the distilling of spirits contrary to

that Act, must be quashed. *Regina v. Carter*, 5 O. R. 651.—Rose.

The calling of a magistrate sitting on a case as a witness does not of itself disqualify him from further acting in the case. *Regina v. Sproule*, 14 O. R. 375.—C. P. D.

Jurisdiction of justices of the peace in the absence of the police magistrate. See *Regina v. Gordon*, 16 O. R. 64; *Regina v. Lynch*, 19 O. R. 664.

The word "person" in R. S. C. c. 1, s. 7, sub-s. 21, includes any corporation "to whom the context can apply according to the law of that part of Canada to which such context extends," but as justices of the peace have not now and never had jurisdiction by the criminal procedure to hear charges of a criminal nature preferred against corporations, such word does not include corporations in cases where a justice of the peace is attempting to exercise such a jurisdiction. *Re Chapman and the City of London and Re Chapman and the Water Commissioners of the City of London*, 19 O. R. 33.—Robertson.

A justice of the peace cannot compel a corporation to appear before him, nor can he bind them over to appear and answer to an indictment; and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them. *Id.*

A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess. *Id.*

#### IV. PROCEDURE.

##### 1. Summons.

The defendant, being present in court on a charge which was disposed of, was, without any summons having been issued, charged with another offence, namely, of selling liquor without a license. The information was read over to him, to which he pleaded not guilty, and evidence for the prosecution having been given, he thereupon asked for and obtained an enlargement till the next day, when, on his not appearing, he was convicted in his absence, and fined \$50 and costs, and in default of payment forthwith, without any distress having been directed, imprisonment was awarded:—Held, that under the circumstances the issuing of a summons was waived. *Regina v. Clarke*, 19 O. R. 601.—MacMahon.

Waiver of summons by appearance and defence. See *Regina v. Bennett*, 3 O. R. 45, p. 1036; *Regina v. Roe*, 16 O. R. 1, p. 1104.

##### 2. Evidence.

Per Patterson, J.—Remarks upon the general right of a person charged before a magistrate with an indictable offence to call witnesses for his defence, and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime. *In Re Phipps*, 8 A. R. 77.

Under 32-33 Vict. c. 23, s. 25 (Dom.), as amended by 49 Vict. c. 51, s. 1 (Dom.), defendant was charged by his wife, before a magis-

trate, with refusing to provide necessary clothing and lodging for herself and children. At the close of the case for the prosecution, defendant was tendered as a witness on his own behalf. The magistrate refused to hear his evidence not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently without further evidence committed him for trial:—Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind, and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review:—Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher court. *Regina v. Meyer*, 11 P. R. 477.—Wilson.

Held, that a defendant is not entitled to remove proceedings by certiorari to a Superior Court from a police magistrate or a justice of the peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court and no motion made to quash it. *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

Held, that even had the conviction in this case been moved to be quashed, and an order nisi applied for upon the magistrate and prosecutor for a mandamus to the former to hear further evidence, which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the court would not interfere. *Id.*

Where a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety. *Regina v. Ramsay*, 11 O. R. 210.—Galt.

Compelling accused to testify. See *Regina v. Lackie*, 7 O. R. 431, p. 1116; *Regina v. McNicol*, 11 O. R. 659, p. 1106.

The defendant was convicted by two justices of the peace under the Weights and Measures Act, 42 Vict. c. 16, s. 14, sub-s. 2 (Dom.), as amended by 47 Vict. c. 36, s. 7 (Dom.), of obstructing an inspector in the discharge of his duty, and was fined \$100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress. At the hearing before the justices the defendant tendered his own evidence, which was excluded. The defendant appealed to the Quarter Sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed. On motion for certiorari:—Held, that the conviction having been affirmed in appeal certiorari was taken away except for want or excess of jurisdiction, and that there was no such want or excess of jurisdiction, inasmuch as the justices and the Quarter Sessions had jurisdiction to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by certiorari. Per Ar-

mour, J. That even if the determination on this point could be reviewed the justices were right in excluding the evidence of the defendant, inasmuch as the offence charged was a crime. *Regina v. Dunning*, 14 O. R. 52.—Q. B. D.

On the trial of an offence under a by-law the magistrate cannot refuse to receive the defendant's evidence. *Regina v. Grant*, 18 O. R. 169.—C. P. D. But see *Regina v. Hart*, 20 O. R. 611.

See *Regina v. Nunn*, 10 P. R. 395, p. 1108; *Regina v. McNicol*, 11 O. R. 659, p. 1106; *Regina v. Sproule*, 14 O. R. 375, p. 1042; *Regina v. Downslay*, 19 O. R. 622, p. 1109.

### 3. Adjournments.

The magistrate, on the 12th November, adjourned the case, by consent, for one week, for judgment, and against the protest of defendant's counsel, changed the day, and gave judgment on the 18th:—Held, that the conviction must be quashed. *Regina v. Hall*, 8 O. R. 407.—Rose.

Where the magistrate adjourned the hearing of a case under the C. T. Act, 1878, for more than a week, contrary to the 32 33 Vict. c. 31, s. 46 (Dom.), the conviction was quashed, but without costs:—Semble, the consent of the defendant to the adjournment, if proved, would not have given jurisdiction. *Regina v. French*—*Regina v. Robertson*, 13 O. R. 80. Followed by O'Connor J. in *Regina v. Hunter*, *Id.*, 82n.

Held, that where an adjournment of the proceedings before the magistrate for more than one week had been made at the request of the defendant, who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, and urging that on the evidence it ought to be dismissed, defendant had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal:—Semble, that the provisions of section 46 of 32-33 Vict. c. 31 (Dom.), that no such adjournment shall be "for more than one week" are directory merely. *Regina v. French* and *Regina v. Robertson*, 13 O. R. 80, distinguished and not followed. *Regina v. Heffernan*, 13 O. R. 616.—Robertson.

32-33 Vict. c. 31, s. 46 (Dom.), provides that the hearing may be adjourned to a certain time and place, but no such adjournment shall be for more than a week:—Held, that the week must be computed as seven days exclusive of the day of adjournment. *Regina v. Collins*—*Regina v. Goulais*, 14 O. R. 613.—O'Connor.

Upon an information for an offence against the Canada Temperance Act a police magistrate heard all the evidence within the proper time, and at the close of the evidence announced in presence of the parties that judgment would be reserved for two weeks from that day—at which appointed time judgment was duly pronounced:—Held, that 32 and 33 Vict. c. 31, s. 46 (Dom.), which is to be read into the Canada Temperance Act by virtue of section 107, applies only to an adjournment of the hearing or the further hearing of the information or complaint, which is quite a distinct thing from the adjudication or determination of the charge after the hearing is completed. Justices are not obliged to fix the

fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty or the amount proper to be imposed, or taking advice as to the law applicable to the case. Notwithstanding the adjournment after the close of the hearing for fourteen days in order to consider and give judgment, the police magistrate had jurisdiction, and the conduct of the proceedings was not even irregular. *Regina v. French*, 13 O. R. 80, distinguished. *Regina v. Hall*, 12 P. R. 142.—*Boyd*.—Q. B. D.

Where at the conclusion of the evidence, on a charge of selling liquor contrary to the C. T. Act, the magistrate reserves his judgment, for the purpose of reaching a decision or of considering the amount of the penalty, he is not restricted to the one week mentioned in section 43 of R. S. C. c. 178. *Regina v. Hall*, 12 P. R. 142, followed. *Regina v. Alexander*, 17 O. R. 458.—C. P. D.

See *Regina v. Eli*, 10 O. R. 727, p. 1037; *Regina v. Kennedy*, 17 O. R. 159, p. 1038; *Regina v. Read*, 17 O. R. 185.

#### 5. Appeals.

Held, that a prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint: as by R. S. O. (1877), c. 74, s. 4, the practice of appealing in such a case is assimilated to that under Dom. Stat. 33 Vict. c. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.—*Osler*. See 51 Vict. c. 45 s. 7 (Dom.).

See *Regina v. Green*, 12 P. R. 373, p. 219.

#### V. WARRANT OF ARREST.

The warrant was issued in the united counties of Northumberland and Durham, and was endorsed by a magistrate in the county of Peterborough, "This is to certify that I have endorsed this warrant, to be executed in the county of Peterborough," but there was no proof of the hand writing of the justice who issued the warrant or recital of such proof as required by 32-33 Vict. c. 30, s. 23 (Dom.), sch. K:—Held, that the warrant was defective, and the arrest illegal, for which the defendant was liable in trespass. *Reid v. Maybee*, 31 C. P. 384.—C. P. D.

The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—Held, that a person cannot, under the Imperial Act, 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a superior court in this country. Such warrant must disclose a felony according to the law of this country, and Semble, that the expression "felony, to wit, larceny," is insufficient. The

prisoner was therefore discharged. *Regina v. McHolme*, 8 P. R. 452.—*Cameron*.

See *Regina v. Bernard*, 4 O. R. 603, p. 1114.

#### VI. INFORMATIONS.

##### 1. Generally.

Held, that the information in this case was not objectionable for not setting out the false pretences of which the defendant was convicted, as it was in the form in which an indictment might have been framed: and moreover, the objection was met by the 32-33 Vict. c. 32, s. 11 (Dom.), and by 32-33 Vict. c. 31, s. 67 (Dom.). *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

The objection that defendant has pleaded guilty to a defective information is, under 32-33 Vict. c. 31, s. 5 (Dom.), not admissible. *Regina v. McCarthy*, 11 O. R. 657.—*Galt*.

Quære, whether the defendant could object to the regularity of the information and summons, he having appeared in obedience to the summons, and pleaded not guilty. *Regina v. Roe*, 16 O. R. 1.—Q. B. D.

See *Regina v. Hall*, 12 P. R. 142, p. 1035.

#### VII. CONVICTIONS.

##### 1. Generally.

A conviction must be under seal. *In re Ryer and Plores*, 46 Q. B. 206.—*Osler*. *Bond v. Conmee*, 15 O. R. 716; 16 A. R. 398.

Held that the fact that the memorandum of conviction differed from the conviction as returned, in not providing for imprisonment in default of payment, did not invalidate the conviction, for it is sufficient if the penalty has been fixed at any time before the conviction is formally drawn up. *Regina v. Smith*, 46 Q. B. 442.—*Osler*.

Held, the defendant having had the certiorari directed to the magistrate who had convicted, was estopped from objecting that the conviction was in reality made by three, as appeared from the memorandum of conviction which was signed by them. *Ib.*

The defendant was convicted before a magistrate, for that he "did in or about the month of June, 1880, on various occasions," commit the offence charged in the information: and a fine was inflicted "for his said offence":—Held, that the conviction was bad, under 32-33 Vict. c. 21, s. 25 (Dom.), as shewing the commission of more than one offence. *Regina v. Clennan*, 8 P. R. 418.—*Wilson*.

An allegation in a conviction that the offence was committed between the 30th June and 31st July was held a sufficiently certain statement of the time. *Regina v. Wallace*, 4 O. R. 127.—Q. B. D.

Conviction held bad, as there had been no offence committed against the Act 32-33 Vict. c. 21, s. 110 (Dom.), under which the defendant had been convicted, and also in not shewing the time and place of the commission of the offence. *Regina v. Young*, 5 O. R. 400.—*Boyd*.

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A conviction under R. S. O. (1877), c. 181, for selling liquor without a license, purporting to be made by three magistrates, but signed by two only, was returned with a certiorari:—Held, if an objection at all, a ground for sending back the writ, that the third magistrate might sign the conviction, but not a ground for quashing it. *Regina v. Young*, 7 O. R. 88.—Osler.

Held, that the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it. *Regina v. Brady*, 12 O. R. 358.—Wilson.

Upon a motion on the return of a habeas corpus to discharge the prisoner, who was convicted of keeping a house of ill-fame:—Held, that the conviction was bad on its face for uncertainty in not naming a place where the offence was committed:—Held, also, that it was defective because it did not contain an adjudication of forfeiture of the fine imposed. *Regina v. Cyr*, 12 P. R. 24.—O'Connor.

Held that the Summary Convictions' Act applied to cure a defect in the form of a conviction under the Lotteries, Betting and Pool Selling Act. *Regina v. Freeman*, 18 O. R. 524.—C. P. D.

## 2. Offences Against Municipal By-laws.

A by-law of a town provided that no one should use any wagon, etc., upon any of the streets of the town for drawing bricks, stones, etc., when the weight of the load should exceed 1,500 pounds, unless the tires of the wheels were of a specified width, but the by-law was not to apply to any wagon conveying lumber or goods from the mill or manufactory thereof into the town if distant more than two miles from the town limits, nor to any person passing through the town with vehicles loaded with the said articles:—Held, bad, as discriminating against residents of the town in favour of others:—Held, also, that a conviction under such by-law was bad for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour. *Regina v. Pipe*, 1 O. R. 43.—Osler. See as to last holding. *Regina v. Hodge*, 7 A. R. 246, p. 311.

The by-law directed imprisonment only in default of distress. *Quere*. Per Cameron, J., whether the 32-33 Vict. c. 31, s. 59, would apply so as to enable the justice to commit under it in the first instance upon proper evidence. *McLellan v. McKinnon*, 1 O. R. 219.

The defendant, who was a traveller for a tea dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then got the tea which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited "hawkers or petty chapmen and other persons carrying on petty trades," from selling goods in the manner pointed out by the Consolidated Municipal Act, 1883, s. 495 (3):—Held, that the defendant was

not a "hawker," nor was the word pedlar used in the Act, and if he was a "petty chapman or person carrying on a petty trade," the conviction could not be supported, for he was "not carrying goods for sale." *Regina v. Coutts*, 5 O. R. 644.—Rose.

"The Consolidated Municipal Act, 1883," (46 Vict. c. 18), s. 495, sub-s. 3, empowered the council of any county to pass by-laws for licensing, etc., hawkers, etc., going from place to place, etc., with any goods, wares, or merchandise for sale, and by 48 Vict. c. 40, s. 1 (Ont.), the word "hawkers" shall include all persons who, being agents for non-residents of the county, sell or offer for sale tea, dry goods, or jewelry, or carry and expose samples of any such goods to be afterwards delivered, etc.:—Held, that electrotype ware was not jewelry within the above enactment, and a conviction for selling this without license was therefore bad, and was quashed, though the fine imposed had been paid:—Held, also, that the words "other goods, wares, and merchandise," in the conviction, were too general. *Regina v. Chayler*, 11 O. R. 217.—Wilson.

The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of section 1 of 48 Vict. c. 40 (Ont.). The defendant, against the protest of his counsel, was called as a witness, and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account; that he had formerly sold tea on commission for W. but purchased that in question for the purpose of evading the by-law. The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:—Held, 1. That defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, s. 495, sub-s. 3, nor within 48 Vict. c. 40 (Ont.). 2. That the conviction was defective in not stating that P. W., was non-resident within the county, and that the expression "of the city of London" was not sufficient. 3. That defendant had been improperly compelled to give evidence against himself. 4. That the having a license is a matter of defence, and not of proof by the prosecution. 5. That the intention to evade the by-law was immaterial so long as the agency did not in fact exist. *Regina v. McNicol*, 11 O. R. 659.—Wilson.

The by-law under which the defendant was convicted, provided that "no transient trader or other person occupying a place of business in the town of M., for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall \* \* offer goods, wares, and merchandise for sale \* \* within the limits of the town of M., without, or until he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandise, contrary to the by-law:—Held, that the want of an allegation in the conviction that the defendant was a

transient trader whose name had not been duly entered on the assessment roll for the current year, was fatal. *Regina v. Caton*, 16 O. R. 11.—Q. B. D.

The defendant, a wholesale and retail dealer in teas in the county of W., where he resided, went to the county of H., and sold teas by sample to private persons there, taking their orders therefor, which were forwarded by him to county of W., and the packages of teas subsequently delivered. All the packages were sent in one parcel to H. county, and there distributed. The defendant was convicted under a by-law passed under statutes which are now R. S. O. (1887) c. 184, s. 495, sub-s. 3, (a) and (b), for carrying on a petty trade without the necessary license therefor:—Held, that the conviction could not be sustained, and must be quashed. *Regina v. Henderson*, 18 O. R. 144.—C. P. D.

A by-law required "all hay, etc., sold at the market or elsewhere in the town of Cornwall, which is required to be weighed by the vendor or purchaser, to be weighed with public weighing-scales," etc. A conviction under this by-law was, that defendant in contravention of said by-law brought hay into said town, and had some weighed on scales other than the public scales:—Held, that the conviction was bad in not stating that the hay was sold in the market or elsewhere in said town, and must be quashed; and with costs to be paid by complainant, the weighmaster, who had instituted the prosecution for his own benefit, after warning, instead of bringing an action in the Division Court. *Regina v. Hollister*, 8 O. R. 750.—Rose.

A conviction for violating a by-law was quashed, the by-law having been passed on the 27th March, to go into force the 3rd April following, in anticipation of an Act, 45 Vict. c. 24 (Ont.), passed the 10th March, to go into operation the 2nd April then next ensuing. Sub-section 2 of section 8 of the Act provides "such vendors of articles in respect of which a market fee may be now imposed as shall voluntarily use the market place for the purpose of selling such articles," to market fees, whereas the twelfth section of the by-law in question was, "any person or persons who shall voluntarily come upon the said market-place, etc., for the purpose of selling," etc.:—Held, that "Vendors who shall voluntarily use the market-place for the purpose of selling" was not identical with or equivalent to "any person or persons who shall voluntarily come upon the said market-place for the purpose of selling;" nor was the expression "use the market place for the purpose of selling" the same as "come upon the market-place for the purpose of selling;" and that the conviction was bad on this ground also. *Regina v. Reed*, 11 O. R. 242.—O'Connor.

Held, that the conviction was bad, as differing from both statute and by-law, being for refusing to pay the fees on eight quarters of beef "exposed for sale," whereas the 13th section of the by-law applied only to cases of butcher's meat exposed for sale. *Id.*

47 Vict. c. 32, s. 13, sub-s. 12 (Ont.), enacts that by-laws may be passed "for regulating or preventing the ringing of bells, blowing of

horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants," etc. Section 2 of by-law No. 179 of the city of London, passed under that Act, is as follows: "No person shall, in any of the streets or in the market-place of the city of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants of the said city." "Provided always that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada." The prisoner was convicted under the by-law of beating a drum on a public street in the city of London:—Held that the by-law so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual, or calculated to disturb was ultra vires, and invalid, and that the refusal to receive evidence on the prisoner's behalf was a valid ground for her discharge:—Held, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction. *Regina v. Num*, 10 P. R. 395.—Rose.

A conviction was, that the defendant did, on the 16th May, 1886, create a disturbance on the public streets of the village of L., by beating a drum, etc., contrary to a certain by-law of the village. The information was in like terms except that the act was laid as done on Sunday. The by-law was passed under 47 Vict. c. 32, s. 13 (Ont.), whereby power was given to pass by-laws (sub-section 12), "for regulating or preventing the ringing of bells, blowing of horns, shouting, and other unusual noise or noises, calculated to disturb the inhabitants." The by-law was, "the firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises in the public streets of L., on the Sabbath Day, are strictly prohibited." The evidence was that given by a person who saw the defendant "playing the drum in the streets of L." on the day in question. Held, that the conviction was bad in not alleging that the beating of the drum was without any just or lawful excuse:—Semble, that it could not be inferred from the evidence that the drum made any unusual noise, as the witness did not say he heard any noise, but only that he saw defendant beating a drum:—Semble, also, that the words used in the statute that the noise made must be "calculated to disturb the inhabitants," and in the conviction that the defendant "did create a disturbance by the beating a drum" were not equivalent terms. *Regina v. Martin*, 12 O. R. 800.—Wilson.

Section 510 of the Municipal Act, 1883, authorizes the licensing of owners of livery stables and of horses, etc., for hire. A by-law passed thereunder required every person owning or keeping a livery stable or letting out horses, etc., for hire to pay a license fee. Defendant was convicted under this by-law, for that "he did keep horses, etc., for hire" without having paid the license fee:—Held, that the conviction was in conformity with both statute and by-law. *Regina v. Sealwell*, 12 O. R. 391.—Wilson.

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The defendant was convicted of a breach of a by-law passed under section 436 of R. S. O. (1887), c. 184, which provided that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," etc. The defendant was the owner of waggons and horses which, at the date complained of, were employed in hauling coal and gas pipes for a gas company, for which defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, and which were so being used on the day complained of:—Held, that the defendant came within the terms of the by-law, and was therefore properly convicted. *Regina v. Boyd*, 18 O. R. 485.—C. P. D.

A city by-law prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing any runner or other person to assist or act in consort with him in soliciting any passenger or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle should be left to choose without any interference or solicitation. An employee of defendants with the consent of a railway company and under instructions from his employer boarded an arriving passenger train at one of the outlying city stations on its way to the Union station, and went through the cars calling out "baggage transferred to all parts of the city," and having in his hands a number of the transfer company's checks. No baggage was taken at the time:—Held, that there was no breach of the by-law but merely the carrying out of the defendants' agreement with the company; and further, that the train did not come within any of the places mentioned in the by-law. Per Rose, J.—If the by-law in terms had covered this case it would have been ultra vires. *Regina v. Verral*, 18 O. R. 117.—C. P. D.

On the trial of a charge of being a transient trader without a license contrary to a municipal by-law, no copy thereof certified by the clerk to be a true copy, and under the corporate seal, as required by section 289 of R. S. O. (1887) c. 184, was given in evidence. A by-law stated by the solicitor for the complainant to be the original by-law, was, however, read to the defendant in court:—Held, that the requirements of section 289 not having been complied with, the conviction was invalid, and must be quashed. *Regina v. Bowday*, 19 O. R. 622.—Galt.

See *Regina v. Cuthbert*, 45 Q. B. 19, p. 1114; *Regina v. Washington*, 46 Q. B. 221, p. 1110; *McLennan v. McKinnon*, 1 O. R. 219, p. 1111; *Regina v. Chapman*, 1 O. R. 582; *Regina v. Gravelle*, 10 O. R. 735, p. 1111; *Regina v. Flory*, 17 O. R. 175, p. 1112; *Regina v. Grant*, 18 O. R. 169, p. 1112.

#### 6. Other Offences.

The defendants were convicted for unlawfully assaulting F. V. "by standing in front of the horses and carriage driven by the said V., in a hostile manner, and thereby forcibly detaining him, the said V., in the public highway against his will":—Held, that the conviction was bad in stating the detention as a conclusion and not as part of the charge, which, as shewn by the

conviction, was merely standing in front of the horses, and did not amount to an assault. *Regina v. McElligott*, 3 O. R. 535.—Wilson.

On motion to discharge a prisoner on habeas corpus on conviction before a police magistrate, the conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grievous bodily harm":—Held, that the addition of the words "with intent to do grievous bodily harm," did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding:—Held, also, that imprisonment at hard labour for a year was properly awarded under 38 Vict. c. 47 (Dom.). *Regina v. Boucher*, 8 P. R. 20.—Hagarty.

The owner of a sheep killed or injured by a dog can, under R. S. O. (1887), c. 214, s. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the Act applies to a case where the dog has been set upon the sheep. It did not appear upon the face of the conviction in question that the offence was committed within the territorial jurisdiction of the convicting justices of the peace, but upon the depositions it was clear that it was so committed:—Held, that the saving provision of section 87 of R. S. C. c. 178, should be applied; and the order nisi to quash the conviction was discharged. *Regina v. Perrin*, 16 O. R. 446.—Armour.

A summary conviction under R. S. C. c. 168, s. 59, alleged, in the words of the statute, that the defendant unlawfully and maliciously committed damage, injury, and spoil to and upon the real and personal property of the Long Point Company:—Held, that this was not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage, etc., and what the particular nature and quality of the property, real and personal, was in and upon which such damage, etc., was committed; and the conviction was quashed for uncertainty. *Regina v. Spain*, 18 O. R. 385.—Q. B. D.

#### 7. Penalties and Imprisonment.

The original conviction was for "acting in a disorderly manner by fighting, and breaking the peace, contrary to the by-law and statute in that behalf;" imprisonment with hard labour was imposed in default of payment of the fine, and the costs were made payable in the alternative to the magistrate or the prosecutor:—Held, bad. *Regina v. Washington*, 46 Q. B. 221.—Osler.

A conviction for a common assault adjudged payment of a fine and costs, and in default imprisonment:—Held, good; and that it was not necessary to order that a distress warrant to compel payment to be issued before imprisonment. *Regina v. Smith*, 46 Q. B. 442.—Osler.

A conviction under the "Ontario Medical Act," R. S. O. (1877), c. 142, s. 40, for practising without being registered, was quashed, because in default of payment of the fine imposed, distress was also awarded:—Held, that section 57 of 32-33 Vict. c. 51 (Dom.), does not apply, as by section 46 of the Medical Act provision is



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By sub-section 2, of section 8, of R. S. C. c. 157, any loose, idle, or disorderly person or vagrant, shall upon summary conviction before two justices of the peace be deemed guilty of a misdemeanour, and liable to a fine not exceeding \$50, or to imprisonment not exceeding six months, or to both. By section 62 of R. S. C. c. 178, the justices are authorized to issue a distress warrant for enforcing payment of a fine; and, if issued, to detain the defendant in custody, under section 62, until its return; and, if the return is "not sufficient distress," then to imprison for three months. Two justices of the peace for the city of Toronto, in the absence of the police magistrate for the city, convicted the defendant for an offence under the Act, and imposed a fine of \$50, and, in default of payment forthwith, directed imprisonment for six months unless the fine were sooner paid:—Held, that under the said sub-section the justices had jurisdiction to adjudicate in the matter; and that it was not necessary to consider the effect of an agreement entered into between the police magistrate and one of the justices to assist him in the trial of offences:—Held, also, that the conviction was bad, for under R. S. C. c. 157, there was no power to award imprisonment as an alternative remedy for non-payment of the fine; while under R. S. C. c. 178, imprisonment could only be awarded after a distress has been directed and default therein; and furthermore the imprisonment in such case could only be for three months. *Regina v. Lynch*, 19 O. R. 664.—C. P. D.

See *Regina v. Smith*, 46 Q. B. 442, p. 1104; *Regina v. Pipe*, 1 O. R. 43, p. 1105; *McLellan v. McKinnon*, 1 O. R. 219, p. 1119; *Goodman v. Regina*, 3 O. R. 18, p. 447; *Regina v. Boucher*, 8 P. R. 20, p. 1110; *Regina v. Ambrose*, 16 O. R. 251, p. 1047; *Regina v. Cyr*, 12 P. R. 24, p. 1106; *Regina v. Hall*, 12 P. R. 142, p. 1103; *Regina v. King*, 18 O. R. 566, p. 1118.

See also PUBLIC MORALS AND CONVENIENCE.

### 8. Amendment of.

Held, that an amended conviction cannot be put in after the return of a certiorari. *Regina v. MacKenzie*, 6 O. R. 165.—Iose. See also *Regina v. Bennett*, 3 O. R. 45, p. 1035; *Regina v. Elliott*, 12 O. R. 524, p. 1111; *Bond v. Conmee*, 16 A. R. 398, p. 1063.

A magistrate may amend his conviction at any time before the return of the certiorari, and the court refused to quash because of the previous return of a bad conviction, especially where it had not been filed. *Regina v. McCarthy*, 11 O. R. 657.—Galt.

See *McLellan v. McKinnon*, 1 O. R. 219, p. 1119; *Regina v. Dunning*, 14 O. R. 52, p. 1111.

### 9. Return of.

To Clerk of the Peace. See *Longway q. t. v. Atison*, 8 O. R. 357, p. 1119.

### 10. Quashing.

#### (a) Generally.

Held, that the validity of a by-law might be questioned on a motion to quash the conviction

made under it. *Regina v. Cuthbert*, 45 Q. B. 19.—Osler.

Where the offence is sufficiently stated, the conviction cannot be avoided for matter of form. *In re Zou her*, Cassels' Dig. 180.

Held, that a conviction once regularly brought into, and put upon the files of the court, is there for all purposes, and that a defendant may move to quash it, however, or at whosever instance it may have been brought there. Where, therefore, on an application for a habeas corpus, under R. S. O. (1877), c. 70, a certiorari had issued, and in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate, or recognizance. *Regina v. Leveque*, 30 Q. B. 509, distinguished. *Regina v. Wehlan*, 45 Q. B. 396.—Q. B. D.

In shewing cause to a rule nisi for quashing a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it, need not be made. *Regina v. McAllan*, 45 Q. B. 402.—Q. B. D.

On an application to quash a conviction brought up upon certiorari, the court will not notice any facts not appearing in the conviction, for the purpose of impeaching it on any ground, except want of jurisdiction; nor has the court any power to review the decision of the sessions in a matter within their jurisdiction, nor to grant a mandamus to compel them to rehear an appeal. The court, refused, therefore, to quash a conviction under the Liquor License Act, affirmed on appeal, on the ground, among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina v. Grainger*, 46 Q. B. 382.—Q. B. D.

Per Armour, J.—This court has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect of such adjudication, and 32-33 Vict. c. 31, s. 71 (Dom.), does not take away the certiorari in such a case. *McLellan v. McKinnon*, 1 O. R. 219.

A warrant was issued by a magistrate for the apprehension of the defendant, who was brought before another magistrate thereon, convicted and fined. Subsequently the magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction. The court quashed the second conviction, with costs: Held, that, even assuming that the first conviction was void by reason of the defendant having been brought before a magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and at any rate the magistrate who convicted the second time could not take advantage thereof. *Regina v. Bernard*, 4 O. R. 603.—Rose.

Where an order quashing a conviction is made upon default of any one appearing to support it, the effect of quashing it not only involving the restoration of the fine paid by the defendant, but exposing the convicting magistrate to an action, there is inherent jurisdiction in the court to open up such order so made. The jurisdic-

tion of the full court to rehear motions to quash convictions has not been taken away by the Judicature Act, but still exists in the Divisional courts. *Regina v. Fee*, 13 O. R. 590.—Chy. D.

Quere, whether a single judge has power to hear a motion to quash a conviction. If he has power his decision is final, and not appealable. If he has no power, then his action is of no avail, and still unappealable. *Regina v. McAuley*, 14 O. R. 643.—C. P. D.

The jurisdiction to quash convictions was at the time of the passing of the Ontario Judicature Act in the Courts of Queen's Bench and Common Pleas respectively, and was exercised and exercisable by them respectively sitting in term; the courts or divisions of the High Court of Justice mentioned in sub-section 3 of section 3 of the Act can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice; the sittings of these respective courts or divisions are analogous to and represent the sittings of the former courts of common law in term, and it is to the sittings of these courts or divisions that applications to quash convictions must now be made, having regard to section 87 and Rule 484 of the O. J. Act (Con. Rule 1), and of R. S. C. c. 174, s. 2, sub-a. 1, and section 270. The courts or divisions are not to be confounded with the Divisional Courts, which are a distinct organization under the Judicature Act, and invested thereby with special functions. Section 28 of the Act, upon which the supposition that a single judge sitting in court had jurisdiction to quash a conviction was founded, refers to civil actions and proceedings only. And where a single judge sitting in court heard and determined a motion to quash a conviction, an appeal to the judges of the Queen's Bench Division from his decision, refusing to quash such conviction, was treated as a substantive motion to quash the conviction. *Regina v. Beemer*, 15 O. R. 266.—Q. B. D.

The jurisdiction to hear motions for orders nisi in criminal matters vested in the Common Pleas Division of the High Court of Justice for Ontario is the original jurisdiction of the Court of Common Pleas prior to confederation and by virtue of section 5 of C. S. U. C. c. 10, the court "may be holden by any one or more of the judges thereof in the absence of the others." On a return of an order nisi to quash a conviction the court was composed of two of the judges thereof, the third judge being absent attending to other pressing judicial work.—Held, that the Court was properly constituted to dispose of the order. *Regina v. Runchy*, 18 O. R. 478.—C. P. D.

Where the proceedings before a magistrate are removed under 29 & 30 Vict. c. 45, the judge is not to sit as a court of appeal from the findings of the police magistrate upon the evidence which that officer has taken; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a

general rule except upon an appeal. *Regina v. Green*, 12 P. R. 373.—Street. See also, *Regina v. Dowling*, 17 O. R. 698, p. 219.

Whether proceedings to quash a conviction under an Ontario Act should be taken before a single judge, or a divisional court. Quere. *Regina v. Wason*, 17 A. R. 221.

Upon improper reception or rejection of evidence by magistrate. See IV., 2, p. 1100.

See *McLennan v. McKinnon*, 1 O. R. 219, p. 1119; *Regina v. MacKenzie*, 6 O. R. 165, p. 1061; *Hunter v. Giltison*, 7 O. R. 735, p. 1120; *Regina v. McCarthy*, 11 O. R. 657, p. 1113; *Regina v. Hodgins*, 12 O. R. 367, p. 1098; *Regina v. Elliott*, 12 O. R. 524, 531; *Bond v. Conmee*, 16 A. R. 398, p. 1121; *Regina v. Richardson*, 13 P. R. 303, *infra*; *Jones v. Grace*, 17 O. R. 681, p. 1122.

#### (b) Recognizance.

By section 90 of R. S. C. c. 178, and the Rule of court thereunder, no motion to quash any conviction brought before any court by certiorari shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties.—Held, that the sufficiency of the suretyship is not shewn by the mere production of the recognizance, but there must be evidence on which the court can say they were sufficient sureties. Where therefore there was no affidavit of justification to the recognizance it was held not to comply with the statute. *Regina v. Richardson*; *Regina v. Addison*, 17 O. R. 729.—C. P. D.

It is only by the indulgence of the court that a second application is permitted or entertained, where the first application has been refused. And where the defendants' applications for orders nisi to quash convictions were refused upon the ground of non-compliance with the statute and rule requiring a recognizance and affidavit of justification to be filed, and the court upon such applications was not favourably impressed by what was urged as to the merits of the applications.—Held, that the indulgence of the court ought not to be extended in favour of fresh applications made by the defendants upon new material supplying the defects. *S. C.*, 13 P. R. 303.—C. P. D.

#### (c) Costs.

Quere, whether defendant should not get the costs of quashing a conviction made to test the law. *Regina v. Jamieson*, 7 O. R. 149.—Rose.

The fraudulent removal of goods, under 2 Geo. II. c. 19, s. 4, is a crime, and a conviction therefor was consequently quashed, with costs against the landlord, because the defendant had been compelled to give evidence on the prosecution. *Regina v. Lackie*, 7 O. R. 431.—Rose.

Where a weighmaster instituted a prosecution for his own benefit, after warning, instead of bringing an action in the Division Court and the conviction was quashed, he was ordered to pay the costs. *Regina v. Hollister*, 8 O. R. 750.—Rose.

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Costs of the application to quash a conviction will be adjudged against a private prosecutor where he lays an information without having reasonable ground for believing that the charge will be sustained by proper evidence. *Regina v. Kennedy*, 10 O. R. 396.—O'Connor.

The order to quash the conviction was made without costs because the defendant had taken so many exceptions to the conviction upon which he had failed, and because the merits of the complaint were against him. *Regina v. Lynch*, 12 O. R. 372.—Wilson.

Conviction quashed with costs against the informant, where he had a pecuniary interest in the prosecution. See *Regina v. Stewart*, 17 O. R. 4.

See *Regina v. French*—*Regina v. Robertson*, 13 O. R. 80, p. 1102; *Regina v. Walker*, 13 O. R. 83, p. 1043.

### VIII. WARRANT OF DISTRESS.

When a distress warrant, upon a conviction, has been issued and returned, the truth of the return cannot be tried upon affidavits. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

Where a conviction is affirmed on appeal to the sessions the warrant of distress or commitment may be issued by the convicting justice. *Arcott v. Lilley*, 14 A. R. 283.

See *Regina v. Smith*, 46 Q. B. 442, p. 1110.

### IX. WARRANT OF COMMITMENT.

Seemingly, that the warrant issued in this case after the dismissal of the appeal by the Sessions, and which followed the original conviction in directing imprisonment for six months, without making allowance for the two days' imprisonment already suffered, was not open to objection. *Arcott v. Lilley*, 11 O. R. 153.—Q. B. D.

A warrant of commitment need not be dated if not issued too soon. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

In determining, upon a motion to discharge a prisoner, whether a warrant of commitment is defective, the Court cannot, in view of the Summary Trials Act, E. S. C. c. 176, go behind the conviction; and the proper course where there is a conviction sufficient in law, and a variance between the conviction and warrant of commitment, is to enlarge the motion so as to enable the magistrate to file a fresh warrant in conformity with the conviction. And where the conviction alleged that the offence was committed in January, 1887, and the commitment in January, 1888, the motion was enlarged accordingly. *Regina v. Larin*, 12 P. R. 642.—MacMahon.

Under section 58 of the Malicious Injuries to Property Act, R. S. O. c. 168, the offence must be "unlawfully and maliciously" committed, and the damage must exceed \$20. The warrant of commitment charged the offence as having been wilfully and maliciously committed, omitting the word "unlawfully":—Held, that

this was fatal to the commitment:—Held, also, that the commitment should have alleged that the damage exceeded \$20. *Regina v. Fife*, 17 O. R. 710.—Q. B. D.

A warrant of commitment issued by two justices of the peace, for non-payment of a fine and costs imposed on J. D., who had been convicted for an offence under the Indian Act, directed the constables of the county of B. to take and deliver J. D. to the keeper of the common jail of the county, to be kept there for two months, unless the fine and costs imposed, including the costs of conveying to the jail, should be sooner paid:—Held, that the justices having had jurisdiction over the offence, and the warrant being valid on its face it afforded a complete protection to the constable executing it, and the defendant was properly convicted of assaulting the constable while attempting to execute the warrant, notwithstanding that the awarding of the punishment may have been erroneous, in directing imprisonment for non-payment of the fine and costs, including costs of conveying to jail, as not authorized by the said Act. *Regina v. King*, 18 O. R. 566.—Q. B. D.

A commitment for part of the sum adjudged by the conviction to be paid is not authorized by the Summary Convictions' Act, and is illegal. The plaintiff was convicted under the Canada Temperance Act and was adjudged to pay a fine and costs, to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned, etc. He paid the costs but not the fine, and a distress warrant was issued against him. Nothing being made under the distress a warrant of commitment was issued under which he was imprisoned:—Held, reversing C. P. D. 17 O. R. 708, that the commitment was bad. *Trigerson v. Board of Police of Cobourg*, 6 O. S. 435, approved and followed. Judgment of C. P. D. affirmed on other grounds. *Sinden v. Brown*, 17 A. R. 173.

See *Jones v. Grace*, 17 O. R. 681, p. 1122.

### X. SEARCH WARRANT.

As it appeared that in this case the search warrant had been issued, and the defendant's premises searched, for the mere purpose of possibly securing evidence upon which to bring a prosecution, the justices of the peace and the informant were ordered to pay the defendant's costs. *Regina v. Walker*, 13 O. R. 83.—Cameron.

### XI. PROHIBITION TO.

A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess. *Re Chapman and the City of London; Chapman and the Water Commissioners of the City of London*, 19 O. R. 33.—Robertson.

### XII. ACTIONS AND PROCEEDINGS AGAINST.

#### 1. For Not Returning Convictions.

In an action against two justices of the peace to recover a penalty for not making an immediate return of a conviction under R. S. O.



(1877) c. 76 :—Held, that it is a question for the jury whether, under the circumstances of any particular case, the return made is immediate, and that in a *qui tam* action the jury's finding for defendant should not be disturbed. In this case the conviction was made on the 31st August, and the magistrates withheld the return until the 15th September, expecting to receive the fine every day, and intending to return it with the conviction. The jury having been directed to find whether this was not "reasonably immediate" returned a verdict for defendants, which was upheld. *Longway qui tam v. Avison*, 8 O. R. 357.—Q. B. D.

## 2. For Wrongful Acts or Acting without Jurisdiction.

A magistrate acting under 32-33 Vict. c. 20, s. 37 (Dom.), convicted four persons for creating a disturbance thereunder, and imposed upon each a fine of \$5, but instead of severing the costs which he had charged, imposed the full amount thereof against each defendant, and received it from each :—Held, that under the circumstances, more fully set out in the report of the case, the overcharge must be deemed to have been wilfully made, so as to render the defendant liable to the penalty imposed in such cases by the R. S. O. (1877), c. 77, s. 4. *Parsons qui tam v. Crabbe*, 31 C. P. 151.—C. P. D.

When an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour" :—Held, Cameron, J., dissenting, that their assuming to amend the conviction was not a quashing of a conviction, and therefore trespass would not lie against the justice. *McLellan v. McKinnon*, 1 O. R. 219.—Q. B. D.

The conviction awarded imprisonment with hard labour in default of payment of the fine. The sessions amended the conviction by striking out hard labour and awarding imprisonment only in default of distress. The commitment under which plaintiff was confined directed imprisonment at hard labour. Per Cameron, J.—The conviction as amended, which was the only one put in evidence, superseded the original conviction, and in effect quashed it so far as regarded the hard labour; defendant was bound to shew an existing conviction authorizing the commitment, and as he failed to do this, the excess of jurisdiction in awarding hard labour made him liable in trespass; and—Sembles, that the award of imprisonment in the first instance under the circumstances in evidence, would also make him so liable. *Ib.*

In an action against a justice of the peace and constable for having issued a search warrant against the plaintiff, for having and concealing a colt belonging to another :—Held, that the notice of action and statement of claim, being each of them founded upon a cause of action arising in a case in which the justice had jurisdiction, were defective for want of the allegation that the justice acted "maliciously, and without reasonable and probable cause;" and that the statement of claim was defective in not shewing a right to restitution of the property,

although the plaintiff was acquitted of any wrongful taking, detention, or concealment of the same. *Hosell v. Armour*, 7 O. R. 363.—Q. B. D.

Held, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, the statement of claim not alleging that the property had not been stolen. *Ib.*

Held, that the defendant, who was a visiting superintendent and commissioner of Indian affairs for the Brant and Haldimand reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian reserve in the county of Brant :—Held, also, that the discharge of the plaintiff from custody on *habeas corpus* was not a quashing of his conviction on the above charge; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been so; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause. *Hunter v. Gilkison*, 7 O. R. 735.—Q. B. D.

Held that the 4th section of R. S. O. (1877), c. 73, as amended by 41 Vict. c. 8 (Ont.), prevents an action being brought for anything done under a conviction, whether there was jurisdiction to make the conviction or not, so long as the conviction remains unquashed and in force. *Arscott v. Lilley*, 11 O. R. 285.—Q. B. D.; 14 A. R. 283.

The plaintiff having been arrested, convicted, and imprisoned for having liquors for sale near public works, writs of *habeas corpus* and *certiorari* were issued and on the return thereof he was discharged. Under a writ of *certiorari* directed to defendants, the convicting magistrates, the conviction, which was not under seal, was returned by defendants' solicitor to whom all the papers had been delivered by defendants, and who in his affidavit accompanying the return swore that the conviction returned was the one made by defendants :—Held, by Armour, J., at the trial, in an action against the magistrates, that not being under seal it was not necessary that the conviction should have been quashed before action brought. *Haacke v. Adamson*, 14 C. P. 201, and *McDonald v. Stuckey*, 31 Q. B. 577, followed :—Held, also, by the C. P. D., that the return being made to a writ of *certiorari* directed to defendants, and not referring to the *certiorari* directed to the jailor under the *habeas corpus*, and in face of the solicitor's affidavit, a properly sealed conviction which however was not produced at the trial could not be received. *Bond v. Conmee*, 15 O. R. 716; 16 A. R. 398.

From the village of M., where the arrest and conviction took place and the liquors were destroyed, to the Canadian Pacific Railway, then in course of construction, over fifty miles dis-

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public road; but subsequently the Dominion  
Government, by proclamation, issued under R.  
S. C. o. 151, proclaimed the ten miles on each  
side of the supply road to be in the vicinity of  
a public work:—Held, by Armour, J., and the C.  
P. D., MacMahon, J., doubting, that the village  
of M. was not within three miles of a public work  
under R. S. O. (1877), c. 32. Per Galt, C. J.—  
The place did not come within either Act, no  
proclamation having been issued at the time. On  
application to the Divisional Court for leave to  
put in evidence the written order for the destruc-  
tion of the liquor, which was not produced at the  
trial. Per Galt, C. J.—The magistrate had no  
power to make the order, the authority to do so  
being based on R. S. O. (1877), c. 32, which was  
not made applicable, and therefore the order was  
not admissible. Per Rose and MacMahon, JJ.—  
The order for the destruction of the liquor was  
not dependent on the conviction of the plaintiff,  
and came within R. S. O. c. 73, and the destruc-  
tion was an act under an order thereunder, which  
order must be quashed to avoid the protection  
afforded by section 4; but per Rose, J., it should  
not now be received in evidence. Per MacMahon,  
J.—It should be received; and a new trial granted  
on this part of the case:—Held, by the Court of  
Appeal that there was no explanation why this  
order was not produced at the trial, it was too  
late to produce it now, and a new trial could  
not be granted even assuming that the order  
contained the adjudication as to the forfeiture  
of the liquors. *S. C.*, 15 O. R. 716; 16 A. R.  
398.

The order for the destruction of the liquors  
was not produced, but the person who destroyed  
the liquors stated, without objection, that he  
had received a written order to destroy the  
liquors, signed by both justices, and that he had  
returned the order to them. This order had not  
been quashed:—Held, that the defendants were  
entitled to say that the existence of such an  
order was proved, but that the order for the  
destruction and the adjudication of forfeiture  
were two different things, and that in order to  
obtain protection, the order or adjudication of  
forfeiture should have been proved, and that it  
was not necessary to quash a mere order for de-  
struction. The order spoken of in R. S. O.  
(1877) c. 73, s. 4, is an order in the nature of a  
conviction, i.e., an original adjudication by the  
magistrate upon some matter brought before  
him by charge, complaint, conviction, or other-  
wise, and not an order for the purpose of carry-  
ing out or enforcing such adjudication. *S. C.*  
16 A. R. 398.

The plaintiff, who resided in the county of  
H., was convicted before defendant G., a police  
magistrate for the county of B., for giving in-  
toxicating liquor to an Indian, and fined with  
commitment to the county gaol of B. on non-pay-  
ment of the fine. The fine not having been paid,  
G. issued a warrant of commitment, directed to  
all the peace officers of B. to arrest plaintiff, and  
prepared a form of endorsement to be signed by  
a justice of the peace of H., authorizing the de-  
fendant N., a constable, to arrest plaintiff in H.  
G. handed the warrant to N. telling him plaintiff  
lived in H. and he would have to get the warrant

endorsed. N. took it to R., a justice of the  
peace for H., who signed the endorsement and  
plaintiff was arrested by N. and taken first  
before G. in B. to see if he would accept a note  
in payment, and then to the county gaol of B.  
The plaintiff was afterwards discharged on  
habeas corpus, but the conviction was not  
quashed:—Held (Galt, C. J., dissenting), that  
the action was maintainable against the defend-  
ants G. and R.: that there was no power en-  
abling R. to endorse the warrant, and that he was  
guilty of trespass in so doing; and that G. was  
liable as a joint trespasser, for by his interfer-  
ence he was responsible, not only for the arrest  
but for the subsequent detention in the gaol of  
B.; and that it was not necessary to quash the  
conviction before action brought, as the arrest  
in the county of H. was not anything done  
under a conviction or order within section 4 of  
R. S. O. (1887), c. 73. At trial, the jury  
found that the plaintiff had sustained no damage  
as against R. and they assessed the damages  
solely against G. Judgment was thereupon  
entered as against G., and the action dismissed  
as to R.:—Held, that the finding of the jury as  
to the damages, was in law permissible; but had  
R. been held liable, as plaintiff at most could  
only have had a new trial, or elect to retain his  
judgment as against G. alone, the court would  
not interfere with the finding. *Quere*, whether  
the constable N. was protected under 24 Geo.  
II. c. 24. Form of order as to costs of N.  
given. *Jones v. Grace*, 17 O. R. 681.—C. P. D.

See *Sinden v. Brown*, 17 O. R. 706, 17 A. R.  
173, p. 1118.

### 3. Notice of Action.

In an action against justices of the peace for  
malicious arrest, the notice of action stated that  
the cause of action arose "in the month of May  
last, 1884, at said village of M. and in the town  
of P."; and was served at defendant C.'s head  
office on his agent there, also at his place of  
residence, and on his solicitors. The statement  
of claim alleged the service of such notice. The  
only defence was "not guilty by statute R. S. O.  
(1877), c. 73, s. 11," the section requiring notice  
being section 10:—Held, by Armour, J., and  
the C. P. Divisional Court, that the statement  
of time and place as well as the service was suffi-  
cient. *Olipphant v. Leslie*, 24 Q. B. 398, followed.  
*Bond v. Conmee*, 15 O. R. 716; 16 A. R. 398.

Held, by the C. P. Divisional Court, that no  
objection could now be taken to the notice, as  
under the O. J. Act and rules, the particular se-  
ction of the statute relied on should have been  
pleaded. *Ib.*

Semble, the omission to give notice of action  
must be pleaded or the section which requires  
it, referred to in the plea of "not guilty by  
statute." *S. C.*, 16 A. R. 398.

Held, in this case, that the magistrate having,  
in the honest belief that he was acting in the  
execution of his duty as such, issued the war-  
rant of commitment after payment of the costs  
adjudged, was, though acting without jurisdic-  
tion, entitled to notice of action, and that, no  
notice having been given, the action failed. *Sin-  
den v. Brown*, 17 A. R. 173.

The endorsement on the notice of action was that it was "given by V. M., of Queen Street, in the city of Brantford, in the county of Brant, solicitor for the within named James Jones." Within was the notice, namely, "I do hereby as solicitor for and on behalf of James Jones, of the village of Jarvis, in the county of Haldimand, farmer," etc.—Held, that the notice taken in connection with the Interpretation Act, 31 Vict. c. 1, s. 29 (Ont.), was sufficient. *Moran v. Palmer*, 13 C. P. 538, not followed as decided prior to said Act; but, Quere, whether any notice of action was necessary. *Jones v. Grace*, 17 O. R. 631.—C. P. D.

See *Howell v. Armour*, 7 O. R. 363, p. 1120.

#### 4. Venue.

Held, that the effect of Rule 254 of the O. J. Act (Con. Rule 653) is to abolish all local venues, as well those made so by statute as at the common law, except actions of ejectment. *Legacy v. Pitcher*, 10 O. R. 620.—Q. B. D.; *Ireland v. Pitcher*, *Id.*, 631.—Rose.

In an action for malicious arrest and for destruction of liquor under R. S. O. (1877), c. 73:—Held, following *Legacy v. Pitcher*, 10 O. R. 620, that in such an action the venue need not be laid where the offence was committed. *Boud v. Connee*, 15 O. R. 716.—C. P. D.; 16 A. R. 398.

The venue in the action was laid at the city of Toronto, and subsequently, by consent, an order was made, striking out the jury notice and directing the trial to take place at Port Arthur:—Held, that in view of this order, the objection that the venue was improperly laid could not be sustained. *S. C.*, 16 A. R. 398.

#### 5. Costs.

In an action against justices of the peace for false imprisonment, etc., the divisional court (10 O. R. 631) ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation:—Held, that the action being within the proper competence of the Division Court (unless the defendant objected thereto), the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off:—Held, also, *Cameron, C. J.*, dubitante, that the effect of R. S. O. (1877), c. 73, s. 19, read in connection with section 12 of that Act, and with R. S. O. (1877), c. 43, s. 18, sub-section 5, R. S. O. (1877), c. 47, s. 53, sub-section 7, and R. S. O. (1877), c. 50, s. 347, is not to provide that the plaintiff should have costs on the Superior Court scale when his recovery is within the jurisdiction of an inferior court. Per *Cameron, C. J.*—The case came under section 18 rather than section 19 of R. S. O. (1877), c. 73. *Ireland v. Pitcher*, 11 P. R. 403.—C. P. D.

The defendant served upon the convicting magistrates notice of a motion by way of appeal from an order of a judge in chambers refusing a certiorari to remove a conviction under the

Liquor License Act, returnable before a Divisional Court in Michaelmas sittings, but "not set the motion down for hearing before the sittings, or take any step after serving the notice of motion to bring it to a hearing during the sittings. The court ordered the defendant to pay to the magistrates their costs of appearing to shew cause against the motion. *Regina v. Armstrong*, 13 P. R. 306.—C. P. D.

The provisions of R. S. O. (1877), c. 73, s. 4, protect a magistrate from an action for anything done under a conviction so long as the conviction remains in force; not where the conviction does not justify what has been done under it. The plaintiff being in custody on a warrant issued by the defendant L. on a conviction had before him under the Vagrant Act, applied to be discharged under the Habeas Corpus Act, the plaintiff electing to remain in custody at London, and on the 4th February an order was made on that application for her discharge, which order was duly received by the gaoler on the 6th. Meanwhile, a fresh warrant had been issued by L. on the 4th and delivered to the gaoler, who, by direction of the County Crown Attorney, detained her for two hours after receipt of the order for her discharge, when another warrant was prepared, and she was again arrested. In an action brought for such arrest and imprisonment for two hours, the jury found the plaintiff was entitled to a verdict, but that she had not sustained any damage which the judge before whom the case was tried, treated as a verdict for the defendants, but refused the justice his costs, (11 O. R. 285). On appeal to this court, the dismissal of the action was affirmed, but:—Held, reversing the judgment of the court below, (11 O. R. 285), that section 19 R. S. O. (1877), c. 73, has not been repealed by any of the provisions of the Ontario Judicature Act; and therefore the dismissal of the action should be with costs to the magistrate, as between solicitor and client. *Arcott v. Lilley*, 14 A. R. 283.

See *Ireland v. Pitcher*, 10 O. R. 631; *Regina v. Walker*, 13 O. R. 83, p. 1043; *Jones v. Grace*, 17 O. R. 681, p. 1122.

### LACHES.

I. ENTITLING SURETY TO DISCHARGE—See PRINCIPAL AND SURETY.

II. IN CARRYING OUT CONTRACTS—See SPECIFIC PERFORMANCE.

III. IN MATTERS OF PRACTICE—See PRACTICE.

IV. WAIVER OF DELAY—See WAIVER.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor the latter is bound to use due diligence in enforcing payment thereof, and if through his default or laches the money secured thereby is lost it will be charged against the creditor and deducted from his demand. *Synod v. DeBlaquiere*, 27 Chy. 536.—Proudfoot; *Id.* 550.—C. of A.

On an application to open up proceedings by way of review on the ground of newly discovered evidence, Ferguson, J., refused the relief asked with costs on the ground amongst others, that the company, had they exercised due diligence in the matter, might have become aware of the prior purchase and payment to which such evidence related. *Dumble v. Cobourg and Peterborough R. W. Co.*, 29 Chy. 121. See also *Murray v. Canada Central R. W. Co.*, 7 A. R. 646, p. 31.

The fact that an applicant for a mandamus against a municipal corporation to levy a sinking fund has been a ratepayer for years does not bar him because he did not apply earlier, as the levying a rate for a sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clarke v. Town of Palmerston*, 6 O. R. 616.—Proudfoot.

Semble, that although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by shewing laches of the applicant, though in this case no such laches existed. *Re Fenton v. County of Simcoe*, 10 O. R. 27.—Wilson: *In re McAlpine v. Township of Euphemia*, 45 Q. B. 199.

Semble, where there is sufficient distress on the property, and the municipality by its own laches puts it out of its power to distrain, section 100 of the Assessment Act does not avail to give the right to collect by action. *Carson v. Veitch*, 9 O. R. 706.—C. P. D.

Held that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a re-issue there), before the application for a re-issue in this country, is fatal to the validity of the re-issue here. *Kidder v. Smart Manufacturing Co.*, 8 O. R. 362.—Ferguson.

Per Spragge, C. J. O., the sale to the mortgagee in this case was a fraud on the plaintiffs, and they had not disentitled themselves to relief by delay as for all that appeared the real facts as to the purchase were unknown to them until just before the filing of the bill. *Faulds v. Hawper*, 9 A. R. 537.

McA. filed an application with the proper government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the commissioner of Crown lands; but owing to a defective survey it was impossible then to convey the berths. Subsequently, the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he having removed to the United States, never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for \$4,000. B. afterwards became en-

titled by subsequent assignments for value to all McA.'s interest, the assignments being duly filed in the Crown Lands Department. McA. and B., in 1884 joined in a petition of right for the issue of the license, and the Attorney-General demurred to the same:—Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would be probably, under ordinary circumstances, a defence to a claim for specific performance, but under the facts in this case a vendor would not be allowed to set up such a defence:—Held, also, that as the assignments were duly filed, and the Crown had the power of forfeiting the claim for non-payment, and did not do so, even were the rule between subjects to apply, it would not be a bar in this case:—Semble, it may be doubted whether the same rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited. *McArthur v. The Queen*, 10 O. R. 191.—Proudfoot.

If the individual shareholders in a joint stock company could bring an action against the promoters for damages caused by alleged misrepresentation by the latter as to the prospects of the company when formed, a delay of four years, during which they suffered the business of the company to go on with a full knowledge of the alleged misrepresentations would disentitle them to relief. (Strong J., dissenting.) *Beatty v. Neelon*, 13 S. C. R. 1; 12 A. R. 50.

The plaintiff made an arrangement in T. with Y., an employee of a certain company, to discount their draft on B. & Co., for \$4,989.65, at three months, and in pursuance of this arrangement a draft was drawn in H. by Y. in the company's name, on plaintiff, payable on demand to their own order, for \$4,800, dated 23rd July, 1883. This draft was taken by Y. to defendants' banking house at H., and there discounted by him, and the proceeds drawn by cheques in the name of the company. The draft was then forwarded by the defendants to their branch in T., and by them presented to the plaintiff for acceptance and payment. Plaintiff then discounted the first mentioned draft with the defendants at T., and with the proceeds paid the draft for \$4,800. Plaintiff, about 11th September, 1883, discovered that both drafts had been forged by Y., and immediately notified defendants, at the same time demanding payment of the amount of the forged draft for \$4,800, which was refused by defendants. Plaintiff paid the first mentioned draft at maturity:—Held, that plaintiff had not lost his right of action by his delay in discovering the forgery, there being no actual genuine party on the bill against whom defendants could have recourse, and no remedy having been lost by them by such delay. *Ryan v. Bank of Montreal*, 12 O. R. 39.—Q. B. D.; 14 A. R. 533.

The plaintiff, an ignorant man and a foreigner, deposited a sum of money with the defendants on 24th September, 1884, and received from them a non-negotiable deposit receipt for the amount, in which it was stated that the defendants would "account to" the plaintiff therefor, etc. At the same time the plaintiff's

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signature was left with the defendants for the purpose of identification. The plaintiff left the receipt with one S. S. for safe keeping, and went away. He returned in April, 1885, when S. S. informed him that he had drawn the money and promised to return it. The defendants had paid the money without proper identification, and without comparison of the signature of S. S. with that of the plaintiff. Ignorant of the method by which the money had been obtained and of his rights against the defendants, the plaintiff did nothing further, and S. S. left the country in August following, heavily indebted. Subsequently, in December of the same year the plaintiff was informed of his rights, and consulted a solicitor, who promised to attend to the matter, but failed to do so. In April, 1886, the plaintiff consulted another solicitor when a demand was made on the defendants, and on their refusal this action was brought. This demand was the first intimation to the defendants of the fraud practised on them:—Held (reversing the judgment of Armour, J., at the trial), that as the plaintiff's delay was not suggestive of collusion or of any unfair dealing on his part, his failure to make a demand or sue the defendants, when he first heard his money had been obtained by S. S., did not operate against him so long as his claim was not barred by the Statute of Limitations:—Held, also, that no legal duty was cast on the plaintiff to notify the defendants, and thus an essential element of estoppel by conduct was absent. *Merchants' Bank v. Lucas*, 13 O. R. 520, distinguished. *Saderquist v. Ontario Bank*, 14 O. R. 586.—Chy. D.; 15 A. R. 609.

Upon the death of the testator's widow the three surviving children of the deceased nephew (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside and the rents and proceeds of sales received by the brother and sister repaid to him:—Held, affirming the judgment of Robertson, J. (16 O. R. 341), that as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will the plaintiff was not barred by laches or acquiescence from recovering any portions of the land unsold at the time his claim was made, and any mortgages to secure purchase moneys of land previously sold and held by the defendants at the time his claim was made, and any moneys received by them after that time, but that there could be no recovery back of the moneys actually received by them before notice of the claim. *Cooper v. Phibbs*, L. R. 2 H. L. 148; *Earl Beauchamp v. Winn*, L. R. 6 H. L.

223; and *Rogers v. Ingham*, 3 Ch. D. 351, considered and followed. *Baldwin v. Kingstone*, 18 A. R. 63; 16 O. R. 341. Carried to the Privy Council.

Where promissory notes of third persons were transferred by the defendant without endorsement as collateral security for a debt due by him to the plaintiff, who now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral notes, and that he had not notified the defendant of their non-payment:—Held, that if the defendant had been injured by such laches or want of notice, and to the extent to which he had been injured, he should be exonerated from payment, but not otherwise; and that the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches and want of notice as a matter of fact, it was a conclusion of law that detriment had followed to the defendant. *Ryan v. McConnell*, 18 O. R. 409.—Chy. D.

Motion to set aside award refused on the ground of delay. See *Pardee v. Lloyd*, 5 A. R. 1, p. 48.

Held, in this case, that by acquiescing in the sale of land, and by her laches the widow had waived her right to compensation for the loss of benefits bequeathed to her by her husband. See *Ripley v. Ripley*, 28 Chy. 610, p. 563.

Laches on the part of a railway company disentitling them to municipal debentures. See *Re Grand Junction R. W. Co. v. County of Peterborough*, 45 Q. B. 302; 6 A. R. 339.

A railway company held not to be in a position to enforce the delivery of debentures by a municipality after the lapse of nine years from the passing of the by-law where a total change of circumstances had taken place, and when the period fixed by the plaintiffs' charter for the completion of the railway had expired. See *Canada Atlantic R. W. Co. v. City of Ottawa*, 12 A. R. 234.

Held, in this case that the defendant was not debarred by laches from setting up the defence of false representation in the sale to him of certain land. See *Lee v. McMahon*, 2 O. R. 664; 11 A. R. 565, p. 776.

In application to set aside judgment. *Lightbound v. Hill*, 9 P. R. 295, p. 1082; *McLean v. Smith*, 10 P. R. 145, p. 881.

Application to open foreclosure refused on account of delay. See *Miles v. Cameron*, 9 P. R. 502.

Application for interim alimony. Delay in proceeding not satisfactorily accounted for. See *Thompson v. Thompson*, 9 P. R. 526, p. 889.

In applying for injunction. See *Sanson v. Northern R. W. Co.*, 29 Chy. 459 p. 926; *Davies v. City of Toronto*, 15 O. R. 33, 919.

In objecting to order amending pleadings. See *Court v. Walsh*, 9 A. R. 294.

In application for interpleader order. See *Darling v. Collatton*, 10 P. R. 110, p. 1015.



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In moving for prohibition to Division Court.  
See *Re Soules v. Little*, 12 P. R. 533, p. 551.

In presentation of cheque for payment. See  
*Blackley v. McCabe*, 16 A. R. 295, p. 137.

Held, in this case that the situation of the  
parties not having been changed, the defendant  
was not bound by laches. See *McDonald v.*  
*McDonald*, 17 A. R. 192.

In moving to quash liquor license by-law. See  
*Bann v. Brockville*, 19 O. R. 409, p. 1052.

See *Tylee v. The Queen*, 7 S. C. R. 651;  
*Thompson v. Canada Fire and Marine Ins. Co.*,  
6 O. R. 291; 9 O. R. 284, p. 286; *Hyde v. Bar-*  
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*turing Co. v. Wilson*, 6 O. R. 421, p. 257; *Clark*  
*v. Eckroyd*, 12 A. R. 425.

### LADING (BILLS OF).

See *BILLS OF LADING AND WAREHOUSE RECEIPTS.*

### LAND.

- I. ASSESSMENT OF—See *ASSESSMENT AND TAXES.*
- II. BOUNDARIES—See *BOUNDARY.*
- III. POWERS OF COMPANIES TO HOLD—See *COMPANY.*
- IV. CLEARING LAND—See *FIRE.*
- V. CROWN LANDS—See *CONSTITUTIONAL LAW—CROWN LANDS.*
- VI. INDIAN LANDS—See *INDIAN LANDS.*
- VII. DEDICATION OF—See *DEDICATION—WAY.*
- VIII. DESCRIPTION OF LAND—See *DEED.*
- IX. MINERAL LANDS—See *MINERAL LANDS.*
- X. OIL LANDS—See *OIL LANDS.*
- XI. EXPROPRIATION OF—See *CROWN—EMINENT DOMAIN—MUNICIPAL CORPORATIONS—RAILWAYS AND RAILWAY COMPANIES.*
- XII. LATERAL SUPPORT—See *LATERAL SUP-PORT.*
- XIII. IMPROVEMENTS ON LAND—See *IM-PROVEMENTS ON LAND.*
- XIV. CONVERSION OF REALTY INTO PERSON-ALTY—See *CONVERSION.*
- XV. LEASE OF—See *LANDLORD AND TENANT.*
- XVI. MORTGAGE OF—See *MORTGAGE.*
- XVII. SALE OF—See *SALE OF LAND—SALE OF LAND BY ORDER OF THE COURT.*
- XVIII. CONVEYANCE OF—See *DEED.*
- XIX. DEVISE OF—See *WILL.*
- XX. ESTATES IN—See *ESTATE—WILL.*

### XXI. TITLE TO LAND.

1. Generally—See *SALE OF LAND.*
  2. Jurisdiction of Courts—See *COUNTY COURT—DIVISION COURT—JUSTICE OF THE PEACE.*
  3. Barred by Statute of Limitations—See *LIMITATION OF ACTIONS.*
- XXII. COVENANTS IN CONTRACTS RELATING TO LAND—See *COVENANT.*
- XXIII. RECOVERY OF—See *EJECTMENT.*
- XXIV. EXECUTION AGAINST—See *EXECUTION.*
- XXV. TRESPASS—See *TRESPASS.*
- XXVI. OF INFANTS—See *INFANT.*
- XXVII. OF MARRIED WOMAN—See *HUSBAND AND WIFE.*
- XXVIII. IN THE HANDS OF EXECUTORS—See *EXECUTORS AND ADMINISTRATORS.*
- XXIX. PARTITION OF—See *PARTITION.*
- XXX. SURVEY OF—See *SURVEY.*
- XXXI. VALUING—See *VALUATOR.*
- XXXII. CROPS—See *CROPS.*
- XXXIII. FENCES—See *FENCES.*
- XXXIV. FIXTURES—See *FIXTURES.*
- XXXV. ROADS—See *WAY.*
- XXXVI. WASTE—See *WASTE.*

Quere, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he find he cannot dispose of them as such, or for any other reason, replace his land as it was before. *In re Hon. G. W. Allan*, 10 O. R. 110.—*Wilson.*

Action for damages to a farm caused by sowing barley purchased from the defendant, which was mixed with weeds. See *McMullen v. Free*, 13 O. R. 57.

### LAND SCRIP.

See *Burns v. Young*, 10 A. R. 215, p. 475.

### LAND WARRANT.

See *McKenzie v. Dwight*, 11 A. R. 381, p. 772.

### LANDLORD AND TENANT.

- I. OPERATION OF THE STATUTE OF FRAUDS, 1132.
- II. LEASE OR LICENSE, 1133.
- III. AGREEMENT FOR LEASE, 1133.
- IV. CONSTRUCTION AND OPERATION OF LEASES.
  1. Leases Under Short Forms Act, 1133.

2. *Commencement and Duration of Tenancy*, 1134.3. *Other Cases*, 1135.4. *Covenants*.(a) *To Pay Rent*, 1136.(b) *To Pay Taxes*, 1137.(c) *Not to Assign or Sub-let*, 1138.(d) *Against Incumbrances and for Quiet Enjoyment*, 1139.(e) *To Repair—To Keep up Fences—Commission of Waste*, 1139.(f) *To Rebuild*, 1141.(g) *To Pay for Buildings or Improvements*, 1142.(h) *Other Covenants*, 1143.(i) *Implied Covenants*, 1144.(j) *Covenants Running with the Land*, 1144.5. *Rectifying Leases—See DEED*.V. *LEASES BY PARTICULAR PERSONS*.1. *Tenants for Life—See ESTATE*.2. *Mortgagors—See MORTGAGES*.3. *Trustees—See TRUSTS AND TRUSTEES*.VI. *MINING LEASES—See MINERAL LANDS*.VII. *TENANT AT WILL—See LIMITATION OF ACTIONS*.VIII. *TENANT FOR LIFE—See ESTATE—WASTE*.IX. *RENT*.1. *Payable by Improvements*, 1144.2. *Right to Deduct Taxes*, 1145.3. *Apportionment*, 1145.4. *Effect of Assignment*, 1146.5. *Premises Burnt*, 1146.6. *After Expiration of Term*, 1146.7. *Occupation Rent*, 1146.8. *Rent Service—Rent Seck*, 1146.X. *SUB-LEASE*, 1146.XI. *RENEWAL OF LEASE*, 1147.XII. *ASSIGNMENT OF LEASE*, 1148.XIII. *POSTPONING LEASE TO MORTGAGE*, 1148.XIV. *TERMINATION OF LEASE*, 1149.XV. *EVICION AND SURRENDER OF LEASE*, 1150.XVI. *FORFEITURE OF LEASE*.1. *By Acts of Lessee*, 1151.2. *Waiver of Forfeiture*, 1152.XVII. *ATTORNMENT OF TENANT*, 1152.XVIII. *QUALIFICATION OF TENANTS AS VOTERS—See PARLIAMENTARY ELECTIONS*.XIX. *OTHER RIGHTS OF TENANTS*, 1153.XX. *RIGHTS OF REVERSIONER*, 1153.XXI. *NOTICE TO QUIT*, 1153.XXII. *CROPS—See CROPS*.XXIII. *FIXTURES—See FIXTURES*.XXIV. *ACTIONS AND PROCEEDINGS BY LANDLORD*.1. *On Covenants*.(a) *Imperfect Execution of Lease*, 1153.(b) *Damages*, 1154.2. *Receipt of Rent after Action Brought*, 1154.3. *Overholding Tenants*, 1154.4. *Distress—See DISTRESS*.5. *Ejectment or Action for the Recovery of Land—See EJECTMENT*.6. *Landlord's Claim for Rent—See SHERIFF*.XXV. *ACTIONS AGAINST LANDLORD*.1. *Damages Recoverable*.(a) *Refusing to Give Possession*, 1155.(b) *Breach of Covenant in Lease*, 1155.(c) *Giving False Notice of Sale*, 1155.2. *Other Cases*, 1155.XXVI. *DISPUTING LANDLORD'S TITLE*, 1156.I. *OPERATION OF THE STATUTE OF FRAUDS*.

The plaintiff sued defendant for damages for refusing to give him possession of premises which the plaintiff alleged that defendant had verbally agreed to give him a lease of for sixteen months:—Held, affirming the judgment of the county court, that the evidence did not shew an actual letting, but that even if it did the plaintiff must fail under the fourth section of the statute of frauds, as the action was brought in respect of an agreement for an interest in land. *Moore v. Kay*, 5 A. R. 261.

The plaintiff was the lessee of certain premises used as a factory, and having become insolvent the lease was forfeited by the lessor, the defendant, though at what particular time did not appear. The plaintiff continued in occupation, and an arrangement was entered into, whereby one F. agreed to purchase the machinery on the premises from the official assignee, giving the plaintiff the option to redeem it within two years. The plaintiff further obtained from the defendant an agreement, as follows:—"Toronto, January 27th, 1880. In the event of Thomas Carroll continuing the occupation of building on Hayter street, I promise and agree to give a new lease at a rental of \$600 for five years; also agree to allow, etc., (specifying certain allowances). Signed, R. S. Williams." The defendant refused to sign a lease of the premises to the plaintiff, and an action being brought for specific performance:—Held, dismissing the action, that the agreement was not sufficient to satisfy the statute of frauds, as it did not appear from it with certainty when the term was to begin, nor to whom the lease was to be given. Semble, that the official assignee should have been made a party, and that in any event it would have been a case for damages, not for specific performance. *Carroll v. Williams*, 1 O. R. 180.—Boyd.

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The defendant agreed to pay the plaintiff \$300 if he would procure a lease of the premises then occupied by him under lease from one W., and adjoining the defendant's, with the privilege of making a doorway between the two houses, and assign the lease to him. At the plaintiff's request, the defendant wrote him the following letter: "To Mr. John Bland. Dear Sir,—In reply to yours of to-day, I promise to give you \$300 provided you can give me a transfer lease, with privilege to make an opening between your premises and my own. Cash to be paid on completion of transfer lease. This is as I understand it. Yours most truly, T. Eaton." The plaintiff procured a lease, and tendered an assignment of it to the defendant, who refused to accept it, whereupon the plaintiff sued for the \$300.—Held, reversing the decision of the County Court, that the defendant's letter was a sufficient memorandum to satisfy the requirements of section 4 of the Statute of Frauds, within which the agreement fell as being a contract concerning an interest in land; that the premises were described with sufficient certainty, and the omission to specify the terms of the lease was immaterial, they having been left in the plaintiff's discretion. The plaintiff, therefore, was held entitled to recover. *Bland v. Eaton*, 6 A. R. 73.

Rent issuing out of land is a tenement; it partakes of the nature of land, and is within the fifth section of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1. *Hopkins v. Hopkins*, 3 O. R. 223—Chy. D.

See *Magee v. Gilmour*, 17 O. R. 620; 17 A. R. 27, p. 1135.

## II. LEASE OR LICENSE.

See *Seymour v. Lynch*, 7 O. R. 471; 14 A. R. 738; 15 S. C. R. 341; *Roan v. Kronsbein*, 12 O. R. 197, p. 588.

## III. AGREEMENT FOR LEASE.

The defendant entered into negotiations with a loan company, who were the owners of a farm, for a lease thereof to him. The terms were discussed, and pending a lease to be prepared by the company's solicitors and executed by defendant, he was allowed to enter into possession. The defendant admitted that until he executed the lease there was no completed agreement. A lease was accordingly prepared, containing what the company understood were the terms, which defendant refused to execute. The company thereupon sold the land to plaintiff and gave defendant notice to quit. In an action by plaintiff to recover possession.—Held, that the plaintiff was entitled to recover; that as the defendant was not in possession under any concluded agreement regarding the lease he was merely in as tenant at will to the loan company, which was determined by the notice to quit. *Lennox v. Westney*, 17 O. R. 472.—C. P. D.

## IV. CONSTRUCTION AND OPERATION OF LEASES.

### 1. Leases Under Short Forms Act.

See *Emmett v. Quinn*, 7 A. R. 306, p. 1142; *Crawford v. Buggy*, 12 O. R. 8, p. 1140.

## 2. Commencement and Duration of Tenancy.

In July, 1880, M. conveyed certain lands to plaintiff which were embraced in lands of which the defendant was tenant from year to year of M. under a tenancy since 1868. In December, 1880, the plaintiff executed in favour of M. what purported to be a statutory lease of the lands conveyed to him at a yearly rent of twenty cents. The habendum was during the term of the occupancy of the tenant as lessee of George Thompson, the defendant, "of the lands leased to him, the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing and to be fully complete and ended as soon as the said G. T. shall vacate the said premises or cease to reside thereon." The defendant continued to pay rent to M., and was never called upon to attorn or pay rent to the plaintiff, and received no notice to quit from M. prior to action brought, and no demand of possession from plaintiff until about the commencement of this action. M. required an undertaking from plaintiff not to disturb defendant while he continued her tenant, and informed defendant of this lease, and that he should have undisturbed possession while he paid rent to her. The defendant claimed title under M., and contended that the conveyance did not affect his rights under his lease.—Held, that the lease by plaintiff to M. did not operate as a lease for years owing to the uncertainty of the termination thereof; but would be a tenancy at will until payment of rent when it would be a tenancy from year to year; and also might be deemed an agreement fixing the annual value of the premises at twenty cents, which M. should collect from the defendant and pay over to the plaintiff.—Held, also, that on the conveyance by M. to plaintiff there was a severance of the reversion, and the rent became apportionable at common law, but the concurrence of the defendant was necessary, or apportionment by a jury; and that it might not be unfairly assumed that there was such concurrence, and that defendant paid the twenty cents to M. for plaintiff, becoming thereby tenant from year to year to plaintiff, and entitled to six months' notice to quit; or that M. paid the rent to plaintiff and became tenant from year to year to plaintiff; and she receiving rent as theretofore from defendant he was as against or under her entitled to the benefit of such term, and either she or defendant to the six months' notice. The defendant was therefore held entitled to possession until he received the proper notice to quit. *Reeve v. Thompson*, 14 O. R. 499.—Rose.

The plaintiff's testatrix, who had a life estate in certain lands, made a lease of them for ten years to one of the defendants, who was entitled to the reversion in fee. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the lessor, her heirs and assigns," for payment to "the said lessor, her heirs and assigns." The lessor died before the expiration of ten years, and this action was brought by the executrix of her will to recover (inter alia) the instalments of rents which became payable, as it was alleged, upon the lease after her death.—Held, that, as the interest of the lessor was a freehold interest, the plaintiff could not recover either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant:—

Held, also, that there was no estoppel to prevent the lessee from shewing that the title of the lessor had come to an end, and that he himself became the owner upon her death. *Thatcher v. Bowman*, 18 O. R. 265.—Street.

Since the Judicature Act the result of a verbal lease of real property for more than three years, to continue until and expire upon a day certain, where the tenant has taken possession, is that he is bound to give up possession at the end of the stipulated period without notice to quit. And where McC., the tenant for such a term, sublet to the defendants, but not for any definite period.—Held, that their term also expired upon the day the original tenancy expired, and when they continued in possession thereafter they were over-holding tenants. *Magee v. Gilmour*, 17 O. R. 620.—Q. B. D.

The plaintiff, the landlord, issued a distress warrant for rent of the premises in question after the expiry of the term and the defendants, without the concurrence of McC., who had tried to dislodge them and refused to receive rent from them after the expiry of the term, paid the rent demanded to the plaintiff's bailiff, not as being due by themselves, but as being due by McC., to the plaintiff. The warrant recognized McC. as being tenant on the day of its date, some months after the expiry of the term, but did not recognize the defendants' rights in any way. In an action of ejectment the defendants disclaimed being tenants under the plaintiff and insisted that they were still in under McC.—Held, that the payment of the rent did not, under the circumstances, establish a new tenancy between McC. and the defendants, even if McC. ever became the tenant of the plaintiff after the expiry of his original term, which was not shewn. The plaintiff after the expiry of the term served on the defendants a written notice to quit, in which they were recognized as his tenants.—Held, that, having disclaimed being tenants to the plaintiff, the defendants were not entitled to notice to quit, and if they were, the one they received was sufficient. *Id.*

On appeal the Court of Appeal dismissed the appeal. The court agreed with the judgment below, holding that the tenancy, though by oral lease, void under the Statute of Frauds, was a tenancy for a term certain and not from year to year; that the sub-tenancy came to an end with the tenancy, and that the subsequent proceedings fully set out in the report did not operate to create a new term as between the sub-tenant's and the plaintiff. *B. C.*, 17 A. R. 27.

See *Wilson v. Gilmour*, 46 Q. B. 545, p. 491; *Lennox v. Westney*, 17 O. R. 472, p. 1133.

### 3. Other Cases.

By a lease from one D. to the plaintiff it was provided that if D. sold the farm the plaintiff should give up possession upon receiving six months' notice before the 1st of April, and that he should have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said fallow should be paid for at a reasonable valuation. D. afterwards sold to the defendant, and in August the plaintiff received the stipulated notice after he had prepared the summer fallow but before he had

sown it. He afterwards sowed it with fall wheat, and gave up possession on the 1st of April. Neither D. nor the defendant elected to pay for the crop, and the defendant converted it to his own use.—Held, affirming 44 Q. B. 509, that the true construction of the provision was, that the plaintiff was to have the privilege of harvesting any crops which might have been put in on the summer fallow, unless D. elected to pay for them at a valuation; that he had never parted with the property in the crop, and that he was therefore entitled to recover in trover against the defendant. Per Patterson, J. A.—If the lessor intended to pay for the work, he was bound to elect to do so when he gave the notice, or at the latest, when he resumed possession. *Harrison v. Pinkney*, 6 A. R. 225.

A tenant agreed to pay for certain premises 6 months and taxes, and for some eighteen years remained in possession, paying the taxes and paying nothing else. The tenant, after the expiration of this period, gave to his landlord an acknowledgment of indebtedness for rent for the whole period.—Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accruing after he had so acquired possession by giving to the landlord an acknowledgment of indebtedness in respect of rent. *Davis v. McKinnon*, 31 Q. B. 564, observed upon. Judgment of the Q. B. D., 16 O. R. 393, reversed, and that of Street, J., at the trial restored. *Finch v. Gilray*, 16 A. R. 484, followed in *Coffin v. North American Land Co.*, 21 O. R. 80.

Effect of lease by infant. See *Lipsett v. Perdue*, 18 O. R. 575, p. 905.

### 4. Covenants.

#### (a) To Pay Rent.

The plaintiff, by deed of 30th of December, 1882, created a term for ten years, which became vested in the defendants, of "all the mines of ores of iron and iron stone, as well opened as not opened, which can, shall, or may be wrought, dug, found out, or discovered within, upon, or under ten acres square of the north half of lot number 12 in the 6th concession of Madoc". Yielding and paying \$1 per gross ton of the said iron stone or ore for every ton mined and raised from the land and mine, payable quarterly on the 1st days of March, June, September, and December, in each year. The lessees covenanted to dig up, etc., not less than 2,000 tons the first year and not less than 5,000 tons in every subsequent year, and "pay quarterly the sum of \$1 per ton for the quantity agreed to be taken during each year." \* \* \* And if the same should exceed the quantity actually taken, such excess to be applied towards payment of the first quarter thereafter in which more than the stipulated quantity should be taken: "Provided, that if the iron ore or iron stone shall be exhausted and not to be found or obtained there, by proper and reasonable effort, in plying quantities, then the parties of the second part shall be at liberty to determine the lease." The defendants entered,

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16 O. R. 393,  
J., at the trial  
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merican Land Co.,

ee *Lipsett v. Per-*

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and proceeded to work the mines until Sep-  
tember (or December), 1884, when, having  
taken out about 300 tons, they ascertained  
that the ore could not be obtained in paying  
quantities, whereupon they notified the lessor  
thereof and of their desire to surrender their  
lease, which surrender the lessor refused to  
accept, and instituted proceedings to recover  
the amount of two quarters' rent, all prior  
rents having been regularly paid. The de-  
fendants counter-claimed for the rents already  
paid by reason of failure of consideration :—  
Held, (1) that, in the absence of any specified  
mode of surrendering the term having been  
provided for the lease, the act of the defendants  
was a sufficient determination thereof; (2) (in  
this reversing the judgment of Ferguson, J.)  
that the consideration for the lease had not  
failed, so as to bring it within the class of cases  
where the subject matter could be treated as  
non-existent, and by the true construction of  
the lease the plaintiff was entitled to be paid  
quarterly for the quantity of ore agreed to be got  
out; that the defendants were not entitled to  
recover back any of the rents paid, and that  
the lessor was entitled to judgment for such rent  
as accrued due between the 1st of June and the  
giving of the notice of surrender. *Wallbridge v. Gaujo*, 14 A. R. 460, affirmed by Supreme  
Court *sub nom. Palmer v. Wallbridge*, 15 S.  
C. R. 650.

#### (b) To Pay Taxes.

Breach of covenant to pay taxes remedied be-  
fore statement of claim for recovery of possession  
filed. See *Buckley v. Beigle*, 8 O. R. 85, p. 1152.

Held, that under the wording of the covenant  
to pay "all taxes, rates, duties, and assessments  
whatsoever, \* \* \* now charged or here-  
after to be charged upon the said demised pre-  
mises," the defendant was liable for local improve-  
ment taxes and for the additions made under the  
Assessment Act year by year to the amount of  
the taxes in arrear or additions made by the  
municipality. *Boulton v. Blake*, 12 O. R. 532.—  
Ferguson.

K. and others, on 1st October, 1880, leased to  
C. and another two parcels of land for four years,  
the lessees covenanting to pay all taxes, rates,  
etc., "which now are, or which during the con-  
tinuance of the term hereby demised, shall at  
any time be rated," etc. In March, 1881, the  
lessors mortgaged one of said parcels to H. In  
December, 1883, part of the mortgaged land was  
sold to C. for the arrears of taxes to 31st Decem-  
ber, 1882, and a conveyance was subsequently  
made to him by the warden and treasurer. It  
appeared that the land was sold for the taxes  
due for the years 1880 and 1882, with interest  
and costs. In an action brought by the mort-  
gagee H. to set aside the tax deed as a cloud on  
the title, or to have the tax purchaser declared  
a trustee for him:—Held, that the tax pur-  
chaser could not hold the title so acquired against  
his lessors and the plaintiff, the lessees being  
bound under their covenant to pay the taxes for  
which the land was sold. *McNaughton v. Wigg*,  
35 Q. B. 111, distinguished. *Heyden v. Castle*,  
15 O. R. 257.—Q. B. D.

See *Finch v. Gilray*, 16 A. R. 484, p. 1136.

#### (c) Not to Assign or Sub-let.

The plaintiffs, owners in fee of certain land on  
the 30th October, 1866, leased it for twenty-one  
years to one B. by a lease under the Short  
Forms Act, containing covenants to pay rent  
and not to assign or sub-let without leave. By  
a deed of the same date, after reciting the lease,  
and an agreement of B. to purchase the build-  
ings on the land for \$1,400, the plaintiffs con-  
veyed the said buildings to B. his executors,  
administrators and assigns. B. then mortgaged  
the premises to H., and afterwards assigned his  
interest to C., who assigned to G. H., and G.  
H. assigned to M. This last assignment was  
objected to by the plaintiffs, who brought eject-  
ment against the defendant D., who was in pos-  
session of the buildings under a verbal lease from  
B., for the forfeiture occasioned by such assign-  
ment, as also for non-payment of rent. While  
a rule nisi to set aside their verdict was pending  
the plaintiffs obtained a decree in Chancery, by  
which the conveyance to B., as far as it conveyed  
the land on which said buildings stood, was de-  
clared to be a mistake, and was rectified so as to  
pass only a chattel interest in said buildings, and  
no estate in the land:—Held, that the plaintiffs  
were entitled to recover for the breach of the  
covenant not to assign, etc., but that under the  
circumstances their recovery must be limited to  
the land alone and not to the buildings thereon,  
and that therefore they could not enter into the  
buildings or remove the defendant therefrom.  
*Toronto Hospital Trustees v. Denham*, 31 C. P.  
203.—Wilson.

On 19th May, 1870, E. made a lease of certain  
household premises to P. for twenty-one years.  
On 30th June, 1871, P., with E.'s assent, as-  
signed to J. B. On 10th April, 1877, E., who  
was merely a bare trustee for plaintiff, assigned  
the reversion to her. On 29th December, 1882,  
J. B., without plaintiff's knowledge or assent,  
assigned to C. B., who thereafter was in pos-  
session of the property, receiving the rents from  
sub-tenants and paying the rents under the prin-  
cipal lease to the plaintiff. The plaintiff had  
also received the rents prior to E.'s assignment  
to her. The lease was under seal, and was in  
the ordinary printed form, and purported to be  
under the Short Forms Act. The statutory  
covenants were prefaced by the words:—"And  
the said lessee for himself, his heirs and exec-  
utors, administrators and assigns hereby cove-  
nants with the said lessor, his heirs and exec-  
utors, administrators and assigns, in manner and  
form following, that is to say." Then followed  
the ordinary statutory covenants, except that  
after the covenant "to repair" were the words  
"reasonable wear and tear and accidents by fire  
and tempest excepted," and after the covenant  
"not to assign, and sub-let without leave," the  
additional covenant "and not to carry on any  
business that shall be deemed a nuisance." The  
covenant not to assign was (except as to the  
additional words) in the language used in cove-  
nant 7, column 2 of the Short Form of Leases  
Act:—Held, that the covenant not to assign or  
sub-let, etc., did not include assignees, as they  
could not be held to be named; and the pre-  
fatory words to the covenant would have no con-  
trary effect; and therefore J. B.'s assignment  
to C. B. was no breach thereof; and this was  
equally so as to sub-letting by using the prem-



ises as a tenement house; and also from the fact of the user having been open and notorious both by P. and J. B. for some thirteen years a license to do so must be presumed. Quære, whether such covenant ran with the land, the authorities on the point being conflicting; but the county judge, to whom the case had been referred, having found that it did so run, a judge sitting in single court refused to interfere. *Crawford v. Bugg*, 12 O. R. 8.—McDougall, Co. J.—Rose.

(d) *Against Incumbrances and for Quiet Enjoyment.*

See *Anderson v. Stevenson*, 15 O. R. 563, p. 1149; *Cumberland v. Kearns*, 18 O. R. 151; 17 A. R. 281, p. 428.

(e) *To Repair—To keep up Fences—Commission of Waste.*

Seemle, that in this country the removal of a fence on a farm from one place to another is not per se, as a matter of law, a breach of a covenant to repair and keep fences in repair; and whether it is so or not would be a question of fact under the circumstances of each case. When the lessor accepted rent after such a removal with knowledge of it:—Held, a waiver of the forfeiture, if any, and that he could not afterwards claim to re-enter for the continuance of the fence in its altered position as a breach of the covenant. *Leighton v. Melley*, 1 O. R. 207.—Q.B.D.

On May 19th, 1870, E. made a lease of certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E. who was merely a bare trustee for plaintiff, assigned the reversion to her. On 29th December, 1882, J. B., without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rents from sub-tenants and paying the rents under the principal lease to the plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was under seal, and was in the ordinary printed form, and purported to be under the Short Forms Act. The statutory covenants were prefaced by the words: "And the said lessee for himself, his heirs and executors, administrators and assigns hereby covenants with the said lessor, his heirs and executors, administrators and assigns in manner and form following, that is to say." Then followed the ordinary statutory covenants, except after the covenant "to repair" were the words "reasonable wear and tear and accidents by fire and tempest excepted," and after the covenant "not to assign or sublet without leave," the additional covenant "and not to carry on any business that shall be deemed a nuisance:—Held, that the covenant to repair, ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B.; and he would only be liable for the breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words, "reasonable wear and tear," etc.:—Held, also, that there could be no liability on defendants as executors of J. B. for breach of implied covenant by themselves and J. B. to use the premises in a tenant-like manner, for there

being a lease under seal with express covenants, no such implied covenant would arise. *Crawford v. Bugg*, 12 O. R. 8.—McDougall, Co. J.—Rose.

Held, also, that an action of waste would lie notwithstanding the express covenant to repair; but there must be what would constitute waste. A mere breach of covenant, not amounting to waste, not being sufficient; but to maintain such action the plaintiff must have a vested interest in the reversion, at the time waste committed, so that her claim, if any, must be for waste committed after she acquired the reversion and up to J. B.'s assignment; but there could be no liability here, for as to J. B., it appeared his assignment was made more than a year prior to his decease; and the R.S.O. (1877) c. 107, s. 9, only applied to breaches committed by testator within six months prior to his decease; and that it was not necessary for the defendant to set this up as a defence, the onus being on plaintiff to show that she came within the statute; and as to the executors it appeared they had no interest in the term and had never intermeddled with the property. *Id.*

Held, also, that there was no breach of the covenant by defendant to repair according to notice because the notice was given to J. B. after he had parted with his interest in the term. *Id.*

Held, also, that as to many of the alleged breaches they were such as came within the terms "reasonable wear and tear," while as to others the evidence failed to disclosed the date when they occurred and therefore whether prior to the assignment to J. B. *Id.*

On December 5th, 1882, plaintiff by lease, made according to an Act respecting "Short Forms of Leases," R. S. O. (1877) c. 103, demised to defendant certain premises for a grocery and liquor store, for a term of years. In April, 1883, defendant made a door through an inner brick wall, to get access from the store to a portion of the premises previously reached only from the outside. Plaintiff at first objected to this, but afterwards assented to it. A partition, partly glass and partly wood, in which was a door, separated the office from the store. In April, 1885, defendant proceeded to move this partition nearer the centre of the store, substituting wood for the glass, closing up the door and converting a front window into a door, so as to make the office a liquor store, to comply with the new law requiring a separation of liquors from groceries. Plaintiff claimed an injunction to prevent further waste, and a right to re-enter for breach of the covenant to repair. The judge at the trial found that no damage was done to the premises:—Held 1. That the breaking through the brick wall, for the purpose of making the door, was a breach of the covenant to repair, but was not a continuing breach, and had been waived by the landlord. 2. That under the statutory covenant to repair, the tenant was bound to keep in repair not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make: that the right to erect such fixtures is to this extent, viz., that they shall not be such as to diminish the value of the demised premises, nor to increase the burden upon them as against the landlord, nor to impair the evidence of title. 3.

The plaintiff acts as co-tenant.

By a covenant certain parties, state, et cetera, the plaintiff, appellants, the negligence of the plaintiff, amounting to the plaintiff, for Lowe and Tas, respondent, the fire in the lease, and 1,625 Skelton, 1

See *Coleman v. Ambrose*, 18 O. R. 151; 17 A. R. 281, p. 428.

In a lease of the Act, covenants with the plaintiff, the statute, and another, the building destroyed by the second party of assignee, executed the building. Subsequently, sold to one N. the property, the building, defendant, (1) that the building, by the lease, assigns, a 420, was Morrison, being in making of and did not A., dissever, having been the defendant and bound Burton, a

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The plaintiff's reversion not being injured by the acts complained of, there was no waste and no forfeiture. *Holderness v. Lang*, 110 O. R. 1.—Q. B. D.

By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, etc., as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted." Subsequently, the appellant (alleging the fire had been caused by the negligence of the respondents) brought an action against them for the amount of the costs of reconstructing the premises and restoring them in good order and condition, less the amount received from insurance:—Held, affirming the judgment of the court of Queen's Bench for Lower Canada (appeal side), Ritchie, C. J., and Taschereau, J., dissenting, that the respondents were not responsible for the loss, as the fire in the present case was an accident by fire within the terms of the exception contained in the lease, and therefore articles 1,053, 1,627 and 1,629 C. C. were not applicable. *Evans v. Skelton*, 16 S. C. R. 337.

See *Cook v. Edwards*, 10 O. R. 341, p. 1143; *Amhrose v. Fraser*, 14 O. R. 551, p. 1143; *Houston v. McLaren*, 14 A. R. 103, p. 1144; *Clendenan v. Blatchford*, 15 O. R. 285; *Ferguson v. Troop*, 17 S. C. R. 527, p. 1151.

#### (f) To Rebuild.

In a lease, expressed to be made in pursuance of the Act respecting Short Forms of Leases, the covenants, in place of the words "the lessee covenants with the lessor," were commenced with the words "the said party of the second part covenants with the said party of the first part." Then followed covenants representing the statutory short form covenants, and a covenant to build a house on the demised premises; and another covenant to rebuild in the event of the building so erected during the term being destroyed by fire. This last covenant was introduced by the words, "and the said party of the second part further covenants with the said party of the first part." The lessee, with the assent of the lessor, assigned the lease, and the assignee built in pursuance of the covenant, and executed a mortgage to the defendant, and on the buildings being burnt down rebuilt them. Subsequently the defendant, on default of payment, sold, under the power in his mortgage, to one N., who assigned the leasehold interest in the property to the defendant, and thereafter the buildings, during the occupation of the defendant, were again destroyed by fire:—Held (1) that the covenant to rebuild derived no aid from the statute, and was to be read, as made by the lessee for himself alone and not for his assigns, and the decree of Blake, V. C., 27 Chy. 420, was reversed; Spragge, C. J., Burton, and Morrison, JJ.A., holding that the covenant being in respect of something not in esse at the making of the lease did not run with the land, and did not bind the defendant: Patterson, J. A., dissenting on the ground that the buildings having been erected, before the assignment to the defendant, the covenant ran with the land and bound him. Held, (2) by Spragge, C. J., Burton, and Morrison, JJ.A., that the covenant

to build not being one of the statutory covenants, must be read as being made by the lessee for himself alone and not for his assigns. Per Patterson, J. A. That the short form words introductory to the covenants should be read as if extended in the long form upon the deed; and therefore the words "for himself, his executors, administrators, and assigns" applied to the covenant to build, though not to the covenant to rebuild. Per Patterson, J. A. The use of the words "party of the first part," and "party of the second part," inserted in the introductory part of the covenants was a sufficient compliance with the provision of the statute, in respect to short forms of leases, which says that any name or names may be substituted for the words "lessor" and "lessee." Remarks on *Minshull v. Oakes*, 2 H. & N. 793. *Emmett v. Quinn*, 7 A. R. 306.

#### (g) To Pay for Buildings or Improvements.

B. demised certain lands to W. by deed of lease, containing an agreement that, "at the expiration of the lease, the lessor, his heirs, or assigns, will pay the said lessee, etc., one half of the then value of any permanent improvements he may place upon the said lands," etc.—Held, that the liability to pay for the said improvements ran with the land and attached as an equitable lien thereon as against the plaintiff, to whom B. had conveyed the said land, such lien attaching on the title which B. had at the time of such conveyance to the plaintiff, and that on the expiration of the term, the latter could only recover possession of the said land subject to such lien. Reference to the master ordered to fix the value of such improvements. *Berrie v. Woods*, 12 O. R. 693.—Boyd.

Held, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised did not run with the land, and that the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected. *McClary v. Jackson*, 13 O. R. 310.—Q. B. D.

In 1849 W. F. married A. F. without marriage settlement. In 1872 W. F. entered into a covenant for himself, his heirs, and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse, which the lessee was to have liberty to erect, and did erect upon the demised premises. Pending the term, W. F. conveyed the reversion in such a way that it became vested in himself and W. as trustee, as to the whole beneficial interest, for A. F.:—Held (affirming the decision of Ferguson, J., reported 12 O. R. 459), that the separate estate of A. F. was not bound by the covenant, though she was equitable owner of the reversion as above mentioned at the time of the erection of the malt-house, and until the expiration of the lease. Per Boyd, C.—Whether the covenant was one that ran with the land or not, and whether A. F. or her trustees were assignees within the meaning of 32 Hen. VIII. c. 34 or not, privy of estate is not tantamount to privy of contract so as without more to affect the separate estate of a married woman, as if she had expressly contracted with reference thereto:—Held, also (affirming the decision of Ferguson, J.), that a claim on behalf of the said trus-

tees for rent in arrear, and for damages for non-repair, was not matter of set-off against damages recovered against W. F. for breach of his said covenant, though he was one of the trustees, they not being matters arising in the same right. Per Boyd, C.—Semble, if the amount to be paid for the malthouse had formed a lien on this particular land out of which the rent issued, it may be that the claim for set-off in respect of rent in arrear and damages for non-repair would have prevailed. *Ambrose v. Fraser*, 14 O. R. 551.—Chy. D.

Power of trustees to grant lease for twenty-one years with provision for compensation for improvement or renewal. See *Brooke v. Brown*, 19 O. R. 124.

See *Mason v. Macdonald*, 45 Q. B. 113, p. 122.

#### (h) Other Covenants.

A lessee covenanted that during the term he "will cultivate, till, manure, and employ such part of the demised premises as is now, or shall hereafter be brought under cultivation in a good, husband-like, and proper manner, and shall not nor will during the said term cut any standing timber upon the said lands except for rails or buildings on the said demised premises, and also shall and will sufficiently repair and keep repaired the erections and buildings, fences, and gates erected or to be erected upon the said premises: the said lessor finding or allowing on the premises all rough timber for the same, or allowing the said lessee to cut and fell so many timber trees upon the said premises as shall be requisite." The lessor having brought an action on the above covenant claiming damages against the lessee on the ground that he had converted certain pasture into arable land, which, however, the jury found was an act of proper husbandry, thereupon judgment was entered for the defendant. On motion for a new trial:—Held, that the lessee was at liberty under the lease to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent, if it was a reasonable and proper thing to do in the course of good and judicious husbandry, and there was nothing to indicate that the landlord was to control the use of the timber so as that he might limit it to the buildings, fences, and erections existing at the date of the lease. *Cook v. Edwards*, 10 O. R. 341.—Chy. D.

The plaintiff had under several leases been in occupation of a farm of the defendant's for about twenty-five years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor would put up a new house, the plaintiff agreeing to accept a new lease for six years and pay an increase in his rent of \$150 a year. Plaintiff also agreed to perform some work in connection with the building in the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up the house:—Held,

affirming the judgment of the court below, that the circumstances attending the execution of the lease as also the corroboration afforded by the lease itself warranted the court in admitting parol evidence to shew that the first year of the term was the year in which the house was to be erected:—Held, also, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the plaintiff being to perform certain work on the building during the first summer of the term, and the increased rent being payable for the whole term then created, the first year must be considered reasonable. *Bulmer v. Brumwell*, 13 A. R. 411.

The lease from the defendant to the plaintiff contained the usual covenant by the lessee to repair fences, etc., but the lessor agreed "to build the line fence between the premises hereby demised and the farm of D. M., should the same be required during the currency of the lease." The evidence shewed that there was no line fence between the farms, but that there was a fence upon D. M.'s land about twenty-four yards south of the boundary line. The plaintiff alleged that this fence was out of order; and that the defendant would not repair it, and that in consequence damage had been done to his crops by cattle, and he contended that the stipulation as to the line fence being "required during the currency of the lease," was fulfilled by the fence on D. M.'s land being out of repair:—Held (affirming the judgment of the court below), that no liability could accrue under the defendant's covenant until something occurred to disturb the state of things existing at the time the lease was made, and that the covenant was designed to meet such a contingency as D. M. refusing to allow entry on his land to repair the fence, or his requiring the line fence to be built. Per Osler, J. A., the language of the covenant being indefinite, evidence was properly admitted to explain it. *Houston v. McLaren*, 14 A. R. 103.

Damages for breach of covenant to renew. See *Anderson v. Stevenson*, 15 O. R. 563, p. 1149.

See *Loughi v. Sanson*, 46 Q. B. 446, p. 1152; *Cowling v. Dickson*, 5 A. R. 549, p. 1153; *Roos v. Kronsbain*, 12 O. R. 197, p. 588; *McEwen v. Dillon*, 12 O. R. 411, p. 1155.

#### (i) Implied Covenants.

See *Crawford v. Bugg*, 12 O. R. 8, p. 1140.

#### (j) Covenants Running With the Land.

See *Crawford v. Bugg*, 12 O. R. 8, p. 1140; *Berrie v. Woods*, 12 O. R. 693, p. 1142; *Emmett v. Quinn*, 7 A. R. 306, p. 1142; *McCaskill v. McCaskill*, 12 O. R. 783, p. 422; *McClary v. Jackson*, 13 O. R. 310, p. 1142; *Anderson v. Stevenson*, 15 O. R. 563, p. 1149; *Ambrose v. Fraser*, 14 O. R. 551, p. 1143.

### IX. RENT.

#### 1. Payable by Improvements.

See *Mitchell v. McDuffy*, 31 C. P. 266, p. 523; *Workman v. Robb*, 7 A. R. 389.

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## 2. Right to Deduct Taxes.

Certain property in the city of Toronto had been owned by B., and on his death in 1884, intestate, and without known heirs, defendant entered and leased the property to the plaintiff, the defendant agreeing to pay the taxes. In 1884, the taxes assessed for 1883 not having been paid, a distress was entered therefor, when the plaintiff paid them and claimed to deduct them from the rent. The assessment for 1883 was against B. as owner, of which he received notice, and he was similarly assessed and received notice for the two prior years. In the assessment roll the name of the street and property was given, but not the number of the house or lot, except an arbitrary number adopted by the assessment department for their convenience, and without information from the department the lot could not be discovered:—Held, that section 21 of the Assessment Act, R. S. O. (1877) c. 180, which, in the absence of an agreement to the contrary, authorizes the tenant to deduct the taxes paid by him from his rent, only does so when he could be compelled to pay the same; and as, following *Chamberlain v. Turner*, 31 C. P. 490, there appeared to be no valid demand here, there was no right to collect the taxes, and therefore no right to deduct the same:—*Quære*, whether the description in the assessment roll was sufficient; but under the circumstances, and in view of the provisions of section 57 validating the roll as finally passed by the court of revision, B. probably could not have raised this objection to a distress or suit for the taxes. *Carson v. Veitch*, 9 O. R. 706.—C. P. D.

## 3. Apportionment.

J. B. leased certain lots, A, B, C, D, E and F, with other lands to the defendant. J. C. also, at the same time, leased lot G and other lands to defendant. J. C. then conveyed his reversion in lot G to J. B., and J. B. conveyed away the other lands mentioned in his lease to S. A. H. Defendant assigned all his interest in both leases to J. S. McM., with the knowledge that J. S. McM. intended to endeavour to procure a conveyance of the fee for the purpose of laying out the land in building lots, which he failed to do, and J. S. McM. assigned all his interest in lots A, B, C, D, E, F, and G to C. Both J. S. McM. and J. C. paid rent to J. B., and after his death to his executrix the plaintiff. The rent of lots A, B, C, D, E, F and G fell in arrear, and the taxes also were left unpaid. Plaintiff then recovered judgment in an action of ejectment against C., and took possession of the lots. In an action to recover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, in which it was contended that as the action was brought against the original lessee who had assigned the lease, and was one on the covenant resting in privity of contract and not in privity of estate, there could not be an apportionment of the rent as to these lots. It was:—Held, following *The Mayor, etc., of Swansea v. Thomas*, 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover. Held, also, that there was no eviction of the defendant by the lessor. Held, also, on the evidence, that although defendant might be a surety for the assignee, there was no release of the assignee, and conse-

quently no discharge of the surety. Held, also, following *Barnes v. Bellamy*, 44 Q. B. 303, that the rent accrued from day to day, and was apportionable in respect of time accordingly. *Boulton v. Blake*, 12 O. R. 532.—Ferguson.

R. S. O. c. 136, (1877) ss. 2-6, does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but makes a severance where a third interest intervenes. And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived:—Held, that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order. *Masie v. Toronto Printing Co.*, 12 P. R. 12.—*Dalton, Master*.—Galt.

See *Reeve v. Thompson*, 14 O. R. 499, p. 1134.

## 4. Effect of Assignment.

See *Graham v. Lang*, 10 O. R. 248, p. 526; *Baker v. Atkinson*, 11 O. R. 735, p. 527; *Fuchs v. Hamilton Tribune Co.*, 10 P. R. 409, p. 293; *Escrett v. Kent*, 15 O. R. 9, p. 113; *Linton v. Imperial Hotel Co.*, 16 A. R. 337, p. 527.

## 5. Premises Burnt.

See *Agar v. Stokes*, 5 A. R. 180, p. 1149.

## 6. After Expiration of Term.

The evidence in this case showed that the plaintiff allowed the defendants to remain in occupation for two months after the expiration of their term, and made no demand for an increased rental; but they had notice that if they desired to remain on longer they must pay an increased rental:—Held, that the plaintiff must be deemed to have agreed to allow the defendants to remain for the two months on the terms of paying the rent reserved by the lease, but thereafter only on paying the increased rent. *Hilliard v. Gemmell*, 10 O. R. 504.—C. P. D.

## 7. Occupation Rent.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor v. McGregor*, 5 O. R. 617.—Ferguson.

See *Shanagan v. Shanagan*, 7 O. R. 209, p. 765; *Munsie v. Lindsay*, 10 P. R. 173; 11 O. R. 520, p. 899.

## 8. Rent Service.—Rent Seck.

See *McCaskill v. McCaskill*, 12 O. R. 783, p. 422.

## X. SUB-LEASE.

See *Mogee v. Gilmour*, 17 O. R. 620; 17 A. R. 27, p. 1135.

## XI. RENEWAL OF LEASE.

The trustees of M., deceased, who held the legal estate in land in trust for sale for the purpose of a reservoir, sold to one Z., in 1854, a portion of lot ten, Niagara Falls Survey, for the purpose of a reservoir, the intention being to run a line of pipes over the residue of said lot to Niagara Falls, where a pump-house was to be constructed for the purpose of forcing the water to the reservoir, and thence it was to be distributed by pipes over the town of Niagara Falls. T. B., as well as E. B. M., the acting trustee, agreed to extend this lease forever at a rental to be fixed every twenty-one years. The trustees subsequently sold the land in question to S. B., son of T. B., whose place, it was understood, S. B. was to take. T. B. having the right of purchase under his lease, and having expended large sums in improving the property, S. B. subsequently mortgaged to a certain company, who sold under foreclosure proceedings to the plaintiff. The land through which such pipes were to run had been devised by one M. to E. B. M., his wife and three others as trustees. In 1854 E. B. M. alone leased it to T. B. for fourteen years. In 1854 T. B. leased a strip eight feet wide by 650 feet long to Z., for the purpose of laying his pipes therein, for ten years at a nominal rent, and both T. B. and E. B. M., in that year, by separate instruments, covenanted with S. B. that she or T. B., if he should purchase the land under a provision in his lease for that purpose, would continue the lease to Z. for twenty-one years, perpetually renewable, at a rent to be fixed by arbitration. Z. constructed the reservoir, etc., and laid down the pipes in 1854, and the town had been supplied by them ever since. In 1864 E. B. M. gave a further lease to T. B. for seven years, and in 1868 she conveyed to S. B. the appointee of T. B., his father. S. B. mortgaged to a loan company, who sold under a decree for sale to the plaintiff, stating in the advertisement that it was subject to the right of the defendants, who represented Z., to lay their water pipes under the lease from T. B. to Z. After the expiration of that lease no further lease had been executed, but \$12 a year was, by agreement, paid as rent to T. B. and S. B., until the title became vested in the plaintiff, who refused to accept rent or recognize defendants' rights, and brought trespass against them:—Held, 1. That the lease of 1850 by E. B. M. alone, was not binding on her co-trustees unless they could be shown to have agreed to it. 2. That the right of Z. to get a lease from T. B. under the covenant of 1854, continued as against T. B. under the second lease of 1864. 3. That the defendants having, under the covenants of T. B. and E. B. M., taken possession and constructed the works, which were of a permanent and expensive character, and for the public benefit, and having paid rent up to the time of the plaintiffs acquiring title, and all parties having had notice, and made no objection, they were entitled to an injunction staying the action, and to a lease for twenty-one years, renewable at a rent to be fixed by arbitration or by the registrar of the court. *Davis v. Lewis*, 8 O. R. 1.—Q. B. D.

It was provided in a lease that if the lessee should desire a renewal for a further term and give a defined notice, containing the name of

an arbitrator the lessors at the expense of the lessee, should execute a new lease at such increased yearly rent as might be determined by the award of three different arbitrators, or a majority of them:—Held, that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee; but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference, one-half of the arbitrators' fees, for which the action was brought, and one-half of the plaintiff's costs of the action. *Marsack v. Webber*, 6 H. and N. 1; *In Re Autothreptic Steam Boiler Co.*, 21 Q. B. D. 182 referred to. *Smith v. Fleming*, 12 P. R. 520.—Ferguson. Affirmed *Id.* 657.—Q. B. D. See *Anderson v. Stevenson*, 15 O. R. 563, p. 1149.

## XII. ASSIGNMENT OF LEASE.

D. being indebted to the plaintiff for costs by an instrument not under seal, assigned to him a lease of certain premises made by D. to defendant, together with all rent in respect of said lease and the term thereby created. In an action to recover from defendant the rent which accrued due after the making of the assignment, the judge charged the jury that while plaintiff remained D.'s solicitor he could not take any security for his benefit, and that he should have discovered the connection between them, and let D. have independent legal advice:—Held, misdirection, for that the assignment, if not valid in other respects, was valid so far as it was a security for costs already incurred:—Held, also, that D. was not a necessary party. Quere, whether the assignment should be treated as of the reversion or of future rent accruing out of the land, and so void as not under seal; or as an assignment of a chose in action, namely, of the moneys payable under the covenants of the lease, and so valid. *Galbraith v. Irving*, 8 O. R. 751.—C. P. D.

See *Boulton v. Blake*, 12 O. R. 532, p. 1146.

## XIII. POSTPONING LEASE TO MORTGAGE.

A., the owner of certain lands, executed a lease under the Short Forms Act to the plaintiff and two others for twenty years, which was registered. The lessees covenanted to plant the premises with fruit trees, and keep the premises during the term as an orchard. The lessor covenanted for quiet enjoyment; and that if during the term the premises were for sale, the lessees should have the refusal, and if the lessees could not on the expiration of the term get a renewal, they were to be allowed a fair valuation for the orchard and improvements. The lessees went into possession and planted the fruit trees. Afterwards to enable the lessor to procure a loan from an investment company, the lessees entered into an agreement, which was registered, to postpone their lease to a mortgage to the company, so that the mortgage would be a first and prior incumbrance on said lands, and in default of the payment of the mortgage money, the lease was to be forfeited and void; and the company might, without any notice, etc., enter and hold said lands freed from the lease, etc. The lessor then executed two other mortgages to different mortgagees on the property, which were past due at the commencement of this ac-

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tion. The lessor subsequently and during the continuance of the lease made default in payment of the mortgage to the company, who sold the land, and after satisfying their mortgage, paid the balance of the purchase money into court:—Held, by Robertson, J., and affirmed by the Divisional Court (Galt, C. J. dissenting), that by the agreement postponing the lease to the company's mortgage, the lessees were placed in no worse position than if the mortgage had been made prior thereto, so that the lessees were merely held subject to the mortgage, and the subsequent mortgages to the lease; and that the lessees were entitled to damages for breach of the covenant for quiet enjoyment. Per Robertson, J., also. The lessees were entitled to damages for breach of the covenant for renewal; and, *Semble*, such covenant did not run with the land:—Held, also, by the Divisional Court, in this reversing the judgment of Robertson, J. (Galt, C. J., dissenting), that the plaintiff having an estate in the land had a claim on the fund in court prior to the subsequent mortgages, and was entitled to a declaration for payment out of the value of her interest in the unexpired term, namely, one-third of the net annual value or profit which would have been derived therefrom had the lessees been permitted to remain on the land during the term, and that such value must be computed with reference to the agreement that on non-renewal the lessees were to get the value of the trees and improvements; and in such view it was not necessary to consider the question of the breach of the covenant to renew. *Anderson v. Stevenson*, 15 O. R. 563.—C. P. D.

#### XIV. TERMINATION OF LEASE.

A lease of a mill, and ten acres of land adjoining for five years at the rent of \$500 for the first year and \$550 for each of the four succeeding years, payable half-yearly in advance, contained the usual covenants and provisions in which was the covenant to pay rent, without any exception as to fire, and to keep in repair, accidents by fire excepted; and the lease concluded with the following clause: "Should the mill be rendered incapable by any fire, or tempest, then the portion of rent for the unexpired portion of the term paid for in advance, to be refunded by the lessor to the lessee," but there was no provision in such event for the cesser of the term:—Held, *Burton, J. A.*, dissenting, reversing the judgment of the County Court, that the effect of the whole instrument was, that the destruction of the premises by fire, not merely gave a right to a return of a proportionate part of the current half-year's rent, but put an end to the whole term, and therefore that the lessor was not entitled to recover rent for the half-year succeeding such destruction. *Agar v. Stokes*, 5 A. R. 190. See also *Brown v. Ponsanault*, 3 S. C. R. 102, overruled by *Porteous v. Reynar*, 13 App. Cas. 120.

Held, that although a new contract of tenancy may be inferred from the fact of a notice by a mortgagee to pay rent to him, and acquiescence by the tenant by payment of the rent, still as the circumstances, in this case, showed that it was not intended to create such a contract, but rather that the interest being paid, the possession of the mortgagor and his tenants

was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee. *Forse v. Socereen*, 14 A. R. 492.

See *Lough v. Sunson*, 46 Q. B. 446, p. 1152; *Mayer v. Gilmour*, 17 O. R. 620; 17 A. R. 27, p. 1135; *Wallbridge v. Gaudet*,—*Palmer v. Wallbridge*, 14 A. R. 460; 15 S. C. R. 650, p. 1137; *Thatcher v. Bowman*, 18 O. R. 265, p. 1135.

#### XV. EVICTION AND SURRENDER OF LEASE.

In an action to recover a year's rent on a covenant in a lease for three years, it was shewn that the defendant had harvested the crops on the farm, and that they, together with the barn and stable, were destroyed by fire before the expiration of the year, and that he was paid the insurance money; whereupon he left the farm, and the plaintiff entered, ploughed and put in a crop. The plaintiff afterwards applied on several occasions to the defendant for payment of the rent, when the defendant said he had not any money. It was shewn that a proposition had been made to leave the matter to arbitration:—Held (affirming the judgment of the judge of the County Court of Peel), that the acts of the plaintiff did not amount to an eviction, that there was not evidence to support a surrender in law, and that the plaintiff was entitled to recover. *Burton and Patterson, J. J. A.*, dubitante. *Nixon v. Malby*, 7 A. R. 371.

The plaintiffs by their agent, in June, 1881, verbally leased to S. & W. for three years certain premises in which the latter carried on business in partnership for about a year, when W. sold out his interest to one D., who in partnership with S. carried on the same business for about ten months, when S. withdrew from the partnership and sold out his interest to D., who agreed with S. to pay all rent then due or to become due in respect of the premises which he continued to occupy and pay rent for. The plaintiff without authority drew for a quarter's rent on S. & D., who refused to accept it; and a fire having occurred on the premises the plaintiff expended the insurance money in repairs, with D.'s consent. Default having been made of six months' rent due on the 15th December, 1883, the plaintiffs instituted proceedings against S. & W. for the recovery thereof:—Held (reversing the judgment of the court below), that although the plaintiffs were cognizant of the several changes in the partnership and the occupation by D. of the premises, these acts were not evidence of a surrender in law, and that they were not estopped from enforcing payment of the overdue rent against S. & W. *Patterson, J. A.*, dubitante. *Gault v. Shepard*, 14 A. R. 203.

The doctrine of surrender by act and operation of law applies as well to a term created by deed as to one created by parol. *Lawrence v. Faux*, 2 F. & F. 435, distinguished. *Id.*

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after except with the consent of the lessee. An action for rent under

the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time without the necessary consent whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. On the trial the jury found that no consent had been given by the lessee for such occupation and that the lessee had no beneficial use of the premises while it lasted:—Held, per Taschereau, Gwynne and Patterson, JJ., reversing the judgment of the court below, 1. That the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the acts and conduct of the lessee. 2. The two months' limitation in the lease had reference to the entry by the lessor to commence the repairs and not to his subsequent occupation of the premises, and the lessor having entered upon the premises within the prescribed period he had a reasonable time to complete the work and his subsequent occupation was not wrongful. Per Taschereau and Gwynne, JJ., that assuming assent was necessary the evidence clearly shewed that the lessor was on the premises after the 1st of July with the assent of the lessee; he had a right, therefore, to remain until such assent was revoked, which was never done. Per Patterson, J., that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving the tenant of the use of a portion, does not necessarily work an eviction; a tenant may be deprived of the beneficial occupation of the premises for part of his term, by an act of the landlord, which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction. Per Ritchie, C. J., and Strong, J., approving the judgment of the court below, that the jury having negatived consent by the lessee, and the evidence shewing that the acts of the landlord were of such a grave and permanent character, as to indicate an intention to deprive the tenant of the beneficial enjoyment of a substantial part of the premises, they amounted to an eviction of the tenant which operated as a suspension of the rent. *Ferguson v. Troop*, 17 S. C. R. 527.

See *Dainty v. Vidal*, 13 A. R. 47, p. 337.

#### XVI. FORFEITURE OF LEASE.

##### 1. By Acts of Lessee.

The defendant leased from the plaintiff the "refreshment-room and apartments connected therewith," part of a railway station, and covenanted that "no spirits of any kind should be sold or allowed to be sold in the refreshment-room," and that if he "should fail, refuse, or neglect to carry out the terms of the lease, then that the lessee should, if required by the lessor, quit, leave, and absolutely vacate the premises, and the lease should terminate." The judge of the County Court of York found that by a sale of spirits in the bar room, part of the demised premises, the lease had been forfeited, and ordered the issue of a writ to put the landlord in possession under the Overholding Tenants' Act, R. S. O. (1877) c. 137:—Held, affirming his decision, that the sale was a contravention of the lease, that the proviso for the termination of the same extended to negative covenants; and that

the lease was therefore forfeited, and a right of entry accrued to the lessor, and that it was a case coming within the Overholding Tenants' Act. *Loughi v. Sanson*, 46 Q. B. 446.—Wilson.

In actions to re-enter for breach of a covenant in a lease, the court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture. Thus in the present case, where the plaintiff claimed to recover possession of certain lands leased by her to the defendant on the ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before statement of claim filed:—Held, that the action could not succeed. The above is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment. *Buckley v. Beigle*, 8 O. R. 85.—Boyd.

S. and his partners were tenants of D. under a lease which provided that any assignment by the lessees for the general benefit of their creditors should forfeit the term. The lessees, at a time when two quarters' rent were overdue and in arrear, made such an assignment to C., who thereupon took possession of the premises and shortly afterwards paid D. the two quarters' arrears of rent. A few weeks later D. served on S. and his partners a demand of possession and notice of application to the judge under the Overholding Tenants' Act, which S. handed to C., and C. appeared before the county judge on the hearing of the application, and had himself added as a party to the proceedings. On motion by C. in the High Court to set aside the proceedings:—Held, that the act of the lessees in making the assignment was an act whereby their tenancy was determined within the meaning of the second section of the Overholding Tenants' Act, and that C. having intervened in the proceedings could not object that no demand had been served on him:—Held, also, that the receipt after the forfeiture of the rent which had become due before the forfeiture did not operate as any waiver thereof, and that a sufficient demand in writing of possession had been made upon C. by the landlord. *Dobson v. Sootheran*, 15 O. R. 15.—Q. B. D.

See *Graham v. Lang*, 10 O. R. 248, p. 526; *Baker v. Atkinson*, 11 O. R. 735, p. 527.

##### 2. Waiver of Forfeiture.

*Leighton v. Medley*, 1 O. R. 207, p. 1139; *Holderness v. Lang*, 11 O. R. 1, p. 1141; *Dobson v. Sootheran*, 15 O. R. 15, *supra*.

#### XVII. ATTORNMENT OF TENANT.

In replevin, the defendant, who had mortgaged the demised premises to one E., claimed as landlord, under a lease alleged to have been made by him subsequent to the mortgage, three quarters' rent, which had been paid by the tenant to E.:—Held, that the evidence set out in the report, shewed that E. was the original and actual lessor, or, at all events that previous to the payment of the rent avowed for, the tenant had attorned to E. with the defendant's

consent. *McLennan v. Hannum*, 31 C. P. 210.—C. P. D.

See *Bank of Montreal v. Gilchrist*, 6 A. R. 659, p. 1157; *Mulholland v. Harman*, 6 O. R. 546, p. 576.

### XIX. OTHER RIGHTS OF TENANTS.

Right of tenant to bore for oil. See *Lancey v. Johnston*, 29 Chy. 87.

Rights of tenant in respect to expropriation of land. *In Re Welland Canal Enlargement—Fitch v. McRae*, 29 Chy. 139, p. 460.

Right of tenant to maintain action for injury to lateral support of building. See *McCann v. Chisholm*, 2 O. R. 506 p. 1158; *Backus v. Smith*, 5 A. R. 341, p. 1159.

Right of tenant to redeem mortgage. See *Martin v. Miles*, 5 O. R. 404.

Setting aside lease on grounds of improvidence.—Compensation for improvements. See *Shanagan v. Shanagan*, 7 O. R. 209, p. 765.

A tenant who, for the purpose of rendering the land more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them and is liable for their value if he disposes of them. *Saunders v. Breakie*, 5 O. R. 603, commented on. *Lewis v. Godson*, 15 O. R. 252.—Q. B. D.

Right of tenant to set-off against rent. See *Walton v. Henry*, 18 O. R. 620, p. 528.

### XX. RIGHTS OF REVERSIONER.

Held, that any act of the tenant without the knowledge or sanction of the landlord could only affect his interest as tenant and could not prejudice the reversioner. *Dixon v. Cross*, 4 O. R. 465.—Proudfoot.

Liability of lessor's wife, assignee of the reversion, on covenant of her husband to pay for certain premises to be erected by the lessee on the demised premises. See *Ambrose v. Fraser*, 12 O. R. 459; 14 O. R. 551, p. 1143.

### XXI. NOTICE TO QUIT.

See *Reeve v. Thompson*, 14 O. R. 499, p. 1134; *Magee v. Gilnour*, 17 O. R. 620, 17 A. R. 27, p. 1135; *Lennox v. Westney*, 17 O. R. 472, p. 1133.

### XXIV. ACTIONS AND PROCEEDINGS BY LANDLORD.

#### 1. On Covenants.

##### (a) Imperfect Execution of Lease.

The two defendants and one C. being in possession of premises as assignees of a covenant from the plaintiff for a lease, he caused a lease to the three to be drawn, which was executed by the defendants, on the representation that C. had executed a counterpart thereof, which was not the case, and the lease was never executed by him.—Held, affirming the judgment of the Court of Common Pleas, that the evidence set out in the report, shewed that the intention of both

the plaintiff and the defendants was, that C. should be a party to the lease, and that the plaintiff could not recover the rent due in an action upon the covenant in the lease. *Piper v. Simpson*, 6 A. R. 175.

#### (b) Damages.

In an action brought to reform a lease, and claiming damages for breach of a covenant:—Held, that such claim for damages was not a "purely money demand" under section 4 of the A. of J. Act, R. S. O. (1877), c. 49. *Gowanlock v. Mans*, 9 P. R. 270.—Dalton, Master.

#### 2 Receipt of Rent after Action brought.

In ejectment plaintiff alleged a demise to defendant as a monthly tenant. Defence, a yearly tenancy. After notice to quit, and after action brought, plaintiff received from defendant a payment on account of rent, which he shortly afterwards returned to defendant:—Held, affirming the judgment of Rose, J., at the trial, that there is no distinction in principle between the effect of payment of rent, as such, after action brought, upon the determination of the tenancy by notice to quit and by forfeiture, and therefore the payment of rent after action brought, had no effect upon this action, either as a bar to it or as a waiver of the notice to quit:—Held, that the intention with which the rent was received must be considered. *Laxton v. Rosenberg*, 11 O. R. 199.—Q. B. D.

#### 3. Overholding Tenants.

Where a party who has held for a term at a certain rent continues to occupy after the expiration of his term, it is presumed, if there is no evidence to the contrary, that he holds at the former rent. *Hilliard v. Gemmell*, 10 O. R. 504.—C. P. D.

The expression "colour of right" in the Overholding Tenants' Act, R. S. O. (1887), c. 144, means such semblance or appearance of right as shews that the right is really in dispute. The Act confers no authority upon the county judge to try the question of the tenant's right or title; and as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the judge is bound to dismiss the case. *Gilbert v. Doyle*, 24 C. P. 60, and *Woodbury v. Marshall*, 19 Q. B. 597, not followed. Upon the proceedings before the county judge being commanded to be sent up, the high court may stay proceedings upon the writ of possession under the Act. *Price v. Guinane*, 16 O. R. 264.—Armour.

When there was a dispute between landlord and tenant as to the date when the tenancy commenced, and an application was made under the Overholding Tenants' Act at the time when according to the tenant's contention his lease had not expired:—Held, that there was that "colour of right" in the tenant which the Act contemplates. *Price v. Guinane*, 16 O. R. 264, followed. *Bartlett v. Thompson*, 16 O. R. 716.

See *Longhi v. Sanson*, 46 Q. B. 446, p. 1152; *MacGregor v. Defoe*, 14 O. R. 87, p. 1156;

*Dobson v. Sootheran*, 15 O. R. 15, p. 1152; *Mayee v. Gilmour*, 17 O. R. 620; 17 A. R. 27, p. 1135.

## XXV. ACTIONS AGAINST LANDLORD.

### 1. Damages Recoverable.

#### (a) Refusing to Give Possession.

Action by a tenant against his landlord for refusing to give him possession of the demised premises:—Held (Wilson, C. J., dissenting), that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth. But it is not open to the tenant to shew that he rented the premises for the purpose of there carrying on a certain business, of which the landlord was aware, that he could not procure other premises, and to claim the profits which he might have made in such business if he had been let into possession. *Ward v. Smith*, 11 Price 19, not followed: *Jacques v. Millar*, 6 Ch. D. 153, commented upon. *Marrin v. Graver*, 8 O. R. 39.—Q. B. D.

#### (b) Breach of Covenant in Lease.

In an action by the plaintiff, the lessee of a certain farm, against the defendant, the lessor, for breach of the covenants contained in the lease, to dig ditches, etc.:—Held (Cameron, C. J., diss.), that the measure of damages was the difference between the rentable value of the demised premises with the defendant's covenant performed, that is, with the improvements made, and the value without such improvements. At the trial the judge directed that if certain improvements were made, the damages were to be reduced thereby. On its being shewn to the court that those improvements had substantially been made, the damages were reduced to \$200. *McEwen v. Dillon*, 12 O. R. 411.—C. P. D.

#### (c) Giving False Notice of Sale.

By a covenant in a lease of a farm from defendant to the plaintiff, it was provided that upon receiving six months' notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation:—Held, reversing 45 Q. B. 94 that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice. *Cowling v. Dickson*, 5 A. R. 549.

### 2. Other Cases.

The plaintiff having remained in possession and paid rent after the expiry of his term the de-

fendants levied a distress upon plaintiff's goods in the premises, situate six miles from Toronto, for two months' arrears of rent and removed the goods to Toronto to impound and sell. The plaintiff brought trespass, claiming that he was not defendants' tenant:—Held.—1. That the relationship of landlord and tenant existed at the time of the distress. 2. That the removal to Toronto, unless unnecessary and unreasonable, or malicious, was not a good ground of action. *MacGregor v. De foe*, 14 O. R. 87.—Q. B. D.

Liability of landlord to tenant for injuries occasioned by negligence of employee of the landlord in charge of an elevator. See *Stephens v. Chaussé*, 15 S. C. R. 379.

See *Cowling v. Dickson*, 5 A. R. 549, p. 1155.

## XXVI. DISPUTING LANDLORD'S TITLE.

The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the land under the Statute of Limitations but was not aware of the effect of his possession. The defendant, who had purchased the interest of the heirs of the original owner and vendor, and his solicitor, by representing to plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years at a nominal rent, with a covenant to yield up possession at the end of the term:—Held, that under the circumstances, the lease must be set aside; but even if allowed to stand, it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance. *Hillock v. Sutton*, 2 O. R. 548.—C. P. D.

P., being the owner in fee of the land in question, died intestate in September, 1853, leaving his wife, the present plaintiff, and two daughters, who resided on the land for a short time after his death. The widow made several leases of the land, and finally leased it to M., the defendant's devisee, who, at the expiration of his lease, took a second lease with a covenant to deliver up at the end of the term. He purchased the interest of one of the daughters, and a new lease, was then made to him by the plaintiff, the rent being reduced by one-third, because it was considered that the widow and daughters were each entitled to a third of the rents. Pending this lease the tenant purchased the other daughter's interest, and at the expiration of the term in 1873 he refused to give up possession, alleging that he owned the land, and that the plaintiff's right to dower was barred by lapse of time:—Held, affirming the judgment of Cameron, J., that M., the tenant, having, while owner of one undivided half of the land, covenanted to give up possession to the plaintiff at the end of the term, and having got into possession under her, the defendants claiming under M. were estopped from disputing her right, and must restore possession to her before setting up an adverse title; that M., by accepting the lease at a reduction of one-third of the rent, on his purchase of the daughters' interest, had acquiesced in the plaintiff's claim as dower, and was estopped from setting up the Statute of

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titled therefore to judgment for one-third of the  
land for life, and to mesne profits since the ex-  
piration of the lease. *Patterson v. Smith*, 42  
Q. B. 1, remarked upon. *Pyatt v. McKee*, 3 O.  
R. 151.—Q. B. D.

S., being indebted to the plaintiffs, entered into  
an agreement to mortgage to them, amongst  
other lands, certain land known as the Dominion  
Hotel property. A mortgage was on the same  
day executed, but by mistake the Dominion  
Hotel property was omitted therefrom, and a lot  
owned by S. adjacent thereto inserted. The de-  
fendant had been the tenant of S., and after the  
mortgage, attorned and paid some rent to the  
plaintiffs, believing them to have a title to the  
lands. In an action for arrears of rent:—Held,  
affirming the judgment of the County Court of  
York, that after such attornment and payment  
of rent, the defendant could not be heard to deny  
the plaintiffs' title, and they being the equitable  
owners of the land were entitled to recover:—  
Held, also that the title not being open to ques-  
tion by the defendant, the County Court had  
jurisdiction. *Bank of Montreal v. Guchrist*, 6  
A. R. 659.

N., respondent, as assignee in insolvency of  
H., who bought a lot of land from the pur-  
chaser at a sheriff's sale for taxes, filed a bill in  
Chancery under the Ontario Administration of  
Justice Act against W. & O'N. (appellants),  
who were in possession, praying inter alia that  
defendants be ordered to deliver up possession  
of the lands and to account for the value of  
trees, etc., cut down and removed. W. by his  
answer adopted O'N.'s possession and claimed  
under conveyance from the Crown and im-  
peached the validity of the sale for taxes. O'N.  
by his answer alleged he was in possession under  
W. At the trial it was proved that H. gave a  
lease of the lot to one T. for four years, and that  
O'N. went to T. while he was still in possession,  
and by fraudulent representations induced T.  
to leave the place and thereby obtained posses-  
sion for the benefit of W. The Court of Chan-  
cery for Ontario (29 Chy. 338) held that  
appellants were obliged to yield up possession  
to the respondent before asserting any title in  
themselves. The Court of Appeal for Ontario  
varied the decree by declaring that the decree  
was to be without prejudice to any proceeding  
the appellant W. might be advised to take to  
establish his title to the lands in question within  
two months from the date thereof:—Held, per  
Ritchie, C. J., and Strong, Fournier, and Henry,  
J.J., affirming the judgment of the courts below,  
that the appellants, having gone into possession  
under T., were estopped in this suit from dispu-  
ting their landlord's title, and that the respondent  
was entitled to an injunction to restrain ap-  
pellants from committing waste and to an ac-  
count for waste already committed. Per Strong,  
J.—The decree made by the Chancellor would  
have constituted no bar to a subsequent action  
at law or suit in equity by W. to impeach the  
tax sale, and should not have been varied by the  
Court of Appeal. Per Gwynne, J.—The case  
should have been disposed of upon the issue as  
to the validity of title upon which the plaintiff  
had by his bill rested his case; and as the  
appellants had failed to prove that the taxes  
had been paid before the sheriff's sale, the On-

tario statute, 33 Vict. c. 23, had removed all  
errors and defects, if any there were, which  
would have enabled the true owner, at the time  
of the sale, to have avoided it, and pursuant to  
the provisions of R. S. O. (1877) chapter 40, sec-  
tion 87 the respondent was entitled to recover  
possession of the land in question and to have  
execution therefor, but not to an order for an  
injunction or any direction for an account, the  
statute authorizing title to real property to be  
tried in a Court of Chancery not justifying a  
judgment of a more extensive character than  
would have been pronounced in a court of com-  
mon law if the action had been brought there.  
*White v. Nelles*, 11 S. C. R. 587.

In an action of ejectment by a landlord against  
a tenant whose term had expired:—Held, that  
the defendant was not precluded from setting up  
that the plaintiff's title expired or was put an  
end to during the term; and to raise such de-  
fence it was not necessary for the tenant to go  
out of and then resume possession. *Kelly v.*  
*Wolff*, 12 P. R. 234.—*Dalton, Master.*—Rose.

See *Mulholland v. Harman*, 6 O. R. 546, p.  
576; *Magee v. Gilmour*, 17 O. R. 620; 17 A. R.  
27, p. 1135.

## LARCENY.

See CRIMINAL LAW.

## LATERAL SUPPORT.

The plaintiff was entitled to the lateral sup-  
port of the defendants' land, in which they  
made excavations for the purposes of a rink,  
whereby the plaintiff's land was damaged:—  
Held, that in substituting artificial support for  
the natural support of the soil which had been  
removed, the defendants might construct it of  
any material, provided it was a sufficient sup-  
port for the purpose, and that they continued  
to maintain the plaintiff's land in its proper  
position:—Held, also, that in estimating the  
plaintiff's damages, no sum should be allowed  
for damages to arise in future. The damages  
were assessed at \$40, but judgment was given  
for the restoration of the plaintiff's land:—  
Held, that the plaintiff was entitled to full  
costs. *Snarr v. Granite Curling and Skating Co.*  
1 O. R. 102.—Ferguson.

Held, that an action against the proprietor of  
adjoining land for damage done to a building by  
the removal of the lateral support afforded by  
such adjoining land, may be maintained by the  
tenant of the building. *McCann v. Chisholm*,  
2 O. R. 506.—C. P. D.

The plaintiff, tenant for years of the defen-  
dant S., sued for loss of use of a tenement in  
consequence of the fall of the wall thereof,  
which was caused by the excavation of the ad-  
joining lot for a cellar by the defendant H. who  
owned it. H. had excavated his land in some  
places to within a few inches of the dividing  
line, close to which the house in question stood.  
This house had been built upon oak planks laid  
about one foot under the ground, by S. in 1854,  
when he had a lease of the lot for ten years,



which gave him the right to remove it at the expiration of the term. In 1856, however, he acquired the fee, and in 1870, he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H. from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way:—Held, that owing to the unity of seizin of S., there had not been twenty years' continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant:—Held, also, that when S. sold H.'s lot, there was no implied reservation of the right of support for the house:—Held, also, reversing the judgment of the Queen's Bench, 44 Q. B. 428, that under the circumstances there was no evidence of negligence in fact, and that the plaintiff was therefore not entitled to recover. *Backus v. Smith*, 5 A. R. 341.

In 1883, M. W. being seized of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards died having devised the other half to M. There was a house on the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. M. now commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same:—Held, that he was entitled to the relief claimed. *Wray v. Morrison*, 9 O. R. 180.—Ferguson.

## LAW SOCIETY OF UPPER CANADA.

See BARRISTER—SOLICITOR.

By section 44 of R. S. O. (1887), c. 145, "An Act respecting the Law Society of Upper Canada," whenever a barrister or solicitor has been or may be found guilty of professional misconduct by the benchers, "after due enquiry by a committee of their number or otherwise," it shall be lawful for the benchers in convocation to disbar any such barrister, and, by section 36 of that Act, upon any enquiry by committee the benchers or committee shall have power to examine witnesses under oath. In calling the committee together, no notice of the meeting was sent to the treasurer of the society, an ex officio member thereof, he being in Europe, and the notice to the other members did not state the purpose of the meeting. Subsequently the committee reported to convocation that the complaint had been fully established, and recommended that the plaintiff be disbarred:—Held, (reversing the decision of the Divisional Court, 17 O. R. 300) that the plaintiff having appeared before convocation and substantially admitted the charge, and the propriety of the report of the committee, could not be permitted to say that the defendants had acted without "due enquiry," or to set up any

irregularities there might have been in the preliminary proceedings. Per Hagarty, C. J. O., and Osler, J. A.—Notice to the treasurer was unnecessary. *Hands v. Law Society of Upper Canada*, 17 A. R. 41.

Upon a charge of professional misconduct, the plaintiff attended before the discipline committee, the standing committee of convocation to whom all charges of such nature are referred, and without objection allowed witnesses to make unsworn statements, and cross-examined them thereon, he also making an unsworn statement himself. Upon the consideration of this report the evidence was read before Convocation, and the plaintiff appeared with counsel and practically admitted the charge taking no objections to the proceedings, whereupon Convocation adopted the report and resolved that he be disbarred, etc. An action to have this resolution declared void, and to restrain further proceedings, was dismissed by Boyd, C., (16 O. R. 625.) This judgment was subsequently reversed by the Queen's Bench Divisional Court, (17 O. R. 300), whereupon the defendants appealed to this court. Per Hagarty, C. J. O., and Osler, J. A.—The power to take evidence under oath was, unless waived, imperative. Per Burton, J. A.—The power to take evidence under oath was discretionary. *Id.*

Per Boyd, C.—It is not essential to the jurisdiction of domestic tribunals that they should have the powers of ordinary courts of justice in the trial of litigated matters. R. S. O. (1887), c. 145, s. 36, is not imperative; it confers the power to examine witnesses under oath, which may or may not be employed according to the sound discretion of the particular tribunal. Where there is or is likely to be any conflict in the evidence, the witnesses should be sworn. But in this case the salient facts were not controverted by the plaintiff; his counsel having stated in his presence that he did not know that he could differ from the conclusions which the committee had come to; and the evidence derived from admissions of a party unsworn is sufficient to found even a decree of the court. The objection that the discipline committee had taken evidence without oath, therefore failed. *S. C.* 16 O. R. 625.

Per Q. B. Divisional Court.—That by the provisions of R. S. O. (1887), c. 145, s. 36, the Legislature intended that the evidence in inquiries such as the one in question should be taken upon oath; and not to confer upon the defendants a discretion to take it upon oath or without oath as they should think proper; and they could not by arrangement between themselves and the plaintiff adopt a different mode of obtaining the facts than that which the legislature prescribed in conferring their authority upon them. *S. C.* 17 O. R. 300.

Per Boyd, C.—The intervention of the Law Society upon the solicitation of the person aggrieved was quite warrantable, notwithstanding that such person had brought an action for pecuniary redress. *S. C.*, 16 O. R. 625.

The jurisdiction of the law society should not be less than that of the court; and the latter is exercised not merely in cases arising out of purely professional employment, but whenever the transaction is so connected with the profes-

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sional character of the solicitor as to afford a presumption that that character formed a ground and reason of the employment. It is for the benchers to determine and adjudge what is and what is not becoming conduct in a member of the society, under R. S. O. (1887), c. 145, s. 44; and any act of any member that will seriously compromise the body of the profession in public estimation is within the province of this law. Any misconduct which would prevent a person from being admitted to the society justifies his removal; and the conduct which unfits a man to be a solicitor should a fortiori preclude his being a barrister. The plaintiff, according to his own statements before the committee, was acting as a solicitor in the transactions complained of; and the objection that he was not engaged in that capacity, or in the capacity of barrister, failed. *Id.*

The fact that the plaintiff prior to the resolution of the benchers had made restitution to the complainant did not oust the jurisdiction to discipline. *Id.*

Held affirming the judgment of the Chy. Div. 17 O. R. 104, that a judge of a superior court of the province of Ontario, who, after his voluntary resignation of his office, before he has become entitled to a retiring allowance, has been accepted, resumes the practice of his profession, is a "retired judge" within the meaning of R. S. O. (1877), c. 138, s. 4, and as such an ex officio bencher of the Law Society of Upper Canada. Burton, J. A., dissenting. *Macdonell v. Blake*, 17 A. R. 312.

## LAW STAMPS.

Where an examination of parties pursuant to R. S. O. (1877), c. 50, s. 161, takes place before a deputy clerk of the crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money. *Denmark v. McConaghy*, 8 P. R. 136.—Osler.

## LEASE.

### I. OF CHATTELS, 1161.

### II. OF FISHERY, 1162.

### III. OF LAND.

#### 1. Generally.—See LANDLORD AND TENANT.

#### 2. Mining Lands.—See MINERAL LANDS.

### IV. OF TOLLS.—See WAY.

### V. MORTGAGE OF LEASE, 1162.

#### I. OF CHATTELS.

By a verbal agreement, entered into in June, 1876, the plaintiff leased to his son, M., who was residing with him, the farm occupied by them, for five years, at an annual rent of \$100, M. agreeing also to support the plaintiff and the other members of his family. By the terms of the agreement M. was to have the use and enjoyment of the stock and implements on the

premises, estimated to be worth \$1,010. It was also stipulated that M. should have power to sell or otherwise dispose of such portions of the stock and implements as he might think desirable, but at the conclusion or sooner determination of the term, he was to leave others of equal value, any surplus above that amount to be his own. Either party was to be at liberty to determine the lease at any time he thought fit to do so. In January, 1879, M. having become financially embarrassed, and finding he was losing by the farm, expressed his determination to try some other mode of life, and said that the plaintiff might have the place and the stock, etc., thereon, if he, the plaintiff, would discharge him from any claim in respect of the rent, no portion of which had been paid. M. did accordingly abandon the place, and the plaintiff thereupon assumed the management and control thereof, and took possession of the stock, etc. M. subsequently returned to his father's and continued to reside and work on the farm for his father. In March following M. executed a surrender to the plaintiff of all his right and interest in or to the farm and the crops upon it. In the month of April, for the expressed consideration of \$340, which it was alleged his father had lent him, he also executed a memorandum assigning to the plaintiff all his interest in the stock and farming implements, etc., on the place, which included, it was said, a buggy, cutter, and harness, which had been purchased by M. for his own use. In October, 1879, the defendant sued out execution against M. under which the sheriff seized the farm stock and implements, together with the said buggy, cutter, and harness. In an interpleader proceeding by the father, in which a verdict was rendered for the plaintiff, on appeal from a rule refusing to set the verdict aside.—Held, (reversing 32 C. P. 90) that the lease from the father to his son had the effect of vesting the chattel property in the latter; and *quære*, whether it was afterwards revested in the father by the writings executed by M.; but as the question whether there had been a delivery and change of possession sufficient under the Bills of Sale Act had not been passed upon by the jury, and as some doubt existed in respect of the buggy, cutter, and harness, a new trial was ordered; costs to abide the result. *Oliver v. Newhouse*, 8 A. R. 122.

Held, per Osler, J., the identical articles were not necessarily to be returned but only in the same kind and value, and therefore the transaction constituted a sale, and the property became vested in the son, and liable to be seized in an execution against him. S. C., 32 C. P. 90.

See *Bickford v. Canada Southern R. W. Co.*, 14 S. C. R. 743, p. 1147.

#### II. OF FISHERY.

See *Regina v. Robertson*, 6 S. C. R. 52, p. 308.

### V. MORTGAGE OF LEASE.

See *Kelly v. Imperial Loan & Investment Co.*, 11 A. R. 526.

**LEGACY.**

See WILL.

J. B. being the owner of certain land, by his will, gave his son, M. B., a legacy of \$150 and charged it on the land, which he devised to his son W. B., an infant: with a provision that his son J. B. should occupy it during the minority of W. B. and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained \$150 of the purchase money because the legacy was not released; but by an agreement agreed to pay T. B. the \$150 as soon as he should furnish a release duly executed by M. B. The right to receive the \$150 under this agreement and any right he had to obtain this release was assigned by T. B. to M. K. M. K. having tendered a release for execution to T. B. who declined to execute it, brought a suit to compel him so to do:—Held, that although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered, still as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compellable to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do. The purchaser should not have objected to the title on account of the legacy if there was proof of its being paid. *Kaiser v. Boynton*, 7 O. R. 143.—Boyd.

Interest on Legacy. See *Toomey v. Tracey*, 4 O. R. 708; *Munzie v. Lindsay*, 11 O. R. 520, p. 899.

**LEGISLATIVE ASSEMBLY.**

- I. POWERS OF—See CONSTITUTIONAL LAW.
- II. ELECTIONS TO—See PARLIAMENTARY ELECTIONS.

**LETTERS.**

- I. OF ADMINISTRATION—See EXECUTORS AND ADMINISTRATORS.
- II. CONTRACTS BY—See CONTRACT.
- III. IN EVIDENCE—See EVIDENCE.
- IV. DEFAMATORY LETTERS—See DEFAMATION.
- V. PATENT.
  1. For Lands—See CROWN LANDS.
  2. For Invention—See PATENT FOR INVENTION.
- VI. ROGATORY—See EVIDENCE.

**LIBEL.**

See CRIMINAL LAW—DEFAMATION.

**LICENSE.**

- I. LEASE OR LICENSE—See LANDLORD AND TENANT.
- II. OF FERRIES—See FERRY.
- III. FOR SALE OF LIQUORS—See INTOXICATING LIQUORS.
- IV. MUNICIPAL LICENSES—See MUNICIPAL CORPORATIONS.
- V. TIMBER LICENSES—See CROWN LANDS.

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, etc., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in:—Held, that the evidence of such agreement was not admissible, as it would add to the written agreement, and was not collateral thereto; but even if admissible, if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also that the evidence failed to establish the alleged agreement, and that the plaintiff was not estopped from denying it. *McKenzie v. McGlaughlin*, 8 O. R. 111.—C. P. D.

Semble, the dominion parliament has power to enact that a license from the crown shall not be necessary to enable corporations to hold lands within the dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license. *McDiarmid v. Hughes*, 16 O. R. 570.—Q. B. D.

Of Cabs. See *Regina v. Reeves*, 1 O. R. 490.

From minister of marine and fisheries. See *Regina v. Robertson*, 6 S. C. R. 52, p. 308.

Revocable license to a right of way. See *Duncan v. Rogers*, 15 O. R. 699; 16 A. R. 3.

**LICENSE COMMISSIONERS.**

See INTOXICATING LIQUORS.

**LIEN.**

- I. GENERALLY, 1165.
- II. ON LAND.
  1. *Equitable Liens*, 1165.

2. *Mechanics' Liens.*

- (a) *Generally*, 1166.
- (b) *Mortgaged Property*, 1169.
- (c) *Execution Creditors*, 1171.
- (d) *Registration*, 1172.
- (e) *Actions on*, 1173.
- (f) *Costs*, 1174.

3. *Vendors' Lien*—See SALE OF LAND.4. *Tax Purchaser's Lien*—See ASSESSMENT AND TAXES.5. *Other Liens*, 1175.

## III. OF INNKEEPER, 1175.

## IV. FOR COSTS—See COSTS—SOLICITOR.

## I. GENERALLY.

Lien of secured creditor under R. S. O. (1877) c. 107, s. 30. See *Chamberlen v. Clark*, 1 O. R. 135; 9 A. R. 273.

Held, that the settlement of a claim under a negotiable security without the security being delivered up subjected the defendant to such charges as were a specific lien thereon of which they had notice, or semble, even without notice. *Hall v. Griffith*, 5 O. R. 478.—C. P. D.

Lien of Crown for customs duties.—Preference of Crown over the subject. See *Clarkson v. Attorney-General of Canada*, 15 O. R. 632; 16 A. R. 202, p. 110.

Three persons occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interest a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of the moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint-stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator.—Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that no actual notice to them or to the company being shown the bank had no lien. Judgment of the County Court of York reversed. *In re Herr Piano Company*, 17 A. R. 333.

See *Troop v. Hart*, 7 S. C. R. 512; *Grant v. La Banque Nationale*, 9 O. R. 411, p. 139; *Hall v. Collins Bay Rafting and Forwarding Co.*, 12 A. R. 65, p. 182; *McDonald v. McCall*, 12 A. R. 593, p. 822; *Foster v. Russell*, 12 O. R. 136; *Sanderson v. McKercher*, 13 A. R. 561; *Byers v. McMillan*, 16 S. C. R. 194, p. 661; *Discher v. Canada Permanent Loan and Savings Co.*, 18 O. R. 273, p. 1175.

## II. ON LAND.

1. *Equitable Liens.*

Per Hagarty, C. J.—If "an equitable lien, charge, or interest" be created by deed or by any writing capable of being registered, actual notice of such deed or interest will, under the

67th section of the Registry Act, 31 Vict. c. 20 (Ont.), prevent the effect of priority of registration. But as to equitable liens, etc., evidenced by parol only, amongst others a vendor's lien for unpaid purchase money, they have by that Act been prevented from affecting a duly registered title. In the disposition of real property, unless in cases of actual moral fraud, the stringent observance of the Registry Law is the wisest rule to adopt. *Peterkin v. McParlane*, 9 A. R. 429.

Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee who held the title under a deed absolute in form, brought into the master's office with his account certain orders, signed by the mortgagor, directing him to pay the parties named in them any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered.—Held, (1) that such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands prior to the receipt by the sheriff of the plaintiffs' fi. fa. lands, and that such lien-holders should be made parties in the master's office, and prove their claims in their own right. *Canadian Bank of Commerce v. Forbes*, 10 P. R. 442.—Hodgins, Master-in-Ordinary.

2. *Mechanics' Liens.*(a) *Generally.*

The plaintiff furnished materials to G. for a building which G. had contracted to erect for the defendants. After the defendants had paid G. all there was due to him, and after G. had abandoned his contract the plaintiff notified the defendants of his unpaid account against G. for such materials; and filed a bill to enforce his lien more than ninety days after the materials had been furnished. A demurrer for want of equity was allowed, with costs; and Semble, that even if the bill had been filed in time, there would not have been any lien. Remarks upon the various provisions of the Mechanics' Lien Act. *Briggs v. Lee*, 27 Chy. 464.—Spragge.

In a building contract for the erection of a church, the contractor agreed with the building committee to settle with all other persons doing work upon or furnishing materials for the construction thereof, and stipulated that neither he nor they should have any lien upon the building for their work or materials.—Held, binding on the sub-contractors, though made without their knowledge or assent. *Forhan v. Lalonde*, 27 Chy. 600.—Blake.

It was also stipulated that twenty per cent. of the contract price should not be payable until thirty days after the architect should have accepted the work, and that the balance of the contract price so to be retained should not be payable until all sub-contractors were fully paid and settled with:—Held, (1) that no trust was thereby created in favour of the sub-contractors as to the sum agreed to be retained; and the contractor having assigned his interest in the

contract to a third party, and the committee having waived their right to insist that the sub-contractors should be paid:—Held, (2) that the assignee was entitled to receive twenty per cent. to the exclusion of the sub-contractors. *Ib.*

M. having bargained in January with R. & E. to do certain work, and supply certain machinery in their mill, the last of the work being done, and the last of the machinery supplied on the 28th July, filed his lien on the 25th August, and commenced his action 2nd October. On the 24th July, R. & E. had sold and conveyed the mill to P., who, not being aware of this claim, registered his conveyance on 29th July. The lien registered made no mention of P. as "owner," and M. had drawn a draft for part of the money at three months, dated 28th July, which had been accepted by R. & E.:—Held, that M. was entitled to his lien notwithstanding the sale to P. That the omission of P. as owner did not invalidate the lien, and that the drawing of the draft did not operate as a waiver of the lien. *Makins v. Robinson*, 6 O. R. 1.—Ferguson.

W. entered into a contract with M. to do certain carpenter work on buildings for a contract price of \$2,690, which was afterwards, after taking an account of the extras to and omissions from the contract, increased to \$2,781.85. He proceeded with the contract, and did work to the value of \$2,350, and received on account \$2,125, when he failed and notified W. that he could not proceed with the contract. W. then entered into a contract with C., who was M.'s surety, to finish the work, which he did at an expense of \$325.88. Certain sub-contractors and employees of M. filed liens, and W. moved to have them vacated on the ground that he was entitled to apply the ten per cent. drawback in completing the contract:—Held, reversing in part the order of Proudfoot, J., who dissented, that the amount upon which the ten per cent. drawback was to be calculated was not the whole amount of the contract price, but the amount of the work done by the contractor when he failed and abandoned the work. *Re Cornish*, 6 O. R. 259.—Chy. D.

The defendant H. contracted with the defendant C. for the building of a house. A clause in the agreement gave H. a right to dismiss C., and employ others to finish the work, in the event of C.'s failure to carry out the contract. H. acting thereunder dismissed C. and agreed verbally with the respective plaintiffs P. & G., who had sub-contracts under C., that if they would proceed with their respective portions of the work, and finish the same, he (H.) would pay them:—Held, affirming the judgment of Boyd, C., (2 O. R. 233), that the agreement with P. & G. was a new and independent contract, not a promise to pay the debt of another, and that P. & G. were entitled to liens for all work done under such agreement with H. as contractors. *Petrie v. Hunter; Guest v. Hunter*, 10 A. R. 127.

The plaintiffs contracted with one C. for the execution of the stone work upon certain building which C. had contracted to build. C. never completed the work, but during the progress thereof was paid in good faith the full value of the work actually done by him on the building before he abandoned the contract:—Held, reversing the judgment of the County Court, that

a sub-contractor with C. could not enforce payment of his claim to the extent of ten per cent. of the contract price under the Act R. S. O. (1877) c. 120, s. 11, as amended by 41 Vict. c. 17, s. 1:—Quere, as to the meaning and effect of that clause. *Goddard v. Coulson*, 10 A. R. 1.

The last of the materials in respect of which the plaintiffs, as sub-contractors, claimed a lien under the Mechanics' Lien Act upon the estate of the landowner, were delivered on the 16th September, 1887, and the claim of lien was not registered nor was notice in writing given until the 11th October, 1887, and this action to enforce the lien was not brought till 29th October, 1887:—Held, that under sections 9 and 10 of R. S. O. (1887), c. 126, the lien claimed did not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor. *Goddard v. Coulson*, 10 A. R. 1, followed. *Truax v. Dixon*, 17 O. R. 366.—Q. B. D.

When in an action to enforce a mechanic's lien the plaintiff purported to set out on his statement of claim the registered lien verbatim, and the same as so set out, did not show that the work was done and the material furnished, within thirty days from the registration of the lien, nor the amount due:—Held, on demurrer, bad, but leave given to amend. *Roberts v. McDonald*, 15 O. R. 80.—Proudfoot. See next case.

Section 16 of R. S. O. (1887), c. 126, requires that the claim of lien shall state the time or period within which the materials were furnished. The claim registered in this case did not state the year, but only the months and days of the months. It stated, however, that the materials were furnished on or before the 17th September, 1887; and in this and all respects it followed Form 1 in the schedule to the Act; and subsection 2 of section 16 provides that the claim may be in one of the forms given in the schedule to the Act:—Held, that the statement that the materials were furnished on or before a named day was a sufficient statement of the time or period within which they were furnished, according to the true intent and meaning of section 16. *Roberts v. McDonald*, 15 O. R. 80, overruled. *Truax v. Dixon*, 17 O. R. 366.—Q. B. D.

G. supplied bricks to W., who had leased certain land from H. with an option of purchase. The contract for the supply of the bricks was made between G. and W., and on W.'s credit, although H. was aware that they were being supplied, and that buildings were being erected on the land. These buildings were being erected by W. under a verbal agreement to that effect between W. and H. subsequent to the lease, and by which agreement H. had agreed to lend part of the money required for the buildings to W., advancing the same as the work progressed on the security of the property. W. did not exercise his right of purchase under the lease, and G. filed his lien against both W. and H., and brought this action to establish the same against the interest of both of them:—Held, affirming the decision of Boyd, C., (8 O. R. 478), that the interest of H. in the property was not charged. It requires something more than mere knowledge of the work being done to bind the owner under R. S. O. (1877) c. 120, s. 2, sub-s. 3. The privity and assent must be in pursuance of an agreement. H. could in no sense be looked upon as a prior mortgagee and it is only against



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such that R. S. O. (1877) c. 120, s. 7, gives priority to the lien-holder. *Graham v. Williams*, 9 O. R. 458.—Chy. D.

Held, following *Breeze v. The Midland R. W. Co.*, 26 Chy. 225 (Proudfoot, J., dissenting), that a mechanic's lien does not attach upon an engine-house and turntable built for a railway company, and confessedly necessary for the proper working of the railway; and that such engine-house and turntable, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanic's lien. *King v. Alford*, 9 O. R. 643.—Chy. D.

There is nothing in the Mechanics' Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanic's lien is not analogous to a vendor's lien. Per Proudfoot, J. The Mechanics' Lien Act was intended to place mechanics on a more favourable footing than other creditors, and their right ought not to be measured by what could be realized upon an execution. There seems no distinction in principle between their position and that of an unpaid vendor of land. *Id.*

S. was the owner of a lot upon which he was building four houses and W. was his plumbing contractor doing the work on all at a specified sum for each house. He commenced his work in September, 1887, and finished about May, 1888. V. was the contractor for the brickwork and as such was on the premises from time to time, as the work was going on and was not paid by S. V. purchased one of the houses, which was conveyed to him by S. by deed, dated 1st December, 1887, and registered 20th February, 1888. On 24th February, 1888, W. registered his lien on the whole property. Both V. and W. alleged that they knew nothing of the other's transaction. On an appeal from Robertson, J., who held (affirming the master in chambers) that V. had notice of W.'s claim, and that his summary application to have W.'s lien discharged must be dismissed with costs, the court were evenly divided. Per Proudfoot, J. A lien should be registered against any one whose rights are acquired during the progress of the work, and if not so registered it becomes absolutely void, unless proceedings are taken to realize within thirty days: no proceedings were taken within that time by W. and the lien not being registered against the subsequent owner ceased to be a lien at all. *Hynes v. Smith*, 27 Chy. 150, and *McVean v. Tiffin*, 13 A. R. 1, followed. Per Ferguson, J. The real question is not whether there was a valid registration of the lien, but whether the judgment of Robertson, J. affirming the refusal of the master to discharge the lien on a summary application was right. The master was justified in so refusing. *Wanty v. Robins*, 15 O. R. 474, referred to. *Re Wallis and Vokes*, 18 O. R. 8.—Chy. D.

See *Grant v. Dunn*, 3 O. R. 276, p. 1172.

#### (b) Mortgaged Property.

A mortgagee filed a bill for sale, making certain lien-holders under the Act parties defen-

dants therein, alleging that the work, by virtue of which their liens arose, was commenced after the registration of his mortgage:—Held, that the lien-holders should have been made parties in the master's office; and plaintiff's costs of making them defendants by bill were disallowed on revision of taxation. *Jackson v. Hammond*, 8 P. R. 157.—Thom, Taxing Officer.

In order to preserve the lien which the Mechanics' Lien Act creates in favour of a contractor performing work on a house or other building for the owner, it is necessary to register the same during the progress of the work, and as soon as the claim arises, or it may be postponed to a mortgage created subsequently, but registered prior to such lien. *Proudfoot, V. C.*, dissenting. *Hynes v. Smith*, 27 Chy. 150.—Chy. D.; 8 P. R. 73.

The plaintiffs instituted proceedings to enforce a mechanic's lien assigned to them, which had been duly registered, and a suit thereon prosecuted. The plaintiffs claimed to be entitled to priority in respect of such lien over the claim of a mortgagee—whose mortgage was prior to the contract under which the lien arose—for the amount by which the selling value of the premises had been increased by the work and materials placed thereon. The assignee of the mortgagee demurred, on the ground that he was an owner of the land, within the meaning of the Act, R. S. O. (1877), c. 120, s. 2, and that proceedings had not been taken against him within the time specified by the Act:—Held, that he was not such an owner, not being a person upon whose request or upon the credit of whom, etc., the work had been done. *Bank of Montreal v. Haffner*, 29 Chy. 319.—Proudfoot.

The period of ninety days, limited by the 21st section of the Mechanic's Lien Act (R. S. O. 1877, c. 120), for the commencement of proceedings to enforce the lien, applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that, whether proceedings have or have not been previously taken against the owner within the ninety days. *Bank of Montreal v. Haffner*, 10 A. R. 592.

The plaintiffs, assignees of a mechanic's lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien against the owner they brought this action after the lapse of more than ninety days from filing their lien, to obtain a declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land:—Held, reversing the judgment of Ferguson, J. (3 O. R. 183), that the lien had ceased to exist as against the mortgagee. *Id.*

Each lien under the Mechanics' Lien Act stands on its own footing, every lien-holder being entitled to security upon the enhanced value arising by reason of the work and materials. *S. C.*, 3 O. R. 183.—Ferguson.

In an action to enforce a mechanic's lien under R. S. O. (1877), c. 120, a reference in the usual form was directed to the local master at Chatham, to inquire whether any person besides the plaintiffs, other than prior mortgagees, had any

incumbrance, etc., upon the premises in question. In proceeding under this reference, the master made a number of persons, including the appellants, parties in his office, and caused them to be served with notice "T." which erroneously recited the judgment as directing an inquiry as to incumbrances generally. The appellants thereupon petitioned to discharge the master's order upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action. It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and had advanced the full amount of the mortgage money some months before the plaintiffs' lien was registered, though a portion was advanced after they had commenced work or supplied materials. The mortgagees had no notice of the plaintiff's lien:—Held, reversing the judgment of the court below, that the appellants' claim was prior to that of the plaintiffs and that they were not proper parties to the action, being excepted by the terms of the judgment, nor was the master warranted in entering upon any inquiry as to the amount advanced by them subsequent to the commencement of the work. *Richards v. Chamberlain*, 25 Chy. 402, and *Hynes v. Smith*, 27 Chy. 150, referred to. *McVean v. Tiffin*, 13 A. R. 1. See *McNamara v. Kirkland*, 18 A. R. 271.

The plaintiff worked on a barn belonging to the defendant up to 9th August, 1887, and did some further work on 25th October, following. The defendant mortgaged his land to A. S., by mortgage dated 21st October, and registered 24th October. Plaintiff registered his lien 25th October, and having brought his action against defendant only, obtained the usual judgment with a reference to the master, who made A. S. a party to the suit in his office, and A. S. thereupon petitioned to have the master's order set aside. Held, following *McVean v. Tiffin*, 13 A. R. 1, that the mortgage was not a subsequent but a prior mortgage as regarded the plaintiff's lien, and that A. S. should not have been added as a party. *Reinhart v. Shutt*, 15 O. R. 325.—*Boyd*.

Where there is a registered prior mortgage affecting land and buildings, and a mechanic's lien for subsequent work thereon, the mortgage retains its priority only to the extent of the value of the security before the work began, in respect of which the lien attaches, and the lien has priority only to the extent of the additional value given by the subsequent improvements. And where the owner of a mill subject to a mortgage, intending to have certain improvements effected, which although as regards the work of a lien-holder were fully carried out, were otherwise only partially complete and left the mill in an unfinished state:—Held, that the lien-holder was not entitled to priority for the work done, it not clearly appearing that the selling value of the property had been increased thereby. *Kennedy v. Haddow*, 19 O. R. 240.—*Boyd*.

See *Graham v. Williams*, 9 O. R. 458, p. 1169.

#### (c) Execution Creditors.

See *Cole v. Hall*, 12 P. R. 584; 13 P. R. 100, p. 1174.

#### (d) Registration.

The plaintiffs delivered and set up for the defendant a boiler and engine, supplied by themselves, in September, 1878, upon certain terms of credit, which expired on the 25th April, 1879. Registration of the lien was effected on the 23rd December, 1878, and a bill to enforce the lien was filed on the 31st May, 1879:—Held, that the effect of the delay in the registration of the lien was, that the lien under the Act had ceased to exist, notwithstanding the plaintiffs had done some immaterial work upon the machinery late in December, 1878; the thirty days within which the registration was to be effected being to be computed not from the time such alterations were made, or the defects in the machinery were remedied, but from the time when it was applied and placed, i. e., in September, 1878. *Neill v. Carroll*, 28 Chy. 30.—*Spragge*. Affirmed on rehearing. *Ib.* 339.—Chy. D.

Where, as to the effect of the Act when the credit does not expire until after thirty days from the completion of the work, and there has been no registration of lien. *Ib.*

Where G. claimed, under the Mechanics' Lien Act, a lien in respect of materials furnished, by virtue of an assignment from the original furnisher thereof:—Held, G. had a right to register a claim for the same under the said Act, but the affidavit of verification required by sec. 4, sub-s. 2, must be made by himself, and not by the assignor. *Grant v. Dunn*, 3 O. R. 376.—*Proudfoot*.—Chy. D.

The master in chambers has jurisdiction to entertain a motion under R. S. O. (1877) c. 120 s. 23, to annul the registry of a mechanic's lien when the amount in question is over \$200. *Re Cornish*, 6 O. R. 259 followed. *Re Moorehouse and Leak*, 13 O. R. 290.—Chy. D.

When a contractor working for several owners has but a single contract for the supply of materials with the material-man, the time of filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the material-man and the contractor, but by the completion of the work by the contractor for the several owners. *Ib.*

The law that a lien which arises by virtue of being employed and doing work on land is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser who registers his conveyance, must be restricted to an innocent purchaser who is entitled to the protection of the Registry Act, i. e., one who has not actual notice of the prior lien before he pays his money and registers his deed. *Wenty v. Robins*, 15 O. R. 474.—Chy. D.

The land upon which the lien was claimed was in the county of Wellington, but the affidavit of the plaintiffs verifying the claim of lien registered was made in the county of Bruce, and before a commissioner for taking affidavits in that county:—Held, that the affidavit satisfied section 16, sub-section 2, of the Act. *Truax v. Dixon*, 17 O. R. 366.

See *Hynes v. Smith*, 27 Chy. 150, p. 1170; *McPherson v. Gedge*, 4 O. R. 246, p. 1173; *Re Wallis and Vokes*, 18 O. R. 8 p. 1169; *Truax v. Dixon*, 17 O. R. 366, p. 1168.

(c) *Actions On.*

Under section 15 of the Mechanics' Lien Act, R. S. O. (1877), c. 120, suits brought by a lienholder shall be taken to be brought on behalf of all lien-holders of the same class; and in case of the plaintiff's death, or his refusal or neglect to proceed, the suit may, by leave of the court, be prosecuted by any lien-holder of the same class. *McPherson v. Gedge*, 4 O. R. 246.—C. P. D.

A number of unregistered lien-holders brought an action under the Act to enforce their liens against one G., which proceeded to the close of the pleadings, and was then dismissed with the plaintiffs' assent. P., the assignee of a registered lien-holder, relying on the action, took no steps to enforce his lien or to register a certificate within the ninety days, under section 21. On being informed of the dismissal of the action he applied to be allowed to intervene as plaintiff and to prosecute the suit on his own behalf:—Held, Galt, J., dissenting, reversing the judgment of Hagarty, C. J., which affirmed the judgment of the master-in-chambers, that the applicant should be allowed to intervene and prosecute the action; and that the applicant was of the same class as the plaintiffs, in that they all contracted with or were employed by G. Lien-holders "of the same class" are those who have contracted with the same person, whether their liens are registered or not. Per Galt, J. The applicant was not of the same class as the plaintiffs, for he was a registered lien-holder and came within section 21, whereas they were unregistered and came within section 20; and the ninety days having expired the applicant's lien was gone, so that even if the plaintiffs' suit were still pending the applicant could not have become a party to it. *Id.*

The question whether an issue as to a mechanic's lien should be summarily tried or not rests largely, if not entirely in the discretion of the judge. *Re Moorehouse and Leak*, 13 O. R. 290.—Chy. D.

Four mechanics worked with a contractor for wages upon two buildings, owned by different persons, and each registered a lien for his services on both the buildings, against the contractor and against both the properties on which they worked and against both the owners, each lien being for the amount of the whole wages claimed in respect of services as to both properties. All four joined in one action against the contractor and the two owners to enforce their liens. Upon a summary application by the contractor, the mechanics' liens and writ of summons were set aside. *Oldfield v. Barbour*, 12 P. R. 554.—Dalton, Master.

The appellant's execution against lands was placed in the sheriff's hands shortly after the registration of a mechanic's lien by the plaintiff, who began his action to enforce such lien and registered his lis pendens within the ninety days prescribed by section 23 of the Mechanics' Lien Act, R. S. O. (1877), c. 126, but did not cause the appellant to be added as a party till the case had been brought into the master's office, which was after the expiry of the ninety days. The appellant contended that as against him proceedings to realize the plaintiff's lien had not been instituted within the proper time, and therefore his execution had gained priority over

the lien, and he was improperly added as a subsequent incumbrancer in the master's office. Section 29 of the Act provides that the lien may be realized in the High Court according to the ordinary procedure of that court:—Held, that the effect of sections 23 and 29 is that the lien shall cease after ninety days unless in the meantime proceedings are instituted in the High Court according to its ordinary procedure, to realize the claim; the practice or procedure of the court is as much the law of the land as any other part of the law; and the making the appellant a party to the proceedings in the master's office was a regular step in the action, authorized and prescribed by the practice and procedure of the court for nearly thirty years, of which the appellant could not complain, the action having been regularly commenced within the ninety days. *White v. Beasley*, 2 Chy. 660; *Moffatt v. March*, 3 Chy. 163; and *Jackson v. Hammond*, 8 P. R. 157, referred to. *Juson v. Gardiner*, 11 Chy. 23; *Shaw v. Cunningham*, 12 Chy. 101; *McDonald v. Wright*, 14 Chy. 284; and *Bank of Montreal v. Haffner*, 10 A. R. 592, distinguished. Decision of *Ferguson, J.*, 12 P. R. 584, affirmed. *Cole v. Hall*, 13 P. R. 100.—C. of A.

Held, upon demurrer to a statement of claim in an action to enforce a mechanic's lien brought by a sub-contractor against the owner of the lands and the contractor, that it was necessary for the plaintiff to aver that there was something done from the owner to the contractor. *Townsend v. Baldwin*, 18 O. R. 403.—Boyd.

Where, in a consent judgment in the usual form in lien cases, a reference was made to a local registrar of the court:—Held, that an appeal lay from his report, it appearing from the whole judgment that the reference was to him as master. *Kennedy v. Haddow*, 19 O. R. 240.—Boyd.

See *Briggs v. Lee*, 27 Chy. 464, p. 1166; *Virtue v. Hayes*—*In re Clarke*, 16 S. C. R. 721.

(f) *Conts.*

Where the plaintiff's claim in an action to enforce a mechanic's lien was only \$142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over \$200:—Held, that the action was properly brought in the High Court of Justice, and the costs should be on the scale of that court, and it made no difference that the other lien-holder failed to substantiate his claim. *Hall v. Pit.*, 11 P. R. 449.—Wilson.

The plaintiffs, sub-contractors, in an action brought in the High Court to enforce a mechanic's lien, claimed against the contractor \$245.29, and recovered \$284.54. They claimed a lien on the land for the amount due them, but upon the investigation of accounts to the extent of upwards of \$1,700 between the contractor and the landowner, it was found that the latter owed only \$63.79, and the plaintiffs' lien was limited to this amount:—Held, upon an appeal from taxation of costs, that the contractor could not have sued the landowner in the Division Court to recover the balance of \$63.79, but must have proceeded in the County Court, and the plaintiffs, suing upon

the same claim, were therefore entitled to County Court costs; and as the plaintiffs' claim was also beyond the jurisdiction of the Division Court, upon any construction of the meaning of section 28 of the Mechanics' Lien Act, R. S. O. (1887), c. 126, the plaintiffs could not have brought their action in the Division Court, and were therefore entitled to tax their costs upon the County Court scale. *Truax v. Dixon*, 13 P. R. 279.—Galt.—Q. B. D.

Held, that, as the plaintiffs could not have hoped to establish a case which would have entitled them to High Court costs, the defendant landholder should be allowed a set-off of the excess of his costs incurred in the High Court over what he would have incurred in the County Court; but as the action was tried without a jury, and Con. Rule 1172 did not apply, the taxing officer had no power to allow this set-off without the direction of the court; and the judgment of the court was amended so as to meet the case. *Id.*

#### 5. Other Liens.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon except as against the crown:—Held, affirming the judgment of the court below, that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed. *O'Brien v. Cojswell*, 17 S. C. R. 420.

Certain lands were subject to a first mortgage, a charge registered by an engine company in respect to the price of an engine supplied by them, and a mortgage to the plaintiff registered subsequently to the said charge; and the lands having been sold under the power of sale in the first mortgage, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage. The engine company had resumed possession of the engine, and sold it, and claimed the balance of the price under the charge out of the said surplus in priority to the plaintiff:—Held, that they were entitled to make that claim, and that having sold the engine without notice to the plaintiff the latter was entitled to impeach that sale by shewing that a greater sum could have been realized, if it had been properly sold after proper notice. But:—Held, also, that the plaintiff was alone entitled to the value of the interest of the wife of the owner of the equity of redemption in the land as inchoate dower; inasmuch as she had barred her dower in his favour, whereas she had not done so in connection with the charge of the engine company. In the absence of arrangement, the value of this interest must be ascertained and retained in court to be paid out to the plaintiff if the right of dower attached by the wife surviving her husband and to the engine company if it did not attach. Remarks upon the position of holders of hire receipts after resuming possession of the chattels covered thereby. *Discher v. Canada Permanent Loan and Savings Co.*, 18 O. R. 273.—Boyd.

#### III. OF INNKEEPER.

J. and his wife took rooms in premises kept by defendant, R. A., called the "Shandon

House," paying for them, and agreeing to pay \$30 a month for rooms and board. Subsequently, they rented from plaintiff a piano. They left the "Shandon House" in debt for board and lodging to R. A., who thereupon detained the piano, which was claimed by the plaintiff:—Held, that the relation between defendant, R. A. and J., was not that of innkeeper and guest, but of boarding-house keeper and boarder:—Held, also, that as the piano was not the property of J. and his wife, that defendant had no lien on it for board and lodging under R. S. O. (1877), c. 147. Quere, whether the house kept by defendant R. A. was an "inn" within the meaning of R. S. O. (1877), c. 147, s. 1. *Newcombe v. Anderson*, 11 O. R. 665.—Q. B. D.

An innkeeper, claiming to act under R. S. O. (1887), c. 154, sold by public auction a stallion belonging to the plaintiff, a boarder at the inn, to enforce a lien thereon for the keep and accommodation thereof:—Held, that the lien existed and the sale was authorized. After the lien accrued the plaintiff removed the stallion and subsequently brought it back to the inn:—Held, that the lien survived on the return of the stallion. *Huffman v. Walterhouse*, 19 O. R. 186.—C. P. D.

#### LIFE ASSURANCE.

See INSURANCE.

#### LIFE ESTATE.

See ESTATE—WILL.

#### LIGHT.

[See R. S. O. 1887, c. 111, s. 39.]

Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months. The propriety of such a rule in the towns of this province remarked upon and questioned. The case of *Flight v. Thomas*, 11 A. & E. 688; 8 Cl. & F. 231, considered and followed. *Burnham v. Garvey*, 27 Chy. 80.—Spragge.

The plaintiff was the owner of lot eight, and the defendant of the adjacent lot (9). At the time the plaintiff's lot was conveyed to him it had a house upon it with windows looking over lot nine, which was then vacant, and was also the property of the plaintiff's grantors, subject to a mortgage. The equity of redemption in lot nine was afterwards conveyed to one through whom the defendant acquired title; and G., the immediate predecessor in title of the defendant, satisfied the mortgage, and obtained and registered a discharge of it. Buildings were erected on lot nine by the defendant and his predecessors, and the plaintiff complained of the interference by such erections with the access of light to his house on lot eight, contending for

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an express or implied grant of light over lot nine, and invoking the principle that a grantor cannot derogate from his grant:—Held, reversing the judgment of the Common Pleas Division (11 O. R. 331) that by payment of the mortgage and registration of the discharge, G. did not acquire a new and independent estate such as would have the effect of enabling him to derogate from the grant of light, if any, made to the plaintiff by their common grantors. *Booth v. Aleock*, L. R. 8 Ch. 663, and *Lawlor v. Lawlor*, 10 S. C. R. 194, distinguished. The jury were asked: "Did the defendant's house interfere injuriously with the light of the plaintiff's house?" They answered, "Yes, but not injuriously:—"Held, that in effect a question of law had been submitted to the jury and that the finding was too uncertain to support a judgment for the defendant. Per Osler, J. A., dissenting, that the finding of the jury plainly was, that the defendant's house did not interfere injuriously with the light, and had caused no substantial diminution of the light necessary for the enjoyment of the plaintiff's house. Under all the circumstances, no objection having been made on the ground of misdirection the justice of the case did not require that a new trial should be granted:—Held, also, per Patterson, J. A., and Ferguson, J., that there was an express grant to the plaintiff by the conveyance to him of lot eight, which was, under the "Short Forms Act," of all light used and enjoyed with the house; but per Patterson, J. A., that upon the evidence the defendant's house intercepted no light to which the plaintiff was entitled. Per Burton, and Osler, J. J. A., that the grant of light was an implied one, the conveyance of the house carrying with it all those incidents necessary to its enjoyment, which it was in the power of the vendors to grant; and the general words in the conveyance did not enlarge or limit the grant. Per Burton, J. A., that under the conveyance to him the plaintiff became entitled to the enjoyment of the right to the light from the vacant land to the same extent as enjoyed by his grantors at the time of the conveyance:—Held, also, per Patterson, J. A., that the conveyance to the plaintiff was, as regards lot nine, unregistered, and in the event of the plaintiff proceeding to another trial the defendant should be allowed to set up the registry laws as a defence. *Carter v. Gracett*, 14 A. R. 685. But see *Israel v. Leith*, 20 O. R. 361.

## LIMITATION OF ACTIONS.

### I. CLAIM TO REALTY.

1. *Operation of the Statute*, 1178.
2. *When the Statute Begins to Run*, 1178.
3. *Nature and Proof of Possession*, 1180.
4. *As Against the Crown*, 1183.
5. *Tenants at Will*, 1183.
6. *Tenants for Life*, 1185.
7. *Dower*—See *DOWER*.
8. *Tenants in Common*, 1185.
9. *Possession By or Against Infants*, 1185.
10. *Land in Trust*, 1186.
11. *Equitable Estates*, 1188.

12. *Mortgagor and Mortgagee*, 1188.
13. *Boundaries*, 1191.
14. *Easements*.  
(a) *Generally*, 1192.  
(b) *Water Rights*—See *WATER AND WATERCOURSES*.
15. *Fraud*, 1193.
16. *Servant or Caretaker*, 1194.
17. *Actual and Constructive Possession*, 1195.
18. *Adverse Possession*, 1195.
19. *Exclusive Possession*—*Possession By or Among Relatives*, 1195.
20. *Entry or Claim*, 1197.
21. *Discontinuance*, 1199.
22. *Acknowledgment of Title or Payment of Rent*, 1200.
23. *Avoidance by Legal Proceedings*, 1201.

### II. PERSONAL ACTIONS.

1. *Accounts*, 1201.
2. *Breach of Promise of Marriage*, 1203.
3. *Interest*, 1203.
4. *Judgments*, 1203.
5. *Libel and Malicious Prosecution*, 1204.
6. *Money Charged Upon Land*, 1204.
7. *Money Had and Received*, 1205.
8. *Executors and Trustees*, 1205.
9. *Married Women*, 1206.
10. *Infants*, 1206.
11. *Acknowledgment*, 1207.
12. *Payment on Account*, 1208.
13. *Effect of Legal Proceedings*, 1209.
14. *Particular Statutes*, 1209.
15. *Against Insurance Companies*—See *INSURANCE*.

### III. RIGHT OF CROWN TO PLEAD PRESCRIPTION, 1209.

### IV. ACTIONS IMPEACHING TAX SALE—See ASSESSMENT AND TAXES.

### V. ACTIONS AGAINST RAILWAY COMPANIES—See RAILWAYS AND RAILWAY COMPANIES.

#### I. CLAIM TO REALTY.

##### 1. *Operation of the Statute*.

Where a right to relief in respect of lands arises during the progress of a cause, and more than ten years are allowed to elapse before acting thereon, such right will be barred by "The Real Property Limitation Act," R. S. O. (1887), c. 108. *Ross v. Pomeroy*, 28 Chy. 435.—Spragge.

##### 2. *When the Statute Begins to Run*.

Hugh O'Hare purchased the land in question, and took a deed dated 30th April, 1870. His brother James, the defendant, paid a small portion of the money, and immediately went into possession. Hugh occasionally visited the place. On the 30th November, 1874, Hugh mortgaged to the plaintiff, who issued his writ on the 25th February, 1881. Defendant claimed title by



possession:—Held, that in any event the statute would not commence to run in defendant's favour until a year from his entry, and that he therefore had acquired no title. *Grant v. O'Hare*, 46 Q. B. 277.—Q. B. D.

By a deed to trustees in 1837 two lots of land were conveyed in trust for E. A. for her life, with remainder as follows:—Lot No. 2 to G. A. and lot No. 1 to A. A. to the use of them, their heirs and assigns, as joint tenants and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1863 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878 A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action against the defendant for the recovery of the said lot No. 2.—Held, that as there was no time prior to the death of the tenant for life when either the trustee or the remainderman could have interfered with the possession of the said lot, the Statute of Limitations did not begin to run against the remainderman until the death of the tenant for life in 1875, and he was therefore entitled to recover:—Held, also, that for the purpose of the said action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint-tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs. *Adamson v. Adamson*, 12 S. C. R. 563.

A testator devised land subject to a lease, to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H., to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been so receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will:—Held, affirming the decision of Proudfoot, J., that the devise of rent was void under 25 Geo. II. c. 6, s. 1, as J. H. was the beneficial devisee of the whole of it. Rent issuing out of land is a tenement; it partakes of the nature of land, and is within the 5th section of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1:—Held, further (also affirming Proudfoot, J.), that the perception of the rent by the executor was from the outset "wrongful" within R. S. O. (1877), c. 108, s. 5, sub-sec. 5, and C. H. had acquired a good title by possession. *Hopkins v. Hopkins*, 3 O. R. 223.—Chy. D.

The Statute of Limitations does not begin to run against a tax purchaser until the period of redemption has expired. *Smith v. Midland R. W. Co.*, 4 O. R. 494.—Boyd.

A husband and wife were married in 1841. In 1865 the wife acquired three adjoining lots of land by conveyance from a stranger. The defendant was put in possession of the lands in 1869 by the husband, and in 1870 one of the lots

was conveyed by them to him. In 1881 the husband and wife mortgaged the unconveyed lots which were afterwards purchased by the plaintiff at a sale under the power of sale in the mortgage. The defendant remained in possession of all the lots until 1888. In an action of trespass:—Held (in this affirming the judgment of Rose, J.), that the wife's disability of coverture having been removed in 1876 by 38 Vict. c. 16, ss. 1 and 5 (R. S. O. 1887, c. 111, ss. 4 and 43), the Statute of Limitations ran against her from that time, and that the defendant had acquired a good title by possession against her:—Held, however, that a new right of entry accrued to the mortgagee, and that the statute did not commence to run against him until (as the earliest possible period) the time of the execution of the mortgage, less than ten years before action, and that the plaintiff claiming under him was entitled to succeed:—Semble, per Ferguson, J. The plaintiff, as purchaser, under the power of sale, in the mortgage acquired a "new title" at the time of such sale, at which time the statute began to run against him. *Cameron v. Walker*, 19 O. R. 212.—Chy. D.

In case of tenancies at will. See *Cooper v. Hamilton*, 45 Q. B. 502, p. 1184; *Smith v. Kromm*, 46 Q. B. 163, p. 1184; *Re Defoe*, 2 O. R. 623, p. 1185.

See *Young v. Midland R. W. Co.*, 16 O. R. 738.

### 3. Nature and Proof of Possession.

Where a vendor was not in possession of lands, the fact that for upwards of ten years he had paid the taxes on the property is not such a possession as is required to bar the right of the owner under the Statute of Limitations. *In re Jarvis v. Cook*, 29 Chy. 303.—Sprague.

In an action of trespass quare clausum fregit for the purpose of trying the title to certain land adjoining the city of Belleville, the defendants pleaded not guilty; and 2nd, that at the time of the alleged trespass the said land was the freehold of the defendants, M. E. McC. and J. L. McC., and they justified breaking and entering the said close in their own right, and the other defendants as their servants, and by their command. The case was tried by Armour, J., without a jury, and he rendered a verdict for plaintiff with \$30 damages. The judgment was set aside by the Court of Common Pleas, and they entered a verdict for the defendants in pursuance of R. S. O. (1877) c. 50, s. 287. On appeal the Court of Appeal reversed this judgment, and restored the verdict as originally found by Armour, J. The defendants thereupon appealed to the Supreme Court:—Held, that the appellants (defendants), on whom the onus lay of proving their plea of liberum tenementum, had not proved a valid documentary title, or possession for twenty years of that actual, continuous, and visible character necessary to give them a title under the Statute of Limitations; therefore plaintiff was entitled to his verdict (Henry J., dissenting.) *McConaghy v. Denmark*, 4 S. C. R. 609.

C. R. died intestate in 1864, seized in fee simple of the land in question, leaving his widow and several heirs-at-law. The widow remained in possession from the time of his death until her own decease in 1881, and cultivated the farm. There was some evidence of her declarations that

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she kept possession with the consent of the heirs for them, claiming only her dower, but no evidence of a written acknowledgment of their title. She devised the land to the plaintiff.—Held, that the possession of the widow was not a possession qua dower even of one-third of the land, and that the title of the heirs-at-law to the whole had been thereby barred. *Johnston v. Oliver*, 3 O. R. 26.—Q. B. D.

In 1853 M., the owner of the land in question, conveyed it to P. D., who in 1859 conveyed it to L. D. Neither P. D. nor L. D. ever entered into occupation of the lot, which was a vacant one. In 1855 the defendant, who was a builder, with the knowledge and consent of P. D., used the lot for depositing his building materials on, and had continued to do so ever since, but with the like knowledge and assent of L. D. after his purchase. In 1876 L. D. fenced the lot, leaving a gate for defendant's convenience; he also planted a small portion of it, and allowed soil to be taken from it to level it. In 1877 P. D. was declared insolvent, and S., the assignee in insolvency, filed a bill in chancery to set aside the deed of 1859 from P. D. to L. D., as having been made in fraud of creditors. In 1879 defendant contracted to purchase the lot from L. D. for \$2,400, on which he paid \$300. In 1880 a decree was obtained setting aside the deed of 1859, which was affirmed on rehearing. This was affirmed on appeal, defendant being surety for L. D. for the costs of the appeal. He had never paid any taxes on the lot. In 1880 nine feet of the lot were sold for taxes, and defendant became the purchaser; but it was redeemed.—Held, under these circumstances the defendant's possession was not such as to give him a title under the Statute of Limitations: that the plaintiff was not shewn to have been dispossessed, or to have discontinued the possession: that the agreement by defendant to purchase was evidence to preclude him from setting up a title by possession against the plaintiff, as was the fact of his having become security for L. D. in supporting his, L. D.'s, title. *Donovan v. Herbert*, 40 O. R. 635.—C. P. D.

In 1869 L. married G., his deceased wife's sister. G., having had a son by L., died in 1871, seized of certain lands of which L. remained in continuous possession until 1883, the time of action brought:—Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not to work tortiously against the heirs-at-law of the wife. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

In ejectment it appeared that the lot in question had been granted in 1812, with other lots, to M. A. P., M., and P. In order to prove the alleged conveyance of the 13th February, 1816, by M. C. to W., which had been lost, the plaintiff put in a memorial thereof, registered 19th December, 1820, signed by the grantee, including an undivided moiety in all the land in the patent with other lands. It was shewn also that W., in 1827, had mortgaged all the lands in this memorial with other lands, to a bank, which, in 1829, reconveyed them to the trustees under W.'s will: that in 1833, R. took a conveyance from the devisee of W. of three of the lots mentioned in the memorial, not including the lot in

question; and that in 1834, proceedings were taken in partition on the petition of the devisee of W., under which this lot was assigned to W. Possession had been held of this lot, not in accordance with the alleged lost deed, but by persons claiming under R.: but the court held that the evidence failed to prove such possession for forty years, or that it was taken with the knowledge of W. or his devisee. The plaintiff claimed under a deed from such devisee executed in 1873:—Held, that the plaintiffs claiming under W. were protected under C. S. U. C. c. 88, s. 3, as against the possession of R., his co-tenant, for less than forty years. *Van Velsor v. Hughson*, 45 Q. B. 252.—Q. B. D.; 9 A. R. 330.

In 1868 B. being the owner and occupant of the east half of lot one in the village of Oil Springs, took possession of the garden, etc, on the west half of such lot on which there was a dwelling-house occupied by a tenant and enclosed the land by a fence with his own lot; and in 1872 the house having been deserted by the tenant or occupant took possession of that also, repaired it and used it as a workshop. In the same year A. who was at one time the owner of such west half removed the doors and windows of the dwelling, and never afterwards returned to the premises. Thenceforward B. remained in undisturbed possession of the house and land, repairing and cultivating the same, and also paying the taxes levied thereon until in October, 1884, he sold the property to the defendant:—Held, that B. by virtue of such possession and through B.'s conveyance to him, the defendant, had acquired a good title under the Real Property Limitation Act. *Seale v. Johnston*, 13 A. R. 349.

The fact of there being no conveyances between successive occupants of land does not prevent a possessory title being acquired by virtue of their combined periods of possession, provided the possession has been of a continuous character against the true owner, and provided that the successive occupants claimed under each other in some sufficient way as in this case by virtue of a sale for value. The statute of limitations speaks of possession without reference to conveyances. *Simmons v. Shipman*, 15 O. R. 301.—Chy. D.

By an arrangement made within ten years before an action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability:—Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party. Per *Armour, C. J.*—At all events, upon the evidence, the possession of the defendant at the date of the conveyance, if any, was as tenant at will to the owners of the legal estate; and there was also evidence of an entry by D. sufficient to prevent the setting up by the defendant of any possession prior thereto. *McDiarmid v. Hughes*, 16 O. R. 570.—Q. B. D.

A lessee of a lot had for more than twenty years exercised acts of ownership over part of a lot adjoining, and now claimed to have acquired title from his landlord by possession to the said part, and brought this action of trespass against the present owner of the rest of the said adjoining lot:—Held, that his action must be dismissed, for although a tenant taking in land adjacent to his own by encroachment, must, as between himself and his landlord, be deemed *prima facie* to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third persons. *Brueya v. Rose*, 19 O. R. 433.—MacMahon.

See *Griffith v. Brown*, 5 A. R. 303, p. 1197; *Steers v. Shaw*, 1 O. R. 26, p. 1192; *Wulfin Woodstock Gas Co.*, 1 O. R. 630, p. 1199; *Miller v. Hamlin*, 2 O. R. 103, p. 1190; *Re Defoe*, 2 O. R. 623, p. 1185; *Faulds v. Harper*, 11 S. C. R. 639, p. 1191; *Adamson v. Adamson*, 12 S. C. R. 564, p. 1179; *Sherren v. Pearson*, 14 S. C. R. 581, p. 1198.

#### 4. As Against the Crown.

The Statute of Limitations was held not to be a bar to an action though brought by the crown in its capacity as trustee of the land in question in the suit. *Regina v. Williams*, 19 Q. B. 397, followed. *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511.—Chy. D.

The plaintiff set up that he had a right by prescription to keep and use a boathouse in front of his lot on the bank of the Ottawa river without being interfered with:—Held, that any structure on the water even if existing for twenty years, would be an interference with the the free use of the river reserved by the crown and the right to so interfere could not be acquired by lapse of time. The action was therefore dismissed. *Warin v. London, etc., Loan and Agency Co.*, 7 O. R. 706, distinguished. *Ratté v. Booth*, 10 O. R. 351.—Proudford. See *S. C.*, *sub nom. Booth v. Ratté*, 15 App. Cas. 188.

See *McQueen v. The Queen*, 16 S. C. R. 1.

#### 5. Tenants at Will.

The plaintiff's father, who lived in the township of T., owned a block of 400 acres of land, consisting respectively of lots 1 in the 13th and 14th concessions of the township of W. The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, to take what timber he required for his own use, or to help him pay the taxes, but not to give any timber to anyone else, or allow any one else to take it. He settled in 1849 upon the south half of lot 1 in the 13th concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one M. K. In December following he moved to the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north fifty acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by

possession. The judge at the trial found that the plaintiff entered into possession and so continued merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent up to remove plaintiff off the land, because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father:—Held, reversing the Court of Appeal, 4 A. R. 563, which had reversed the Court of Common Pleas (29 C. P. 449), that the evidence established the creation of a new tenancy at will within ten years. Per Gwynne, J.: That there was also abundant evidence from which the judge might fairly conclude as he did, that the relationship of servant, agent, or caretaker, in virtue of which the respondent first acquired the possession, continued throughout. *Ryan v. Ryan*, 5 S. C. R. 387. See *Heaward v. O'Donohoe*, 18 A. R. 529.

John C. being owner in fee of the land in question, sometime after 1854 placed his brother James C. in possession, rent free. In 1867 defendant having married a daughter of James C., went to live with the latter and occupied part of the house, at the instance of John C., who wished his niece to remain in the house and take care of her infirm mother. John C. died 22nd September, 1874, having devised the land to the plaintiff. James C. died in 1873 or 1874, and his wife about a year later, and the defendant and wife continued in possession. In 1875 one G. went to the house with the plaintiff's husband, with the view of renting it, when defendant shewed them over the house, and said if it was going to be rented he would rent it himself and pay as much for it as any one, and he spoke of buying it. The plaintiff having brought this ejectment in March, 1879:—Held, that plaintiff was entitled to recover as against defendant, who set up the Statute of Limitations. Per Hagarty, C. J.—The defendant was never tenant to John C. during the lifetime of James C. and his widow; and the statute did not begin to run in his favour till a year after the death of the latter. Per Armour, J.—The entry of the defendant in 1867 by John C.'s authority determined the tenancy at will of James C., theretofore existing, and a new tenancy at will by defendant and James C. thereupon began, which was determined by the death of James C.'s widow, when defendant became tenant at sufferance to the plaintiff, and her entry, by her husband, with G., acquiesced in by the defendant, was a sufficient entry to create a new tenancy at will and stop the running of the statute. *Cooper v. Hamilton*, 45 Q. B. 502.—Q. B. D.

An entry upon land under assertion of right, and verbal submission by the occupant, and consent to remain as tenant for the owner, create a new tenancy at will, and give a fresh point of departure under the Statute. Where the attention of the jury had not been sufficiently called to the question whether this took place on the premises, a new trial was granted. *Smith v. Keown*, 46 Q. B. 163.—Q. B. D.

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A. was let into possession of certain lands as tenant at will to B., in 1870, and B. died in 1878, having devised the lands to trustees in trust for A. for life, and then in trust for C., which devise A. in no way refused, but continued in possession ostensibly as before, and now claimed title by length of possession against the said trustees and C.:—Held, that A. must be presumed to have accepted the devise, and his retention of possession must be attributed to his rightful title under the devise; and therefore even if A. could be considered as tenant at will to his trustees, and capable of acquiring title by possession as against them and C., which under R. S. O. (1877), c. 108, s. 5, sub-s. 7, 8, he could not, yet on the death of B. a new tenancy at will was created, and a new period commenced for the running of the statute, which had not at the time of action brought, continued long enough to give the plaintiff title by possession. *Re Defoe*, 2 O. R. 623.—Boyd.

See *Workman v. Robb*, 7 A. R. 389; 28 Chy. 243, p. 1198; *Pearson v. Mulholland*, 17 O. R. 502, 514; *McDermid v. Hughes*, 16 O. R. 570, p. 1182.

#### 6. Tenants for Life.

See *Adamson v. Adamson*, 7 A. R. 592; 12 S. C. R. 563, p. 1188; *Ryan v. Kronsbein*, 12 O. R. 197, p. 588; *Young v. Midland R. W. Co.*, 16 O. R. 738.

#### 8. Tenants in Common.

Where one of several tenants in common enters and dispossesses a trespasser he is, as regards his co-tenants, in possession simply as any stranger would be; and such possession does not enure to the benefit of his co-tenants. Per Cameron, J.—The act of one co-tenant in so taking possession would be by virtue of his legal estate, and his so doing would enure to the benefit of his co-tenants; thus giving a fresh starting point for the statute to begin to run against them. *Shepherdson v. McCullough*, 46 Q. B. 573, p. 432, remarked upon, and as applied to the facts of this case, approved. *Harris v. Mudie*, 7 A. R. 414; 30 C. P. 484.

See *Kennedy v. Bateman*, 27 Chy. 380, p. 1194; *Heward v. O'Donohoe*, 18 A. R. 529.

#### 9. Possession By or Against Infants.

Where a person enters upon the lands of infants, not being a father or guardian, or standing in any fiduciary relation to the owner, and remains in possession for the statutable period, the rights of the infants will be barred. *Quinton v. Frith*, 1r. R. 2 Eq. 415, considered and not followed. *In re Taylor*, 28 Chy. 640.—Chy. D., reversing S. C., 8 P. R. 207.

Trustees, under a will executed by a woman who afterwards married, received on behalf of an infant devisee the rent of certain lands from the tenant. When the infant came of age the tenant paid the rent to her. Subsequently and after more than ten years had expired, since the trustees first received the rent, the heir-at-law of the testatrix claimed the land, on the grounds

that the will was revoked by the subsequent inter-marriage of the testatrix and that the Statute of Limitations did not run for or against an infant:—Held (without deciding as to the revocation of the will), that the possession of the trustees was the possession of the infant, and she thus acquired a good statutory title to the land. *Re Goff*, 8 P. R. 92.—*Stephens, Referee*.—Proudfoot.

See *Hughes v. Hughes*, 6 A. R. 373, p. 436, p. 1207; *Faulds v. Harper*, 9 A. R. 537, p. 1190; S. C., 11 S. C. R. 639, p. 1191.

#### 10. Land in Trust.

The defendant in consideration that his father would convey to him certain lands in the township of Caledon, undertook and agreed to convey to the plaintiff, a younger brother, 100 acres of land in the township of Artesmesia. The father conveyed the land to the defendant, but instead of his conveying to the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age:—Held, that under these circumstances the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the Statute of Limitations; but the defendant having denied the agreement to convey, which, however, was clearly established by his own evidence, the court (Blake, V. C.), on dismissing the bill, refused to give defendant his costs. *Ferguson v. Ferguson*, 28 Chy. 380.

J. by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows," etc.: "But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs and assigns, after the death of H., share and share alike." He then nominated P. executor of his will, "with full power and authority to act in the same." J. died in 1838, leaving H. and three children him surviving. P. took out probate. In 1846, H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which was retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will:—Held affirming the decision of Oslar, J. A., that P. could not be said to have been an express trustee within R. S. O. (1877) c. 108, s. 30, and that being so, the plaintiff's action was barred by the Statute of Limitations. *Johnston v. Kramer*, 8 O. R. 193.—Chy. D.

Held, that J. L. having been appointed by the Surrogate Court, guardian of her son, T. L., she thereby became an express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet that the guardianship ended and the trust ceased with

T. L.'s minority, and as after that J. L. dealt with the land in question as her own for some twenty-two years, she had acquired a good title to it by possession as against T. L.:—Held, also, that T. L., having in his pleadings set up that J. L. had been in possession for the said twenty-two years as his tenant, could not now obtain a new trial on the ground that he could show by evidence that she had been in as caretaker for him. *Semble*, per Proudfoot, J., that if J. L. had, after the minority of T. L. continued to manage the property for his benefit, she would then have been a constructive trustee for him, not an express one. *Hickey v. Stover*, 11 O. R. 103.—Chy. D., followed in *Clark v. Macdonell*, 20 O. R. 564, but not followed in *Kent v. Kent*, 20 O. R. 445.

On 23th July, 1833, J. M., by marriage settlement, conveyed certain property, including an hotel, to trustees to permit him to receive the rents for his life excepting a life annuity to his wife, and on his death, subject to such annuity, to pay annuities to each of his two daughters, S. M. and C. A. M., and subject thereto to divide the balance of the rents annually into three equal shares, and to apply one share to the support and education of the children of a deceased son, W. M. M.; another share to a son, R. D. M., and the third share to his daughter, F. E. C., with limitations over. On 27th March, 1860, by a decree in chancery, W. and O. were appointed trustees in the place of B. and P., and the trust estate was vested in them. J. M. died on the 14th of March, 1870. W. M. M.'s children all died in J. M.'s lifetime, and their said one-third share having thereby reverted to J. M., he disposed of the same by his will. On 10th May, 1882, judgment of the High Court was pronounced, directing the removal of W., the surviving trustee, that an account be taken, and appointing R. D. M. and R. C. trustees; and also directing that all lands, etc., and all other assets, both real and personal, now vested in W. as such trustee, be vested in R. D. M. and R. C. upon the several trusts in the said settlement and will. On the death of J. M., R. D. M. had entered into possession of the hotel and continued in such possession, receiving the rents to his own use without any question after the said judgment, and up to his death on 17th April, 1887. By his will and codicil, dated respectively 27th April, 1880, and 25th October, 1881, he devised to his executors his real estate, consisting of the said hotel property, upon trust to pay the rents to his wife for life, and after her death to divide the same equally among his children. In 1888, an action was brought by three of his children to have it declared that the hotel was vested in R. C., the surviving trustee, under the trusts of the settlement, etc.:—Held, that the action could not be maintained, for that when R. D. M. took possession of the hotel in 1870, he did not go in under the trustees, but adversely to them, and continued to so hold till his death, and the judgment of May, 1882, whereby R. D. M. was appointed one of the trustees, and the trust estate vested in them, could not be extended beyond its ordinary meaning so as to take away a property of which he had become the absolute owner, and put it back into the trust estate. *Murchison v. Murchison*, 17 O. R. 254.—Street.

See *Attorney-General v. Midland R. W. Co.*, 3 O. R., 511, p. 1183; *Re Goff*, 8 P. R., 92, p. 1186; *Faulds v. Harrier*, 11 S. C. R. 639, p. 1191; *Adamson v. Adamson*, 7 A. R. 592, *infra*; 12 S. C. R. 563; *Bank of Montreal v. Stewart*, 14 O. R. 482.

#### 11. Equitable Estates.

Held (affirming the judgment of Spragge, C., 28 Chy. 221), upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the equitable remainderman, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life. Per Burton, J. A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of the trustee. The provisions of the Statute of Limitations as regards equitable estates considered. Per Patterson, J. A.—Under the circumstances appearing in this case the plaintiff was entitled to recover in respect of the equitable estate. *Adamson v. Adamson*, 7 A. R. 592. See also, *S. C.*, 12 S. C. R. 563.

#### 12. Mortgage and Mortgagee.

The plaintiffs, the administrator and heirs-at-law of a mortgagee, filed their bill against the mortgagor on or before the 20th October, 1864. After service, and on the 15th November, 1864, an agreement was entered into between the parties, whereby the plaintiff took notes for the mortgage money, the first payable 1st June, 1866, and the others in the six following years, whereupon proceedings on the mortgage were suspended. The defendant made a payment in June, 1867, and died in 1869. The notes were not paid. The suit on 29th August, 1879, was revived against the infant heir of the mortgagor:—Held, that the claim was barred by R. S. O. (1877) c. 103, s. 23; but in case of the plaintiffs desiring to obtain the fruits of a judgment recovered against the original defendant, the bill was retained for a year as against the infant defendant, as he would be a proper party in a proceeding against the personal representative of his ancestor to enforce the judgment. *Ross v. Pomroy*, 28 Chy. 435.—Spragge.

The possession of a stranger which has not ripened into a title against the owner of land, will not enure to the benefit of him so in possession as against the mortgagee, so long as his interest is regularly paid by the owner. *Chamberlain v. Clark*, 28 Chy. 454.—Spragge.

When the right of action for entry or foreclosure is taken away by virtue of R. S. O. (1877) c. 108, s. 15, the title itself of the mortgagees is extinguished, and the right of action wholly disappears. *Court v. Walsh*, 1 O. R. 167.—Boyd.

A mortgagee who has suffered the statute to run before he asserts his right of entry cannot, by afterwards getting possession of the property, revive his title to it, but he is in as a mere trespasser. *Id.*



*and R. W. Co.,*  
8 P. R., 92,  
S. C. R. 639,  
7 A. R. 592,  
of *Montreal v.*

Held, affirming the judgment of the Chancery Division (1 O. R. 187), *Spragge, C. J. O., diss.*, that an assignment under the Insolvent Act, 1875, by an insolvent mortgagor does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagee against the land. *S. C., 9 A. R. 294.*

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The remedy by way of foreclosure or sale in mortgage suits is a proceeding to recover lands within the meaning of R. S. O. (1877) c. 108, s. 4. Therefore when a suit to foreclose a mortgage was commenced ten years and eight months after the date of the default in payment, and the plaintiff claimed payment of the mortgage debt, possession and foreclosure:—Held, that the only relief to which the plaintiff was entitled, was judgment upon the covenant for payment. *Fletcher v. Rodden, 1 O. R. 155.—Chy. D.*

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Where mortgagors in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular," the mortgaged land, habendum, "as and for all the estate and interest" of the grantors "in and to the same":—Held, sufficient to pass the fee to the grantees:—Held, also, the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, passed by the above deed to the grantees, and coupled with their own subsequent possession for the necessary period conferred on them an absolute title to the land by virtue of R. S. O. (1877) c. 108, ss. 15, 19. *Bright v. McMurray, 1 O. R. 172.—Boyd.*

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C., being the locatee of the crown, in 1860, mortgaged the north half and the south half of the land by two mortgages to McM. In 1865 he died. In 1870 and 1874, McM. assigned the mortgages respectively to D. In 1875 the patent of the north half issued to one Campbell, who paid the purchase money due to the crown on the whole lot, at the request of M. and A., the widow and son of C., and the patents of the east and west halves of the south half, issued to M. and A. respectively, without any intention (as shewn by the memorandum in the Crown Lands Department) to cut out the right, if any, of D. under his mortgage. In 1876, D., under the power in his mortgages, sold to L., who, in 1876, made a mortgage to the plaintiff, on which this suit was brought. M. and A. had, in the meantime, always occupied the land without paying principal or interest, and they claimed title by possession:—Held, affirming the judgment of the Court of Chancery, (27 Chy. 253), that M. and A. had, under the Statute of Limitations, acquired a title by possession. *Watson v. Lindsay, 6 A. R. 609.*

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H., being seized of land subject to a mortgage to L., dated 14th October, 1863, and to one M., dated 12th January, 1864, made an assignment to W. on 22nd November, 1864, under the Insolvent Act of 1864. On 23th January, 1865, he obtained his discharge. On 27th January, 1869, he obtained from M. an assignment of M.'s mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in this mortgage to F. H. to the use of his, the grantor's wife, his co-defendant, the consideration mentioned being \$250, which was credited on the mortgage. On 12th April, 1869, L. assigned his mortgage to M.

& B., who, on 28th March, 1873, assigned it to W. In 1879, H., having procured assignments to himself of most of the claims against his insolvent estate, presented a petition signed by himself to compel W. to wind it up. He alleged that M. & B. held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right, title, and interest of the insolvent in the land; and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. H. attended at the sale, and objected to the sale of the land, and bid for the same; but the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to H., as assignee, for the claims against his estate. H. and his wife had remained in undisturbed possession since his discharge in insolvency:—Held, reversing the decision of Oler, J., that upon the evidence, set out in the report of the case, the possession of H. and his wife must be considered to have been the possession, of H.; that the title of the first mortgagee was not extinguished, and that defendants were estopped by their conduct from disputing the plaintiff's title. *Miller v. Hamlin, 2 O. R. 103.—Q. B. D.*

The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments. Where H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation, the latter as between the debtors being security only, H. being bound to pay principal and interest, and expressly named as a person entitled to redeem both mortgages, W. never having made any payment at all:—Held, in a suit for foreclosure, that the period of limitation prescribed by section 30 of chapter 84, of the Consolidated Statutes of New Brunswick ran in respect of both mortgages from the date of the last payment of interest by H. Judgment of Supreme Court, 9 A. C. R. 637, reversed. *Lewin v. Wilson, 11 App. Cas. 639.*

The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage. Hence in a redemption suit, where the mortgagor died intestate in 1858, leaving children, the plaintiffs therein, some of whom, if alone, would have been barred as to redemption by R. S. O. (1877) c. 108, ss. 19, 20:—Held, since some of the children had not been adult for five years preceding the filing of the bill, none of the plaintiffs were barred by the statute. R. S. O. (1877) c. 108, s. 43, applies to mortgage cases as well as other cases. *Hall v. Caldwell, 8 U. C. L. J. 93 followed. Forster v. Patterson, 17 Ch. D. 132 and Kinsman v. Rouse, 17 Ch. D. 104 not followed. Faub v. Harper, 9 A. R. 537; 2 O. R. 405.—Chy. D. But see S. C., infra.*

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In a foreclosure suit against the heirs of a deceased mortgagor, who were all infants, a decree was made ordering a sale; the lands were sold

pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to L., one of the defendants to the suit, a bona fide purchaser, without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands brought by the heirs of the mortgagee some eighteen years after the sale and more than five years after some of the heirs had become of age:—Held, reversing the judgment of the Court of Appeal (9 A. R. 537), that the suit being one impeaching a purchase by a trustee for sale the Statute of Limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. (1877) c. 108, s. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L. Held, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants. *S. C.*, 11 S. C. R. 639.

Per Burton, J. A.—An action to redeem a mortgage is not an action to recover land, within the meaning of the Real Property Limitation Act. *S. C.*, 9 A. R. 537.

See *Hooker v. Morrison*, 28 Chy. 369, p. 1200; *Miller v. Brown*, 3 O. R. 210, p. 1200; *Donovan v. Heribert*, 9 O. R. 39; 12 A. R. 298, p. 122; *McDonald v. Elliott*, 12 O. R. 98, p. 1205; *Cameron v. Walker*, 19 O. R. 212, p. 1180.

### 13. Boundaries.

The plaintiff owned the east three-quarters and the defendant the west quarter of lot 25, in the 11th concession of Euphrasia. Sixteen years before suit, L., a surveyor, was employed by both plaintiff and defendant to ascertain the true division line between their lands. The parties cleared up to the line run by L. on each side of it and a fence was gradually built along the line as the clearing proceeded, but did not extend through the lot, and had not all existed for more than ten years. The plaintiff had notified defendant that, if any of his timber fell into the plaintiff's clearing, the defendant must remove it. Two years before suit another survey was made, at the plaintiff's instance, throwing the division line two chains ten links further west than L.'s line. On this line the plaintiff erected a fence which the defendant took down, and the plaintiff brought trespass:—Held, *Armour, J.*, dissenting, that there was ample evidence of the defendant's possession of the land bounded by the line run by L., so as to entitle him to claim according to that line produced from front to rear of the lot, and a verdict in his favour was upheld:—Per *Armour, J.*, adjoining proprietors cannot be bound by a line run between them, which is not the true line, except by such a contract as a court of equity would decree specific performance of: here there was

no evidence of any contract or intention to abide by L.'s line, whether it was a true line or not; and in such a case the statute will give a title only to such land as has been substantially enclosed for the whole of the statutory period. Per *Hagarty, C.J.*, that apart from the statute, the evidence did not shew with sufficient clearness, as a matter of survey, that defendant had trespassed on his land. *Shepherdson v. McCullough*, 46 Q. B. 573.—Q. B. D.

Thirty or forty years before action a blazed line had been run between the lots of plaintiff and defendant by S., a surveyor, along part of which a fence had been erected. The parties respectively cut timber and exercised acts of ownership on the lands on each side of and up to the blazed line. The plaintiff swore that although he and his father had been governed by this line and never claimed or went beyond it, it was always their intention to dispute it when they should be able to establish the true line. The judge at the trial found that there was sufficient evidence of defendant's occupation of the land up to the blazed line to extinguish the plaintiff's title:—Held, *Armour, J.*, dissenting, that the verdict was right. Title by possession to wild land can be made out otherwise than by actual enclosure. *Steers v. Shaw*, 1 O. R. 26.—Q. B. D.

The plaintiff and M., his next adjoining neighbour, in 1868, employed a surveyor to run the line between his land and that of M. The line drawn ran through a wood. For more than ten years the plaintiff was in the habit of cutting timber up to the said line, and he and the owners of the adjoining land recognized it as the division line:—Held, that this was sufficient occupation by the plaintiff to give him a good title by possession up to the said line, whether it was the correct line or not. *Harris v. Mudie*, 7 A. R. 414, distinguished. *McGregor v. Keiller*, 9 O. R. 677.—Proudfoot.

In an action for damages by trespass by McI. on M.'s land and by closing ancient lights defendant claimed title in himself and pleaded a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out the pleadings in reference to lights and drains, and to try the question of boundary only:—Held, affirming the judgment of the Supreme Court of Nova Scotia, *Ritchie, C.J.*, and *Gwynne, J.*, dissenting, that independently of the conventional boundary claimed by the defendant, the weight of evidence was in favour of establishing a title to the land in question in the defendant, and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years. Semble, that if it was open to him such user was not proved. *Mooney v. McIntosh*, 14 S. C. R. 740.

See *Cain v. Junkin*, 6 O. R. 532; 13 A. R. 525, p. 486.

### 14. Easements.

#### (a) Generally.

Held, *Armour, J.*, dissenting, that the Ontario Act (R. S. O., 1877, c. 108), reducing the

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period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way in alieno solo, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction. *Mykel v. Doyle*, 45 Q. B. 65.—Q. B. D. See *McKay v. Bruce*, 20 O. R. 709.

Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months. The propriety of such a rule in the towns of this province remarked upon and questioned. The case of *Flight v. Thomas*, 11 A. & E. 688; 8 Cl. & F. 231, commented on and followed. *Burnham v. Garvey*, 27 Chy. 80.—Spragge. But see *R. S. O. (1887), c. 111, s. 36*.

The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H. who owned it. H. had excavated his land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built upon oak planks laid about one foot under the ground by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term. In 1856, however, he acquired the fee, and in 1870 he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H., from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way:—Held, that owing to the unity of seizin of S., there had not been twenty years continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant. *Dackus v. Smith*, 5 A. R. 341.

A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During such unity of possession the running of the Statute of Limitations is suspended. *Stohart v. Hilliard*, 19 O. R. 542.—Boyd.

Right of way. See *Maughan v. Casei*, 5 O. R. 518; *Duncan v. Rogers*, 15 O. R. 699; 16 A. R. 3.

Party walls. See *Jamen v. Clement*, 13 O. R. 115, p. 209.

See *Wells v. Northern R. W. Co.*, 14 O. R. 594.

### 15. Fraud.

The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took

no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The court, on a bill filed by the other tenants in common asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill, with costs. Whether the sale under execution was operative or not, the defendant having held possession ever since, claiming the premises as absolute owner, the title by virtue of the Statute of Limitations ripened into a title in his favour. *Kennedy v. Bateman*, 27 Chy. 380.—Blake.

One G. in 1873 made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance, brought this action to have the said conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors:—Held, that the plaintiff was entitled to the relief asked. A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years. *Boyer v. Gaffield*, 11 O. R. 571.—Boyd.

A subsequent creditor cannot uphold an action to set aside a voluntary conveyance under 13 Eliz. c. 5, merely on the ground that a debt of prior date to the conveyance is still unpaid, if such prior debt has become barred by lapse of time. *Struthers v. Glennie*, 14 O. R. 726.—Proudfoot.

See *McGregor v. McGregor*, 27 Chy. 470, p. 1196; *Faulds v. Harper*, 11 S. C. R. 639, p. 1191.

### 16. Servant or Caretaker.

B. entered into possession of a small portion of a lot of land which he had fenced and cultivated, the lot being in a state of nature, and upon the agent of the owner discovering B. to be so in possession suffered B. to remain there, he agreeing to look after the property in order to protect the timber; and B. subsequently assumed to sell the whole to one J., his grandson. On a bill filed by the owner, the court held that under the circumstances the Statute of Limitations did not run in favour of B. so as to give him a title by possession, and that J. was not entitled to the benefit of the defence of "purchase for value without notice," he having omitted to allege that B. was seized; that J. believed he was seized; that B. was in possession, and that the consideration for the transfer by B. to himself had been paid. Subsequently, and in 1878, the plaintiff's agent again visited the property, and obtained B.'s signature to a memorandum agreeing to hold possession and look after the property for the plaintiff:—Held, a sufficient recognition of the title of the plaintiff, and that the defendants could not put him to proof thereof. *Greenhields v. Bradford*, 28 Chy. 299.—Spragge.

See *Ryan v. Ryan*, 5 S. C. R. 387, p. 1184; *Hewards v. O'Donohoe*, 18 A. R. 529; *Hickey v. Stover*, 11 O. R. 106, p. 1185.

### 17. Actual or Constructive Possession.

The judgment of the Court of Common Pleas (30 C. P. 484) affirmed as regards the right of the defendant under the Statute of Limitations to that portion of the land of which actual possession had been shewn for forty years; but varied by entering judgment for the plaintiff for the rest of the land sued for. The doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of, by fencing or cultivating, for the requisite period. (Cameron, J., dissenting.) *Harris v. Mudie*, 7 A. R. 414.

In 1811 P. the owner of certain land, sold it to D. who went into possession and occupied till 1827 or 1828, when he was turned out by the sheriff under legal proceedings, taken by Dufait, who was put in possession, and remained in possession until 1864, when he conveyed to O. through whom the plaintiff claimed. D.'s actual possession had been only of about ten acres:—Held, that D.'s possession was of the whole land; and that he could not be treated as a squatter so as to enable him only to acquire a title to the ten acres actually occupied. The plaintiff objected that the evidence of the recovery by legal proceedings was inadmissible, because no judgment was proved; and not being proved was no evidence against him but:—Held, that though this might be so if the plaintiff's title were being inquired into, it was admissible for the defendant in respect of his possessory title. *Robertson v. Daley*, 11 O. R. 352.—C. P. D.

<sup>2</sup> See *Steers v. Shaw*, 1 O. R. 26, p. 1192; *Cain v. Junkin*, 6 O. R. 532; 13 A. R. 525, p. 486; *Pearson v. Mulholland*, 17 O. R. 502.

### 18. Adverse Possession.

In an action for the recovery of land it appeared that the land was granted by the crown in 1838 to plaintiff's mother, who was then a married woman, and who had by her husband issue born alive and capable of inheriting the estate. The patentee died in 1856; her husband lived till 1883. Neither of them, nor any of their heirs-at-law, were ever in possession. Defendant claimed by possession, which began in 1853, and had continued thenceforward without interruption:—Held, following *Doe Corby v. Bramston*, 3 Ad. & El. 63, that the patentee having been dispossessed within the terms of the statute, R. S. O. (1877) c. 108, s. 5, in 1853, more than twenty years before this suit was commenced, the action was barred by section 44 of that Act, notwithstanding the continuation until 1883 of the estate by the curtesy of plaintiff's father. *Hicks v. Williams*, 15 O. R. 228.—Q. B. D.

### 19. Exclusive Possession—Possession By or Among Relatives.

Sometime before 1863 the defendant M. at the solicitation of his father and mother went into

possession of 300 acres of land, 100 acres of which were the estate of the mother, and cultivated the same relying on the promise and agreement of his parents to give him a conveyance. In 1866 the mother died without having executed any deed of her 100 acres, and in October of that year the father, in the belief that he was heir to his wife, executed a conveyance to M. of the whole 300 acres, and which M. executed as grantee. The father died in 1873, and M. continued to reside on the property with the knowledge of his several brothers and sisters until 1877, when, owing to objection raised by a railway company who desired to obtain a deed of a portion of the 100 acres, it was discovered that the deed of 1866 had not effectually conveyed that portion belonging to the mother, and thereupon the defendant obtained a deed of quit claim from the several heirs. In 1878 a bill was filed by the heirs impeaching this deed as having been obtained by fraud, and the court being satisfied that the same had been obtained improperly set it aside with costs; but ordered M. to be allowed for his improvements, as having been made under a bona fide mistake of title, he accounting for rents and profits since the death of the father; and:—Held, that under the circumstances M. could not avail himself of the statute, as up to the death of his father in 1873, he was rightfully in possession under the deed from the father which stopped the running of the statute against the heirs of the mother and which, though void as a deed in fee, was effectual to convey the father's interest as tenant by the curtesy. *McGregor v. McGregor*, 27 Chy. 470.—Spragge.

In 1851 the defendant's father bought for defendant the land in question, and in pursuance of his instructions, to prevent the defendant disposing of the land, the deed, which was registered, was made to defendant's son W., then about twelve years old. The defendant and his family thereupon took possession, and lived there up to the present time, the defendant being assessed and paying the taxes. The family residence, with the garden and orchard, which was fenced off from the rest of the land, and comprised from two to four acres, was always deemed to be the defendant's special property, and he had always exclusive possession thereof, with the consent of the others. W. resided with his father for several years, and then went to the United States, but returned in 1869, when he conveyed by deed in fee simple, which was registered, to one H., his step-brother, who had full knowledge of all the facts and circumstances, and who had been working the land on shares with the defendant and another. Defendant complained to him of the sale and denied W.'s right to sell, whereupon it was arranged that things were to go on as before, and defendant was to have his share. H., in 1870, and again in 1874, without the defendant's knowledge, mortgaged the land, by mortgages duly registered, to the plaintiffs, who had no notice or knowledge of any of the circumstances, or of the defendant's possession. In February, 1881, ejectment was brought by the plaintiffs:—Held, that the plaintiffs, being purchasers for value without notice, claiming under the registered paper title, were under R. S. O. (1877) c. 111, s. 81, entitled to recover, except as to the house and plot, to which the defendant by his exclu-

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live possession had acquired a title under the  
Statute of Limitations. *Canada Permanent  
L. and S. Co. v. McKay*, 32 C. P. 51.—C. P. D.

In 1870, the defendant, under agreement  
therefor with his father, the owner of a farm,  
went into possession of a certain portion thereof,  
and remained in possession sixteen years. The  
exact nature of the agreement did not appear,  
but it pointed to the ownership in defendant of  
the portion occupied. In 1876, the father exe-  
cuted a mortgage of the whole of the farm to  
the L. & C. Loan Co., which was witnessed by  
defendant, who made the affidavit of execution  
on which the mortgage was registered. The de-  
fendant swore that he was not aware of the con-  
tents of the mortgage, nor that it included the  
portion of which he was in possession. In 1882  
the father made a mortgage to the plaintiffs also  
of the whole lot, and on default the plaintiffs  
brought an action to recover possession of the  
portion occupied by defendant:—Held, that the  
evidence shewed that the defendant had been in  
exclusive possession of the land occupied by him  
for the statutory period so as to acquire a title  
thereto by possession; and the fact of his being  
a witness to the mortgage to the L. & C. Co., and  
its subsequent registration, under the circum-  
stances, did not by virtue of section 78 R. S. O.  
(1877) c. 111, create an estoppel. *Western Canada  
Loan Co. v. Garrison*, 16 O. R. 81.—C. P. D.

## 20. Entry or Claim.

Where the true owner of land in exercise of  
his right enters upon any portion of the land  
which is not in the actual possession of another  
the entry is deemed to refer to the whole lands,  
*Great Western R. W. Co. v. Lutz*, 32 C. P. 166.—  
C. P. D.

In order to gain convenient access to the up-  
per rooms of their house the plaintiffs construct-  
ed a wooden platform, stairway and landing, on  
the outside of the house on the defendant's land.  
The structure was composed of planks laid upon  
blocks or scantling resting upon the ground, but  
the head of the stairs was supported upon posts  
which rested upon the ground. The platform  
and stairway were open to every one, including  
the defendant, and there was no bar or gate to  
prevent defendant from entering on his property.  
The defendant took no proceedings against the  
plaintiffs until the expiration of ten years:—  
Held, reversing the decree of Spragge, C., (26  
Chy. 503), that the plaintiffs had not such posses-  
sion of the land covered by the structure as by  
force of the Statute of Limitations to vest in  
them a title in fee simple; but that even if the  
statute had commenced to run it was stopped  
by the fact, as stated in the evidence, that dur-  
ing the ten years the defendant had temporarily  
taken up the platform, and used the land for  
his own purposes. It was held on the evidence  
that this was not shewn to have been done by  
the plaintiffs' permission; but Quare, per  
Patterson, J. A., whether if it had been it would  
not still have interrupted the operation of the  
statute. *Griffith v. Brown*, 5 A. R. 303.

R., in 1867, permitted the defendant L. to  
occupy certain lands upon an alleged agreement  
that in lieu of rent he should make improve-  
ments such as were required for L.'s trade, but

not defined as to extent or value, of which R.  
would obtain the benefit, and that L. would  
give up possession when R. required it—there  
being no agreement for any term. R., between  
1867 and 1879, went occasionally on the place  
and spoke to L. about the improvements, telling  
him to make such improvements as he chose.  
In 1879, after L. had become financially invol-  
ved, he restored the possession of the premises to  
R.:—Held (Burton, J. A., dissenting), that L.  
could not have set up a title under the Statute  
of Limitations; nor could the plaintiffs, his cre-  
ditors, claim the land as having been so acquired  
by him. Per Spragge, C. J., and Osler, J.—The  
entries of R. in going upon the land, were suffi-  
cient to prevent the statute from running; and  
per Spragge, C. J., R. might be said to have been  
in receipt of the "profits" of the land, through  
its increase in value by reason of the improve-  
ments. Per Patterson, J. A.—The evidence  
shewed that by the successive improvements  
made as they were, the relation of landlord and  
tenant was continued or created anew, even  
though the improvements to be made were not  
strictly in lieu of rent, nor could be treated as  
profits of the land. Per Burton, J. A.—L. upon  
the evidence entered as tenant at will; there  
was no receipt of "profits" within the meaning  
of the statute; and no entry inconsistent with  
the lessee's title; and L. having acquired a title  
by possession the land was liable for his debts.  
If L. had acquired a title under the statute, his  
giving up possession again to R. would not re-  
vest the estate. *Workman v. Robb*, 7 A. R.  
389; 28 Chy. 243.

Actual occupation of land is not essential to  
give a right to maintain trespass by one who has  
the legal title. It is sufficient that he enter upon  
the land so as to put himself in legal possession  
of it:—Held, that putting up boards on the land  
stating that the land was for sale, was a sufficient  
entry upon his part to vest the legal possession  
in him to enable him to maintain trespass. *Don-  
nan v. Herbert*, 4 O. R. 635.—Wilson.

Isolated acts of trespass, committed on wild  
lands from year to year, will not give the tres-  
passer a title under the Statute of Limitations,  
and there was no misdirection in the judge at  
the trial of an action for trespass on such land  
refusing to leave to the jury for their considera-  
tion such isolated acts of trespass as evidencing  
possession under the statute. To acquire such  
title there must be open, visible and continuous  
possession known, or which might have been  
known to the owner, not a possession equivocal,  
occasional or for a special or temporary purpose.  
*Doe d. Des Barres v. White* (1 Kerr N. B. 595),  
approved. The judgment of the court below  
affirmed, Gwynne, J., dissenting on the ground  
that the finding of the jury on the question sub-  
mitted to them was against evidence, and fur-  
ther that the acts done by the defendant were  
not mere isolated acts of trespass, but acts done  
in assertion of ownership during a period ex-  
ceeding thirty-five years, and the evidence of such  
acts should have been submitted to the jury and  
the jury told that if they believed this evidence  
they should find for the defendant. *Sherrin v.  
Pearson*, 14 S. C. R. 581.

In 1860 D. M., the then owner of certain  
lands, conveyed to A., who in 1861 conveyed to  
N., through whom plaintiff claimed. D. M.



continued in possession, and, at his request, his sister M. B. came and resided with him, and took charge of the house and their sister S. M., who was subject to fits, which to some degree affected her mind. In 1862 D. M. died, the two sisters remaining in possession, M. B. taking charge and control. In 1868 defendant, the sisters' nephew, came to reside with them, M. B. giving him charge of the place, upon which he subsequently erected buildings. In 1875 N. went upon the land in assertion of his title as owner, having previously threatened to bring ejectment, and was induced to execute a life lease in favour of M. B. and S. M., which was accepted by S. M., who executed the lease, but not by M. B., who refused to do so; S. M., M. B., and defendant still continuing to reside on the premises. M. B. died in 1879 and S. M. in 1886. The defendant continued to reside thereon. In 1887 the plaintiff brought ejectment against defendant, who claimed a title by possession—Held, that N. having entered and taken possession, and placed S. M. in possession as his tenant under him, her possession was his and his successors in title; and, therefore, plaintiff was entitled to recover. *Arnold v. Cummer*, 15 O. R. 382.—C. P. D.

See *Hooker v. Morrison*, 28 Chy. 369, p. 1200; *Cooper v. Hamilton*, 45 Q. B. 502, p. 1184; *Walten v. Woodstock Gas Co.*, 1 O. R. 630, *infra*; *McDiarmid v. Hughes*, 16 O. R. 570.

## 21. Discontinuance.

On 8th April, 1854, the plaintiff acquired by conveyance the fee simple of a vacant piece of land, but did not enter. Shortly after a railway company surveyed and staked out a portion of it, with other land required for their railway, and the sum to be paid by them to the plaintiff was settled by arbitration under the statute, but the company never paid or took possession. On 31st December, 1857, the plaintiff recovered judgment against the railway company, and under proceedings in Chancery sold their interest in the land to the defendant P., who did not take actual possession, though he went upon the land prior to 1860, and examined the clay to see whether it was fit for brick making. He did not fence or cultivate it, though it was fenced on two sides by the adjoining proprietors. He also put up a board on it with an advertisement that the lot was for sale, signed by him, but when was not shewn, and it was knocked down and not replaced. In 1876 P. sold the land to the defendant company, who immediately went into possession and made valuable improvements. The railway company and the defendants paid the taxes from 1853.—Held (Cameron, J., dissenting), that neither the railway company nor P. had such a possession of the land as extinguished the title of the plaintiff, who was therefore entitled to recover the land. Per Cameron, J.—There had been a discontinuance by the plaintiff, and sufficient evidence of an adverse claim to defeat the plaintiff's title. *Walten v. Woodstock Gas Co.*, 1 O. R. 630.—Q. B. D.

See *Hooker v. Morrison*, 28 Chy. 369, p. 1200; *Griffith v. Brown*, 5 A. R. 303, p. 1197; *Jessup v. Grand Trunk R. W. Co.*, 28 Chy. 583; 7 A. R. 128; *Workman v. Robb*, 7 A. R. 389; 28 Chy. 243, p. 1198.

## 22. Acknowledgment of Title or Payment of Rent.

The father of the defendant was in wrongful possession of land from 1844 to 1862, when P. the owner mortgaged to A., who assigned to the plaintiff, and interest was regularly paid thereon by the mortgagor until two years before the institution of this suit. In 1865 the defendant wrote to P. concerning a purchase of some timber on the lands, and P.'s agent went over and measured the timber out, which was sold to the defendant; and in 1866 P. sold timber on the land to strangers.—Held, (1) that such entries upon the land, which were sufficient to constitute trespass if unlawful, interrupted the running of the statute in favour of the defendant, who was tenant at will; and that the written application of the defendant to P. was a sufficient acknowledgment of title to prevent the running of the statute as against P., and (2) that the possession of the defendant before the creation of the mortgage which was insufficient at that time to bar the mortgagor, did not run against the plaintiff. *Hooker v. Morrison*, 28 Chy. 369.—Spragge.

An acknowledgment of title by a person in possession of land, given to a mortgagor, is sufficient to prevent the occupant acquiring title under the statute, so as to bar the rights of the persons entitled. For this purpose it is not necessary that the mortgagor should be acting as agent of the mortgagee; the mortgagor for such purpose is a person entitled under the statute. *Ib.*

A., in 1835, went into possession of land upon the invitation of P., who promised to give him a deed, but subsequently refused to do so. A. thereupon determined to remain upon, and succeeded in making a living from the land. P. died three years afterwards, having devised the land to A. and his wife for their joint lives, with remainder to J., one of the contestants. A. occupied the land until 1877, when he executed a conveyance thereof in fee to the petitioner.—Held, on appeal, affirming the decision of the referee of titles allowing the claim of the contestants, that A. by his entry had become tenant at sufferance to P., and that as A. was aware of the devise to himself, and never did any act shewing a determination not to take the estate so given to him, the estate for life had vested in him, and that he or his grantee could not claim the fee by virtue of A.'s possession. Some thirty years after A.'s entry he granted part of the land to one B., and J. joined in the conveyance.—Held, a sufficient admission of the title of J. as a remainderman, and so an admission that the will was operative on the land; J. having no claim to the land otherwise than under the will. *Re Dunham*, 29 Chy. 258.—Proudfoot.

Where a mortgagee in possession wrote, in 1871, to the holder of the equity of redemption as follows: "The amount due me in November, 1853, on your mortgages was as follows" (stating the amounts). "No part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest."—Held, a sufficient acknowledgment of title to give a new starting point to the statute from the date of the letter. *Miller v. Brown*, 3 O. R. 210.—Proudfoot.

## Payment of

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Morrison, 28

A tenant agreed to pay for certain premises six dollars a month and taxes, and for some eighteen years remained in possession paying the taxes to the municipality and paying nothing else. The tenant after the expiration of this period gave to his landlord an acknowledgment of indebtedness for rent for the whole period:—Held that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accruing after he had so acquired possession by giving to the landlord an acknowledgment of indebtedness in respect of rent. *Davis v. McKinnon*, 31 Q. B. 564, observed upon. Judgment of the Queen's Bench Division, 16 O. R. 393, reversed, and that of Street, J., at the trial, restored. *Finch v. Gilray*, 16 A. R. 484. Followed in *Coffin v. North American Land Co.*, 21 O. R. 80.

See *Greenshields v. Bradford*, 28 Chy. 299, p. 1198.

## 23. Avoidance by Legal Proceedings.

Although according to the ruling in *Adamson v. Adamson*, 25 Chy. 550, a plaintiff will not be allowed to amend so as to set up a title acquired after the filing of the bill, yet where by error in the conveyance the west instead of the east half of the lot was conveyed, it would seem, (per *Proudfoot, V. C.*) that it would not be any infringement of that rule to allow an amendment setting up the fact that since the filing of the bill the error had been corrected by a new conveyance, and making the necessary amendments in the bill in accordance therewith. But the bill having been amended in one part of it in this respect, leaving the erroneous description of the land in the earlier part of it, the court on rehearing held that the suit had not been instituted with regard to the east half so as to prevent the defence of the Statute of Limitations being set up, and affirmed the decree of *Blake, V. C.*, 25 Chy. 552. *Dumble v. Larush*, 27 Chy. 187.—Chy. D.

## II. PERSONAL ACTIONS.

## 1. Accounts.

Where A., one of two residuary legatees and executors, left the collection of the outstanding assets of the deceased entirely to B., the other residuary legatee and executor, under an agreement between them, by which B. was to remit a moiety when a certain specified amount was collected, and it appeared that the residue was ascertained or could have been ascertained within a year from the testator's death:—Held, that A.'s claim to what was so collected more than ten years before action brought was barred by the Statute of Limitations, but as to what was got in by B. afterwards A. was entitled to recover:—Held, also, that the fact of the fund in B.'s hands having been from time to time drawn upon to make good deficiencies in the general legacies, so that the residue was not precisely and for all purposes ascertained, did not prevent the bar of the statute; neither was there any fiduciary relationship between A. and B., such as to have that effect. *Quære*, whether, if the money collected by B. could have been specifically traced and fol-

lowed, the court would allow this to be done, notwithstanding the lapse of ten years:—Held, lastly, that the bar of the statute applied not only to assets distributed by B. but also to assets retained by him. *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 3 O. R. 361.—Chy. D.

One of two executors and co-residuary legatees got in portions of the residuary estate, and as to such his estate was held liable as for a legacy to the other residuary legatee (19 C. L. J. 95). Some of the moneys so got in were reinvested, and afterwards came again into the hands of such co-residuary legatee in administering the estate:—Held, as to the latter moneys, the relationship of debtor and creditor applied, but that by reason of the Statute of Limitations the account could not extend further back than six years. Some of the residuary estate consisted of lands, which the co-residuary legatee as tenant in common occupied, or got in the rent and profits of:—Held, (1) that the account extended only to whatever had been paid or given by tenants or occupants of the joint property more than the co-tenant's just share or proportion. (2) That such co-tenant was not liable for the profits or produce taken by him from the common property, nor for his enjoyment of such property when there was no exclusion or ouster. (3) That the six years' bar of the Statute of Limitations applied to such claim. *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4.—*Hodgins, Master in Ordinary*.

Where in an action for a partnership account on a contract for work done on a canal, it appeared that the business had been closed, the books made up, a final estimate obtained, and the plant sold, more than six years before the commencement of the action:—Held, that the plaintiff was barred by the Statute of Limitations, and the fact that within the six years, a certain sum had been paid over to the plaintiff's solicitors, but without his knowledge, as the full amount of the partnership profits due to the plaintiff, could not operate to take the case out of the statute. *Cotton v. Mitchell*, 3 O. R. 421.—*Ferguson*.

S. was an assignee for the benefit of creditors of J. E. and G. was similarly assignee of E. H. E. Before the assignments J. E. was a creditor of E. H. E. for money lent and as a holder of certain notes. After the assignments G. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for payment of the judgment. G. set up the Statute of Limitations. On a reference to a Master he found: (1) That the judgment was an answer to the defence of the Statute of Limitations; (2) That there had been a balancing of accounts between J. E. and E. H. E. as to the account before E. H. E.'s assignment and as to the notes after E. H. E.'s assignment, and that each balancing of accounts was such a balancing as prevented the operation of the Statute of Limitations; (3) That before the assignments and within six years of action brought E. H. E. paid several sums to J. E. on general account, and that such payments as far as the general account outside of the notes was concerned prevented the operation of the Statute of Limitations; (4) That E. H.

E. agreed to pay interest to J. E., and he allowed it to him; (5) That he disallowed some of the items of the judgment as not having been proved outside of the judgment; (6) That he disallowed certain sums of money omitted from the plaintiff's claim—although proved to his satisfaction, as outside the scope of the reference. On appeal from the master it was:—Held, that the judgment recovered against E. H. E. after his assignment in an action to which G. was not a party was not even *prima facie* evidence against G., *Eccles v. Lowry*, 23 Ch. 167, considered. That the balancing of accounts, before the assignments, upon the general account, and also the payments on account were sufficient to prevent the operation of the statute. That the balancing of accounts, after the assignments, as to the notes did not prevent the operation of the statute. That by reason of the payments made on general account being appropriated to the account of the whole indebtedness including the notes, the latter were not barred by the statute. That the interest was properly allowed as it was included in the balancing of accounts and the notes were payable with interest. *Stewart v. Gage*, 13 O. R. 458.—Proudfoot.

## 2. Breach of Promise of Marriage.

See *Costello v. Hunter*, 12 O. R. 333, p. 864; *Grant v. Cornock*, 16 O. R. 406; 16 A. R. 532, p. 861.

## 3. Interest.

Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid. Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered. *Wiley v. Ledgard*, 10 P. R. 182.—Hodgins, *Master in Ordinary*.

See *Crone v. Crone*, 27 Ch. 425, p. 1207.

## 4. Judgments.

To an action on a foreign judgment recovered in the Supreme Court in New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof:—Held on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation is governed by the *lex fori*, and not by the *lex loci contractus*. *North v. Fisher*, 6 O. R. 206.—Rose.

Judgment was recovered in 1856. On the 23rd of October, 1869, an order was made by a judge in chambers to revive by entering a suggestion on the roll under the C. L. P. Act, and the suggestion was entered on the 22nd January, 1870, but no execution issued after that date. On the 6th December, 1884, an order was made under Rule 355, O. J. Act, (Con Rule 885) for leave to the plaintiff to issue execution:—Held, that the entry of a suggestion under the C. L. P. Act was a judgment of the court and gave a new starting point for the Statute of Limitations to run from, and that the period of limitation in the case of judgments in personal actions is twenty

years under R. S. O. c. 61, and not ten years under R. S. O. c. 128, which relates to judgments as liens on land. *Allan v. McTavish*, 2 A. R. 278, and *Boice v. O'Loane*, 3 A. R. 67, commented on and followed:—Quare, per Rose, J., whether there is any period fixed by the statute beyond which the court may not have power to allow execution to be issued. *McCullough v. Sykes*, 11 P. R. 337.—Dalton, *Master*,—Rose.

The plaintiff recovered judgment against the defendants on the 3rd of November, 1863, and the last execution issued thereon was returned in September, 1865. More than twenty years afterwards the plaintiff moved for leave to issue execution against the surviving defendant, but no evidence was given of any part payment on account of the judgment or acknowledgment of liability thereon within that period:—Held, that if the motion was necessary it had been rightly refused:—Quare, whether it was necessary to obtain leave to issue execution upon, or to revive the judgment, execution having been in fact issued and returned within six years from its recovery. *Allan v. McTavish*, 2 A. R. 278; *Boice v. O'Loane*, 3 A. R. 167, commented on. *McMahon v. Spencer*, 13 A. R. 430.

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At that time the plaintiff's father was dead and no personal representative of his estate had been appointed. On the 4th November, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R. by his statement of defence put the plaintiff to the proof of his position and title to sue on the judgment, and set up, amongst other defences, the Statute of Limitations, R. S. O. (1887) c. 60.

Held, that the widow was the person lawfully entitled to administer, and as she had renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed:—Semble, also, that an objection raised at the trial that L. was not before the Court was a valid one; for an action on a joint judgment is not different in principle from an action on a contract against joint contractors. *Chard v. Ras*, 18 O. R. 371.—Boyd.

See *Stewart v. Gage*, 13 O. R. 458, p. 1203.

## 5. Libel and Malicious Prosecution.

See *Mayor of Montreal v. Hall*, 12 S. C. R. 74.

## 6. Money Charged Upon Land.

Held, that an action on a covenant in a mortgage for payment of the mortgage money, does not come within R. S. O. (1877) c. 108, s. 23, limiting suits for the purpose therein mentioned

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to ten years. *Allan v. McTavish*, 2 A. R. 278,  
followed in preference to *Sutton v. Sutton*, 22  
Ch. D. 511, and *Fearnside v. Flint*, 22 Chy.  
579. *McDonald v. Elliott*, 12 O. R. 98.—Rose.

See *Crone v. Crone*, 27 Chy. 425, p. 1207; *Simp-*  
*son v. Corbett*, 5 O. R. 377; 10 A. R. 32, p. 727;  
*Mitchell v. Holland*, 16 S. C. R. 687, p. 1206.

#### 7. Money Had and Received.

See *Baldwin v. Kingstone*, 16 O. R. 341; 18 A.  
R. 63, p. 594.

#### 8. Executors and Trustees.

Where the estate of a deceased person is in-  
solvent, the provisions of the Act respecting  
trustees displace any right on the part of the  
executor to retain in full; and as against an ex-  
ecutor claiming as creditor, any other creditor  
may set up the Statute of Limitations. *Re Ross*,  
29 Chy. 385.—Boyd.

In an action by the plaintiff against the de-  
fendant as administrator of his deceased brother  
W. G. as to an amount of \$800 which the plain-  
tiff alleged that W. G. received for her from  
another brother, S. G., also deceased, the evi-  
dence shewed that S. G. at the time of his  
death directed W. G., to whom he left the rest  
of his property, to pay the plaintiff the \$800,  
and W. G., after S. G.'s death, informed the  
plaintiff that he was taking charge of the  
money for her:—Held, that W. G. was a trustee  
for the plaintiff under an express trust, and  
therefore, that under the O. J. Act, s. 17, sub-s.  
2, the Statute of Limitations would not consti-  
tute a bar to the claim. *Cook v. Grant*, 32 C.  
P. 511.—C. P. D.

A testator directed a sum of money to be in-  
vested, the interest whereof was to be employed  
in endeavouring to discover his brother, to  
whom the money was to be paid if discovered  
within five years from the death of the testator,  
and if not so found the amount to be paid to  
M. C. The executors took the bond of the per-  
sons liable to pay the amount to the estate, and  
subsequently an instalment payable under such  
bond was recovered by the executors and paid  
over to M. C. Afterwards the balance was re-  
covered by one of the executors, who invested it  
in his business, and sought to defeat a suit to  
compel payment of the amount at the instance  
of the personal representative of M. C., by set-  
ting up the Statute of Limitations; more than  
ten years having elapsed since M. C. had be-  
come entitled to the bequest:—Held (affirming  
the decree of the court below, 27 Chy. 307),  
that the conduct of the executors constituted  
them trustees, and that the right to recover the  
money was not barred, and that C., into whose  
hands the money had come, was chargeable with  
interest from the time of its receipt by him.  
*Cameron v. Campbell*, 7 A. R. 361.

In 1877, defendant B., who was engaged in a  
general business collecting and investing money,  
having become aware that plaintiff held some  
promissory notes of one F. for whom B. was  
effecting a loan, suggested that plaintiff should  
hand over the notes to him as money was going  
through his hands for F. and that he would col-

lect them and save the amount for herself and  
children: Plaintiff having acted on such sug-  
gestion and the money having been received by  
B. in that year was retained by him until 1886  
when he became insolvent and made an assign-  
ment under the Act to trustees, who in distribut-  
ing the assets refused to recognise the plaintiff's  
claim, and pleaded the Statute of Limitations to  
an action brought to enforce payment:—Held,  
reversing the judgment of the Chy. Div., (13 O. R.  
173) that the transaction was such as created the  
relation of trustee and cestui que trust between  
the plaintiff and B., and that the right to recover  
from B.'s estate was not barred by the lapse of  
time. *Coyne v. Brodely*, 15 A. R. 159.

C. H. (the respondent) as trustee for certain  
creditors of the firm of R. M. and sons, sued J.  
M. M. (the appellant), a member of the firm,  
for \$4,720, alleging: 1. A registered notarial  
transfer from one J. R. M. to him, as trustee,  
of a similar sum with all rights, mortgages, etc.,  
thereunto appertaining, due by the said appel-  
lant to J. R. M. for the price of certain real  
estate in Montreal; 2. A transfer of certain  
promissory notes signed by the appellant for the  
same amount and representing the price of sale  
of said property, but which were to be in pay-  
ment thereof only if paid at maturity. The  
appellant was a party and intervened to the  
deed of transfer and declared himself satisfied  
and subject to its conditions. The appellant  
pleaded that the respondent had no action as  
trustee under article 19 C. C. P., and that the  
price had been paid by the two promissory notes  
which were now prescribed:—Held, 1. Affirm-  
ing the judgment of the court below, that  
article 19 C. C. P. was not applicable. The  
appellant having become a party to the regis-  
tered transfer, which gave the respondent as  
trustee all mortgagee's rights, was estopped  
from denying the efficacy of such deed or of the  
right of the plaintiff to sue thereunder in his  
quality of trustee. *Barland v. Moffatt*, 11 S. C.  
R. 76, and *Browne v. Pinoneault*, 3 S. C. R.  
103, distinguished. 2. That the notes in ques-  
tion having been given as collateral for the price  
of sale of the property, and the property not  
having been paid for, the plea of prescription as  
to the notes could not avail against an action for  
the price. *Mitchell v. Holland*, 16 S. C. R. 687.

*Ferguson v. Ferguson*, 28 Chy. 380, p. 1186;  
*Re Kirkpatrick*—*Kirkpatrick v. Stevenson*, 3 O.  
R. 361, p. 1202; *Adamson v. Adamson*, 7 A.  
R. 592, p. 1188.

#### 9. Married Women.

Held, reversing the judgment of the county  
court that notwithstanding R. S. O. (1877), c.  
125, s. 20, a married woman is still entitled  
under 21 Jac. 1, c. 16, to bring an action in  
respect of her separate property within six years  
after becoming discover. *Carroll v. Fitzgerald*,  
5 A. R. 322.

See *Re Laws*—*Laws v. Laws*, 28 Chy. 382, p.  
882.

#### 10. Infants.

The plaintiff filed his bill against his two bro-  
thers seeking administration of his father's es-

tate, of which he alleged they had possessed themselves on his death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not proved that any fraud or concealment had been practised upon him:—Held, that the plaintiff was barred by the Statute of Limitations, and by the release executed by him. *Hughes v. Hughes*, 6 A. R. 373.

#### 11. Acknowledgment.

On the 19th October, 1866, the owner of real estate granted an annuity thereof of \$40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant, claiming ten years' arrears, with interest thereon:—Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of an annuity; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could recover only six years' arrears without interest, as against a puisne incumbrancer who had duly registered his conveyance. *Crone v. Crone*, 27 Chy. 425.—Proudfoot.

The plaintiff's testator was chief engineer of the defendant company from its inception until arrangements made by the company with one B. for the completion of the road by B., he paying all expenses, etc., including the engineer's salary. In 1881 the testator wrote a letter to the solicitor for the Grand Trunk Railway Company, which company was about to resume control of the defendant's railway, claiming for services rendered the defendant company up to the middle of 1875. The action was commenced in February, 1882, for services rendered from 1871 to 1875. At the trial an amendment was made allowing the plaintiff to claim for services rendered up to 1880. It appeared that the testator was to have had a salary, but the amount was never fixed. During the period from 1875 to 1880 or 1881 he performed services as engineer for the defendant company, certifying to work done, that the company might obtain bonuses, attending meetings and deputations. He also approved of plans of a bridge submitted to him, and in 1878 signed the specifications appended to the contract between the company and B.:—Held, Hagarty, C. J., dissenting, that there was evidence to go to the jury of a continuing employment of the testator subsequent to 1875, and of services rendered as chief engineer within the six years preceding action, notwithstanding the letter written by the testator claiming for services up to 1875 only; and that any inference to be drawn from the writing of the letter was for the jury and not for the judge to draw; and a nonsuit was set aside. Per Hagarty, C. J. The evidence shewed that the testator, though nominally chief engineer of the defendant company subsequent to the contract with B., was in fact working for B. to whom he looked for payment. The effect of letters written by the company's president after the original claim had been barred, and of reports made to the company of claims against them in which the plaintiff's claim was included, discussed as to their sufficiency to revive the claim. *Shanley v. Grand Junction R. W. Co.*, 4 O. R. 150.—Q. B. D.

In an action for a debt, to which the defendant pleaded the Statute of Limitations, the plaintiff gave in evidence, as constituting acknowledgments, (1) a letter from the defendant in which he said: "I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up;" (2) portions of the examination of the defendant, signed by him and taken in a certain other action brought for the administration of the son's estate, having reference to a claim set up by the defendant against the estate, in which he admitted the receipt of the money for which the present action was brought, and stated that he was responsible to the testator of the present plaintiff, who was an executor for it. There was evidence, also, that the son's estate was wound up, and that the defendant received more than sufficient to pay the plaintiff's claim:—Held, affirming the decision of Falconbridge, J., that the letter was a sufficient acknowledgment under the statute, and meant that on the son's estate being wound up, the defendant would pay, and the estate having been wound up, anything conditional in the letter had been ascertained:—Held, also, that the statute was satisfied by an acknowledgment made and signed as in the testimony of the defendant in the administration action. *Smith v. Poole*, 12 Sim. 17, followed. *Roblin v. McMahon*, 18 O. R. 219.—Chy. D.

An acknowledgment of a debt, not being a debt by specialty, to be sufficient under the Statute of Limitations, must be made to the creditor or to his agent. A general acknowledgment of liability or an acknowledgment to a third person, is not sufficient. Judgment of the County Court of Wentworth affirmed. *Goodman v. Boyes*, 17 A. R. 528.

#### 12. Payment on Account.

A promissory note made by the purchaser, and endorsed by his son, was given as security for the payment of land sold to the defendant, on which note a payment had been made by the endorsers:—Held, that such payment was properly applicable to reduce the amount remaining due upon the purchase money, and was sufficient to prevent the running of the statute. *Slater v. Mosgrove*, 29 Chy. 392.—Boyd.

To make a part payment take a debt out of the bar raised by the Statute of Limitations, it is sufficient if the payment be made in respect of a larger debt which is the one sued on. The payment of part is an act from which the inference may be drawn that the debtor intended to pay the balance though no special reference is made thereto at the time of such part payment. *Boulbee v. Burke*, 9 O. R. 80.—C. P. D.

In an action to recover the balance of an alleged debt to which the statute was pleaded as a bar, the debt was proved as also that several payments were made by the defendants thereon:—Held, that an implied promise to pay the balance might be inferred; and therefore the statute did not apply. *Id.*

Application of unappropriated payments the effect of which is to take the debts out of the statute. See *Wilson v. Rykert*, 14 O. R. 188.



After the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment upon it out of his own moneys and on his own account was made by the surviving maker who was the sole executor of his deceased co-maker:—Held, that such payment did not take the debt out of the Statute of Limitations as regards the estate of the latter. *Paxton v. Smith*, 18 O. R. 178.—C. P. D.

See *St. John v. Rykert*, 10 S. C. R. 278.

### 13. Effect of Legal Proceedings.

Held, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate. *Archer v. Severn*, 12 O. R. 615.—Proudfoot.

O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed: (13 O. R. p. 70). O. thereupon, redelivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove on them in the administration proceedings:—Held, that the order for administration prevented the bar of the Statute of Limitations:—Held, also, that H. & Co. might now assert their title to the notes, and prove on them notwithstanding the former champertous agreement with O. *Re Cannon—Oates v. Cannon* (2) 13 O. R. 705.—Proudfoot.

### 14. Particular Statutes.

The period for bringing an action against a clerk of a municipality for omitting names from the collector's roll is not limited to two years under R. S. O. (1877) c. 61, s. 1. *Town of Peterborough v. Edwards*, 31 C. P. 231.—Galt.

To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town, whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months:—Held, bad, as sec. 491 of the Municipal Act, R. S. O. (1877) c. 174, did not apply. *Sullivan v. Town of Barrie*, 45 Q. B. 12.—Osler.

### III. RIGHT OF CROWN TO PLEAD PRESCRIPTION.

Held, that the Statute of limitations is properly pleadable under section 7 of the Dominion Franchise Act, 1876. *Tyles v. The Queen*, 7 S. C. R. 651.

See *Chevrier v. The Queen*, 4 S. C. R. 1.

## LIQUIDATED DAMAGES.

See PENALTY BY CONTRACT.

## LIQUIDATORS.

See COMPANY.

## LIQUOR.

See INTOXICATING LIQUORS—PARLIAMENTARY ELECTIONS.

## LIS PENDENS.

A lis pendens should not be vacated unless it appears from the endorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the court. *Jameson v. Lang*, 7 P. R. 404, approved of. *Sheppard v. Kennedy*, 10 P. R. 242.—Boyd.

When a plaintiff seeks to register a lis pendens he should be more precise in respect to the endorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands. *Id.*

Action by a creditor of M. to set aside a conveyance by M. to his wife, as fraudulent:—Held, a proper case in which to register a certificate of lis pendens, and that pending the action no order could be made to vacate it. *Foster v. Moore* 11 P. R. 447.—Ferguson.

Where a certificate of lis pendens purporting to be issued in this action was, by an error of an officer of the court, issued before the action was begun, an order was made in the action so declaring and directing that it be set aside on that ground. *St. Louis v. O'Cullaghan*, 13 P. R. 322.—Street.

See *McTaggart v. Toothe*, 10 P. R. 261.

## LIVERY STABLES.

See MUNICIPAL CORPORATIONS.

## LOAN COMPANY.

See BUILDING SOCIETIES.

## LOAN OF MONEY.

Loans by municipalities to manufacturing companies. See *Scottish American Investment Co. v. Village of Elora*, 6 A. R. 628.

Quære, whether the power to give would not include power to lend. *Id.*

Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience. *Re Ross*, 29 Chy. 385.—Boyd.

## LOCAL BOARD OF HEALTH.

See PUBLIC HEALTH.

## LOCAL IMPROVEMENTS.

See ASSESSMENT AND TAXES.

## LOCAL JUDGE OF HIGH COURT.

See PRACTICE.

## LOCAL MASTER.

See PRACTICE.

Held, that the local masters who are paid by fees instead of salary, are entitled to charge one dollar per hour in money under chancery tariff, of 23rd March, 1875, when taxing costs. *McGannon v. Clarke*, 9 P. R. 555.—Boyd.

## LODGING HOUSE.

See BOARDING HOUSE.

## LORD'S DAY.

See SUNDAY.

## LOST DOCUMENTS.

See EVIDENCE.

## LOTTERY.

See GAMING.

## LUGGAGE.

See CARRIERS—RAILWAYS AND RAILWAY COMPANIES.

## LUNATIC.

I. APPLICATION FOR DECLARATION OF LUNACY, 1212.

II. APPOINTMENT OF GUARDIAN, 1212.

III. MAINTENANCE, 1212.

IV. CONTRACTS AND DEALINGS WITH, 1212.

V. ACTIONS AND PROCEEDINGS BY AND AGAINST, 1213.

VI. MENTAL INCAPACITY—See FRAUD AND MISREPRESENTATION—WILL.

## I. APPLICATION FOR DECLARATION OF LUNACY.

An application was made by petition to declare R. a lunatic, and the petitioner failing to produce sufficient medical testimony, asked for an order dismissing the petition. Proudfoot, V. C., declined to make such order, but made an order declaring that the court did not see fit to make any order on the application. *Re Randall*, 8 P. R. 202.

See *Re Dumbrell*, 10 P. R. 216, *infra*.

## II. APPOINTMENT OF GUARDIAN.

On an application under Rule 60, O. J. Act, (Con. Rule 336a) for an order appointing the official guardian the guardian of one of the defendants, a person of unsound mind, not so found:—Held, that the motion should be made before the master in chambers. *Crawford v. Crawford*, 9 P. R. 178.—Proudfoot.

See *Warnock v. Prieur*, 12 P. R. 264, p. 1213.

## III. MAINTENANCE.

A petition was presented by the husband of D. to declare his wife a lunatic, which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessaries which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrell*, 10 P. R. 216.—Boyd.

Money in court to the credit of a lunatic though not so found was directed to be paid out in annual sums for maintenance. *Re Hinds—Hinds v. Hinds*, 11 P. R. 5.—Ferguson.

## IV. CONTRACTS AND DEALINGS WITH.

The plaintiffs made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, one of the plaintiffs knew that the defendant was subject to insane delusions, believing that people were conspiring against him to do him some injury. He, however, superintended the repairs, and talked intelligently to the workmen employed about the vessel; but, some months after he became violent, and was confined in an asylum for the insane:—Held, that the plaintiffs were entitled to recover for the work done. *Robertson v. Kelly*, 2 O. R. 103.—Oxler.

J., an infant, gave to M. a promissory note for the purchase money of a buggy, endorsed by his father, who was of unsound mind, and unable to understand what he was doing. The father received no consideration, and M. was not aware of his condition:—Held, on appeal

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from the master at Woodstock, affirming his  
decision, that the father's estate was not liable.  
*Re James*, 9 P. R. 88.—Boyd.

#### V. ACTIONS AND PROCEEDINGS BY AND AGAINST.

Where a person of unsound mind sues by a  
next friend the usual præcipe order that the  
plaintiff do produce is proper and is sufficiently  
obeyed by the affidavit of the next friend.  
*Travis v. Bell*, 8 P. R. 550.—Boyd.

The common law right as to the priority of  
an execution creditor of a lunatic, who has an  
execution in the hands of the sheriff before the  
lunatic has been declared such, will not be in-  
terfered with by injunction restraining him  
from realizing under his writ. *In re Grant*, 28  
Chy. 457.—Spragge.

In a mortgage action for foreclosure a local  
master appointed the official guardian to repre-  
sent a lunatic defendant as guardian ad litem  
without notice being served, as directed by Rule  
69, O. J. A., (Con. Rule 336a). The guardian  
made full inquiries, communicated with the  
relatives of the lunatic, and put in the usual  
formal defence on behalf of the lunatic; and a  
judgment of foreclosure was obtained in cham-  
bers against all the defendants, including in-  
fants and the lunatic defendant:—Held, that  
the order appointing the guardian was an erro-  
neous one, for which there was no proper founda-  
tion, not a mere irregularity which could be  
waived by the subsequent steps taken to protect  
the lunatic's rights. *Warnock v. Prieur*, 12 P.  
R. 264, Dalton, Master.—Boyd.

Held, also, that the term "adult," in G. O.  
Chy. 645, (Con. Rule 717), does not include a  
lunatic or person of unsound mind; and therefore  
that a judgment against a lunatic could not be  
obtained in chambers under G. O. Chy. 434,  
(Con. Rule 717). *Ib.*

Where a defendant in an action becomes of  
unsound mind after judgment, it is not proper  
to notify the official guardian to intervene with-  
out serving the defendant and obtaining an order  
of the court, by procedure analogous to that pro-  
vided by Con. Rules 335 to 338. But where a  
person has been found by the court to be of un-  
sound mind, the official guardian may be served  
without order or notice to the lunatic. Section  
32 of R. S. O. (1887) c. 44 must be limited to  
cases mentioned in the marginal note thereto,  
which correctly defines the scope of the enact-  
ment. *Wolff v. Ogilvy—Re Hagar*, 12 P. R.  
645.—Boyd.

The rule that the solicitor for a party will not  
be accepted by the court as a bondsman for such  
party is still in force. The rule was applied to  
the case of the committee of the person and  
estate of a lunatic giving a bond for the due per-  
formance of her duties as such committee and  
offering her two solicitors as sureties. *Re Gibson*,  
13 P. R. 359.—Robertson.

See *Re Colthart*, 9 P. R. 356, p. 111.

#### MACHINERY.

See FIXTURES.

#### MAGISTRATE.

See JUSTICE OF THE PEACE—POLICE MAGIS-  
TRATE—SESSIONS.

#### MAINTENANCE.

- I. OF INFANTS—See INFANT.
- II. OF LUNATICS—See LUNATIC.
- III. OF SUITS—See CHAMPARTY.
- IV. OF WIFE—See HUSBAND AND WIFE.
- V. AGREEMENTS BETWEEN PARENT AND  
CHILD—See PARENT AND CHILD.
- VI. PROVISION FOR IN WILLS—See WILL.

#### MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

##### I. MALICIOUS ARREST.

1. *When Act in Lies*, 1214.
2. *Pleading*, 1215.
3. *Proof of Malice and Want of Reason-  
able and Probable Cause*, 1215.
4. *Costs*, 1216.

##### II. MALICIOUS CRIMINAL PROCEEDINGS.

1. *When Action Lies*, 1217.
2. *Pleading*, 1218.
3. *Evidence*, 1219.
4. *Reasonable and Probable Cause*, 1220.
5. *Question to be left by Judge to the  
Jury*, 1222.
6. *Damages*, 1223.

##### III. OTHER MALICIOUS PROCEEDINGS.

1. *Proceedings in Bankruptcy*, 1223.
2. *Issuing Execution*, 1224.
3. *Issuing Injunction*, 1224.
4. *Removal of Arbitrator*, 1225.

##### IV. ACTIONS AGAINST MAGISTRATES—See JUSTICE OF THE PEACE.

##### V. NEW TRIALS IN CASES OF—See NEW TRIALS.

##### I. MALICIOUS ARREST.

###### 1. *When Action Lies.*

It is not essential to the maintenance of an  
action for maliciously procuring a judge's order  
to hold to bail, that the order for the arrest  
should be set aside, or that the plaintiff should  
procure himself to be discharged out of custody.  
(Burton, J. A., dissenting.) Such an order if  
obtained regularly and on sufficient material  
cannot (save in very rare and exceptional cases)  
be rescinded or set aside on the merits. *Erick-  
son v. Brand*, 14 A. R. 614.

A corporation may be liable for false imprison-  
ment under an order of its agent acting within  
the scope of his authority. *Lyden v. McGee*,  
16 O. R. 105.—C. P. D.

## 2. Pleading.

In an action for malicious arrest the jury found a general verdict for the plaintiff, with \$200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute R. S. O. (1877), c. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and the court were of opinion under the facts, set out in the report, that there was no evidence on which the special finding of the jury could be supported:—Held, that the nonsuit must be set aside, and judgment entered for the plaintiff, with \$200 damages as assessed. If the statute has not been pleaded honest belief is no defence, if there existed no reasonable ground for such belief. *McKay v. Cummings*, 6 O. R. 400.—C. P. D.

In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour; that the plaintiff was avoiding arrest; that the defendants therefore watched him and when he endeavoured to escape detained him until the arrival of the constable, and then gave him into custody; and that the defendants did this in the bona fide belief that they were justified in thus aiding the arrest:—Held, that although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record. *Purley v. Bennett*, 11 P. R. 64.—Rose.

Y. issued a capias before judgment against V. and had him arrested. After the arrest V. tendered \$90 in full of Y.'s claim, which was refused as not being sufficient. Y. then proceeded with his action, but failed to obtain a judgment for more than \$90. In an action by V. against Y., claiming damages for wrongful arrest, in which no malice was alleged:—Held, on demurrer, that malice would not be inferred, because so far as appeared from the pleadings Y. had reasonable and probable cause for thinking that V. owed him more than \$90, and as malice was not alleged, the demurrer must be allowed with costs. *Vandervoort v. Youker*, 13 O. R. 417.—Ferguson.

## 3. Proof of Malice and Want of Reasonable and Probable Cause.

S., a debtor resident in Ontario, being on the eve of departure for a trip to Europe, passed through the city of Montreal, and while there refused to make a settlement of an overdue debt with his creditors, McK. et al., who had instituted legal proceedings in Ontario to recover their debt, which proceedings were still pending. McK. et al. thereupon caused him to be arrested, and S. paid the debt. Subsequently S. claimed damages from McK. et al. for the malicious issue and execution of the writ of capias. McK. et al. the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable

and probable cause. In his affidavit the reasons given by the deponent McK., one of the defendants, for his belief that the appellant was about to leave the Province of Canada, were as follows:—"That Mr. P., the deponent's partner, was informed last night in Toronto by one H., a broker, that the said W. J. S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and defendant was himself informed, this day, by J. R., broker, of the said W. J. S.'s departure for Europe and other places." The appellant S. was carrying on business as a wholesale grocer at Toronto, and was leaving with his son for the Paris exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew that he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by McK., that after the issue of the capias, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that S. would not pay him, that he might get his money the best way he could":—Held, that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors; and that the evidence shewed the respondent had no reasonable and probable cause for issuing the writ of capias in question. *Shaw v. McKenzie*, 6 S. C. R. 181.

The defendant in his application for the order to hold to bail by his affidavit made out a *prima facie* case, but certain facts and circumstances were omitted therefrom, which, it was contended, might, if stated, have satisfied the judge granting the order, that, although the plaintiff was about to depart from the province, it was not with intent to defraud, etc. At the trial the plaintiff was nonsuited, the judge holding that he had failed to shew a want of reasonable and probable cause. The Divisional Court set aside the nonsuit and granted a new trial:—Held, upon the evidence, affirming this judgment (Patterson, J. A., dubitante), the facts upon which the existence of reasonable and probable cause depended being in dispute, the judge was not in a position to decide that question until the jury had found upon the facts. *Semle*, per Patterson, J. A., the evidence sufficiently shewed that there was no want of reasonable and probable cause; and that the omitted facts were not material to have been stated in the affidavit. *Erickson v. Brand*, 14 A. R. 614.

## 4. Costs.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be \$704, but the plaintiff recovered only \$489. As to \$80 which the plaintiff failed to recover, it was held on the facts stated in the report of the case that he had no reasonable ground for believing defendant to be liable and he abandoned it at the trial, but as to the other portion for which he failed he had reasonable ground:—Held, the defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. (1877), c. 50, s. 349. *Porritt v. Fraser*, 8 P. R. 430.—Osler.

## II. MALICIOUS CRIMINAL PROCEEDINGS.

## 1. When Action Lies.

The declaration alleged that the defendant laid an information that certain harness had been stolen by the plaintiff, whereas the information proved was qualified by the addition of the words "as he supposed:"—Held, affirming the judgment of the County Court, no variance. It was shewn that the information was laid by the defendant on the advice of the magistrate, and that he did not interfere in the issue of the warrant for the plaintiff's arrest, but it was proved that the information contained the substance of the statements made by the defendant, which justified the warrant:—Held, there being an absence of reasonable and probable cause, that the defendant was liable. *Colbert v. Hicks*, 5 A. R. 571.

In July, 1878, on returning with the defendant from cashing a draft which the plaintiff had received from Scotland, the plaintiff boasted to defendant that he was going to get very much larger remittances in May, 1879, and 1880, but there was nothing to shew that the statement was made with a view to obtaining credit. Nearly the whole of the proceeds of the draft, after paying defendant an account then due for goods obtained, was deposited with the defendant, the plaintiff continuing to deal with him until not only the whole of the sum was absorbed, but a further indebtedness had been incurred. The defendant caused a warrant to be issued to arrest the plaintiff for obtaining goods under false pretences, though with the real object of obtaining a settlement of his account. After the plaintiff was arrested and brought before the magistrate he was allowed to go on his own recognizance to appear next day, but being unwell he could not appear, and the charge not being pressed by the defendant, and the magistrate not thinking there was sufficient evidence to commit, the matter was allowed to drop:—Held, that though the evidence shewed that the charge was not legally sustainable, yet if the defendant acted bona fide, which was a matter for the jury, he would be justified in prosecuting:—Held, also, that it sufficiently appeared that the prosecution had terminated. The warrant was issued in the united counties of Northumberland and Durham and was endorsed by the magistrate in the county of Peterborough, "This is to certify that I have endorsed this warrant, to be executed in the county of Peterborough," but there was no proof of the handwriting of the justice who issued the warrant, or recital of such proof, as required by 32-33 Vict. c. 30, s. 23 (Dom.), Sched. K.:—Held, that the warrant was therefore defective and the arrest illegal, for which defendant was liable in trespass. Under the circumstances, a verdict having been entered for the defendant, a new trial was ordered. *Reid v. Mayhew*, 31 C. P. 384.—C. P. D.

In an action for malicious prosecution, the information and warrant of commitment merely disclosed a civil trespass. The plaintiff was nonsuited at the trial. It appeared, however, that the defendants had not disclosed the whole facts to the magistrate, and that, at the hearing, on the plaintiff's solicitor objecting that no criminal offence was charged, one of the defen-

dants said that in order to have the case investigated he would charge the plaintiff with stealing the oats. The statement of claim alleged that the defendants had charged the plaintiff with felony. The court set aside the nonsuit, and granted a new trial, with leave to the plaintiff to amend the statement of claim according to the facts. Per Wilson, C. J. Semble that the facts stated above were evidence that the defendants were putting the criminal law in motion; and the information and warrant being invalid, they were liable as trespassers. Per Osler, J. Quere, as to this, and whether an action for malicious prosecution will lie for making a false and malicious statement to a magistrate, shewing nothing which conferred jurisdiction on him, but on which, nevertheless, he acts by issuing a warrant. *Macdonald v. Henwood*, 32 C. P. 433.—C. P. D.

Held, that an action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause. *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, commented on. *Young v. Nichol*, 9 O. R. 347.—C. P. D.

In an action for falsely and maliciously charging the plaintiff with obtaining money from the defendant by false pretences, and for arresting and prosecuting him therefor before the police magistrate of Belleville, appointed by the Government of the Province of Ontario, and who, it was alleged, had no jurisdiction to act, it being contended that such appointment properly lay with the Dominion Government:—Held, that a person could not be considered a trespasser merely by laying an information before a police magistrate so appointed, charging another with a crime, and praying therein that a warrant might be issued for his arrest. *Richardson v. Ransom*, 10 O. R. 387.—Q. B. D.

Where a party pays under protest a penalty imposed upon him by a justice of the peace in proceedings taken against him under the provisions of chapter 22 of the Consolidated Statutes of Lower Canada, "An act respecting good order in and near places of public worship," and such party afterwards brings an action in damages against the person, whom he alleged had maliciously instigated such proceedings, and at a trial before a jury there is no evidence of the favourable termination of the prosecution against him, the court were equally divided as to the right of such party to maintain his action. Sir W. J. Ritchie, C. J., and Strong and Taschereau, JJ., were of opinion that the action could not be maintained under such circumstances, and Fournier, Henry and Gwynne JJ. contra. The appeal was in consequence dismissed without costs. *Poitras v. LeBeau*, 14 S. C. R. 742.

See *Winfield v. Kean*, 1 O. R. 193, p. 1222; *Lyden v. McGee*, 16 O. R. 105, p. 1223.

## 2. Pleading.

In an action for malicious prosecution, a part of the statement of claim setting out the observations of the judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from publication of such charge in newspapers and otherwise by



defendants, was allowed to stand. *Morrow v. Cheyne*, 12 P. R. 487.—*Dalton, Master*.

See *Macdonald v. Henwood*, 32 C. P. 433, p. 1218.

### 3. Evidence.

In an action for malicious prosecution, on the opening of the defence the defendant was called, and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but on proceeding to state what he had heard, the judge ruled that this was inadmissible, and that the persons who had told him these facts should first be called. They were then called and examined, and afterwards the defendant gave his evidence as to what they had told him. The jury found a verdict for plaintiff with \$500 damages:—Held, that the evidence was improperly rejected when offered; but, *Armour, J.*, dissenting, that as it had afterwards been received, no substantial wrong or miscarriage having been occasioned by the ruling, and the verdict being satisfactory, a new trial should be refused under section 259 of the C. L. P. Act. *Bernard v. Coutellier*, 45 Q. B. 453.—Q. B. D.

Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the quarter sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill":—Held, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced:—Held, also, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected as was done here. *McCunn v. Preneveau*, 10 O. R. 573.—C. P. D.

In an action for malicious prosecution, it appeared that the plaintiff's father sold a buggy to R. for \$115, to be made in two payments of \$58 and \$57 respectively, and until paid the title and right of property were to remain in the vendor. Before the purchase money was paid R. sold the buggy to defendant, a livery stable keeper. The plaintiff's father, on hearing of this, directed the plaintiff to go and take it from defendant, which he did, informing those at defendant's place that plaintiff could be seen at an hotel named. The defendant, on his return, went and saw the plaintiff, who told him he was acting under instructions from his father, who claimed to be the owner of the buggy, but, notwithstanding, the defendant caused the plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The jury found for the plaintiff:—Held, on the evidence, the verdict could not be interfered with. *Scouyall v. Stapleton*, 12 O. R. 208.—C. P. D.

The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that the plaintiff did not give a full and true account of the case:—Held, that this ground failed. *Id.*

Evidence was offered that the magistrate, against whom there was no charge, had, before

acting, consulted the county attorney, which was rejected:—Held, that the rejection was proper. *Id.*

In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and also a charge of obtaining a valuable security by false pretences, the defendant averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes:—Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J., fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them under any agreement or arrangement, and the history of all notes received in carrying out such sales, and all entries in the plaintiff's bill books and all other books relating to such transactions. *Colter v. McPherson*, 12 P. R. 630.—Rose.

In an action for false arrest and malicious prosecution arising out of a false information laid by defendant, a certified copy of the information having been put in and objected to at the trial, leave was given under *Con. Rule 676*, to put in the original afterwards, as also an exemplification of the judgment of acquittal, it appearing that the merits were not with the defendant. *Hamilton v. Broatch—Broderick v. Broatch*, 17 O. R. 679.—Rose.

In an action for malicious prosecution the claim which was put in issue was that defendant did on a certain day charge plaintiff with having on two or three occasions committed wilful perjury. The judge at the trial ruled that the defendant could not go into evidence to contradict plaintiff on his statement as to the perjury, or to establish the truth of the facts desired to be set up:—Held, that the ruling without qualification was too broad; for though a defendant in an action for malicious prosecution is not bound to prove the plaintiff's guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to establish reasonable and probable cause:—*Quere*, as to the onus being on the plaintiff to establish his innocence. *Walt v. Clark*, 18 O. R. 602.—C. P. D.

See *Young v. Nichol*, 9 O. R. 347, p. 1223.

### 4. Reasonable and Probable Cause.

The plaintiff at Brantford having corresponded with the defendant at Hamilton, as to purchasing ice, defendant on 7th September, notified plaintiff by telegram that the ice would not be sent unless plaintiff telegraphed money to cover freight and ice, to which plaintiff answered that the money was paid to the express company, and to send a full car, which was done. No money had, however, been paid to the express com-

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pany. On 9th September, defendant telegraphed plaintiff asking what he meant. The plaintiff replied that he had paid the bank the day before, and to send a car for Monday morning. The defendant, relying on this representation, shipped same to plaintiff on the following day. The plaintiff had, on 9th September, deposited \$30 with a bank in Brantford to defendant's credit, supposing it would be transmitted to defendant, which was not done. On 1st October defendant wrote plaintiff that unless he sent the full amount of account defendant would have to take criminal proceedings. On 7th October, the defendant not having received a reply from the plaintiff, consulted his solicitor, who, defendant said, advised that plaintiff was guilty of a criminal offence, and to have him arrested. The defendant accordingly went to Brantford, laid information before the police magistrate, who issued a warrant under which plaintiff was arrested. On the case coming before the police magistrate, the plaintiff's statement as to the deposit of the money in the bank, was proved to be true, whereupon the magistrate stated that there was no ground for the arrest and dismissed the case. In an action for malicious arrest, the jury found that the defendant believed the plaintiff had not deposited the money with the express company or with the bank, but that he had not reasonable grounds for so believing, and did not take reasonable means to prove the truth of the plaintiff's statement; and also that it was doubtful whether defendant truly represented the facts to his solicitor, and that he did not do so to the police magistrate:—Held, (reversing the judgment of Cameron, C. J., at the trial), under the circumstances, there was a want of reasonable and probable cause; and the plaintiff was entitled to recover. *McGill v. Walton*, 15 O. R. 389.—C. P. D.

Plaintiff who was in occupation of a house on a farm of the defendant's cut off the ends of some logs used in the construction of a small building, which logs were so old and rotten that they had fallen out of their places in the building and the ends rested on the ground. Defendant had plaintiff arrested and imprisoned on a charge of "unlawful and malicious injury to his property," but the magistrate dismissed the case. In an action for malicious prosecution the jury found in answer to questions submitted by the judge that the defendant had not reasonable ground for believing that plaintiff had unlawfully and maliciously injured the property and did not take care to inform himself as to the facts, and was actuated by other motives than the vindication of the law in laying the information, and assessed the damages at \$100. On motion to set aside the verdict the application was dismissed. Per Boyd, C. It was open to the jury to find that the wood was of no value, and that the injury was of too trifling a character to justify the defendant in setting the criminal law in motion, and that was evidently the meaning of their answers to the questions. If there was no actual positive damage proved, the plaintiff was not chargeable under R. S. C. 168 59. Held, also that it was proper to leave the whole case to the jury, and the questions were sufficient for that purpose, and the jury having found a want of reasonable care on the part of defendant to inform himself of the true state of the case was a sufficient justification for holding

that there was a want of reasonable and probable cause. Per Ferguson, J.—The jury virtually found that the property said to be injured was of no appreciable value, and that being the case such facts and circumstances did not exist as were necessary to constitute reasonable and probable cause for the prosecution. *Webber v. McLeod*, 16 O. R. 609.—Chy. D.

See *Reid v. Maybee*, 31 C. P. 384, p. 1217; *Fawcett v. Winters*, 12 P. R. 232.

##### 5. Question to be left by Judge to the Jury.

In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action. Therefore where the jury were directed, in the course of the charge, that if a person makes a charge against another for the purpose of his being arraigned upon it without being justified in point of law, then he does it maliciously: that they need not trouble themselves with a question of malice except as it might be inferred from want of reasonable and probable cause, and that if the information had been laid without proper cause the result would be that it was laid maliciously; and the plaintiff obtained a verdict of \$500:—Held, misdirection, for which a new trial should be granted. Per Hagarty, C. J., dissenting.—Though the directions standing alone might be open to criticism, the charge must be read as a whole; but as the jury were afterwards told repeatedly that they should find for defendant if they thought that he believed the matters sworn to in his information, there was no misdirection which would warrant interference with the plaintiff's verdict. Where the damages are large, and to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection. *Winfield v. Keen*, 1 O. R. 193.—Q. B. D.

A robbery having been committed at the defendant's store a bill of an account due by the plaintiff to the defendant, which it was alleged had been rendered some time previously, was found lying near by, which from its crumpled appearance indicated that it had been carried about for some time in a person's pocket. From this the defendant said he suspected some one in the plaintiff's house, and he went to a magistrate and laid an information, upon which a search warrant was issued, and the plaintiff's house searched, but none of the stolen goods were found therein and no arrest was made. It appeared that the account which was found had never been sent to the plaintiff but a similar one had, the defendant stating that when he caused the search warrant to be issued, he was under the belief that the account had been sent, having forgotten the fact that it had not been. In an action for malicious prosecution, the learned judge entered a verdict for the defendant, holding that the plaintiff had failed to show that the defendant acted without reasonable and probable cause:—Held, there must be a new trial; that it should have been submitted to the jury to say: 1. Whether the account was sent to the plaintiff; 2. Was it found as alleged; 3. If not sent, did the defendant believe it had been so sent; and, 4. If defendant did so believe, were

the circumstances such as to warrant a reasonable man of ordinary prudence in forming such belief; and, per Rose, J., it might be necessary also to submit to the jury the question, whether it was a prudent and reasonable thing for the defendant to rely on his memory. *Young v. Nichol*, 90 O. R. 347.—C. P. D.

Action of trespass for false imprisonment. The plaintiff was arrested, as alleged, by direction of the defendants' agent, the treasurer of the defendant association. On being brought before the police magistrate, the defendants did not appear to prosecute, when the police magistrate remanded plaintiff, and subsequently dismissed the charge, and discharged the plaintiff. At the trial the judge charged the jury that it was not necessary to enquire whether or not the plaintiff was guilty of the crime charged against him, for by his acquittal he must be taken to have been not guilty, and the fact that M. believed him guilty was no excuse. If G. had laid an information, it would have been different, but not having done so, the only question was whether he gave plaintiff into custody:—Held, misdirection; for the defendant M. was justified in ordering the plaintiff's arrest if a felony was committed, and he had reasonable and probable cause to suspect that plaintiff committed the felony:—Held, also, that the defendants could only be liable for the damage proceeding from the arrest, and not for the subsequent proceedings. *Lyden v. McGee*, 16 O. R. 105.—C. P. D.

Where a man has been prosecuted for an assault, and brings an action for malicious prosecution, the finding that there was in fact an assault is not decisive of the question whether there was reasonable and probable cause for the prosecution; the plaintiff is entitled to have the circumstances relied on as justification for the assault submitted to the jury, and to have their finding as to whether the defendant was conscious when he laid the information that he had been in the wrong. A new trial granted on the ground of misdirection. *Hinton v. Heather*, 14 M. & W. 131, followed. *Sutton v. Johnstone*, 1 T. R. 493, distinguished. *Routhier v. McLaurin*, 18 O. R. 112.—Q. B. D.

#### 6. Damages.

See *Lyden v. McGee*, 16 O. R. 105, *supra*.

### III. OTHER MALICIOUS PROCEEDINGS.

#### 1. Proceedings in Bankruptcy.

Held, that an action will lie by a debtor against a creditor to recover damages for falsely and maliciously making a demand for an assignment, under the fourth section of the Insolvent Act of 1875 and amending Acts, and that his remedy is not confined to the imposition of treble costs under section 5. *Nagle v. Timmins*, 31 C. P. 221.—Galt.

To such action, the defendants' third plea, after setting up a variety of dealings between the parties shewing that the plaintiff had from time to time failed to meet his engagements

with defendants, concluded, that the plaintiff being indebted to the defendants in the sum of \$1,400, and being unable to pay the same or to meet his engagements, and the plaintiff being also, to the knowledge of the defendants, indebted in large sums to divers other persons, creditors of the plaintiff, the defendants bona fide believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice, made a demand on the plaintiff:—Held, a good plea, although it was not expressly averred, in the words of section 4, that the plaintiff had ceased to meet his liabilities generally as they became due. Quere, whether that expression means his liabilities to the particular creditor, or to his creditors generally. *Ib.*

#### 2. Issuing Execution.

The defendant having recovered a judgment against the plaintiff in the Division Court at Toronto, a transcript was ordered to be sent to another Division Court at Unionville, but by some mistake in the Division Court office it was not sent until after the debt had been paid, and the clerk of the Toronto court endorsed on it a direction to the clerk of the other court to issue execution and remit the money to him when made. The plaintiff's goods having been seized under this execution, he sued the defendant for having wrongfully and maliciously and without reasonable or probable cause caused the same to be issued and the plaintiff's goods to be seized thereunder. The defendant had never interfered or given any directions beyond instructing the suit to be brought:—Held, that the plaintiff could not recover; that it was his duty to protect himself by seeing that the clerk of the Division Court was notified of payment of the debt, and there was therefore no malfeasance or omission on defendant's part:—Held, also, that the defendant was not liable in trespass, for he had not authorized the direction, by the clerk to issue execution, which was no part of the clerk's duty; and:—Sembles, that neither could he have been responsible if his attorney had directed it, after the suit had been settled. *Tuckett v. Eaton*, 6 O. R. 486.—C. P. D.

Quere, under R. S. O. (1877) c. 47, s. 100, whether a person whose goods have been seized under Division Court process, can have any further relief than the restoration of his goods:—Held, that the damages given were, under the facts set out in the report, grossly excessive. *Ib.*

#### 3. Issuing Injunction.

Where a registered shareholder of a company finding the annual reports of the company misleading applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiffs' affidavit and petition there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of

the plaintiff in the sum of the same or to plaintiff being defendants, in other persons, defendants bona solvent within et of 1875, and reasonable and, and without plaintiff:—Held, not expressly in 4, that the liabilities generally, whether to the parties generally.

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the injunction. *Montreal Street R. Co. v. Ritchie*, 16 S. C. R. 622.

#### 4. Removal of Arbitrator.

On the 14th April, 1868, S. and two others, B. and M., were named joint commissioners to name the amount which should be accorded for expropriation of property required for widening one of the streets in the city of Montreal. On the 7th August, 1868, the appellants, in consequence of an award made by S. in reference to said property, passed a resolution charging him with fraud and partiality, and an application was made on their behalf to the Superior Court to have him removed from the office of commissioner. On the 17th September, 1870, the conclusions of the petition were granted on the ground that the commissioners had committed an error of judgment in the execution of their duty as commissioners, and had proceeded on a wrong principle in estimating the amount payable for the expropriation. The charges of fraud and partiality were held unfounded. On the 20th of September, 1873, the Court of Queen's Bench for Lower Canada (appeal side) reinstated the said S. and B. in their position as commissioners. On the 4th November, 1876, this judgment was confirmed by the Privy Council. In May, 1871, S. brought an action against the defendants for damages which he alleged he had suffered in consequence of his having been unjustly removed by the appellants from the position of commissioner. The respondents, widow and daughter of the late S., became plaintiffs par reprise d'instance. The appellants pleaded that the action was barred under Arts. 2262 and 2267, C. C. (P. Q.) The superior court dismissed the action on the 31st May, 1880, but the Court of Queen's Bench (appeal side) reversed the judgment and allowed \$3,000 damages to the respondents:—Held, on appeal to the Supreme Court of Canada, affirming the judgment of the Court of Queen's Bench. Fournier, J., dissenting, that the action was not an action merely for the libel contained in the resolution of the 7th August, 1868, but for a malicious prosecution in following up that resolution by proceedings instituted in the courts maliciously and without any just cause, and prescription did not begin to run until the termination of such proceedings. The action, therefore, and judgment for damages should be sustained, no objection having been raised that the action was prematurely brought. Per Strong, J.—Following the practice adopted in the Court of Queen's Bench for Lower Canada, where they either increase or lessen the amount of damages according to their appreciation of the facts, the damages in this case should be increased to \$10,000. *Mayor of Montreal v. Hall*, 12 S. C. R. 74.

### MALICIOUS INJURY TO PROPERTY.

See CRIMINAL LAW.

### MALICIOUS WOUNDING.

See CRIMINAL LAW.

### MALPRACTICE.

See MEDICAL PRACTITIONERS.

### MANDAMUS.

#### I. POWER OF COURTS TO GRANT, 1226.

#### II. WHEN IT LIES.

##### 1. Where there is Another Remedy, 1226.

##### 2. To Exercise Discretionary or Judicial Functions, 1227.

#### III. TO COUNTY JUDGES AND OTHER OFFICERS, 1227.

#### IV. TO SESSIONS, 1228.

#### V. TO MUNICIPAL CORPORATIONS.

##### 1. Generally, 1228.

##### 2. To pass By-laws or Issue Debentures in Aid of Railways—See RAILWAYS AND RAILWAY COMPANIES.

#### VI. TO RAILWAY COMPANIES.

##### 1. Registration of Bonds—See RAILWAYS AND RAILWAY COMPANIES.

#### VII. TO OTHER PERSONS, 1230.

#### VIII. APPEAL, 1231.

#### IX. PRACTICE, 1232.

#### X. COSTS, 1232.

#### XI. ENFORCING, 1233.

#### I. POWER OF COURTS TO GRANT.

Under R. S. O. (1877) c. 40, s. 86, c. 49, s. 21, and c. 52, s. 4, et seq., the Court of Chancery could exercise the powers of a court of law in any proceeding, and the powers of the Common Law Courts to grant mandamus upon motion not being by the latter Act restricted, the Court of Chancery might also have granted a mandamus upon motion: and under the Judicature Act, nothing appearing to restrict the jurisdiction, the Chancery Division of the High Court of Justice has the same jurisdiction. *Re Board of Education of Napanee and the Town of Napanee*, 29 Chy. 395.—Proudfoot.

See *Warden, etc., of the Town of Dartmouth v. The Queen*, 9 S. C. R. 509, p. 1227; *In re the Township of Moulton and Cumberland and the County of Haldimand*, 12 A. R. 503, p. 1230.

#### II. WHEN IT LIES.

##### 1. Where there is Another Remedy.

An officer of a municipal corporation applied for a mandamus to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council:—Held, that the applicant could maintain an action against the corporation for his salary, and, as he had that remedy, a mandamus would not be granted at his instance. *Re Whitaker and Mason*, 18 O. R. 63.—Galt.

Held, that it was the duty of the Court of Revision under R. S. O. (1887) c. 193, s. 61, to try the complaint in regard to persons wrongfully omitted from the voters' list; under the Manhood Suffrage Act, and that if no other complete, appropriate and convenient remedy had existed, a mandamus to compel the court to perform its duty would have issued; but as the legislature by section 68 had given a specific remedy for this very breach of duty, by appeal to the county judge, the applicant was not entitled to a mandamus. *In re Marter and the Court of Revision of the Town of Gravenhurst*, 18 O. R. 243.—Q. B. D.

See *Grand Junction R. W. Co. v. County of Peterborough*, 8 S. C. R. 76; *In re Township of Moulton and Canborough and the County of Haldimand*, 12 A. R. 503, p. 1230; *Quillman v. Canada Southern R. W. Co.*, 6 O. R. 567.

## 2. To Exercise Discretionary or Judicial Functions.

A mandamus was applied for at the instance of the sessions for the county of Halifax, to compel the warden and council of the town of Dartmouth to assess, on the property of the town liable for assessment, the sum of \$16,976 for its proportion of the county school rates for the years 1873-78, under section 52 of the Educational Act, R. S. N. S. c. 38. The Supreme Court of Nova Scotia, without determining whether the required assessment was possible and was obligatory when the writ was issued, made the rule nisi for a mandamus absolute, leaving these questions to be determined on the return of the writ. On appeal to the Supreme Court of Canada, it was:—Held (Strong and Gwynne, JJ., dissenting), that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion cannot at present be questioned. *Warden, etc., of the Town of Dartmouth v. The Queen*, 9 S. C. R. 509.

See *In re Ryer and Plows*, 46 Q. B. 206, p. 1228; *Regina v. Grainger*, 46 Q. B. 382, p. 1228; *Re O'Brien*, 3 O. R. 326, p. 1228; *Regina v. Richardson*, 8 O. R. 651, p. 217; *Regina ex rel Grant v. Coleman*, 7 A. R. 619; *Wilson v. Wainfleet*, 10 P. R. 147, p. 1230; *Re White v. Galbraith*, 12 P. R. 513, p. 551.

## III. TO COUNTY JUDGES AND OTHER OFFICERS.

Where a County Court judge improperly refuses to hear the argument of a rule nisi, mandamus is the proper remedy; and where the refusal to hear had been caused by an unmeritorious objection deliberately taken and insisted upon by defendant, he was ordered to pay the costs of the application for mandamus. *In re Dean v. Chamberlin*, 8 P. R. 303.—Osler.

To County Court clerk to enter up judgment. See *Re Great Western Advertising Co. v. Rainer*, 9 P. R. 494, p. 401.

The appointment of a creditor as administrator is not as of right, but rests in the discretion of the judge who appoints, and that cannot be interfered with by any peremptory writ; and R. S. O. (1877), c. 46, ss. 32, 36, do not better

the claim of a creditor. *Re O'Brien* 3. O. R. 326.—Boyd.

Mandamus to County Court judge to try an appeal from the court of revision. See *In re Allan*, 10 O. R. 110, p. 69.

On appeal the judgment of Rose, J. (9 O. R. 154), that a County Court judge will not be compelled by mandamus to inquire on a scrutiny of ballot papers under sections 61, 62, and 63 of the Canada Temperance Act of 1878 as to personation, bribery, or the status on the voters' list of the parties voting, was affirmed by this court, it appearing that the point was covered by a judgment of the Supreme Court of Canada in *Chapman v. Rand*, 11 S. C. R. 312, in which the judgment appealed from in this case was cited and approved of. *Re Canada Temperance Act*, 12 A. R. 677.

A mandamus was directed to issue to compel the judge of the Surrogate Court of the county of Wellington, to grant administration with the will annexed of a certain testator to G. D., one of the next of kin (who had filed the necessary papers), notwithstanding that on an issue directed out of the Surrogate Court a jury had found against the will, it appearing that the present applicant was no party to that issue, and that since the trial of it this court had held in favour of the will. *Dickson v. Monteith*, 14 O. R. 719.—Proudfoot.

The discretion of a judge in the Division Court to permit the plaintiff to amend his claim cannot be interfered with by mandamus. *Re White v. Galbraith*, 12 P. R. 513.—Armour.

See *Regina ex rel. Grant v. Coleman*, 7 A. R. 619.

## IV. TO SESSIONS.

A minute of conviction signed by the justice, but not sealed, was returned to the sessions upon the entering of an appeal therefrom by the defendants. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The chairman reserved judgment, and during the adjournment the justice returned and filed a conviction under seal. The chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard:—Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the chairman's discretion which could not be reviewed. *In re Ryer and Plows*, 46 Q. B. 206.—Osler.

The Court of Queen's Bench has no power to grant a mandamus to compel the sessions to rehear an appeal. *Regina v. Grainger*, 46 Q. B. 382.—Q. B. D.

## V. TO MUNICIPAL CORPORATIONS.

### 1. Generally.

The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiff's therefore. The



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drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening the drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear. —Held, affirming the judgment of Hagarty, C. J. (Cameron, J. dissenting) that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair under R. S. O. (1877) c. 174, s. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs. Per Cameron, J.—An action is expressly given by section 542 for injury done by such neglect, where the drain serves two municipalities; but in a case like the present, though under section 543 the municipality may be compelled by mandamus to repair the drain at the expense of the lands benefited; no action lies for injury caused by non-repair. *White v. Township of Gosfield*, 2 O. R., 287.—Q. B. D.; 10 A. R. 555.

Mandamus to municipal corporation to levy school rates. See *in re High School Board No. 4, of the U. C. of Stormont, Dundas and Glen- gary and the Township of Winchester*, 45 Q. B. 460; *Warden, etc., of the Town of Dartmouth v. The Queen*, 9 S. C. R. 509, p. 1227; *Dartmouth v. The Queen*, 14 S. C. R. 45.

Where a municipal corporation issued debentures under authority of certain by-laws which required a sinking fund to be raised each year to provide for payment of the principal at maturity, but the corporation omitted to raise such sinking fund:—Held, that they should be compelled by mandamus, on the application of a debenture holder, to raise the sinking fund for the current year, and that proceedings were properly taken against the corporation, and not the clerk of the municipality, notwithstanding R. S. O. (1877) c. 180, s. 88. For that enactment must be taken in connection with 46 Vict. c. 18, s. 359, and the clerk is not to insert in the collector's roll any sums which the council has not directed to be levied. Held, however, that the mandamus could not include the levy of the rate for a sinking fund in future years, nor semble the levy of arrears. The not levying a rate for the sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clarke v. Town of Palmerston*, 6 O. R. 616.—Proudfoot.

An appeal from the judgment of Rose, J. (not reported), dismissing an application under 46 Vict. c. 18, s. 535 (Ont.), for a mandamus to compel the repair by the county of Haldimand of an existing bridge or the construction of a new one over the Oswego Creek, where it crosses the boundary line between the townships of Moulton and Haldimand, by reason of the judges of this court being divided in opinion, was dismissed. Per Hagarty, C. J. O., and Osler, J. A.—Indictment was the appropriate remedy. The court below had the right to grant the writ in its discretion, which was, however, properly exercised in refusing it. Per Burton and Patterson, J.J. A.—The duty under the statute is not the general obligation to keep

highways and bridges in repair, but is a specific duty like that cast upon railway companies by their charters with respect to the restoration of roads or the building of bridges. The existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party charged by statute with a specific duty. Indictment would in this case be neither a specific nor an adequate remedy, and a mandamus should have been granted. *In re Township of Moulton and Camboorough and County of Haldimand*, 12 A. R. 503.

It is discretionary with and not obligatory upon a municipal council to open a road allowance, and the fact that a by-law has been passed does not create such an obligation, and a mandamus was refused. *Re Wilson v. Wainfleet*, 10 P. R. 147.—Rose.

The courts of Ontario have no jurisdiction to compel a municipality at the suit of a private individual to open an original road allowance and make it fit for public travel. *Hislop v. Township of McGillivray*, 17 S. C. R. 479. See *S. C.*, 12 O. R. 749; 15 A. R. 687.

Plaintiff entered into an agreement in writing with defendants to do certain work under a provisional by-law, and which agreement contained this clause: "Notwithstanding anything hereinbefore contained to the contrary this agreement \* \* is made subject to the final passing of the said by-law \* \* and in the event of the said by-law not being passed \* \* then this agreement shall be null and void \* \* ." The by-law was never finally passed and the agreement was produced at the trial by defendants to prevent the plaintiff recovering as on a quantum meruit:—Held (reversing Ferguson, J., who retained his opinion), that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a mandamus to the defendants to raise the money. The stipulation as to the final passing of the by-law should receive a reasonable construction and could only be invoked when the work was not properly performed. *Quintance v. Township of Howard*, 18 O. R. 95.—Chy. D.

## VII. TO OTHER PERSONS.

To Board of Audit in cases relating to fees of county attorneys. See *In re Fenton and the Board of Audit for the County of York*, 31 C. P. 31 p. 405; *In re Stanton and the Board of Audit of the County of Elgin*, 3 O. R. 86 p. 405.

To police magistrate to hear further evidence. See *Regina v. Richardson*, 8 O. R. 651, p. 217.

To school trustees to admit pupils. See *Dunn v. Board of Education of Windsor*, 6 O. R. 125; *In Re Minister of Education and McIntyre, v. The Public School Trustees of Section 8, in the Township of Blanchard*, 11 O. R. 439.

Held, that mandamus to the Provincial Secretary is the proper mode for enforcing the issue of a notice under 27-28 Vict. c. 23, s. 5, sub-s. 18 (Can.), stating that a by-law increasing the capital stock of a company had been passed, and declaring the number and amount of shares of

the new stock, etc. See *Re Massey Manufacturing Co.*, 11 O. R. 444; 13 A. R. 446. But see 49 Vict. c. 16, s. 32 (Ont.)

To compel revising officer to hold a sittings and adjudicate upon a complaint to have a name struck off the voters' list. See *Simmons and Dalton*, 12 O. R. 505.

By owner of land taken by railway to settle the amount of compensation. See *Demorest v. Milland R. W. of Canada*, 10 P. R. 73, p. 1232.

Per Strong, J.—Mandamus will never, under any circumstances, be granted where direct relief is sought against the crown. *McQueen v. The Queen*, 16 S. C. R. 1.

To mayor of a corporation to sign warrants for applicant's salary. *Re Whitaker and Mason*, 18 O. R. 63, p. 1226.

Section 49 of the Public Health Act, R. S. O. (1887) c. 205, provides that "The treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act." A physician recovered judgment in a Division Court against a township local board of health, sued as a corporation, for services performed in a smallpox epidemic. It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the board he had brought an action against the municipal corporation for his services, in which he failed. Upon motion by the physician for a mandamus under section 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered:—Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the Division Court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no other remedy, the applicant was entitled to the mandamus. *Re Darby and the Local Board of Health of South Parlaynet*, 19 O. R. 51.—Q. B. D.

A mandamus will not be granted to compel a board of license commissioners to issue a license to a person to whom one has been granted, but not issued, by the retiring commissioners, where they have not completed their functions, their acts having been reversed by their successors in office. *Leeson v. License Commissioners of Dufferin*, 19 O. R. 67.—Chy. D.

See *Chaplin v. Public School Board of the Town of Woodstock*, 16 O. R. 728, p. 923.

#### VIII. APPEAL.

Held, that the appeal in cases of mandamus under section 23 of the Supreme and Exchequer Court Act is restricted by the application of section 11 to decisions of "the highest court of final resort" in the province, and that an appeal will not lie from any court of the province of Quebec but the Court of Queen's Bench. *Fournier and Henry, JJ.*, dissenting. *Danjou v. Marquis*, 3 S. C. R. 251.

See *Warden, etc., of the Town of Dartmouth v. The Queen*, 9 S. C. R. 509, p. 1227.

#### IX. PRACTICE.

There having been a misnomer in the names of the applicants, per Armour and Cameron, JJ., such misnomer not having been objected to on the argument below might be amended. Per Hagarty, C. J., in such a case no amendment should be granted as a matter of discretion. *In re High School Board No. 4 of the U. C. of Stormont, Dundas and Glengarry and the Township of Winchester*, 45 Q. B. 460.—Q. B. D.

The owner of land taken by a railway is entitled to compensation, and the company must proceed to settle the amount thereof under R. S. O. (1877) c. 185, s. 20, if they do not, the proper course is to apply for a mandamus. On such application a formal title in the absence of proof to the contrary need not be proved, it is sufficient if the applicant swear that he is the owner of the land taken. *Demorest v. Milland R. W. Co. of Canada*, 10 P. R. 73.—Cameron.

The notice of motion was addressed to the Midland Railway Company, and the Grand Junction Railway Company, and to the presidents and directors of each, and asked for relief against all or either:—Held, that section 17 of R. S. O. (1877) c. 52, contemplates the calling upon any party who may be affected by the writ if issued to shew cause why it should not issue, and therefore the notice was not objectionable as being in the alternative. *Id.*

Semble, if the evidence given will not warrant the court in granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act, (Con. Rule 755). *Hidlop v. Township of Mettilliray*, 12 O. R. 749.—Q. B. D.

The demand made in this case upon the county council to repair the bridge previous to the application was sufficient:—Per Oaler, J. A.—The demand was insufficient. *In re the Townships of Moulton and Canborough and County of Haldimand*, 12 A. R. 503.

Section 17, sub-section 8, of the O. J. Act applies to motions for mandamus, etc., where an action is pending; but R. S. O. (1877) c. 52, s. 17, specially authorizes a summary application for a mandamus in chambers. *Kincaid v. Kincaid*, 12 P. R. 462, distinguished. *Re Brookfield and the Trustees of Public School Section No. 12 of the Township of Brooke*, 12 P. R. 485.—Boyd.

See *Demorest v. Milland R. W. Co.*, 10 P. R. 82, p. 1233.

#### X. COSTS.

Where a summary application for a mandamus was made to the court, costs of a chamber application only were allowed to the applicant, where the circumstances did not justify the imposition of a larger amount of costs than was sufficient to indicate that the respondents were in the wrong. *Re Brookfield and the Trustees of*

f Dartmouth  
27.

Public School Section No. 12, of the Township of  
Brook, 12 P. R. 485.—Boyd.

See *In re Dean v. Chamberlin*, 8 P. R. 303,  
p. 1227.

#### XI. ENFORCING.

Attachment not sequestration is the proper  
remedy for disobeying a mandamus. *Demarest  
v. Millant R. W. Co.*, 10 P. R. 82.—Wilson.

in the names  
and Cameron,  
on objected to  
mended. Per  
amendment  
discretion. In  
the U. C. of  
and the Town-  
Q. B. D.

railway is en-  
company must  
proof under R.  
do not, the  
mandamus. On  
the absence of  
proved, it is  
that he is the  
est v. Millant  
73.—Cameron.

A writ of mandamus was directed to the Mil-  
land Railway Company, and was served on the  
president. Attachment against the president for  
disobedience to the writ was refused, because it  
appeared that he could not by himself and with-  
out a majority of the board of directors perform  
the act required by the writ, and the other direc-  
tors had not been served; but—Held, that the  
mandamus was properly directed to the com-  
pany. *Ib.*

#### MANSLAUGHTER.

See CRIMINAL LAW.

#### MANUFACTORIES.

I. EXEMPTION FROM TAXATION—See MUNI-  
CIPAL CORPORATIONS.

II. BONUS BY WAY OF AID TO—See MUNI-  
CIPAL CORPORATIONS.

addressed to the  
the Grand Junc-  
the presidents  
for relief against  
17 of R. S. O.  
Alling upon any  
the writ if issued  
not issue, and  
objectionable as

will not warrant  
as upon motion  
before it all the  
determining the  
may be given for  
the Judicature  
v. Township of  
B. D.

Act to provide against frauds in the supply-  
ing milk to cheese or butter manufactories. See  
*Regina v. Wason*, 17 A. R. 221, p. 210; *Regina  
v. Darling*, 17 O. R. 698, p. 219.

#### MARINE INSURANCE.

See INSURANCE.

upon the county  
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pler, J. A.—The  
the Townships  
County of Hal-

e O. J. Act ap-  
etc., where an  
(1877) c. 52, s.  
any application  
Kincaid v. Kin-  
d. Re Brook-  
School Section  
ooke, 12 P. R.  
Co., 10 P. R.

#### MARITIME COURT.

Where a disputed fact involving nautical  
questions is raised by an appeal from the judg-  
ment of the Maritime Court of Ontario, as in  
the case of a collision, the Supreme Court will  
not reverse the decree of the judge of the court  
below merely upon a balance of testimony. *The  
Picton—McQuay v. Keith*, 4 S. C. R. 648.

Held, that 40 Vict. c. 21, establishing a court  
of maritime jurisdiction for the province of  
Ontario, is intra vires of the Dominion Parlia-  
ment. *Ib.*

The appellant's child, a minor, was killed in a  
collision between two vessels by the negligence  
of the officers in charge of one of them ("The  
Garland"). Petition against "The Garland"—  
libelled under the Maritime Court Act at the  
port of Windsor—on behalf of the appellant  
claiming \$2,000 damages suffered by her, owing

to the death of her son and servant, caused by  
the negligence of the officers in charge of the  
said "Garland." The respondent intervened,  
and demurred on the ground that the petition  
did not set forth a cause of action against "The  
Garland" within the jurisdiction of the court:—  
Held (Fournier and Taschereau, J.J., dissent-  
ing), that the Maritime Court of Ontario has no  
jurisdiction apart from R. S. O. (1877) c. 128  
(re-enacting in that province Lord Campbell's  
Act, 9 & 10 Vict. c. 93), in an action for per-  
sonal injury resulting in death, and therefore  
the appellant had no locus standi, not having  
brought her action as the personal representa-  
tive of the child. Per Fournier, Taschereau,  
Henry and Gwynne, J.J. (reversing the judgment  
of the Maritime Court of Ontario), that Vice-  
Admiralty Courts in British possessions and the  
Maritime Court of Ontario, have whatever  
jurisdiction the High Court of Admiralty has  
over "any claim for damages done by any ship,  
whether to person or to property." Per Four-  
nier and Taschereau, J.J., dissenting, that apart  
from and independently of R. S. O. (1877) c.  
128, the Maritime Court of Ontario had juris-  
diction in a proceeding in rem against a foreign  
vessel for the recovery of damages for injuries  
resulting in death; that the appellant, either in  
the capacity of parent or of mistress, was en-  
titled to claim damages for the loss of her son  
or servant. *In re The Garland—Monaghan v.  
Horn*, 7 S. C. R. 409.

Rule 269 of the rules of the Maritime Court of  
Ontario requires notice of appeal from a decision  
of that court to the Supreme Court of Canada  
to be given within fifteen days from the pro-  
nouncing of such decision. A judgment of the  
Maritime Court was handed by the Surrogate  
to the Registrar, but not in open court, on 31st  
August, and was not drawn up and entered  
by the registrar for some time after:—Held,  
Taschereau, J., dubitante, that notice of ap-  
peal within fifteen days from the entry of  
such judgment was sufficient under the said  
rule. Quære, is such Rule 269 intra vires the  
Maritime Court? *The St. Magnus—Robertson  
v. Wigle*, 15 S. C. R. 214.

#### MARKETS.

See MUNICIPAL CORPORATIONS.

#### MARRIAGE.

I. BREACH OF PROMISE OF MARRIAGE—  
See HUSBAND AND WIFE.

II. BIGAMY—See CRIMINAL LAW.

III. VALIDITY OF—See HUSBAND AND WIFE.

IV. DIVORCE—See HUSBAND AND WIFE.

#### MARRIAGE SETTLEMENT.

See FRAUDULENT CONVEYANCES—HUSBAND AND  
WIFE

**MARRIED WOMEN.**

See HUSBAND AND WIFE.

**MARSHALLING OF ASSETS.**

There can be no marshalling of assets in favour of a charity. *Becher v. Hoare*, 8 O. R. 328.—*Ferguson*.

See *Clarke v. Bogart*, 27 Chy. 450.

**MASTER AND SERVANT.****I. CONTRACT OF HIRING.**

1. *Within the Statute of Frauds*, 1235.
2. *Between Relations*, 1236.
3. *Remuneration or Salary*, 1236.
4. *Termination*, 1237.
5. *Other Cases*, 1237.

**II. RIGHTS OF MASTER AND SERVANT.**

1. *Wages*, 1237.
2. *Dismissal*, 1238.

**III. LIABILITY OF MASTER.**

1. *For Acts of Servant in Course of Employment*, 1241.
2. *For Injury to Servant in Course of Employment*.
  - (a) *Generally*, 1243.
  - (b) *Servants own Negligence or Knowledge of Danger*, 1244.
  - (c) *For Acts of Fellow Servants*, 1244.
  - (d) *Workmen's Compensation for Injuries Act*, 1245.
  - (e) *Factories Act*, 1249.
  - (f) *Liability of Railway Companies*—  
See RAILWAYS AND RAILWAY COMPANIES.

**I. CONTRACT OF HIRING.**

1. *Within the Statute of Frauds*.

In an action on a verbal agreement made in November, for the hiring of plaintiff by defendant for a year from the 1st of December then next:—Held, that there could be no recovery for wrongful dismissal, the agreement being one not to be performed within a year; and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied. *Harper v. Davies*, 45 Q. B. 442.—Q. B. D.

Held (reversing the judgment of the County Court of York), that a contract of hiring for a year or more defeasible within the year, is within the fourth section of the Statute of Frauds. The agreement, as alleged by the plaintiff, was made in February, 1880, whereby the defendant was to pay him for his services while he should remain in defendant's employment, at the rate of \$500 a year, for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties, and his salary to

commence on the 3rd of March then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year, and for such longer period as might be agreed upon:—Held, clearly within the statute. *Booth v. Prittie*, 6 A. R. 680.

**2. Between Relations.**

Per Proudford, J.—A son working at home upon his father's place would not be entitled to recover for work and labour in the absence of an agreement to that effect. *Campbell v. McKerricher*, 6 O. R. 85.

Where brothers, or sisters, or other near relatives, live together as a family, no promise arises by implication to pay for the services rendered or benefits which, as between strangers, would afford evidence of such a promise; and therefore in an action between relatives so living together for board, wages, or the like, an express promise must be proved by the party making the claim. *Redmond v. Redmond*, 27 Q. B. 220, followed and approved of. *Iler v. Iler*, 9 O. R. 551.—C. P. D.

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. But where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule; the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of special contract, while they form part of the household. Decision of Proudford, J., varied. *Walker v. Boughner*, 18 O. R. 448.—Q. B. D.

See *Peckham v. Depotly*, 17 A. R. 273, p. 1237.

**3. Remuneration or Salary.**

Where a by-law of a municipality appointed a health officer but did not fix his salary:—Held, that the law would fix his salary at a reasonable sum, regard being had to the services performed. *Bogart v. Township of Seymour*, 10 O. R. 322.—*Ferguson*.

See *Shanly v. Grand Junction R. W. Co.*, 4. O. R. 156, p. 1207; *Ellis v. Midland R. W. Co.*, 7 A. R. 464, p. 1237.

#### 4. Termination.

Municipal officers appointed by the council hold office during the pleasure of the council, and may be removed without notice and without cause. *Willson v. York*, 46 Q. B. 289.—Q. B. D.

Held that a contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners. *Burnet v. Hope*, 9 O. R. 10.—C. P. D.

The plaintiff, who sued for wrongful dismissal, having received a letter from the firm in March, 1882, dispensing with his services from the 1st January, 1883, afterwards signed a receipt for his wages for December, adding "and I am now leaving their employment."—Held, that this was evidence for the jury of acquiescence in the termination of his engagement, more especially as he had made no claim for future wages. *Ib.* See *Ellis v. Midland R. W. Co.*, 7 A. R. 464, *infra*.

#### 5. Other Cases.

Where the plaintiff was engaged by the defendants for "the season," i.e., from early in May till some time in November, as master to manage the steamer "Idyl-Wyld" for \$1000, and he continued so employed until September, when the steamer was burnt.—Held, that the plaintiff was not entitled to more than the proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendants.—Semble, that such a contract made verbally with the president of the defendants' company might be binding. *Ellis v. Midland R. W. Co.*, 7 A. R. 464.

A medical health officer is not a servant of a municipal corporation within the meaning of R. S. O. (1877) c. 47, s. 125. See *Macfie v. Hutchison*, 12 P. R. 167. See, also, *Forsyth v. Canniff*, 20 O. R. 478.

The plaintiff, while a child of very tender years, had been placed by her father with the defendant, who was not a relation, to remain with him until she attained eighteen years of age, he agreeing to support her during that time, to send her to school, to supply her with clothing, and to give to her certain articles when she reached the age of eighteen. She remained with the defendant until she was nearly twenty years of age, being in all respects treated as a member of the family, and doing such work as a member of the family would naturally do.—Held, that the plaintiff had no implied right to remuneration for services rendered after she attained the age of eighteen, and that in the absence of any express agreement for payment of wages, she could not recover. Judgment of the County Court of Elgin reversed. *Peckham v. Depotly*, 17 A. R. 273.

### II. RIGHTS OF MASTER AND SERVANT.

#### 1. Wages.

Right to investigate accounts, etc., where employee has a share in the profits in lieu of remuneration. R. S. O. (1877) c. 133, s. 3. See *Rogers v. Ullmann*, 27 Chy. 137.

To an action by a commercial traveller for wages defendants pleaded a discharge in insolvency, the plaintiff replied that the claim was privileged:—Held, reversing the judgment of the Q. B., (45 Q. B. 188), that privileged claims are not within the class of debts mentioned in section 63 of the Insolvent Act, 1875, to which a discharge does not apply without the consent of the creditor. *Fryer v. Shields*, 6 A. R. 57.

See *Re Bolt and Iron Co.*,—*Livingston's Case*. 14 O. R. 211, p. 1267.

#### 2. Dismissal.

This action was brought by G. against the A. F. S. S. Co. to recover damages for an alleged breach of contract. The plaintiff was master of the SS. George Shattuck, trading between Halifax and St. Pierre and other points in the Dominion. She was owned by defendant company, the plaintiff being one of the largest shareholders of the company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for \$900 a month, afterwards increased to \$950. The ship had been originally accustomed to remain at St. Pierre forty-eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd of May, without prior notice, dismissed from the service of the company. The case was tried before Sir Wm. Young, C. J., without a jury, who, considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict in his favour for \$2,000. A rule nisi was made absolute by the full court for a new trial. On appeal to the Supreme Court of Canada it was:—Held, 1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on this ground. 2nd. Per Ritchie, C. J., and Fournier and Gwynne, JJ., That the fact of the master being a shareholder in the corporation owning the vessel had no bearing on the case, and that it was proper to grant a new trial to have the question as to whether the plaintiff so acted as to justify his dismissal by the owners submitted to a jury, or a judge, if the case be tried without a jury. *Guildford v. Anglo-French S. S. Company*, 9 S. C. R. 303.

The plaintiff agreed with the defendant to serve him as a manager of a tannery for six years, the agreement reciting that he was to manage the works while the defendant was to furnish the capital. He also agreed to disclose to the defendant a secret process of tanning, which defendant was not to use after the agreement, except in connection with the plaintiff, and to manufacture the leather according to such process. The defendant discharged the plaintiff after about seven months, alleging, among other things, that he was not a practical tanner, and that he was not using the secret process, and had not disclosed it to the defendant:—Held, reversing the judgment of Proudford, V. C., 27 Chy. 86, that the plaintiff was a practical tanner within the meaning of the agree-



ment; and that the manufacture of leather was being carried on according to a secret process, and that as no time was limited for disclosing such process, the defendant, who had never asked for the disclosure, had no right to dismiss the plaintiff for its non-disclosure. A reference was therefore directed as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal. *Blake v. Kirkpatrick*, 6 A. R. 212.

The plaintiff renewed his engagement for a year with the defendant company at Hamilton to serve them in the capacity of bookkeeper. Before the expiry of the time agreed for, P., one of the managers of that branch of the company, removed the books from the possession of the plaintiff, placing another in charge thereof and telling the plaintiff that he did not any longer require his services, but that if W., another officer of the company, had anything for him to do outside he would be very glad, adding, "But I have no further service for you in the office, in fact I do not want you in the office." The plaintiff refused to recognize the right of P. to thus remove him, and it was arranged between plaintiff, W. and P., that plaintiff should remain occupying his time with other work until it was ascertained from the head office if P. had the authority he asserted; and on obtaining information in the affirmative, plaintiff left:—Held, affirming the judgment of the court below, that the action of the defendants was a dismissal of the plaintiff. *Lash v. Meriden Britannia Co.*, 8 A. R. 680.

The right of public school trustees to dismiss for good cause a teacher engaged by them, necessarily exists from the relation of the parties. 49 Vict. c. 49 (Ont.), ss. 165, 168, provides a proceeding by which the status or qualification of the teacher may be determined; and the result of such proceeding may be in effect the same as dismissal; but such enactment does not deprive the employers of the inherent right to dismiss. *Raymond v. School Trustees of Cardinal*, 14 A. R. 502.

The defendants carried on the business of a commercial agency, of which the plaintiff was general manager, having oversight over the employees, and command of a large amount of money passing through his hands. By the terms of his engagement plaintiff was to be paid a salary of \$5,000, and was to devote his whole time, influence, and talents to the successful prosecution of the business, the failure of either party to keep the agreement rendering it void. The plaintiff having engaged in speculating in margins in the stock and grain exchange, through brokers and "bucket shops," had sunk all his private means, and had become indebted to a large extent beyond his ability to pay. It appeared also that he had engaged in such speculations with various merchants, whose ratings he had not altered, although in his judgment transactions of that nature, materially affected the credit of those engaging in them. Having been requested by defendants to give up speculating, he refused to do so stating that if his so doing was a condition of his remaining he would dissolve the connection—whereupon he was dismissed:—Held, that his dismissal was justifiable. *Priestman v. Bradstreet*, 15 O. R. 558.—C. P. D.

The plaintiff, who was the inventor of a certain machine and had assigned certain patents therefor to the defendant, agreed to obtain patents for certain improvements made by him thereon, and to assign them to the defendant as soon as obtained, who in consideration thereof agreed to employ the plaintiff for two years, from the date of the agreement for the purpose of demonstrating and placing the patents on the market, and to pay him a certain sum for salary and also his expenses, and the plaintiff and defendant were to share the profits in certain proportions. The tenth clause of the agreement was as follows:—"It is further agreed that the party of the first part (the defendant) is to be the absolute judge as to the manner in which the party of the second part (the plaintiff) performs his duties under this agreement and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal and shall have no claim whatever against the party of the first part." The defendant dismissed the plaintiff within three months of the date of the agreement for alleged disobedience and incapacity, without communicating to the plaintiff his reasons for so acting or calling upon him for any explanations:—Held, affirming the judgment of the Q. B. D. (16 O. R. 495), (Hagarty, C. J. O., dissenting) that the plaintiff having certain rights of property under the agreement the parties to it did not occupy merely the relation of master and servant, and that under the tenth clause the defendant occupied a quasi judicial position and had no right arbitrarily to dismiss the plaintiff but was bound to act in good faith and to enquire into the circumstances upon which he based his determination to dismiss, this necessarily involving notice to the plaintiff and opportunity of being heard. *Russell v. Russell*, 14 Ch. D. 471, distinguished. *Marshall v. McRae*, 17 A. R. 139.

Held, also in the Q. B. D. that the work to be performed not being the only consideration for the wages to be paid, except for the tenth clause the defendant would have had no right to dismiss the plaintiff at all, but would have been left to his remedy upon the plaintiff's covenant. "The business of the defendant" meant the business for which the plaintiff was employed, and the defendant had no legal right to dismiss the plaintiff for alleged breach of duty in connection with work not within the terms of his employment; and even if such work was within the terms of his employment, the defendant had, upon the evidence, no reasonable grounds for dismissing the plaintiff. *S. C.* 16 O. R. 495.—Q. B. D.

In an action for damages for wrongful dismissal tried with a jury, it is for the judge to say whether the alleged acts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction. *McIntyre v. Hockin*, 16 A. R. 498.

If good cause for dismissal exists it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it, and acted upon some other cause in itself insufficient. *Id.*

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When the master has full knowledge of the nature and extent of misconduct on the part of his servant sufficient to justify dismissal, he cannot retain him in his employment, and afterwards at any distant time, turn him away for that fault, without anything new; but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offence may be invoked and may be put in the scale against the offender as cause for dismissal. Condonation is a question of fact for the jury if in the opinion of the judge there is any evidence of it to be laid before them. *Ib.*

See *Hillson v. York*, 46 Q. B. 289, p. 1237; *Burnet v. Hope*, 9 O. R. 10, p. 1237.

### III. LIABILITY OF MASTER.

#### 1. For Acts of Servant in Course of Employment.

Selling liquor without license.—Liability of master and servant. See *Regina v. Howard*, 45 Q. B. 346, p. 1056.

The plaintiff who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured:—Held, Osler, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. *Emerson v. Niagara Navigation Co.*, 2 O. R. 528.—C. P. D.

It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. Per Wilson, C. J. This under 32-33 Vict. c. 20, s. 45 (Dom.), though a release to the purser, did not constitute any bar to the present action against the company. *Ib.*

Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Ib.*

Liability of municipal corporation for act of collector.—Respondent superior. See *McSorley v. Mayor, etc., of the City of St. John*, 6 S. C. R. 531.

Liability of crown for negligence of its servants. See *Regina v. McFarlane*, 7 S. C. R. 216.

In an action for damages for injury caused by negligent driving it appeared that a servant of defendants on his way for a wrench, for which he had been sent for the purpose of shutting off the water from a street hydrant which had burst, without the knowledge or consent of defendants wrongfully took possession of a horse and buggy

belonging to defendants' city commissioner, and therewith ran plaintiff down, causing the injury complained of:—Held that defendants were not liable. *Stretton v. City of Toronto*, 13 O. R. 139.—Q. B. D.

On the 13th April, 1883, C., an architect, who had his office on the third flat of a building in the city of Montreal, in which the landlord had placed an elevator for the use of the tenants, desiring to go to his office went toward the door admitting to the elevator and seeing it open entered, but the elevator not being there, he fell into the cellar and was seriously injured. In an action brought by C. against R., the landlord, claiming damages for the injury suffered, it was proved at the trial that the boy, an employee of R., in charge of the elevator, at the time of the accident had left the elevator with the door open to go to his lunch leaving no substitute in charge. It was shown also that C. had suffered seriously from a fracture to his skull, had been obliged to follow for many months an expensive medical treatment and had become almost incapacitated for the exercise of his profession. C. had been in the habit of using the elevator during the absence of the boy. The trial judge awarded C. \$5,000 damages, and on appeal to the Court of Queen's Bench (appeal side), P. Q., that amount was reduced to \$3,000 on the ground that C. was not entitled to vindictive damages. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the court below, that R. was liable for the fault, negligence and carelessness of his employee and that the amount awarded was not unreasonable:—Held, also, that the sum of \$5,000 awarded by the Superior Court was not an unreasonable amount and could not be said to include vindictive damages, but as no cross appeal had been taken the judgment of the Superior Court could not be restored. *Stephens v. Chausse*, 15 S. C. R. 379.

Under a hire receipt of an organ sold by defendant R., to plaintiff's son, and signed by the latter, the defendant R. was authorized on default of payment to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be, with authority to remove the same, without resorting to any legal process. Default having been made in payment of certain instalments due under the hire receipt, defendant R. sent his bookkeeper, the other defendant, and two assistants, with instructions to get the organ. The bookkeeper taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door and entered the hall, but on his attempting to open the door of the room in which the organ was, the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued, and the plaintiff's wife was injured:—Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty, and were within the general scope of his authority. Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrong-doers. *Murphy v. City of Ottawa*, 13 O. R. 334, distinguished. *Ferguson v. Roblin*, 17 O. R. 167.—C. P. D.

## 2. For Injury to Servant in Course of Employment.

## (a) Generally.

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying: that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used: that they also directed and required him to be carried, as part of his employment, on the defendants' trains: that accordingly he was received by the defendants "to be safely carried" on a train, and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured:—Held, 1. That if the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman in that new employment, just as he had been in his former employment. 2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment; and that there was no cause of action. *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70.—Wilson.

Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established as a foreman is but a fellow servant, though it may be of a higher grade. *Rudd v. Bell*, 13 O. R. 47.—Chy. D.

The corporation of the city of Ottawa contracted with the defendant Doyle to lay down sewer pipes on certain streets in the city of Ottawa, and by their engineer and inspector the corporation exercised superintendence over the work as it progressed. Doyle employed one McCallum to engage workmen and oversee the work: McCallum engaged Murphy, the husband of the plaintiff. During the progress of the work the sides of the sewer caved in through the faulty and negligent shoring of the walls thereof, thereby causing the death of Murphy:—Held, that under the evidence, the corporation were not liable; that no recovery ought to have been had against either of the defendants, as there was no evidence from which it could have been reasonably inferred that the deceased was ignorant of the dangerous character of the work he was engaged in, of which he had quite as much knowledge and means of knowledge as his master, and with the knowledge of which he voluntarily engaged in it: but, as defendant Doyle had not moved against the verdict found against him, it was the jury allowed to stand:—Held, also, that the corporation by their inspector had not so interfered with the conduct of the work by the deceased as to assume personal control over the deceased within *Stephen v. The Commissioner of Police of Thurso*, 3 Court of Session Cases, 4th Series, 535, per Gifford, L. J.:—Held, also, that the action being founded on the relationship of master and servant, both defendants could not be held liable, and that the plaintiff, by retaining her judgment against Doyle, had elected to treat the wrongful act or omission as his, and had therefore no recourse against the corporation. *Murphy v. City of Ottawa*, 13 O. R. 334.—Q. B. D.

## (b) Servant's Own Negligence or Knowledge of Danger.

Held, in an action by a servant for an injury sustained, in consequence of the guard being out of place in working a circular saw which he had to attend, that it was not sufficient to shew that the master knew the saw was not guarded; but it must also appear that the servant was ignorant of that fact, and as the servant was skilled in the use of the saw, and did not look to see whether the guard was on or off, as it was his duty to have done, he could not, therefore, make the master responsible to him for the consequences of his own neglect of duty. *Miller v. Reid*, 10 O. R. 419.—Q. B. D.

The plaintiff having had years of experience in running iron work machines and having been previously employed by the defendants in their wood working manufactory, hired a second time and was injured in working a jointer which he was told other men had been injured at. In an action against the employers:—Held, that plaintiff knew from his own inspection and experience that the machine was dangerous; that it needed caution and firmness in operating; that the risks were open to his observation and that his opportunities and means of judging of the danger were at least as good as those of his employers, and a motion to set aside a nonsuit was dismissed. *Rudd v. Bell*, 13 O. R. 47.—Chy. D.

The defendants were the owners of a tannery for use in which a hoist had been built for them by a contractor, and one of them was, with the plaintiff, one of the defendants' servants, aiding the contractor in putting the hoist in place and testing it. Owing to a defect in the mechanism, of which the plaintiff and defendants were ignorant, the hoist fell and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist. The presence of these might have stopped the fall, but their absence had nothing to do with the occurrence of the accident:—Held, that the defendants were not liable. Judgment of the Queen's Bench Division directing a new trial set aside, and judgment of Falconbridge, J., as the trial restored. *Ross v. Cross*, 17 A. R. 29.

See *McFurlane v. Gilmour*, 5 O. R. 302, p. 1245; *Murphy v. City of Ottawa*, 13 O. R. 334, p. 1243; *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316.

## (c) For Acts of Fellow Servants.

The plaintiff, being engaged in the service of the defendants in repairing a bridge, was injured by the fall of the hammer of a pile-driver, caused, as was found by the negligence of one M. The work was being performed in R.'s section, R. being a councillor, and M., who was the reeve of the municipality, was employed at day wages by R. as foreman:—Held, that M., though reeve, was not acting in that capacity, but as a hired fellow servant with the plaintiff; that there was nothing to so identify the defendants with him in the work, as their chief officer, as to take the case out of the ordinary rule governing the relation of fellow servants; and that the plaintiff therefore could not recover. *Drew v. Township of East Whitby*, 46 Q. B. 107.—Q. B. D.

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The defendants, the proprietors of extensive mills, constructed a tramway to carry lumber from one end of their yard to the other, the cars used being drawn by a steam engine. There was no passenger car, but the employees were permitted to be carried on the road. The track was laid on ties placed on wet ground, very little ballasting was done, and none where the accident happened, and there was other evidence of faulty construction. The plaintiff was going to his work on one of the cars, when it was thrown off the track by reason of a misplaced rail, caused by the defective construction. The defendants employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow servant of the plaintiff, and it was shewn that B. neglected to replace the rail, though he was aware of its being displaced:—Held, that the accident having been caused by the negligence of a fellow servant, the defendants were not liable:—*Quare*, apart from this, whether the plaintiff could have recovered, he being aware that the road was without ballast, the defects in construction being patent, and such tramways being known not to be substantially built or of a permanent character. *McLarlane v. Gilmour*, 5 O. R. 302.—C. P. D.

In an action for damages by the administratrix of M., an employee of the defendant company, who was killed by an explosion of defendants' powder mills, caused by a portion of the machinery being out of repair, it was shewn that W., a director of the company, had some time before the explosion, when the works were idle, given directions to C., the superintendent and head of the works, to have the defective portions of the machinery repaired before recommencing operations; but C. neglected to attend to it, and the repairs were not made. It was not shewn that W. in any way assumed to direct the practical working of the mills, or that he had any special knowledge or ability to do so, and there was no suggestion that C. was an incompetent or improper person to employ:—Held, reversing the judgment of the Queen's Bench Division, 12 O. R. 58, that the intervention of W. had not taken the case out of the general rule of law, that the defendants were not responsible for an accident due to the negligence of a fellow servant, which C. was. *Matthews v. Hamilton Powder Co.*, 14 A. R. 260.

See *Cox v. Hamilton Sewer Pipe Co.*, 14 O. R. 300, p. 1246; *Rudd v. Bell*, 13 O. R. 47, p. 1244.

## (d) Workmen's Compensation for Injuries Act.

*Notice of Action.*—Solicitors for the plaintiff before action wrote as follows to the defendants:—"We have been consulted by Mr. J. Cox concerning injuries sustained by him while in your employ by which he lost his left hand. We have received instructions to commence an action against you for damages unless the matter is satisfactorily settled without delay. If you intend contesting this suit, kindly let us have the address of your solicitors who will accept service of process on your behalf." Held, reversing the decision of Cameron, C. J., that this was sufficient notice of action to satisfy the requirements of 49 Vict. c. 28, s. 7, and section 10 (Ont.). *Stone v. Hyde*, 9 Q. B. D., 76 followed.

*Cox v. Hamilton Sewer Pipe Co.*, 14 O. R. 300.—Chy. D.

Per Proudfoot, J., a notice of action under the Workmen's Compensation for Injuries Act does not require to be signed or to be on behalf of any one. *Mason v. Bertram*, 19 O. R. 1.

*Other Cases.*—In defendants dyehouse a number of vats were used for boiling cotton. In the course of his employment, as a dyer, in defendants' factory in which he had been employed at the same work for about three years, it was necessary for plaintiff to stand on the top of one of these vats, the cover provided for which consisted of several boards, whose average diameter was five feet six inches by ten inches, the vat being five feet. About 3rd December, 1886, plaintiff complained to defendants' foreman that these boards were insufficient in number to cover the vat completely, but defendants did not remedy the defect; and on the 6th of same month, while at work standing on them, one of the boards slipped sideways, precipitating plaintiff into the boiling liquid. Defendants thereafter remedied the defect. A similar accident had occurred in the factory two years before. Held setting aside a non-suit, in an action brought by plaintiff for damages, that there was sufficient evidence of negligence on defendants' part, in not having had the vat "securely guarded," in compliance with the Ontario Factory Act, 1884 (47 Vict. c. 39, s. 15, sub-s. 1), to have justified a jury in finding for plaintiff. Per Wilson, C. J. The plaintiff could not recover under the Workmen's Compensation for Injuries Act (49 Vict. c. 28), because he was barred by the maxim *volenti non fit injuria*, under *Thomas v. Quartermaine*, 18 Q. B. D. 685. Per Armour, J., that independently of the Factory Act there was evidence of negligence on defendants' part to entitle plaintiff to sue under sub-section 1 of section 3 of the Workmen's Compensation for Injuries Act, and that the maxim *volenti non fit injuria* had no application to the facts of this case. *Thomas v. Quartermaine*, supra, considered and distinguished. *Dean v. Ontario Cotton Mills Co.*, 14 O. R. 119.—Q. B. D.

Held, that the evidence in this case, in which the plaintiff, while at work in the sweat-box of a sewer pipe company and engaged in placing the clay in the press, was, according to his witnesses, injured by reason of S. who was in charge of the press, causing the plunger to come down before the plaintiff had given the word, and while his hand was in the press, *prima facie* brought it within section 3, sub-section 3, of the Act, and the nonsuit must be set aside and a new trial had. *Cox v. Hamilton Sewer Pipe Co.*, 14 O. R. 300.—Chy. D.

Per Boyd, C.—If, while in obedience to orders, injury arises through the negligence of one giving the orders, it is sufficient under this sub-section and it is not necessary that an order negligent per se should have been given, nor is any specific order necessary, general prior orders being sufficient. *Id.*

B., the plaintiff's son, was employed as fireman on a locomotive engine which was in charge of a driver named R., B. being under his orders. E. was severely scalded by the bursting of the boiler, from which death resulted. The acci-

dent was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to shew to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he also was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendants' officials it appeared that B. had charge of the water at the time of the accident. In an action against defendants for damages under "The Workmen's Compensation for Injuries Act," 49 Vict. c. 28, s. 3, subsection 5 (Ont.):—Held, that the defendants were not liable. *Brnell v. Canadian Pacific R. W. Co.*, 15 O. R. 375.—C. P. D.

The plaintiff's son who had just come of age was killed by an accident in the defendant's machine shop, where he had been temporarily employed. For about two years previously he had, while attending school, worked on his father's farm, as farmer's sons usually do, without wages, and it was intended that he should study medicine, at an expense to his father of about \$1,000, the course lasting three or four years, and in the vacations, while so engaged in acquiring his intended profession, it was expected that he would work at home as usual. In an action by his father as administrator to recover damages for the death of his son:—Held, that he could have no reasonable expectation of pecuniary or material benefit from the son's life, and a nonsuit was ordered to be entered. *Mason v. Bertram*, 18 O. R. 1.—Chy. D.

The defendants, an iron works company, used in their business, a pair of shears for cutting up boiler plate and scrap iron prior to its being placed in the turnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent to the plaintiff, the latter, in the course of his duty was injured. The plaintiff, though apprehensive of danger, was not aware of the nature or extent of the risk, and obeyed through fear of dismissal. In an action against defendants under the Workmen's Compensation for Injuries Act for the damage sustained by the plaintiff:—Held, that defendants were liable. *Madden v. Hamilton Iron Forging Co.*, 18 O. R. 55.—C. P. D.

By section 15 of the Factories Act, R. S. O. (1887) c. 200, it is provided that all belting, shafting, gearing, flywheels, drums, and other moving parts of the machinery shall be guarded:—Held, that the word "moving" is used in its transitive sense, and signifies "propelling," and that no duty is imposed by the section upon owners of sawmills to guard the saws which are propelled by the moving parts of the machinery. By section 3 of the Workmen's Compensation for Injuries Act, R. S. O. (1887) c. 141, where personal injury is caused to a workman by reason of any defect in the condition of the ways,

works, machinery or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if he had not been engaged in his work:—Held, that the want of a guard to a saw was not a defect within the meaning of this provision. Such a defect must be an inherent defect, a deficiency in something essential to the proper use of the machine. And where a workman in a sawmill was injured by being thrown against an unguarded saw, and it was shewn that a guard would have prevented the injury:—Held, that an action for negligence was not maintainable against the owners at common law, nor by virtue of either of the above mentioned statutes. *Hamilton v. Groenbeck*, 19 O. R. 76.—Q. B. D. Affirmed by Court of Appeal, 18 A. R. 437.

Action by plaintiff to recover damages for the death of her husband by reason of, as was alleged, a defective brake on a car on defendant's railway on which deceased was employed as a brakeman:—Held, that there could be no recovery, for the evidence failed to shew how the accident happened, the contention that it was the defective brake being mere conjecture; and, even had it been the cause, it would have been no ground of liability, for under the defendant's rules it was the deceased's duty to examine and see that the brakes were in proper working order and report any defect to the conductor; and if he made the examination he apparently discovered no defect as he made no report, a latent defect being no evidence of negligence; and if he omitted to make such examination, etc., then the accident would be attributable to his own negligence. *Budgroom v. Grand Trunk R. W. Co.*, 19 O. R. 191.—C. P. D.

In an action by a workman against his employers to recover damages for injuries sustained owing to the falling of the cage of an elevator in the defendants' factory, the negligence charged was in the manner in which the heads of the bolts were held, and in the nature of the safety catch used upon the cage. There was no evidence to shew that the defendants were or should have been aware that the bolts were improperly sustained. They had employed a competent contractor to do this work for them only a few weeks before, and it was not shewn that the alleged defect might readily have been discovered:—Held, that the defendants were not liable upon this head; *Murphy v. Phillips*, 35 L. T. N. S. 477, distinguished. The safety catch was made for the defendants by competent persons, and there was no evidence that it was not one which was ordinarily used:—Held, that the defendants were not liable upon this head unless there was a want of reasonable care on their part in using the appliance which they used; and it was no evidence of such want of reasonable care merely to shew that a safety catch of a different pattern was in use ten years previously by others, or even that it was at present in use, and that a witness thought it might have prevented the accident; and as no negligence was shewn, the defendants were not liable either at common law or under the Workmen's Compensation for Injuries Act. *Block v. Ontario Wheel Co.*, 19 O. R. 578.—Q. B. D.

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bed-plate, some eight inches thick, upon which the iron to be cut was put, and along the face thereof, where the workman stood, was a guard, three inches high, under which the iron was placed and pushed forward to the shears, the only danger being when the iron became too short to allow the guard to be any protection. The bolt was too long, projecting out about four and a-half inches, which it was urged was a defect in the machine, making it dangerous, and the cause of the accident to the plaintiff, but the evidence failed to shew it was insufficient for the purpose for which it was used, or likely to cause injury by reason of its length. The plaintiff, who had previously seen others working at the machine, was put to work at it himself, and had worked several times at it prior to the accident without injury or fear of any, the accident being caused by the piece of iron he was holding becoming too short to hold outside of the guard, and in attempting to hold it down with another piece his fingers got jammed and crushed. Evidence was given that the accident could have been avoided by the use of tongs. No instructions were given plaintiff except a warning not to let his fingers get too close to the shears:—Held, that the defendants were not liable for the accident, there being no evidence that the bolt was insufficient for the purpose for which it was used to bolt the under side of the shears to the bed-plate, or that from its length it was likely to injure a person working at the machine. *Quære*, whether there was evidence of contributory negligence on the plaintiff's part. *Bridges v. Ontario Rolling Mills Co.*, 19 O. R. 731.—MacMahon.

See *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316.

#### (e) Factories Act.

By section 15, sub-section 4, of the Factories Act, R. S. O. (1877) c. 208, "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the inspector, whereby the cab or car will be securely held in the event of accident." The negligence charged was the manner in which the heads of the bolts were held and the nature of the safety catch used upon the cage of an elevator. There was no evidence to shew whether this particular safety catch had been approved by the inspector:—Held, that the onus was upon the plaintiff to prove that the catch had not been approved and if it had neither been approved nor disapproved the question still was whether the catch used was of such a character and pattern as to make the use of it unreasonable. *Black v. Ontario Wheel Co.*, 19 O. R. 578.—Q. B. D.

See *Dean v. Ontario Cotton Mills Co.*, 14 O. R. 119, p. 1246; *Hamilton v. Groesbeck*, 19 O. R. 76, p. 1248.

### MASTER IN CHAMBERS.

See PRACTICE.

### MASTER IN ORDINARY.

See PRACTICE.

### MASTER OF SHIP.

See SHIP.

### MASTERS OF THE COURT.

See PRACTICE.

### MAXIMS.

The rule that "he who comes for equity must do equity" considered and applied. *Olemow v. Booth*, 27 Chy. 15; *Archer v. Severn*, 14 A. R. 723; *Jones v. Dale*, 16 O. R. 717.

*Cessante ratione cessat lex*. See *In re High School Board of the U. C. of Stormont, Dundas and Glengarry and Township of Winchester*, 45 Q. B. 460.

The maxim that the Crown can do no wrong applies to alleged tortious acts of the officers of a public department of Ontario. *Muskoka Mill Co. v. The Queen*, 28 Chy. 563.—Spragge.

Where a widow who had married again filed a bill alleging that she had accepted the provisions and bequests given to her by will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and she now sought to have dower assigned to her:—Held, that the rule "Ignorantia juris neminem excusat" applied, and the bill was dismissed with costs. *Gillam v. Gillam*, 29 Chy. 376.—Spragge.

The maxim "respondet superior" applied in an action against a municipal corporation for act of collector. See *McSorley v. Mayor, etc., of the City of St. John*, 6 S. C. R. 531.

"Quicquid plantatur solo, solo cedit." See *The Stevens, Turner and Burns Foundry and General Manufacturing Co., Limited, v. Barfoot*, 9 O. R. 692; 13 A. R. 366.

"De minimis non curat lex." See *Claxton v. Shibley*, 9 O. R. 451; 10 O. R. 295.

"Injuria non excusat injuriam." See *Ratté v. Booth*, 11 O. R. 491.

*Volenti non fit injuria*. See *Dean v. Ontario Cotton Mills Co.*, 14 O. R. 119, p. 1246; *Le May v. Canadian Pacific R. W. Co.*, 18 O. R. 314.

"Caveat emptor." See *Borthwick v. Young*, 12 A. R. 671; *Moore v. Gooderham & Worts (Limited)*, 14 O. R. 451.

"Cujus est solum ejus est usque ad cælum." See *Potts v. Bovine*, 16 O. R. 152; 16 A. R. 191.

"Actio personalis moritur cum personâ." See *White v. Parker*, 16 S. C. R. 699.

### MECHANICS' LIEN.

See LIEN.

## MEDICAL PRACTITIONERS.

- I. UNLAWFULLY PRACTISING, 1251.
- II. NEGLIGENCE AND MALPRACTICE, 1252.

## I. UNLAWFULLY PRACTISING.

A medical practitioner registered in Great Britain, to entitle himself to practise in this Province, must be registered under R. S. O. (1877) c. 142, s. 21. In this case the plaintiff, a practitioner registered in Great Britain, but not in this Province, claiming to be entitled to practise here, brought an action against the defendant for slandering him in his profession by stating that he was a quack, etc. :—Held, that the action was not maintainable. *Skirving v. Ross*, 31 C. P. 423.—C. P. D.

Where defendant, in partnership with two registered practitioners, resided in an establishment over the door of which was a fanlight containing the names of the registered practitioners, with the addition "M.D., M.C.P. & S., Ont.," and the name of the defendant with only the addition "M. D.":—Held, that the use of the simple letters "M. D.," in contradistinction to the full titles of the partners of defendant appearing on the same fanlight, was not the use of a title "calculated to lead people to infer" registration, and the defendant therefore could not be convicted under section 42 of the Ontario Medical Act, R. S. O. (1877) c. 142. *Regina v. Teer*, 45 Q. B. 144.—Galt.

The defendant, who was agent for a dealer in musical instruments, undertook to cure one P. of cancer by friction and application of a certain oil, receiving as remuneration \$3 a visit, which he stated was for the medicine, being its actual cost. He admitted having practised in Germany, and that he imported the specific in question by the gross. It also appeared that he prescribed other medicine for the patient beside the oil :—Held, that this was practising medicine, and that the defendant was rightly convicted of doing so for gain or hope of reward without registration under the Medical Act. *Regina v. Hall*, 8 O. R. 407.—Rose.

The defendant attended a couple of sick persons for which he received payment, but he neither prescribed nor administered any medicine, nor gave any advice, his treatment consisting of merely sitting still and fixing his eyes on the patient :—Held, that this was not a practising of medicine, contrary to the provisions of R. S. O. (1887) c. 148, s. 45, and a conviction therefor was consequently quashed, with costs against the private prosecutor, as it appeared that he had a pecuniary interest in the conviction. *Regina v. Hall*, 8 O. R. 407, distinguished. *Regina v. Stewart*, 17 O. R. 4.—C. P. D.

A conviction under the "Ontario Medical Act," (R. S. O. 1877, c. 142, s. 40), for practising without being registered, was quashed, because in default of payment of the fine imposed, distress was also awarded ; and, held, that section 57 of 32-33 Vict. c. 31 (Dom.), does not apply as by section 46 of the Medical Act provision is made for enforcing payment. Held, also, that section 40 applies to any person whose

name has been erased from the register, though he may have practised after having been first registered. *Regina v. Sparham*, 8 O. R. 570.—Rose.

Semble, that on a prosecution under the Act the defendant may show that as a matter of law his name was on the register, though by accident or design improperly removed or erased therefrom. *Id.*

Held, that a justice of the peace, on a conviction under sections 40 and 46 of chapter 142 R. S. O. (1877), intitled an Act respecting the profession of medicine and surgery, had no jurisdiction, on default by the defendant of payment of fine and costs, to direct his confinement for the space of one month, unless, in addition to the payment of the fine and costs, he be paid the charges of conveying him to jail. *Regina v. Wright*, 14 O. R. 668.—Rose.

## II. NEGLIGENCE AND MALPRACTICE.

In an action against the defendant, as a surgeon, for negligence, the jury found for the plaintiff, but added to their verdict the following : "We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention." :—Held, a mere expression of opinion, and that it did not nullify or affect the verdict. *Sheridan v. Pigeon*, 10 O. R. 632.—Q. B. D.

Action against a medical man for malpractice. The alleged malpractice consisted in applying what was called the primary bandage to a fracture of the forearm ; and, if this was good surgery, then there was neglect and want of proper care, in applying the bandage too tightly, and in not placing the arm in proper position, whereby the arm became paralyzed and permanently useless. The defendant admitted the use of the primary bandage, and justified its use as proper, and denied that there had been any neglect, etc. The jury found for the defendant :—Held, on the evidence the verdict could not be interfered with. *VanMere v. Farewell*, 12 O. R. 285.—C. P. D.

A medical man called by the defendant stated, from the evidence given by the defendant, and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery :—Held, inadmissible. *Id.*

In an action against a medical practitioner for malpractice the plaintiff must prove not only that there was negligence or want of skill on the part of the defendant, but also that the plaintiff was injured thereby. *McQuay v. Eastwood*, 12 O. R. 402.—C. P. D.

In this case, which was for negligence and want of skill in the treatment of the plaintiff in her confinement, the jury found that the defendant was guilty of such negligence, in that he was remiss in giving instructions to the nurse, and in not seeing that his instructions were properly carried out :—Held, that the inconsistency in the finding would not entitle the defendant to judgment dismissing the action, but at most to a new trial if there was evidence

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to go to the jury thereon:—Held, however, that there was no evidence from which it could reasonably be inferred that the injury complained of by the plaintiff was attributable to either want of skill or care, or negligence by defendant; and judgment was therefore directed to be entered dismissing the action. *Id.*

See *Stretton v. Holmes, 19 O. R. 286.*

## MEMORIALS.

PROOF OF DEED OR WILLS BY—See EVIDENCE.

## MENTAL INCAPACITY.

See FRAUD AND MISREPRESENTATION—LUNATIC—WILL.

Incapacity to understand the nature and obligation of an oath. See *Udy v. Stewart, 10 O. R. 591.*

## MERCANTILE AMENDMENT ACT.

The Mercantile Amendment Act (R. S. O. 1887, c. 122, ss. 2, 3, and 4), applies to the case of partners. *Small v. Riddell, 31 C. P. 373; Potts v. Leask, 36 Q. B. 476; and Scripture v. Gordon, 7 P. R. 164, not followed; in view of the opinion expressed in London and Canadian L. & A. Co. v. Morphy, 14 A. R. 577. Honsinger v. Love, 16 O. R. 170.—Q. B. D.*

## MERCHANTS' SHIPPING ACT.

Held, in this case, that the provisions of the Merchants' Shipping Act did not prevent the property in the ship passing to the assignee under the Insolvent Act. *Jones v. Kinney, 11 S. C. R. 708.*

## MERGER.

See MORTGAGE.

The owner of certain land devised it to his two sons, charged with an annuity to his widow, and also with certain legacies. After his death in March, 1879, the son's devisees mortgaged the land to one C. This mortgage was not registered till January, 1880, though the widow knew of it. They then raised money from the plaintiff in November, 1879, by a mortgage which was registered in the same month, the plaintiff having no knowledge of C.'s mortgage, and, therefore, gaining priority. In this mortgage to the plaintiff the widow joined, barring her dower and releasing her annuity for the benefit of the plaintiff. The plaintiff sold the land under his mortgage, and there was a considerable surplus, and the question was whether the widow as dowress and annuitant had priority over C.:—Held, that the fact that the

widow had accepted a conveyance of a moiety of the land from one of the sons did not cause her annuity to merge in whole or in part, the mortgage to C. intervening; and it not being to her interest to hold that a merger had taken place. The question of interest governs merger in the absence of express intention. *MacLennan v. Gray, 16 O. R. 321.—Boyd. See S. C. 16 16 A. R. 224; S. C. sub nom. Gray v. Coughlin, 18 S. C. R. 553.*

Of Easements. See *Attrill v. Platt, 10 S. C. R. 425, p. 573.*

## MESNE PROFITS.

See EJECTMENT.

Right to mesne profits in action of Dower. See *Ryan v. Fish, 4 O. R. 335, p. 569.*

## MILITIA.

The Act 31 Vict. c. 40, s. 27 (Dom.), as amended by 36 Vict. c. 46 and 42 Vict. c. 35 (Dom.), requires that a requisition calling out the militia in aid of the civil power to assist in suppressing a riot, etc., shall be signed by three magistrates, of whom the warden or other head officer of the municipality shall be one; and that it shall express on its face "the actual occurrence of a riot, disturbance or emergency, or the anticipation thereof requiring such service."—Held, that a requisition in the following form is sufficient:—Charles W. Hill, Esq., Captain No. 5 Company, Cape Breton Militia. Sir,—We, in compliance with chapter 46 section 27 Dominion Acts of 1873, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power to suppress. You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed. A. J. McDonald, warden; R. McDonald, J. P.; J. McVarish, J. P.; Angus McNeill, J. P.—The statutes also provides that the municipality shall pay all expenses of the service of the militia when so called out, and in case of refusal that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses:—Held, Strong J., dissenting, that where the commanding officer died pending such action the proceedings could be continued by his personal representative. *Crewe-Read v. County of Cape Breton, 14 S. C. R. 8.*

## MILLS AND MILL OWNERS.

See FIXTURES—WATER AND WATER-COURSES.

Mill machinery passing under the description of land in deed. See *Winfield v. Foulie, 14 O. R. 102, p. 1266.*

## MINERAL LANDS.

## I. MINING LEASES, 1255.

## II. MINING LEASES, 1255.

## I. MINING LEASES.

Right of railway to expropriate. See *Jenkins v. Central Ontario R. W. Co.*, 4 O. R. 593, p. 920.

Rights of Dominion and Provincial governments in precious metals upon lands conveyed by the government of British Columbia to further the construction of the Canadian Pacific Railway, upon that province being admitted into confederation. See *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 S. C. R. 345; 14 App. Cas. 295.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that in a suit for a share of the profits of a gold mine, where the plaintiff relied on an agreement by the defendant for a transfer of a portion of the latter's interest in such mine for valuable consideration, the evidence was not sufficient to establish a partnership between the parties in the working of the mine and the suit was dismissed. *Stuart v. Mott*, 14 S. C. R. 734.

See *Ontario Natural Gas Co. v. Smart*, 19 O. R. 591.

## II. MINING LEASES.

Held, affirming the judgment of the court below, that where a mining lease is obtained over private lands in Nova Scotia the lessees must obtain from the owners of the land permission to enter either by special agreement or in accordance with the provisions of the Mining Act.—Mining leases may be granted in all districts whether proclaimed or unproclaimed.—A mining lease is not invalid because it includes a greater number of areas than is provided by the statute, such provision being only directory to the commissioner.—The issue of a lease cures any irregularities in the application for a license or in the license itself in the absence of fraud of the licensees. *Fielding v. Mott*, 14 S. C. R. 254.

In an indenture describing the parties as lessor and lessees respectively the granting part was as follows: "Doth give, grant, demise and lease unto the said (lessees) the exclusive right, liberty and privilege of entering at all times for and during the term of ten years from 1st January, 1879, in and upon (describing the land) and with agents, labourers and teams to search for, dig, excavate, mine and carry away the iron ores in, upon or under said premises, and of making all necessary roads, etc., also the right, liberty and privilege to erect on the said premises the buildings, machinery and dwelling-houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores." There was a covenant by the grantees not to do unnecessary damage and a provision for taking away the erections made and for the use of timber on the premises and such use of the surface as might be needed. The grantees agreed to pay twenty-five cents

for every ton of ore mined, in quarterly payments on certain fixed days, and it was provided how the quantity should be ascertained. It was also agreed that the royalty should not be less than a certain sum in any year. The grantees also agreed to pay all taxes and not to allow intoxicating drinks to be manufactured on the premises or carry on any business that might be deemed a nuisance. There were provisions for terminating the lease before the expiration of the term and covenant by the lessor for quiet enjoyment. In an interpleader issue, where the lessor claimed a lien on the goods of the lessees for a year's rent due under the said indenture by virtue of 8 Anne c. 14, s. 1, Patterson, J. A., at the trial gave judgment in favour of the defendants, on the ground that the instrument was a license merely and not a lease. This judgment was reversed by the Q. B. D. (7 O. R. 471) and an appeal to the Court of Appeal owing to an equal division of the judges, was dismissed with costs. Per Hagarty, C. J. O., and Burton, J. A., the instrument was a license. Per Osler, J. A., and Ferguson, J., it was a lease (14 A. R. 738). On appeal to the Supreme Court:—Held, per Ritchie, C. J., and Henry and Tachereau, J.J., that this instrument was not a lease but a mere license to the grantee to mine and ship the iron ores, and the grantor had no lien for rent under the statute. Strong, Fourmier and Gwynne, J.J., contra. *Lynch v. Seymour*, 15 S. C. R. 341.

In a lease of mining lands the reddendum was as follows: "Yielding and paying therefor unto the party of the first part one dollar per gross ton of twenty-two hundred and forty pounds of the said iron stone or ore for every ton mined and raised from the said lands and mine payable quarterly on the first days of March, June, September, and December in each year." The lease contained, also, the following covenants by the lessee: "The parties of the second part for themselves, their executors, etc., covenant and agree to and with the party of the first part, her heirs, etc., that they will dig up and mine and carry away in each and every year during the said term a quantity of not less than two thousand tons of such stone or iron ore for the first year, and a quantity of not less than five thousand tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid." "And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter, in which more than the said quantity shall be taken, and that they will protect such openings as they shall make so as to insure the same against accident, and will indemnify the party of the first part in the event of the same happening and against all costs of prosecution and defence thereof." There was a provision that the lessor should be at liberty to terminate the lease in case of nonpayment of rent for a certain period, and if the iron ore or iron stone should be exhausted, and not to be found or obtained by proper and reasonable effort in paying quantities, then the lessee should be at liberty to

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determine the lease:—Held, affirming the judgment of the court below, 14 A. R. 460, sub nom. *Walbridge v. Gaujot, Ritchie, C. J., and Fournier, J.*, dissenting, that this lease contained an absolute covenant by the lessees to pay the rent in any event, and not having terminated the lease under the above proviso he was not relieved from such payment in consequence of ore not being found in paying quantities. *Palmer v. Wallbridge*, 15 S. C. R. 650.

See *McArthur v. Brown*, 17 S. C. R. 61, p. 605.

### MISDIRECTION.

See NEW TRIAL.

### MISJOINDER.

See PLEADING.

### MISNOMER.

Quere as to the effect of the defendants being described in the note in question in this case as the "Watertown Insurance Company," while the real name was "The Agricultural Insurance Company of Watertown, N.Y." *Sears v. Agricultural Ins. Co.*, 32 C. P. 585.—C. P. D.

There having been a misnomer in the names of the applicants for mandamus, per Armour and Cameron, J.J., such misnomer not having been objected to on the argument below might be amended. Per Hagarty, C. J., in such a case no amendment should be granted as a matter of discretion. *In re High School Board No. 4 of the U. C. of Stormont, Dundas, and Glengarry, and Township of Winchester*, 45 Q. B. 460.—Q. B. D.

The deed to the defendant company described it by its original name of the P. H. L. & B. R. Co., when in fact its name had been changed:—Held, a sufficient descriptio persone, to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681.

### MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

### MISTAKE.

I. IN DESCRIPTION OF LAND—See DEED—SURVEY—WILL.

II. MISTAKEN BOUNDARIES—See LIMITATION OF ACTIONS.

III. OF TITLE—See IMPROVEMENTS ON LAND.

IV. IN ASSESSMENT ROLLS AND VOTERS' LISTS—See ASSESSMENT AND TAXES—PARLIAMENTARY ELECTIONS.

V. RECTIFYING WRITINGS—See DEED—EVIDENCE—INSURANCE.

VI. MONEY PAID UNDER MISTAKE—See MONEY PAID.

VII. IN NAMES—See MISNOMER.

Mistake in computation of amount due on mortgage. See *Stark v. Shepherd*, 29 Chy. 316.

Error in date in deed of transfer. See *Pilon v. Brunet*, 5 S. C. R. 318.

Sale of securities—Error in schedule. See *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. R. 476, p. 1290.

Reissue of patent of invention owing to mistake in specification and description. See *Wither v. Malcolm*, 6 O. R. 12.

Rectifying mistake in accounts. See *Taylor v. Magrath*, 10 O. R. 669.

Payment of money into court to credit of wrong cause. See *Johnston v. Johnston*, 9 P. R. 259, p. 1309.

Delivery by carrier at wrong destination. See *Monteith v. Merchants' Despatch and Transportation Co.*, 1 O. R. 47; 9 A. R. 282, p. 214.

Non-compliance with a condition in an insurance policy to put in the proof within thirty days. See *Robins v. Victoria Mutual Fire Ins. Co.*, 6 A. R. 427, p. 964.

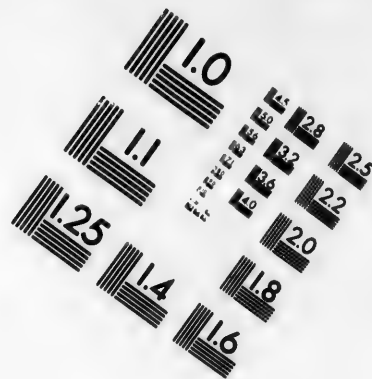
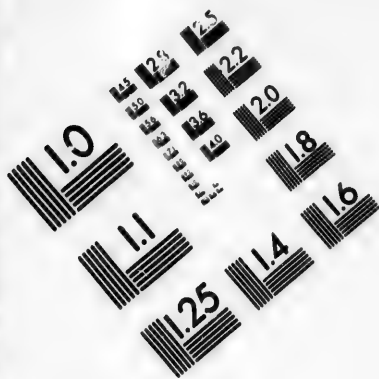
In statement and return of deputy returning-officer. See *Cameron v. Lucas*, 9 P. R. 405.

A party cannot be released from an offer, deliberately made to and accepted by the opposite party, on the ground that his offer turns out to have some different effect from what he supposed it would have. *Coutincau v. City of London Fire Ins. Co.*, 12 P. R. 512.—Armour.

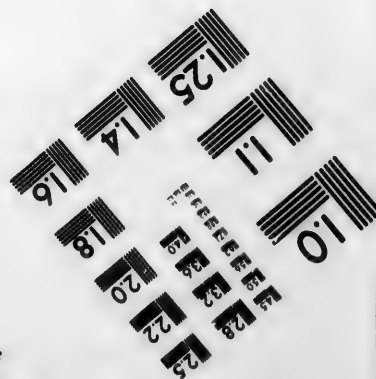
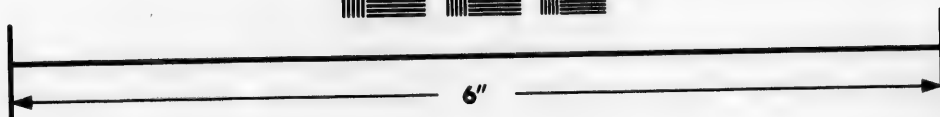
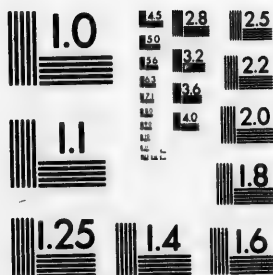
The plaintiff advanced money to the owner of real estate to pay off existing mortgages thereon, and took and registered a mortgage on the property for the amount, paid off the prior mortgages and registered discharges of them, the defendant having all the time an execution against the lands of the mortgagor in the hands of the sheriff of the county in which the lands were situate, of which the plaintiff was ignorant, his solicitors having neglected to search:—Held, that the plaintiff was entitled to be subrogated to the rights of the original mortgagees, and to priority over the defendant's execution, to the amount paid to discharge the prior mortgages, upon the ground of mistake, he having done so under the belief that he was obtaining a first charge; and that he was not disentitled to relief, because by using ordinary care he might have discovered the mistake, the defendant not having been prejudiced thereby. *Brown v. McLean*, 18 O. R. 533.—Street.

The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry and found only two incumbrances registered against the property. Shortly after the defendant completed his purchase, and having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but as he did not make a further search, he did not discover the plaintiff's lien:—Held, affirming the decision of Falconbridge, J. that the defendant



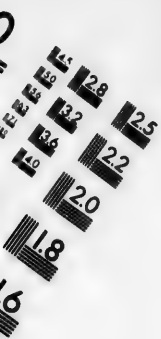


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was entitled to stand in the place of the incumbents whom he had paid off, and to priority over the plaintiff's lien. The Registry Act does not preclude inquiry as to whether there was knowledge in fact; and the court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake. *Brown v. McLean*, 18 O. R. 533, specially considered. *Abell v. Morrison*, 19 O. R. 669.—Chy. D.

In affidavit of bonâ fides in chattel mortgage. See *Boldrick v. Ryan*, 17 A. R. 253, p. 183.

Error and providence in issue of Crown Lands Patent. See *Fonseca v. Attorney General of Canada*, 17 S. C. R. 612, p. 468.

## MONEY.

I. DEPOSIT OF—See BANKS.

II. IN COURT—See PAYMENT.

III. FOLLOWING MONEY—See FOLLOWING MONEY OR SECURITIES—TRUSTS AND TRUSTEES.

## MONEY HAD AND RECEIVED.

An "action for money had and received will lie whenever a certain amount of money belonging to one person has improperly come to the hands of another." Therefore where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors . . . of money to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs." *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 431.—Spragge.

On the death of the testator's widow two sons and a surviving daughter entered into possession, collected repts, sold parts thereof, dividing the proceeds in equal shares amongst themselves and partitioned part of the unsold balance thereof by deed, dated January 31st, 1885, and in all respects dealt with the lands and the proceeds thereof as if they were all equally interested therein. In May, 1886, the plaintiff, the eldest son was advised he was entitled to the whole as

"heir-at-law" of his father. In an action for the construction of the will and recovery back of the moneys paid over, and the partitioned lands remaining unsold, and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned land. It was:—Held, that the moneys paid over more than six years before action, could not be recovered; and following *Rogers v. Ingram*, 3 Ch. D. 351, that as to the moneys paid over within six years, an action for money had and received, would not lie for moneys paid by one party to another under a mistake of law common to both, when both had a full knowledge of all the facts. *Baldwin v. Kingstone*, 16 O. R. 341.—Chy. D.; 18 A. R. 63.

## MONEY PAID.

Right to recover back money paid out of court on judge's order pending appeal. See *Citizen's Ins. Co. v. Parsons*, 32 C. P. 492, p. 412.

*Green v. Duckett*, 11 Q. B. D. 275, followed, as to the right to recover moneys paid under protest. *McKay v. Howard*, 60 O. R. 135.—Boyd.

On the 31st May, 1875, under the authority of 37 Vict. c. 51, s. 192 (P. Q.), the city council of the city of Montreal by a resolution adopted a report from their road committee prepared on the 30th April previous, as amended by a report of their finance committee of 27th May, 1879, recommending the construction of permanent sidewalks in the following streets (inter alia) Dorchester and St. Catharine. On the adoption of these reports with which an estimate indicating the quantity of flagstone required for each street, and the approximate cost of the work to be made in each street had been submitted, the city surveyor caused the sidewalks in the said streets to be made, and assessed the costs of these sidewalks according to the front of the real estate owned by the proprietors on each side of the same, and prepared a statement of the same, which he deposited with the treasurer for collection. D. A. B. possessed real estate on Dorchester and St. Catharine streets, and did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving a notice from the city treasurer to pay within fifteen days certain sums, in default whereof execution would issue, D. A. B. paid, without protest, \$946 25; and on the 29th October, 1878, paid a further sum of \$438.90, and on the 14th November, 1878, without having received any notice, paid \$700 on account of 1877 assessment. In an action by D. A. B. against the city of Montreal, to recover the said sums of money which she alleged to have paid in error, believing the assessment valid:—Held, affirming the judgment of the court below, 2 Dorion's Q. B. R. 221 (Henry and Gwynne, JJ., dissenting), that D. A. B. had failed both in allegation and proof, to make out a case for the recovery of the assessment paid by her, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a

an action for recovery back the partitioned the proceeds of that the plain- artitioned land. eys paid over n, could not e. v. Ingram, 3 eys paid over money had and eys paid by one ke of law com- full knowledge gstone, 16 O. R.

payment of a void assessment illegally extorted. 2. That the city council in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict. c. 51, s. 192. 3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal. *Bain v. City of Montreal*, 8 S. C. R. 252.

Liability of legatees over-paid to refund. See *Anderson v. Bell*, 8 A. R. 531.

B. leased certain premises to Y., who assigned the lease to P., and sold to him the goods on the premises subject to a chattel mortgage to the plaintiff and others. P. gave a chattel mortgage to the plaintiff and others upon these goods to secure to them the purchase money thereof. On the 1st February the defendant took possession of the premises under a verbal agreement with P., that the latter should assign the lease to him, and it was so assigned on 4th June following. There was no evidence as to what bargain there was between P. and the defendant as to the goods, but the goods remained on the premises without the request of the defendant. The plaintiff and his co-mortgagees subsequently took possession of the goods under their chattel mortgage; but on the same day, before they were removed, the landlord seized them for rent, a portion of which was due before defendant took possession. Upon the promise of the plaintiff to pay the rent the landlord withdrew. The plaintiff having refused to keep his promise by paying the rent, the landlord brought an action against him and compelled payment. The plaintiff now sued the defendant to recover the amount so paid:—Held, that, there being no privity of contract or estate between the defendant and the plaintiff, and the goods not having been originally placed in the premises at the tenant's request, and having in fact been in the possession of the plaintiff when seized, the defendant was not bound to protect them against seizure for rent, which he was not shewn to have been liable for: that the plaintiff's payment therefor was voluntary, so far as concerned the defendant, and he could not recover. *Herring v. Wilson*, 4 O. R. 607.—Q. B. D.

The plaintiffs ordered goods from the defendant in Montreal to be shipped to them in Toronto, and three several consignments were made, one of which having been addressed to "J. H. C. & Co.," instead of "H. E. C. & Co.," never reached the plaintiffs, but was, after remaining eighteen months in possession of the carriers, in due course sold for payment of the charges thereon. The plaintiffs in ignorance of the non-receipt of the third consignment accepted and paid the defendant's draft for the amount of the invoices of the three consignments. Subsequently they discovered their error and demanded a return of the amount paid which the defendant refused:—Held, that although the plaintiffs had had the means within reach during all this time of ascertaining the true position of matters, there was no duty cast on them in relation to the defendant which made their delay in discovering the mistake laches on their part, and

that they were entitled to recover back the amount paid as money paid under a mistake of fact:—Sembles, a demand of repayment or notice to payee of the mistake was necessary before action. *Clark v. Eckroyd*, 12 A. R. 425.

The plaintiff at the request of Y., the business manager of the Hamilton Cotton Company, received from him a draft in the name of the company on a New York firm for \$4,989.65, at three months, which plaintiff discounted at the Toronto agency of the defendants, and in pursuance of an arrangement to that effect, Y. drew on the plaintiff in the name of the Cotton Company, payable to their own order for \$4,800, which plaintiff paid on presentment out of the proceeds of the New York draft. About seven weeks afterwards plaintiff discovered that the signatures to, and indorsements on both these drafts had been forged by Y., and immediately communicated such information to the defendants, and demanded from them a return of the amount paid by him to retire the \$4,800 draft which was refused. Plaintiff, however, paid the draft on New York at maturity. In an action brought to recover the money paid to retire the \$4,800 draft, the Q. B. D. held, 12 O. R. 39, that the plaintiff was entitled to recover. An appeal from this judgment was dismissed, the judges of this court being equally divided. *Ryan v. Bank of Montreal*, 12 O. R. 39; 14 A. R. 533.

The defendants, under assumption of a lawful distress for rent, part of which was in arrear, and the other part of which was claimed in advance, entered and seized goods which had been assigned to the plaintiff B. in trust for the benefit of creditors. Three executions were shortly after placed in the sheriff's hands, and the solicitor for the plaintiffs under the first and third executions, relying upon being repaid from the proceeds of the goods, and with full knowledge of all the facts, and to get the distress out of the way and let in the executions paid the rent claimed to prevent the sale of the goods, though not admitting defendant's right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitor. B. did not act under the assignment, and in no way asserted his rights against the execution creditors:—Held, reversing the judgment of the Q. B. D. (11 O. R. 735), that the money so paid could not be recovered back either by the execution creditors on whose behalf it was paid, or by B. as assignee. *Baker v. Atkinson*, 14 A. R. 409.

The plaintiff in 1875 endorsed a promissory note for the accommodation of the defendant N., and the latter delivered it as collateral security to mortgagees of his freehold. The mortgagees procured the defendant B. to enter into partnership with N. and threw off \$1,000 of their mortgage debt, releasing their original securities and taking a new mortgage from both defendants for \$1,000 less than the amount of their claim. This was in 1876. In 1879, when the note fell due, the plaintiff paid the amount to the mortgagees, who applied it in reduction of their mortgage debt. At the time the plaintiff paid he did not know of B.'s connection with the matter. Held, that the plaintiff was entitled to recover against both defendants for the amount paid, as money paid at their request. *Purdum v. Nichol*, 16 O. R. 699.—Q. B. D.; 15 A. R. 244; 15 S. C. R. 610.

## MORTGAGE

## I. PARTIES.

1. *Executors and Administrators—See TRUSTS AND TRUSTEES.*
2. *Trustees—See TRUSTS AND TRUSTEES.*

## II. CONTRACTS OF MORTGAGE.

1. *Form of Generally, 1265.*
2. *Short Forms Act.*
  - (a) *Power of Sale, 1265.*
  - (b) *Distress Clause—See DISTRESS.*
  - (c) *Insurance Clause, 1265.*
  - (d) *Other Cases, 1266.*
3. *Mortgage or Purchase, 1267.*
4. *Rectifying and Varying—See DEED—EVIDENCE.*
5. *Payment of Mortgage Money to Agent, 1268.*
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8. *Fraudulent—See FRAUDULENT CONVEYANCES.*
9. *Fixtures—See FIXTURES.*
10. *Covenant—See COVENANT.*
11. *Of Goods—See BILLS OF SALE AND CHATTEL MORTGAGES.*
12. *Of Stock—See COMPANY.*
13. *Of Ships—See SHIP.*
14. *To Building Societies—See BUILDING SOCIETY.*
15. *Sale of Land Subject to Mortgage—See SALE OF LAND.*

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9. *Rights and Liabilities of Purchaser of Equity of Redemption, 1280.*10. *Ejectment—See EJECTMENT.*

11. *Recovery of Mortgage Money.*
  - (a) *When Action will lie, 1281.*
  - (b) *Interest, 1282.*
  - (c) *Distress—See DISTRESS.*

12. *Cutting Timber, 1285.*13. *Right to Growing Crops, 1285.*14. *Application of Insurance Money, 1285.*15. *Mortgagee Purchasing at Sale of Mortgaged Premises, 1287.*16. *Dower—See DOWER.*17. *Insurance by or for Mortgagee—Right of Subrogation—See INSURANCE.*18. *As Affected by Mechanics' Lien—See LIEN.*19. *Barred by Time—See LIMITATION OF ACTIONS.*

## VI. ASSIGNMENT AND TRANSFER.

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2. *Rights of Parties after Assignment, 1288.*
3. *Other Cases, 1290.*

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  - (a) *Generally, 1293.*
  - (b) *As Affected by Registration—See REGISTRY LAWS.*
2. *Consolidation, 1294.*
3. *Agreement to Postpone, 1295.*
4. *Other Cases, 1295.*

VIII. EJECTMENT BY MORTGAGEES—*See* EJECTMENT.

## IX. SALE OF EQUITY OF REDEMPTION UNDER EXECUTION, 1296.

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5. *By Wife—See HUSBAND AND WIFE.*

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3. *Costs*, 1317.
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5. *Appointment of Receiver*—See RECEIVER.

## XV. MISCELLANEOUS CASES, 1320.

## II. CONTRACTS OF MORTGAGE.

1. *Form of Generally.*

W. H. conveyed his farm to his son, and took back from him a mortgage on it, with a proviso for redemption on payment of \$4,000, without interest, in manner following: To pay W. H. and A. H., his wife, during their joint lives, \$300 a year, and to continue to make the said payments to the survivor during his or her life; and one year after the death of both to pay his brothers and sisters \$300 each at the times therein mentioned, which words were inserted in writing, the rest of the instrument being in print. W. H. and A. H. died, and their administratrix brought this action to recover arrears, R. H. contending that in any event he was not to pay more than \$4,000, which he had fully paid.—Held, that it being impossible to give literal effect to all the parts of the mortgage, the defeazance clause upon payment of \$4,000, without interest, being quite irreconcilable with the particulars regarding the payments, the court must regard the general scope and intent of the deed, and that evidently being to arrange the terms of an annuity for the joint lives of the father and mother, and of the survivor, the deed must be so construed, and that R. H., therefore, could not succeed in his present contention, that he was not in any event to pay more than \$4,000. *Coleman v. Hill*, 10 O. R. 172.—Boyd.

2. *Short Forms Act.*(a) *Power of Sale.*

See *O'Donohoe v. Whitty*, 2 O. R. 424, p. 1297; *Re Gilchrist and Island*, 11 O. R. 537, p. 1298; *Barry v. Anderson*, 18 A. R. 247, p. 1298; *Re Gilmour and White*, 14 O. R. 694, p. 1298; *Re Green and Atkin*, 14 O. R. 697, p. 1298; *Re British Canadian Loan and Investment Co. and Ray*, 16 O. R. 15, p. 1302; *Clark v. Harvey*, 16 O. R. 159, p. 1298.

(c) *Insurance Clause.*

See *Greet v. Citizens' Ins. Co.*—*Greet v. Royal Ins. Co.*, 8 A. R. 596, p. 942.

(d) *Other Cases.*

M. gave a mortgage to T. of certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment, the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unaltered in its usual place, viz., after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing, were entitled to have greater effect attributed to them than the printed clauses. *McKay v. Howard*, 6 O. R. 135.—Boyd.

In 1875, A. K. and H. K. entered into partnership as shingle makers for a term of years on equal terms, and for the purposes of the partnership purchased in A. K.'s name a piece of land about 200 feet distant from the Georgian Bay, which was conveyed to him on 1st September, 1875. In the waters of the bay a shingle mill was erected which was connected with the land so purchased by a tramway which was filled from time to time with saw dust, etc. The mill was so erected for the convenience of floating logs to it. H. K. advanced the money to pay for the mill and machinery. The partnership was never formally dissolved, although H. K. ceased to interest himself in it subsequent to June, 1876. In June, 1876, A. K. mortgaged the said land to J. K. by a mortgage in the statutory form to secure a sum of money advanced by the mortgagee to him, and H. K. to secure the said loan, also executed a mortgage of his individual interest as partner in the said land. This last mortgage recited the partnership, and was given at the request of the mortgagee, who was aware of the existence of the partnership. The mill was in operation until the end of 1882, having been run by different persons in the interval. The land in the mortgages contained, was sold under the power of sale therein, and, with the intention of getting the machinery, was purchased by defendant, who, under authorization removed the machinery. The land was conveyed by the same description to defendant by J. K., by deed made pursuant to the Short Form of Conveyances Act, R. S. O. (1877), c. 102. H. K. subsequently executed a release of the land to the defendant. Under an execution against A. K. the machinery was seized by the sheriff after having been loaded on the cars for defendant. In an interpleader issue it was held (O'Connor, J., dissenting), that the mill and machinery composing the articles in question, became part of the realty in such a manner as to pass under the mortgage of the land from A. K. and H. K. to J. K. by virtue of section 4 R. S. O. (1877), c. 104; and, by the deed from J. K. to the defendant under section 4, of R. S. O. (1877), c. 102. *Winfield v. Fowlie*, 14 O. R. 102.—Q. B. D.

See *McDermott v. Keenan*, 14 O. R. 687, p. 1284.

### 3. Mortgage or Purchase.

Transfer of covenant by absolute assignment—Contemporaneous agreement to re-assign. Whether intended as a security for money or a sale with a right of repurchase. See *Livingston v. Wood*, 27 Chy. 515, p. 424.

Where the plaintiff brought an action to redeem a certain property conveyed by him in a deed absolute in form, and it appeared that the deed in question which he now sought to cut down to a mortgage, had indeed been executed by him for the purpose of securing a debt due to the grantee, but that the main object of the transaction was to protect the property from the results of an anticipated action for breach of contract:—Held, that under these circumstances, evidence was not admissible to rectify the form of the instrument, for this court never assists a person who has placed his property in the name of another to defraud his creditor; nor does it signify whether any creditor has been actually defeated or delayed. The decided weight of authority is that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent grantor to undo the matter either out of court or by the aid of the court. *Symes v. Hughes*, L. R. 9 Eq. 497, commented upon. *Mundell v. Tinkis*, 6 O. R. 625.—Boyd.

In August, 1866, the plaintiff in consideration of \$500, which she asserted was by way of loan, conveyed to M. 100 acres of land by a deed absolute in form. The plaintiff alleged that M. agreed that if the money was repaid during his lifetime, he would accept the same and reconvey the land. The plaintiff in 1871 applied to M., to accept the amount of principal and interest remaining due (she alleging that she had paid \$10 on account thereof), and reconvey the land to her, which request M. refused to comply with. Subsequently, and in June of that year, M. sold and conveyed the land to R. & McK., for \$1,200, and they in June, 1872, sold and conveyed to B., for \$2,000 alleged to be its full value, taking a mortgage for part of the consideration money, which they transferred for value to one W.—not a party to the suit. During the time R. & McK. held the property, they (with knowledge of B.) had cut and disposed of large quantities of wood and timber growing thereon, without any attempt on the part of the plaintiff to restrain them. In November, 1873, the plaintiff instituted proceedings in Chancery seeking to redeem, alleging that the deed she gave was intended as a security merely, and a decree was pronounced in her favour, Spragge, C., being of opinion that the transaction was in reality one of mortgage and that on the pleadings set out in the report, the defendants R. & McK. and B., had distinctly admitted the allegations of the bill in this respect. On appeal, this court being equally divided the appeal was dismissed, and the decree for the plaintiff stood affirmed. Per Hagarty, C. J., and Burton, J. A.—At most the transaction was one of purchase by M., with a verbal undertaking on his part to resell on payment of what should be found due. Patterson, J. A.—While entertaining grave doubts of the plaintiff's right to recover, thought that the evidence did not establish the fact of B. having purchased without notice of the plaintiff's al-

leged right to redeem; and in view of the fact that Spragge, C., who heard the evidence considered that the fact of notice was fully established, thought the decree should be affirmed. Per Proudfoot, J.—The transaction was in reality a security only for the advance of money, and B. bought with actual notice of the plaintiff's claim, and therefore she was entitled to redeem. *Peterkin v. McFarlane*, 9 A. R. 429. See *S. C. sub nom.*, *Rose v. Peterkin*, 13 S. C. R. 677.

See *Rudd v. Frank*, 17 O. R. 758, p. 616; *Klock v. Chamberlin*, 15 S. C. R. 325, p. 877.

### 5. Payment of Mortgage Money to Agent.

M. desiring to raise money upon mortgage of his lands, part thereof was to go to pay off certain existing encumbrances thereon, arranged with a certain solicitor that the latter should get him the money, and he and his wife executed a mortgage for the amount, and left it in the hands of the solicitor. The latter received the mortgage money from the mortgagee and absconded. M. now sued the mortgagee, claiming the money or a discharge of the mortgage:—Held, that leaving the mortgage with the solicitor did not prove that the latter was M.'s agent to receive the money, and the defendant had not satisfied the onus resting upon him of proving this fact, and therefore M. was entitled to judgment as claimed. *McMullen v. Polley*, 12 O. R. 702.—Proudfoot.

See also SUBHEAD IV. 1, p. 1269.

### 6. Other Cases.

The court below (26 Chy. 618) held that the mortgagee of the realty had in this case no right to look to the machinery as security for his claim. On rehearing the court varied this decree by declaring the plaintiff entitled to restrain the removal of the machinery in question, by virtue of a mortgage prior to that in favour of the plaintiff upon the machinery, and which prior mortgage had been, before the institution of this suit, assigned to the plaintiff; leaving the rights of the parties in respect of the subsequent charges on the property to be disposed of either on appeal or on further directions, or on leave reserved. *Dewar v. Mallory*, 27 Chy. 303.—Blake.

Quere, whether a conveyance absolute in form, though a mortgage in fact, comes within the Act 11 Geo. II. c. 19, s. 11, so as to authorize the mortgagee to give notice and receive attornment from a tenant. *McLennan v. Hannum*, 31 C. P. 210.—C. P. D.

The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the bonâ fide purpose of further securing the debt, without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act. *Trust and Loan Co. v. Laurason*, 6 A. R. 286.

The R. S. O. (1877) c. 25, s. 26, declares that any mortgage or lien created by the nominee of the Crown on lands for which the patent has not issued, shall in law and equity have the same



dant, and executed by him and his wife, H. at the time informing him that he was to have such surplus; and also then informed him as well as after the transaction had been closed, wrote to him, that the plaintiffs would send a discharge, though without any authority from the plaintiffs to do so; and defendant stated that he signed on this understanding:—Held (Galt, J., dissenting), that there was no merger of the mortgage debt, but the defendant still remained liable therefor, the equity of redemption having been released only to enable the plaintiffs more conveniently to sell. Per Wilson, C. J.—The accountability for the surplus of the proceeds of the sale, shewed the true nature of the transaction. Per Osler, J.—The merger of the mortgage was a question of intention, such intention being a matter of fact. Per Galt, J.—When the plaintiffs accepted from defendant a release of his equity of redemption without any reference to or mention of the mortgage debt, they thereby discharged the defendant and the charge became merged. *North of Scotland Mortgage Co. v. German*, 31 C. P. 349.—C. P. D.

The owner of lands created two mortgages thereon, and subsequently released his equity to the mortgagee who was entitled to priority, who afterwards bought the interest of the mortgagor at sheriff's sale, and subsequently sold the premises to several purchasers, who bought without notice of the second mortgage:—Held, that this had not the effect of merging the mortgagee's charge in the equity of redemption; and that in a proceeding by parties claiming under the second mortgage, their only right was to redeem as puisne incumbrancers, and that the purchasers were entitled to an enquiry as to the enhanced value of the property by reason of their improvements. *Weaver v. Vandusen—Wills v. Agerman*, 27 Chy. 477.—Spragge.

The plaintiffs held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. Defendant conveyed his equity of redemption to A., who subsequently released to the plaintiff for a nominal consideration, after striving for a substantial one. The defendant, as part of the arrangement, gave the plaintiffs his note for some interest. The plaintiffs having sued on the covenant for payment, the jury were directed that if the release and note were taken by the plaintiffs in satisfaction of the liability on the covenant, to find for the defendant; if taken under a stipulation that it should not have that effect, to find for the plaintiffs; and that in the absence of evidence upon the points the inference would be that it was taken in satisfaction of plaintiffs' claim, the charge being thereby merged. The jury found for the defendant:—Held, that there was no misdirection, the onus of proving that there is no merger being upon the plaintiff in such a case; and the verdict was sustained. *North of Scotland Mortgage Co. v. Udell*, 46 Q. B. 511.—Q. B. D.

The defendant executed a mortgage on certain land to the plaintiffs, dated 5th November, 1881, to secure \$2,200, and interest, and on 8th May, 1882, conveyed the land to L. subject to the mortgage. On 12th May, 1883, L. conveyed to the plaintiffs. Afterwards the plaintiffs entered into an agreement with C. for the sale of the

land to him for a sum less than the amount due them, which was followed by a conveyance to him. Subsequently the plaintiffs brought an action against defendant on the covenant in his mortgage to them to recover the deficiency thereon, contending that the agreement made with L. when they took the conveyance from her was that defendant should not be discharged thereby, as was evidenced by certain correspondence put in by them:—Held, that whether there was such an agreement or not it would not be binding on defendant, for he having sold to L. subject to the mortgage, it was L.'s duty to indemnify him against it, and plaintiff took with knowledge of this and never communicated with him; and, moreover, by their subsequent sale to C. they put it out of the defendant's power to redeem. *North of Scotland Mortgage Co. v. Udell* 46 Q. B. 511, and *North of Scotland Mortgage Co. v. German*, 31 C. P. 349, commented on. *British and Canadian Loan and Investment Co. v. Williams*, 15 O. R. 366.—Robertson.

The defendant having mortgaged certain lands, conveyed them to one P., and afterwards, becoming insolvent, he included this in his schedule as an indirect liability. The conveyance was silent as to whether it was a sale of the equity of redemption merely, or of the whole estate, the payment of the mortgage being part of the consideration, but from the evidence the court inferred the latter. The mortgagee, who had been no party to the arrangement, afterwards obtained from P. the equity of redemption which he caused to be assigned to his wife, in order, as he said, to prevent a merger; and he then sued the defendant on the covenant for the mortgage money:—Held, that there was no merger, and that the plaintiff was entitled to recover. *Macdonald v. Bullivant*, 10 A. R. 582.

In an action on the covenant for payment in a mortgage for the amount of the deficiency after the exercise of a power of sale, defendant set up the sale under the power to one W. and a retransfer by W. on the same day to plaintiff, by which plaintiff became the owner of the land:—Held, on demurrer, no defence. *Pegg v. Hobson*, 14 O. R. 272.—Royd.

A. C., owner of certain lands, mortgaged them to a loan company, and afterwards executed two successive mortgages to one H. Afterwards, in 1887, A. C. sowed a quantity of fall wheat, and in January, 1888, made a chattel mortgage of this wheat to G., which chattel mortgage was properly registered. On April 4th, 1888, before the harvest, under pressure from H., A. C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages, and a small additional unsecured debt due from him to H. On the 5th April, 1888, H. leased the property to A. J. C. for a year. When the fall wheat was ripe, A. J. C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A. J. C. now brought this action to recover its value:—Held, that on his taking the conveyance from A. C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G.'s right as chattel mortgagee became prior in point of time to the title of M., and the action must





Held, reversing the judgment of the Court of Appeal, 6 A. R. 312 (Henry, J.), diss., that the execution and registration in accordance with the Revised Statutes of Ontario, (1877) c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail. *Lawlor v. Lawlor*, 10 S. C. R. 194.

In respect to discharges of mortgages, what the Registry Act makes tantamount to a reconveyance is the certificate of discharge and the registration of it, not the execution of the certificate merely. *In re Music Hall Block—Dumble v. McIntosh*, 8 O. R. 225.—Ferguson.

The equity of redemption in the deed conveyed was subject to a mortgage, a discharge of which was registered on 21st July, 1875, the same day as the deed:—Held, that the deed must be assumed to have been delivered before it was registered, and the discharge of the mortgage on registration operated as a reconveyance to B., who was the assignee of the mortgagor within the meaning of the Act respecting the effect of registering a discharge. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

A discharge of mortgage executed by an assignee thereof contained these words, "and that such mortgage has been assigned to me," without giving the particulars of the dates of and parties to the assignment, was:—Held, sufficient. *Re Mara*, 16 O. R. 391.—Ferguson.

A discharge of mortgage referred to the mortgage as 5764, whereas it was registered as 5764 C. W.:—Held, that it was nevertheless a valid discharge properly registered. The Registry Act, though requiring every instrument to be numbered, says nothing about adding letters, which appear to be only arbitrary marks adopted by the officials for convenience of reference. *Re Clarke and Chamberlain*, 18 O. R. 270.—Boyd.

A discharge of mortgage was signed by "Eliza" Switzer, whereas the mortgage purporting to be discharged was made to "Elizabeth" Switzer:—Held, on a vendor and purchaser application, that there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar, and as a matter of family usage the names are synonymous and interchangeable. *Id.*

Effect of discharge in determining an easement. See *Carter v. Grasett*, 14 A. R. 685, p. 1177.

## V. RIGHTS AND LIABILITIES OF PARTIES AND THOSE CLAIMING UNDER THEM.

### 1. Right of Mortgagor to Maintain Actions.

Held, that O. J. Act, s. 17, sub-sec. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection that the mortgagees should be parties ought not to prevail. *Platt v. Grand Trunk R. W. Co. of Canada*, 12 O. R. 119.—Proudfoot.

In an action against defendant to recover damages for depreciation in the value of a

farm for selling plaintiff barley seed mixed with weed, it was contended that as the farm was mortgaged the plaintiff (mortgagor) could not maintain the action:—Held, that in equity the mortgagor is the owner in a case like this where the land is worth considerably more than the mortgage, and it is for the judge to direct the mortgagee to be added as a party or to direct the sum recovered to be paid into court for his protection if it appear that his interests are being affected prejudicially by the litigation, but it is no reason for dismissing the action, and a new trial was ordered. *McMullen v. Free*, 13 O. R. 57.—Chy. D.

### 2. Right of Mortgagee to Maintain Actions.

Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortgagor, there is nothing to prevent him, if his claim is left unsatisfied, from suing on the covenant in the mortgage, and proceeding to a sale under execution or applying to this court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim. *Parr v. Montgomery*, 27 Chy. 521.—Spragge.

Quere, whether the appellant whose only interest was that of mortgagee of S.'s interest, had any locus standi to bring a suit for partition or to appeal without his co-plaintiff. *Laplante v. Scamen*, 8 A. R. 557.

Held,—Rose, J., expressing no opinion on the point—that where an assignment of a mortgage on land was absolute in form, though as a matter of fact the assignor retained a right to part of the money, an action on the covenant in the mortgage must be brought in the name of the assignee. *Ward v. Hughes*, 8 O. R. 138.—C. P. D.

B., the owner of a mill, subject to a first mortgage for \$4,000, held by one K., gave a second mortgage to plaintiffs. Subsequently B., being desirous of having the mill converted from the "Stone" to the "Roller" system, applied to M., manager of the Ontario Loan and Savings Co., for an advance of \$7,300, to enable him to pay off the mortgage and leave a surplus to be applied in part payment of the cost of reconstruction, which advance the company agreed to make, and a mortgage for that amount was duly executed by B. in favour of the company. B. thereupon entered into an agreement with defendants under which defendants were to reconstruct the mill for \$4,800, \$2,000 to be paid on completion of mill and balance in three equal annual payments, secured by a second mortgage on the property, and it was one of the terms of the said agreement that defendants should be furnished with a letter from M. agreeing to pay the \$2,000 on completion of the mill. Defendants, without communicating with M., commenced work and did not ask him for such letter until after the work had progressed for several weeks. When applied to for such letter, M. informed plaintiffs that he did not agree with B. to give a letter for any specific sum, but only for whatever balance there might be left out of said sum of \$7,300, after paying off prior incumbrances, and that after allowing for the amount of such prior incumbrances there only remained about \$1,200, which latter amount he was willing to

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undertake to pay on the mill being completed. Defendants, in the course of reconstruction, had taken out most of the old machinery and put in new, and made considerable alterations, and upon M. declining to undertake to pay \$2,000, they removed the new machinery put in and left the mill in a dismantled condition. At the time defendants commenced work the amount due on plaintiff's mortgage was about \$1,700. The mill whilst in such dismantled state, was sold under power of sale in K.'s mortgage and only realized enough to satisfy it, and plaintiffs contending that defendants by their acts had diminished the value of their security, and that B., the mortgagor, was insolvent, brought this action to recover damages to the extent to which their security was impaired. It appeared in evidence that M., besides being manager for the loan company, was also plaintiff's manager, and that he was aware that B. had made a contract with defendants for remodelling the mill, although he did not know the precise terms of such contract, and that he saw the work in progress and raised no objection. At the trial the Chief Justice dismissed the action, holding (following *Baker v. Mills*, 11 O. R. 253) that plaintiffs, second mortgagees, not having the legal estate, and not being in possession, or entitled to possession, could not maintain any action:—Held, per Wilson, C. J., and Armour, J., that plaintiffs must fail, not on the ground upon which the Chief Justice at the trial dismissed their actions, but upon the ground that they had by their conduct and acquiescence precluded themselves from bringing it. Per O'Connor, J., that plaintiffs must fail on both grounds. *Western Bank of Canada v. Greey*, 12 O. R. 68.—Q. B. D.

See *Lovell v. Harrington*, 27 Chy. 178, p. 915.

#### 3. Liability of Mortgagor on his Covenant.

The defendant mortgaged certain land to the plaintiffs, covenanting to pay the mortgage money, and then sold to S., who assumed payment of the mortgage as part of the purchase money. S., then gave a second mortgage to the plaintiffs, and then further mortgaged the land. Default having been made, the plaintiffs sued defendant to recover the amount of his mortgage, and prayed for judgment for the whole amount unpaid; but neither sale nor foreclosure was asked:—Held, that the plaintiffs were entitled to judgment on the covenant against defendant for the amount of his mortgage; but that defendant was entitled to a lien on the land for the amount of the mortgage, which, as between him and S., S. had bound himself to pay; and leave was given to defendant to amend, and bring the proper parties before the court so as to enforce his lien. *Hamilton Provident Loan and Investment Co. v. Smith*, 17 O. R. 1.—Rose.

See *North of Scotland Mortgage Co. v. Udell*, 46 Q. B. 514, p. 1271; *Macdonald v. Bullivant*, 10 A. R. 582, p. 1272; *North of Scotland Mortgage Co. v. German*, 31 C. P. 349, p. 1271; *Pegg v. Hobson*, 14 O. R. 272, p. 1272; *Campbell v. Robinson*, 27 Chy. 634, p. 1280; *British and Canadian Loan and Investment Co. v. Williams*, 15 O. R. 354, p. 1272; *Beatty v. O'Connor*, 5 O. R. 731, p. 1301; *Paisley v. Broddy*, 11 P. R. 202, p. 1094.

#### 4. Lease by Mortgagor.

In replevin the defendant, who had mortgaged the demised premises to one E., claimed as landlord, under a lease alleged to have been made by him subsequent to the mortgage, three quarters' rent, which had been paid by the tenant to E.:—Held, that the evidence, set out in the report of the case, shewed that E. was the original and actual lessor, or, at all events, that previous to the payment of the rent avowed for, the tenant had adhered to E. with the defendant's consent. *McLennan v. Hannum*, 31 C. P. 210.—C. P. D.

M. being possessed of certain lands subject to a mortgage, made a lease thereof for a term of years to the plaintiff, which provided, amongst other things, that \$15 should be expended in the first year of the term in procuring manure for the purposes of the farm. Afterwards he created a mortgage in favour of the defendant, and assigned to him the lease as collateral security. The defendant distrained for rent claimed to be due, and plaintiff replevied the goods seized, claiming there was no rent due; and proved the payment of certain moneys to the first mortgagee, and claimed also credit for \$15 a year in respect of manure furnished and expended in each year on the premises, which, at the trial, was proved to have been the true agreement between the landlord and tenant, though not so expressed in the lease, and the lease was ordered to be reformed accordingly:—Held, that the lease should not have been reformed as against defendant, he being a bona fide purchaser for value without notice of the facts on which the plaintiff's equity rested:—Held, also, that although a new contract of tenancy may be inferred from the fact of a notice by a mortgagee to pay rent to him, and acquiescence by the tenant by payment of the rent, still, as the circumstances showed that it was not intended to create such a contract, but rather that the interest being paid, the possession of the mortgagor and his tenants was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee. *Forse v. Sovereign*, 14 A. R. 482.

#### 5. Mortgage in Possession.

As between mortgagor and mortgagee, there is nothing to prevent the mortgagee taking possession at a fair and reasonable rent agreed upon between them. In such a case the mortgagee is not a "mortgagee in possession" in the technical sense of the term. In such a case, however, a subsequent incumbrancer—prior to the first mortgagee entering into possession—is not bound by such an agreement; and the master may charge the first mortgagee with a fair occupation rent, although it exceeds that stipulated for. *Court v. Holland*, 29 Chy. 19.—Boyd.

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees "their heirs and assigns forever, all and singular," the mortgaged land, habendum "as and for all the estate and interest" of the grantors "in and to the same":—Held, sufficient to pass the fee to the grantees. *Bright v. McMurray*, 1 O. R. 172.—Boyd.

C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. & S. Co. On 17th March, 1883, C. made a second mortgage to L. who assigned to plaintiff. On 5th October, 1883, C. leased the premises to defendant for ten years from 1st April, 1884, at \$175 for the first year, and \$165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at defendant's request. The rent payable on 27th October, 1883, 1884, and 1885, was paid by defendant to H., who remitted the money to the company. H. gave defendant receipts for the rent as agents for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease, or of its provisions. The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease and the clause referred to, the payment of rent to the company, and that he was tenant to the company, whose mortgage was in default:—Held, reversing the decision of Boyd, C., that, as the company received the money sent them by H. not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant:—Held, also, that even if the company had been aware of the provision in the lease and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor." The plaintiff was therefore held entitled to recover. *Frost v. Hines*, 12 O. R. 669.—Q. B. D.

See *McDowell v. Phippen*, 1 O. R. 143, p. 1285.

#### 6. Purchase or Release of Part of Property.

Where a purchaser of part of an estate subject to mortgage gave a covenant to pay a proportion of the mortgage money, and a bill was filed by the vendor's assignee to compel payment by the purchaser, the court, refused to give such relief, except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due. In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceedings against such defaulting purchasers, upon indemnifying him against costs. *Clernow v. Booth*, 27 Chy. 15.—Spragge.

B. owned lots D. and E. and mortgaged them, the mortgagee (J.) assigned the security and

afterwards bought up the equity of redemption. P. the plaintiff, subsequently purchased lot D. for which he paid the full value and obtained a conveyance containing statutory covenants for title and possession. J. subsequently sold lot E. to a bona fide purchaser, who conveyed to the appellant:—Held, affirming the judgment of the court below (28 Chy. 356), that P. was entitled to be indemnified out of lot E. to the full extent of the value thereof against the amount due on the mortgage. *Pierce v. Canavan*, 7 A. R. 187. See *S. C.*, 29 Chy. 32.

See *Core v. Ontario Loan and Debenture Co.* 90. R. 236; *Fraser v. Nagle*, 16 O. R. 241, p. 1295.

#### 7. Agreement to Release in Portions.

A mortgage on five stores, and expressed to be for \$10,500, contained a provision that on payment of \$2,500, the mortgagees would release the easterly store mortgaged, and any one or more of the other four stores on payment of \$2,000 each at any time, on receiving a bonus of three months' interest on the sum so paid:—Held, that the benefit of this clause passed to the assignee of the equity of redemption, who was entitled to enforce it. It appeared that the whole \$10,500 had not been advanced:—Held, that the amount required to be paid to entitle the assignee of the equity of redemption to obtain a release of any of the stores must be abated proportionately. *Clarke v. Freehold Loan and Savings Co.*, 16 O. R. 598.—Robertson.

#### 8. Postponing Lease to Mortgage.

See *Anderson v. Stevenson*, 15 O. R. 503, p. 1149.

#### 9. Rights and Liabilities of Purchasers of Equity of Redemption.

When a mortgagor who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to such mortgage, he becomes surety of the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt. *Campbell v. Robinson*, 27 Chy. 634.—Spragge.

Where a debtor at the express instance and under the advice and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's land, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary and void as against him. Such a mortgagee cannot charge against the land under his mortgage any advances made after notice of the conveyance. *Hopkinson v. Rolt*, 9 H. L. C. 514, and similar cases, considered and applied. *Blackley v. Kenny*, 16 A. R. 522.

One of the defendants, who was the husband of another of the defendants, mortgaged certain lands to the plaintiff, a member of a mercantile firm, to secure an existing indebtedness to the firm and future advances. Subsequently the husband, by the advice of the plaintiff, conveyed his equity of redemption in the lands to his wife, subject to the mortgage. At the time of

of redemption. purchased lot D, and obtained a covenant for the benefit of the E. conveyed to the judgment of the P. was entitled to the full extent amount due on an, 7 A. R. 187.

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R. 241, p. 1295.

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*Purchasers of Equity*

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this conveyance, the debt due the plaintiffs' firm was represented by notes under discount which, as they fell due, were retired by the firm, the husband making part payments thereon, procuring fresh goods from the firm, giving renewals for the balances and getting delivery up of the original notes, the wife not being consulted as to these dealings, and rights against her not being reserved. The husband subsequently made an assignment under R. S. O. (1887) c. 124. In an action for that purpose the conveyance to the wife was declared fraudulent and void as against creditors, but not as against the creditors' assignee, it having been made before the Assignment and Preference Act: (*Ferguson v. Kenney, 16 A. R. 276.*) In the present action on the plaintiff's mortgage, it was held by the Court of Appeal that the plaintiff was estopped from disputing the validity of the conveyance to the wife, and that the mortgaged lands were not chargeable with advances made after notice of such conveyance, and the action was referred back to an official referee (16 A. R. 522). On a second appeal from the referee's report:—Held, that the course of dealing of plaintiff's firm did not operate as a payment of the original notes or debt: *Dominion Bank v. Oliver, 17 O. R. 432, followed.* But:—Held, that the wife, at the time of the conveyance to her, became a surety in respect of the lands, and that the renewal of the notes by the plaintiff's firm discharged the lands from liability:—Held, also, following the judgment in *Blackley v. Kenney, 16 A. R. 522*, that the mortgage was not a security for advances made after the conveyance to the wife, nor could the plaintiff's firm claim as simple contract creditors against the lands, nor could the creditors' assignee, who was a defendant in this action, claim on behalf of the other creditors, whether execution creditors or otherwise, they not being parties to this action. *Blackley v. Kenney, 19 O. R. 169.*—Robertson. But see *N. C. in appeal, 18 A. R. 135.*

A purchaser of an equity of redemption is bound against himself and his vendor to pay off the incumbrances, and this quite irrespective of the frame of the contract between the parties. Where therefore lands were exchanged between the plaintiff and defendant which were subject to certain mortgages, the defendant was held bound to pay off those on the lands conveyed to him, and to protect the plaintiff from liability thereon. *Boyd v. Johnston, 19 O. R. 598.*—Boyd.

See *Wilkins v. McLean, 10 O. R. 58; 13 A. R. 467; 14 S. O. R. 22, p. 1305; British and Canadian Loan and Investment Co. v. Wilkins, 15 O. R. 386, p. 1272.*

# 11. Recovery of Mortgage Money.

## (a) When Action will lie.

Held, that a mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money, does not of itself afford conclusive evidence of a debt, so that the mortgagee or his assigns can maintain an action for its recovery. In this case it was shewn that no money was ever advanced by the mortgagee to defendant, the mortgagor, but that the mortgage was given for a debt due by

defendant to one C., who in consideration of getting it agreed to relieve defendant from all personal liability; and the plaintiffs, assignees of the mortgage, were held not entitled to recover. Quære, whether section 1, sub-section 4, and section 2 of the Vendors and Purchasers' Act, R. S. O. (1877), c. 109, apply to such an action as this, or only to actions where the title to land is in question. *London Loan Co. v. Smyth, 32 C. P. 530.*—C. P. D.

A writ was in the hands of the sheriff at the suit of the plaintiffs against L., at the time of the dismissal of a bill filed by L., to redeem the plaintiffs, and at the time of the sale to M., which dismissal had the effect of a decree of foreclosure against L.:—Held, notwithstanding that the plaintiffs might proceed to recover their debt against L., they being in a position to recover the mortgaged premises. *Bank of Toronto v. Irwin, 28 Chy. 397.*—Spragge.

If a person borrows money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment; and if he holds security, such as the mortgage from J. and R. to D., in this case, he can charge the money so loaned on such security. *Court v. Holland, 4 O. R. 688.*—Proudfoot.

## (b) Interest.

A mortgage was to be void on payment of \$2,000, at eight per cent., in five years from the date thereof, with "interest in meantime half-yearly on, etc., in each and every year of said term of five years; and also upon payment of interest at and after the rate aforesaid upon all such interest money as shall be permitted or suffered to be in arrear and unpaid after any of those days and times hereinbefore limited and appointed for payment thereof":—Held, that the contract between the parties was simply one for payment of interest on any interest which might be in arrear before, but not after, the expiry of the mortgage. *Wilson v. Campbell, 8 P. R. 154.*—Blake.

Interest on a mortgage was payable half-yearly in advance on the 1st of April and October. The mortgagee filed a bill for sale, and the registrar on taking the account (in the latter part of January) fixed a day in July following for payment, and allowed the plaintiff interest to that date, but refused to allow him the half year's interest payable in advance on the 1st of April. On appeal Proudfoot, V. C., upheld this ruling. *Trust and Loan Co. v. Kirk, 8 P. R. 203.*—Holmsted, Registrar.—Proudfoot.

Where no rate of interest is fixed by a mortgage to be paid after maturity, the rate of interest mentioned in the mortgage is chargeable *prima facie*, but the person seeking to reduce it may shew that it is more than the ordinary value of money. *Simonton v. Graham, 8 P. R. 495.*—Blake.

Where no interest is reserved by a mortgage none is recoverable until after the day appointed for payment of the principal. *Reid v. Wilson, 9 P. R. 166.*—Holmsted, Registrar.

Quære, as to the effect of a proviso in a mortgage for payment of the amount secured "without interest if paid when due." *Ib.*

Where a mortgage to secure the repayment of money with interest at ten per cent. provided that, "should default be made in payment of the principal money or interest, or any part thereof respectively then the amount so overdue and unpaid to bear interest at the rate of twenty per cent. per annum until paid."—Held, the said proviso was not invalid, or relievable against on the ground of forfeiture. *Downey v. Parnell*, 2 O. R. 82.—Ferguson.

A parol agreement to pay a higher rate of interest than that reserved in the mortgage, is ineffectual to charge the land. *Totten v. Watson*, 17 Chy. 235, and *Matson v. Swift*, 5 Jur. 645, followed. *Re Houston—Houston v. Houston*, 2 O. R. 84.—Proudfoot.

A note dated 11th January, 1862, payable to and endorsed by one S. H., was for \$3,000, with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment.—Held, that the proper construction of the terms of both the note and the covenant as to payment of interest was, that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John v. Rykert*, 10 S. C. R. 278.

On an appeal from a report of a master who had allowed more than six years of arrears of interest in taking an account of what was due on a mortgage containing a covenant to pay interest.—Held, that in a foreclosure suit, interest when due for more than six years should be allowed in taking the mortgage account instead of allowing it for six years only, and compelling the plaintiff to bring another action on the covenant to recover the balance.—Held, also, that more than ten years' arrears of interest had been rightly allowed. *Howen v. Bradburn*, 22 Chy. 96, commented on; *Allan v. McTavish*, 2 A. R. 278, followed. *Macdonald v. McDonald*, 11 O. R. 187.—Proudfoot.

The covenant provided for payment of interest at nine per cent. up to the end of a year from the date of the mortgage.—Held, that there being no evidence why such rate of interest was provided for, and it being matter of common knowledge that nine per cent. was not considered excessive for advances in the year 1866, when the mortgage was made, and for some years following, the same rate of interest should be allowed for the years subsequent to the expiry of the first year. *McDonald v. Elliott*, 12 O. R. 98.—Rose.

By the terms of a mortgage in which the principal was payable by instalments, interest was reserved at the rate of eight per cent. per annum "until payment in full".—Held, (affirming the judgment of Proudfoot, J., 12 O.

R. 492), that these words related to the period fixed for the payment of principal and that interest was only recoverable after that time as damages and not by the terms of the contract, and that there was nothing in the circumstances of the case to justify the allowance of a greater rate than legal interest.—*Semble*, Per Oiler, J. A.—(1) *Prima facie* the rate stipulated for in the contract up to the time certain may be adopted as a reasonable rate to be awarded as damages: (2) there is no distinction in principle in ascertaining interest to be awarded as redemption money, and interest to be awarded as damages. *Powell v. Peck*, 15 A. R. 138.

During the progress of the action money had been paid into court by the defendants which remained there on deposit for upwards of seven years.—Held (also affirming the judgment below), that on taking the account between the parties the defendants were liable to pay in respect of this sum the rate allowed upon the residue of the principal, and were not limited to the rate allowed by the court. *Id.*

In proceedings to foreclose a mortgage on which the principal money had become due by default being made in the payment of interest, although the time for which the mortgage was made had not arrived.—Held, that the rate of interest for the six months allowed to redeem should be computed at the same rate as the mortgage provided for, which in this case seemed a reasonable rate. *Mutlebury v. Stevens*, 13 O. R. 29.—Boyd.

The mortgage was on a printed statutory form, the provision was for payment of the \$800, the printed words "with interest," being struck out; but the mortgagor covenanted to "pay the mortgage money and interest and observe the above proviso;" and there were the usual provisos as to distress for arrears of interest, principal becoming due on nonpayment of interest, etc.—Held, that no interest was payable until after default in the payment of each instalment of principal as it became due. *McDermott v. Keenan*, 14 O. R. 687.—Wilson.

This was an action for redemption, and the chief question involved in the appeal was the construction of the following proviso for payment contained in the mortgage in respect of which the action was brought: "Provided this mortgage to be void on payment \* \* of \$7,500 \* \* on or before the 1st day of June, 1884, with interest thereon at the rate of ten per cent. per annum, until such principal money and interest shall be fully paid and satisfied." The defendants were allowed by the referee interest after the 1st of June, 1884, as damages, at the rate of six per cent., and this ruling was affirmed by Galt, C. J. The Court of Appeal were of opinion that the case was not distinguishable from *Powell v. Peck*, 15 A. R. 138, and *St. John v. Rykert*, 10 S. C. R. 278. *Grant v. People's Loan and Deposit Co.*, 17 A. R. 85. Affirmed. See *S. C. sub nom. People's Loan and Deposit Co. v. Grant*, 18 S. C. R. 262.

Interest can be claimed by mortgagees only from the time the money is actually paid out by them. *Edmonds v. Hamilton Provident and Loan Society*, 19 O. R. 677.—Q. B. D. Affirmed, 18 A. R. 347.



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See *Gordon v. Gordon*, 11 O. R. 611; *Trinity College v. Hill*, 8 O. R. 256, p. 1310; *Archbold v. Building and Loan Ass'n*, 15 O. R. 237; 16 A. R. 1, 1307.

### 12. Cutting Timber.

The first of three mortgagees having filed a bill for sale, the other two proved their claims in the suit. No one redeemed by the day appointed, but a final order for sale was not taken out, because one V., who had purchased the equity of redemption, was negotiating with S., the third mortgagee. During these negotiations V. cut and sold a large quantity of the timber on the land to G., whereupon S. filed a bill praying payment by G., of the price of the timber which had not yet been paid over:—Held, affirming the master's ruling, that the first mortgagee was entitled to it. *Scott v. Vosbury*, 8 P. R. 336.—Proudfoot.

The remedy of a mortgagee against a mortgagor in possession or any one claiming under him who cuts standing timber on the mortgaged premises, where such cutting will render the security insufficient, is not limited to a mere prevention of the mischief by injunction. And where a second mortgagee in possession had cut down timber and sold it, and subsequently in an action on the first mortgage a sale of the property proved insufficient to satisfy the amount thereof. It was:—Held, that the second mortgagee was bound to account for the value of the timber cut and removed by him prior to the action. *McLeod v. Avey*, 16 O. R. 365.—Boyd.

### 13. Right to Growing Crops.

Upon default made in payment of a mortgage the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security. Therefore, when land was sold in July under a decree made in a mortgage suit, without any reservation of crops:—Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the unsecured growing crops, mature and immature. *McDowell v. Plippen*, 1 O. R. 143.—Chv. D.

See *Cameron v. Gibson*, 17 O. R. 233, p. 1273.

### 14. Application of Insurance Money.

A mortgage was made by T. H. C. and B. H. C. to D. of certain lands which contained a covenant to insure in a sum named. A second mortgage was made by the same parties to a bank to secure an indebtedness which also contained a covenant to insure without specifying any amount. At the date of the first mortgage there was an insurance for \$1,400, which was allowed to lapse. On the bank manager discovering this, he procured T. H. C. to effect an insurance, advancing the money to pay the premium, charging T. H. C.'s account therewith, and discounted a note made by T. H. C. and endorsed by B. H. C. to cover the same. The policy was to T. H. C. alone, and was, on sawmill, \$400; on fixed and movable machinery, shafting, gearing, etc., \$1,000; on boiler and connec-

tions, \$100, and on engine and connections, \$500. Loss, if any, payable to the bank. On a fire occurring and the property being burnt, D. required the insurance company to expend the moneys so far as they would go in rebuilding the insured premises:—Held (Cameron, C. J., doubting), following *Stinson v. Pennock*, 14 Chy. 604, that the 14 Geo. III. c. 78, s. 83, is not merely of local application, but extends to this province and applies to a case like the present. Held, also (Cameron, C. J., dissenting), that as between mortgagor and first and second mortgagees, the fixed and movable machinery, etc., boiler, and boiler connections, etc., were included under the word "building," in the said section, so as to entitle D. to the benefit of the insurance thereon, for as between the parties they were treated as part of the freehold and passed as such. Per Cameron, C. J.—The operation of the statute should not be extended beyond its express words, and they limit its operations to an insurance upon a house or building as such, and do not extend to a distinct insurance of fixtures or machinery as such. Per Cameron, C. J., also. Apart from the claim of the bank or their assignees, D., as mortgagee on a mortgage with a covenant to insure, would in equity be entitled to the insurance money if the insurance had been effected by both mortgagors, and the provisions contained in section 12 of R. S. O. (1877), c. 136, are merely a legislative affirmation of such right. *Curr v. Fire Ass. Co.*, 14 O. R. 487.—C. P. D.

The defendant held a mortgage upon the plaintiff's lands to secure \$300 with interest, to be paid yearly, together with an instalment of principal money not less than \$50, the first instalment of principal and interest to fall due on 16th December, 1888. On June 29th, 1888, a fire occurred, and the defendant received \$195, insurance money; without communicating with the plaintiff, he thereupon assumed to apply this as follows: he reckoned the interest up to the receipt of the money, and deducting that credited the balance on the whole sum advanced; and no payment of the first instalment being made by the mortgagor on December 16th, 1888, he proceeded to exercise his power of sale:—Held, on motion for an injunction to restrain the sale, that the rules as to appropriation of payments did not apply, the insurance money not constituting a payment in the ordinary sense of that word, and the mortgagor having had no opportunity of first directing its appropriation:—Held, also, that though the mortgagee had the right as declared by R. S. O. (1887), c. 102, s. 4, to apply the insurance money in satisfaction of the money that ought to be paid under the mortgage, it was not competent to him to accelerate the times of payment, nor to alter in any respect the terms of the instrument without the consent of the mortgagor. The insurance money must be applied from time to time as payments fell due under the mortgage, unless otherwise arranged between the parties. *Corham v. Kingston*, 17 O. R. 432.—Boyd. See *Barber v. Clark*, 20 O. R. 522.

Upon a motion for an interim injunction the defendants filed an affidavit and statement shewing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the

plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which, by virtue of an acceleration clause in the mortgage, had become due:—Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that they must apply the insurance money, as required by R. S. O. (1887) c. 102, s. 4, sub-s. 2, upon arrears of principal and interest. *Cornham v. Kingston*, 17 O. R. 432, approved and followed. *Edmonds v. Hamilton Provident and Loan Society*, 19 O. R. 677.—Q. B. D. But see *S. C.* 18 A. R. 347.

#### 15. Mortgagee Purchasing at Sale of Mortgaged Premises.

P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth \$6,000, subject to incumbrances amounting to \$3,500, and interest. One of the mortgages was in favour of defendant M., who subsequently acquired the interests of the other two mortgagees. After the creation of these mortgages P. executed a deed of trust of the whole property in order to defeat a claim of title set up to ten acres by one S. Default was made in payment of M.'s mortgage, who instituted proceedings at law and recovered judgment, on which he sued out execution and under it the sheriff (after the defendant M. had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and M. bid for and became the purchaser of all at sums amounting in the whole to \$20. The cestui que trust thereupon filed a bill to redeem, alleging that the sale to M. had been at a gross undervalue, and praying to have the same set aside; the court however refused the relief asked with costs, being of the opinion that the deed of trust was fraudulent, and that the price realized was large considering that it was a sheriff's sale. *Parr v. Montgomery*, 27 Chy. 521.—Blake.

See *Ricker v. Ricker*, 7 A. R. 282; *Ingalls v. McLaurin*, 11 O. R. 380, p. 1304; *Pegg v. Hobson*, 14 O. R. 272, p. 1272.

### VI. ASSIGNMENT AND TRANSFER.

#### 1. Form of.

In an application under the Vendor and Purchasers' Act, R. S. O. (1887) c. 112, it appeared that a registered memorial of a deed poll or indorsement executed by the party assigning made on the back of a mortgage (describing it) habendum "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, etc., \* \* \* subject to the provisos and conditions in said mortgage, which said deed poll or indorsement by way of assignment, is witnessed," etc., was offered as evidence of the assignment:—Held, sufficient. *Re Mara* 16 O. R. 391.—Ferguson.

#### 2. Rights of Parties after Assignment.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand. *Synod v. DeBlauquiere*, 27 Chy. 536.—Proudfoot. Affirmed on appeal, 30th June, 1880.

A mortgagor paid off a mortgage after the mortgagee had assigned it, and also a second mortgage obtained by fraud from the same mortgagor to the plaintiffs, who did not procure the mortgagor to join in the assignment of either, or notify him thereof:—Held, that the assignee took the mortgages subject to the equities between the original parties thereto; and as the original mortgagee could not, if plaintiff, have recovered upon the one mortgage because paid, nor upon the other, because invalid, so neither could his assignee. *Wilson v. Kyle*, 28 Chy. 104.—Sprague.

A mortgagor and mortgagee dealt together for some years without having had any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off, in favour of the mortgagor for the balance due him on their general dealings:—Held, affirming the finding of the master, that such a right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity. *Court v. Holland*, 29 Chy. 19.—Boyd.

H., being seized in fee of certain lands, mortgaged them to W., and subsequently sold the minerals thereon, with the right to mine, to the defendant. The mortgage being overdue, W. recovered judgment in ejectment and issued a writ of hab. fac. poss. Defendant hearing of this wrote to H. that the mortgage must be paid, and that he must give him an order to pay it and deduct the money so paid from the purchase money of the minerals. Thereupon a memorandum was drawn up that the defendant should either pay the mortgage in full discharge thereof, or take an assignment of it as a subsequent encumbrance, for the purpose of saving the interest of defendant, as also of said H. in the said lands, the amount so paid to be credited and allowed to defendant upon his purchase money of the minerals. Defendant paid the amount due on the mortgage, though his purchase money was not due to H. Afterwards H. put the plaintiff in possession of the land to farm at a rental, and the defendant having obtained an assignment of the W. mortgage and judgment, evicted the plaintiff:—Held, Armour, J., dissenting, that the payment by defendant was in effect a payment by H., whereby the mortgage was satisfied, and as that payment was made for the purpose of saving H.'s interest as well as his own, the defendant would not have been justified in equity in enforcing the mortgage against H., or his assignee, the plaintiff; and that the plaintiff was entitled to damages for the trespass. Per Armour, J. The defendant was entitled either to pay the mortgage in discharge thereof, or to take an assignment of it as a subsequent encumbrancer; he did the latter; though he was to have been credited with this

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payment, his own payment to H. was not due, and the credit had not in fact been made; and he therefore had the right to enforce the mortgage. The plaintiff claimed \$500. The jury assessed the damages at \$1,500, and the judge at the trial amended the statement of the claim accordingly:—Held, that the damages were excessive, and a new trial was granted. *Robinson v. Hall*, 1 O. R. 266.—Q. B. D.

A mortgage was made by T. to W., who assigned it to M. No money was actually advanced on the mortgage by W., but before the assignment to M., a parol agreement was come to between M. and T. that M. should hold the mortgage as security for a debt which T. owed to M. on a promissory note:—Held, that M. was entitled to hold the mortgage as security for the amount due him from T. *McIntyre v. Thompson*, 6 O. R. 710.—Proudfoot.

The rule that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor as here.

The plaintiff, who was mortgagee of certain lands, alleged that L., the present holder of the mortgage, purchased it from C. with knowledge of the fact that C. had purchased it from the original mortgagee as trustee for the plaintiff, who was to be allowed to redeem on paying whatever C. should pay for the mortgage, and a certain additional sum for C.'s services; and sought to redeem on payment of what was due under the said agreement with C.:—Held, that the above agreement fell within the statute of frauds, and should be evidenced in writing:—Held, also, that even if this were not so, L. could not be affected by such agreement, having purchased without notice of it. *Wright v. Leys*, 8 O. R. 88.—Chy. D.

Y. being the owner of certain land, mortgaged it with other lands to the M. P. B. Society by mortgage, dated 12th July, 1873, registered 14th July, 1873. Subsequently being desirous of selling part and paying off the mortgage and getting a new loan, he by an agreement in writing, arranged with the society to leave the mortgage standing, take a further loan of \$700, and have certain of the lands (of which the lot in question was part) released by the society. A second mortgage for the \$700 advance was prepared and executed, dated 1st February, 1875, registered 11th February, 1875, which by mistake as was alleged, included all the lands in the first mortgage: and a release dated 9th February, 1875, was duly executed by the society releasing the lot in question from the operation of the mortgage of 12th July, 1873, and was afterwards registered 20th March, 1876. B., the plaintiff being aware of the agreement, but unaware that the second mortgage included the lot in question which should have been omitted, loaned Y. certain moneys, and took a mortgage dated 21st May, 1877, registered 6th June, 1877, to secure the payment thereof. The society assigned the second mortgage and all moneys secured there-

by to defendants by assignment dated 1st March, 1880, registered 17th January, 1881, and by deed dated 1st March, 1882, registered 2nd June, 1883. Y. conveyed his equity of redemption to B. In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to B; it was:—Held, affirming the judgment of Ferguson, J., that the combined operation of R. S. O. (1877) c. 111, s. 81, and R. S. O. (1877) c. 95, s. 8, formed a complete defence, and that the defendants as assignees of the mortgage for value, having the legal estate, might defend as a purchaser for value without notice, and claim also the protection of the Registry Act, as against the plaintiff a subsequent purchaser or mortgagee from the original mortgagor:—Semble that even as against the mortgagor the defendants would also be entitled to prevail. *Bridges v. Real Estate Loan and Debenture Co.*, 8 O. R. 493.—Chy. D.

See *Trust and Loan Co. v. Gallagher*, 8 P. R. 97, p. 1274; *Herchmer v. Elliott*, 14 O. R. 714, p. 781.

### 3. Other Cases.

The plaintiffs negotiated for the purchase from the defendants of certain mortgage securities and other assets of the defendants on the basis of an eight per cent. investment, and a schedule was prepared by the defendants' manager exhibiting each security, amongst which there was stated to be a mortgage by F. for \$4,700; whereas in fact there was no such mortgage, but instead two mortgages on the instalment principle, which as an eight per cent. investment were worth only \$3,920, making a deficiency of \$780. This was caused by F. before the schedule was drawn up, intimating his intention of paying off the mortgages, \$4,700, being the amount agreed upon between F. and defendants, which he would have to pay and which defendants' manager therefore in good faith, put into the schedule. Subsequently and while the schedule was in the plaintiffs' solicitor's hands to prepare and settle the deed of assignment, F. decided not to pay off the mortgages, but to go on with the regular payment of the same, and defendants' manager then corrected the schedule by inserting the two mortgages. There was a difference between the plaintiffs and defendants as to the value of the securities, and finally a lump sum was agreed on and paid by plaintiffs, and the assignment executed:—Held, by Osler, J., that, on the evidence, set out in the report, the plaintiffs' solicitor must be deemed to have had notice of the error and alteration in the schedule before the execution of the conveyance or completion of the transaction, and that this was notice to the plaintiffs:—Semble, per Osler, J., that, although the evidence shewed that there was no intention to deceive on the part of the defendants' manager, still there was such a misstatement of a material fact, as, but for the notice, would render the defendants liable for the damage sustained thereby. *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. R. 476.

On appeal to the Divisional Court:—Held, as to the claim for the \$780, there could be no recovery, for that the true construction of the transaction was that the lump sum was to cover

all deficiencies in value as also errors and mistakes, at all events to not an unreasonable amount, which \$780 could not be said to be; and where, as here, there was no fraud, concealment, or misrepresentation. In other respects the judgment was affirmed. *S. C., Ib.*—C. P. D.

The defendants in the deed of assignment covenanted that the mortgages were good and valid charges on the lands, and that the defendants had not done or permitted any act, etc., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes:—Held, per Osler, J., that the covenant was not ultra vires the company or the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold. *Ib.*

Arrears of taxes due on the mortgaged lands were paid by the plaintiffs. The taxes were due by the mortgagors; there was no covenant in the assignment against incumbrances, and no evidence of any request by defendants to pay them:—Held, that the plaintiffs were not entitled to recover the amounts so paid. *Ib.*

The plaintiffs also claimed to recover a sum of money paid to the defendants' solicitors for costs due them:—Held, under the circumstances not recoverable, as it was a voluntary payment. *Ib.*

A bank held a mortgage on certain lands of a customer to secure a current discount account, some of the paper of which consisted of notes made merely for the customer's accommodation. The plaintiff had a second mortgage on the lands, and tendered the bank (who were threatening to sell under their power of sale), together with the amount they claimed as due, a simple assignment to the plaintiff of the mortgage debt and lands containing a covenant that the amount claimed was due. The bank refused to accept the tender as made. The plaintiff then brought this action to compel the execution of the assignment as tendered, or any valid assignment with a covenant that the mortgage moneys were unpaid, and the mortgage a subsisting security for the amount tendered or for an account. On a motion to restrain the bank from dealing with the securities until the trial:—Held, that the plaintiff could not insist on the execution of the assignment as tendered, nor was he entitled to any covenant save the usual trustee covenant against incumbrances:—Held, also, that the bank was entitled to have the assignment shew the exact position of the parties, and also to have the collateral notes specified therein. Although perhaps not essential, it was not unreasonable that the transfer should also shew the nature of the collateral securities held by the bank:—Held, lastly, in settling the minutes of judgment, that the plaintiff might pay the amount claimed into court, but there was no reason why it should remain there pending the taking of the account and the judgment should provide that it might at once be paid out to the bank. *Gooderham v. Traders' Bank*, 16 O. R. 438.—Boyd.

The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this

action, asking for sale, payment and possession. After service of the writ of summons, the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third person, for execution by the plaintiff, under 49 Vict. c. 20, s. 7 (Ont.). The plaintiff refused to execute this assignment on the ground that he held a subsequent mortgage on the same land from the mortgagor, and although he was willing to execute a discharge of the mortgage he was unwilling to assign it to a third party, and the defendants moved for a mandamus (see 7 C. L. T. 399) to compel him to execute the assignment:—Held, that the plaintiff was justified, notwithstanding the above enactment, in refusing to execute the assignment. *Rogers v. Wilson*, 12 P. R. 322.—Rose. *Ib.* 545.—C. of A.

A. M. died in 1838 and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the said real estate to one H. P. T., which were subsequently foreclosed, but no sale was made under the decree in such foreclosure suit. In 1841 the mortgages and the interest of the mortgagee in the foreclosure suit were assigned to one J. B. U. who, in 1849, assigned and released the same to M. M. In 1841 M. M., the administrator, with the will annexed of the said A. M., filed a bill in chancery under the Imperial Statute 5 Geo. II. c. 7, for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor-in-Council, under a statute of the province, for leave to sell the same, which was refused. A decree was made in this suit and the lands sold, the said M. M. becoming the purchaser. She afterwards conveyed said lands to the commissioners of the lunatic asylum, and the title therein passed, by various Acts of the Legislature of Nova Scotia, to the present defendants. M. K., devisee under the will of A. M., brought an action of ejectment for the recovery of the said lands, and in the course of the trial contended that the sale under the decree in the chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor-in-Council. The validity of the mortgages and of the proceedings in the foreclosure sale were also attacked. The action was tried before a judge without a jury and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the court below, that even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, the assignment of the mortgages being merely a release of the debts and not passing the real estate, and the plaintiff, therefore, could not recover in an action of ejectment. Semble, that such sale was not invalid but passed a good title, the Statute 5 Geo. II. c. 7 being in force in the province. Henry, J., dubitante:—Held, also, that the statute chapter 36, section 47 R. S. 4th series (N. S.) vested the said land in the defendants if they had not a title to the same before. Henry, J., dubitante. *Kearney v. Cyvelman*, 14 S. C. R. 33. Leave to appeal to Privy Council refused.

## VII. SEVERAL MORTGAGES.

## 1. Priority.

## (a) Generally.

There were two mortgages registered against property, the first mortgagees were pressing the mortgagor for payment, and about to sell out his chattels, and A. at the request of the mortgagor, and to stop such sale, advanced \$1,000 to them, and took a mortgage to secure himself from the mortgagor, but with no understanding with the first incumbrancers:—Held, that A., though he thus reduced the first mortgage by \$1,000, and so bettered the position of the second mortgagee by that amount, could not claim priority for his advance over the second mortgagee. *Imperial Loan and Investment Co. v. O'Sullivan*, 8 P. R. 162.—Spragge.

C. being the equitable owner of the land contracted by writing (registered) to sell to the defendant on 13th of February, 1877. Part of the purchase money was paid down. C. obtained an order on 17th April, 1878, vesting the land in him—there were two mortgages on the registry prior to one in favour of the loan company. On the 17th May the defendant gave an order on the loan company to pay the proceeds on a loan to their local agent, who was informed by one J., a solicitor who had control of the two prior mortgages, that they were paid off and that he would get them discharged. Thereupon the agent paid C. the balance of his unpaid purchase money, and C. on the 25th May, 1878, conveyed to the defendant. The loan company's mortgage was dated 15th May, and registered the 25th May:—Held, on appeal from the master (affirming his report) that the loan company could not stand in C.'s place and claim priority in respect of his lien for unpaid purchase money over the prior mortgages, following *Imperial L. & I. Co. v. O'Sullivan*, 8 P. R. 162. *Watson v. Donser*, 28 Chy. 478.—Spragge.

The loan company's mortgage contained this clause "that in the event of the money hereby advanced, or any part thereof, being applied to the payment of any charge or incumbrance, the company shall stand in the position and be entitled to all the equities of the person or persons so paid off":—Held, that this provision could not affect prior mortgagees who were no parties to it; and Quere, whether it would apply to the discharge of unpaid purchase money, which does not constitute a charge or incumbrance in the proper meaning of those terms. *Ib.*

The original owner of land created a mortgage thereon in favour of one M. and died without redeeming, and the equity of redemption in the premises descended to C. F., his heir-at-law, who with her husband P. F. joined in a conveyance thereof to trustees charged with the support and maintenance of the plaintiffs, subject to which and the mortgage in favour of M. the premises were limited to P. F. in fee, who subsequently in September, 1875, out of W. F.'s moneys paid the amount due on M.'s mortgage, but which was not actually discharged. In December following, P. F. sold to W. F., conveyed to him the equity of redemption and procured M. to assign his mortgage and convey to him the legal estate. In March, 1877, W. F. mortgaged the land to a loan company, but did

not assign the M. mortgage, and subsequently the plaintiffs filed a bill seeking to have the charge for their maintenance enforced against the mortgage estate:—Held, (reversing the finding of the Master at Hamilton) that the loan company were, under the circumstances, entitled to priority over the plaintiffs to the extent of the amount secured by M.'s mortgage. *Fraser v. Gunn*, 29 Chy. 13.—Boyd.

See *Trust and Loan Co. v. Gallagher*, 8 P. R. 97, p. 1274; *Edwards v. Morrison*, 3 O. R. 428, p. 802; *Maclean v. Gray*, 16 O. R. 321; 16 A. R. 224; 18 S. C. R. 553, p. 561.

## 2. Consolidation.

The rule that a mortgagee shall not be redeemed in respect of one mortgage, without being redeemed also as to another mortgage created by the same mortgagor, applies as well in a suit to foreclose as to redeem. In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage which was registered after it, but without notice thereof. On a sale of the lands embraced in another mortgage a loss was sustained by the mortgagee:—Held, (1) that the defendant, the mortgagee, had not the right as against the plaintiff to consolidate his mortgages and make good the loss on the one out of the surplus on the other sale, the policy of the Registry Act being to give no effect to hidden equities. (2) That by taking a mortgage, and thus giving time to the mortgagor, the plaintiff was a holder of his mortgage for value. *Johnston v. Reid*, 29 Chy. 293.—Spragge.

Where two mortgages on different properties by the same mortgagor came into C.'s hand before the Registry Act of 1865, and the mortgagor, after the passing of the said Act, assigned the equity of redemption to M. by a registered instrument:—Held, on M.'s suing for redemption, that the registered conveyance to M. prevailed, under section 66 of the Act, over C.'s equitable right to consolidate the two mortgages. *Miller v. Brown*, 3 O. R. 210.—Proudfoot.

Two mortgages of a lot of land were made at different periods for different sums by the owner thereof, who afterwards conveyed the equity of redemption in thirty-six feet of the lot to one of the defendants, with a covenant against incumbrances which was partially carried out by the discharge from the second mortgage of the land conveyed. Subsequently the mortgagor conveyed the equity of redemption in the remainder of the lot to another of the defendants. The plaintiff was the assignee of both mortgages, but acquired the second after the discharge therefrom of the thirty-six feet, and now sought payment of the amount due on both mortgages or foreclosure:—Held, that she was not entitled to consolidate her securities against the owner of the thirty-six feet, who however had the right as against the owner of the residue of the land to cast the whole burden of the incumbrances on it, but had no such right against the plaintiff; that the whole of the land, if not redeemed, should be sold charged with the first mortgage,



which should be apportioned between the two parcels according to their respective values. On the owner of the thirty-six feet paying the amount of the first mortgage, the remainder of the land only should be sold and the proceeds divided amongst the parties interested, including the plaintiff as second mortgagee. *Fraser v. Nagle*, 16 O. R. 241.—Boyd.

The plaintiffs who were the mortgagees under three mortgages from the same mortgagors on different lands, were held entitled only to consolidate in respect of the mortgages in default when action was brought to enforce them, and as the amount due on one of the mortgages had been then paid, and there was then no default as to it, the right to consolidate it was refused. *Scottish American Investment Co. v. Tennant*, 19 O. R. 263.—MacMahon.

See *Smith v. Smith*, 18 O. R. 205.

### 3. Agreement to Postpone.

In 1861, W. M., the owner of real estate created a mortgage thereon in favour of J. T. for \$4,000. In 1863 he executed a subsequent mortgage in favour of J. M., the appellant, to secure the payment of \$20,000 and interest, which was duly registered on the day of its execution. In 1866, W. M. executed another mortgage to the respondent C., for the sum of \$4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof, and J. M. executed an agreement under seal—a deed poll—consenting and agreeing that the proposed mortgage to respondent C. should have priority over his. In 1875, J. M. assigned his mortgage for \$20,000 to the Quebec Bank, without notice to the bank of his agreement, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which C. had neglected to register. C. filed his bill against the executors of W. M., and against J. M. and the bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shewn, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants, except as to J. M., who was ordered to pay off the respondent's (plaintiff's) mortgage, principal and interest, but without costs. J. M. thereupon appealed to the Supreme Court of Canada:—Held, affirming the judgment of the Court of Appeal, 5 A. R. 503, reversing 26 Chy. 280, (Strong, J., dissenting), that as appellant could not justify the breach of his agreement in favour of C., he was bound both at law and in equity to indemnify C. for any loss he sustained by reason of such breach. *McDougall v. Campbell*, 6 S. C. R. 502.

### 4. Other Cases.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, (1) That the plaintiffs

were entitled to require as between them and S. that the parcel conveyed to the latter should be resorted to for satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2) That the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Clark v. Bogart*, 27 Chy. 450.—Blake.

The bill was filed by a second mortgagee the first mortgagee not being made a party. At a sale under the decree, M. purchased the land, and afterwards paid the purchase money into court; he then mortgaged the land, then conveyed his equity of redemption, and then took out a vesting order. Grant, a subsequent mortgagee, claimed payment of his claim out of the moneys in court. On the application of M. the referee made an order, directing payment to the assignee of the first mortgagee of his claim out of the purchase money in court. It appeared that M. thought he was purchasing free from incumbrances, and was ignorant of the first mortgage. On appeal, Proudford, V. C., upheld the referee's order. *Fleming v. McDougall*, 8 P. R. 200.

See *Edwards v. Morrison*, 3 O. R. 428, p. 802; *Gzowski v. Beatty*, 8 P. R. 146, p. 1313; *Grant v. La Banque Nationale*, 9 O. R. 411, p. 139; *MacLennan v. Gray*, 16 A. R. 224; 18 S. C. R. 553, p. 561; *Discher v. Canada Permanent Loan and Savings Co.*, 18 O. R. 275, p. 1300.

## IX. SALE OF EQUITY OF REDEMPTION UNDER EXECUTION.

Plaintiff claimed a debt of \$200 from the defendant. Defendant did not appear to the writ. The only property the defendant owned was an equity of redemption in certain lands. In 1863 there were two mortgages, one held by the plaintiff, the other outstanding in other hands. On application of plaintiff for judgment for \$200 and interest, and for a decree for sale of the equity of redemption:—Held, on the authority of *Kerr v. Styles*, 26 Chy. 309, that the plaintiff could have judgment as asked, notwithstanding that in this case there were no fi. fas in the sheriff's hands. *Johnson v. Bennett*, 9 P. R. 337.—Ferguson.

Mortgagee purchasing at sale. See *Parr v. Montgomery*, 27 Chy. 521, p. 1287.

See *Rumohr v. Marz*, 3 O. R. 167, p. 695.

## X. SALE UNDER POWER OF SALE.

### 1. Notice.

A power of sale in a mortgage required notice upon default to be given to the mortgagor, "his heirs, executors, or administrators," or left for him or them at his or their last or usual place of abode, before exercising the power.—Held, that a notice which was served upon the widow, who was also the administratrix of the deceased mortgagor, and addressed to her as such widow, was insufficient, because not served also upon

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#### OF SALE.

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power.—Held,  
on the widow,  
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as such widow,  
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the heir-at-law of the mortgagor, although only  
an infant about three years of age, and that the  
sale under the power was therefore void. *Bart-*  
*lett v. Jull*, 28 Chy. 140.—Spragge.

The notice stated only that unless payment  
was made proceedings would be instituted to  
obtain possession:—Held, that on this ground  
the notice was insufficient to support a sale.  
*Id.*

One of the stipulations of a mortgage was,  
that "interest should be payable half-yearly on  
\* \* provided that the mortgagees, on default  
of payment for three months, may enter on and  
lease or sell the said lands without notice:—"  
"And the mortgagees covenant with the mort-  
gagors that no sale or lease of the said lands  
shall be made or granted by them until such  
time as one month's notice in writing shall have  
been given to the mortgagors:—Held (per  
Proudfoot, V.C.), that the mortgagees could  
sell at any time, without notice, after default  
for three months, and that the purchaser would  
take a good title; and in any event, a notice  
served at any time after default was sufficient,  
and the mortgagees were not bound to wait  
until default had been made for three months to  
give such notice: in other words, that the  
month's notice and the three months' default  
might be concurrent. *Grant v. Canada Life*  
*Ass. Co.*, 29 Chy. 256.

Where F., a solicitor, on behalf of his client,  
served a notice of sale under a mortgage made  
pursuant to the Act respecting short forms, R.  
S. O. (1877), c. 104, upon what he believed, after  
diligent enquiry, was the last place of residence  
of the mortgagor in this province, and did so on  
the instructions of his client, who was fully ad-  
vised as to the said enquiries and their result,  
and bona fide deeming such service sufficient:—  
Held, that F. was entitled, as against his client,  
to tax the costs of the proceedings under the  
power of sale, although it appeared the mortga-  
gor really was at the time of such service within  
this province. R. S. O. (1877), c. 104, permits  
substitutional service at the residence, though  
the mortgagor may be within the jurisdiction.  
But even if such is not the proper construction  
of the statute, it is a matter so doubtful that  
the solicitor who bona fide acted on that view of  
the statute should not lose his costs of so effect-  
ing service. *O'Donohoe v. Whitty*, 2 O. R. 424.—  
Chy. D.

A mortgage deed, purporting to be made  
pursuant to the Short Forms Act contained the  
following: "Provided that the said mortgagee  
on default of payment for two months, may,  
without giving any notice, enter on and lease or  
sell the said lands." The mortgage was assigned  
to G. and K., who assumed to sell under the above  
power:—Held, that they could not confer a good  
title upon the purchaser, for that in construing  
the above power resort could not be had to the  
long form in the Act, inasmuch as notice was  
dispensed with, which, was not a mere exception  
from nor qualification of the short form given in  
the Act, but an abolition of one of its most im-  
portant terms; and the power thus being left to  
its own force, no one but the persona designata,  
the original mortgagee, could exercise it. A  
transfer of the estate does not involve the trans-  
fer of trusts or powers necessarily as inseparable

incidents of the estate. *Re Gilchrist and Island*,  
11 O. R. 537.—Boyd. See *Barry v. Anderson*,  
18 A. R. 247.

The R. S. O. (1877) c. 107, s. 3, provides that  
every new trustee shall have the same powers,  
authorities, and discretions, and shall in all  
respects act as if he had originally been nomi-  
nated a trustee by the deed, will, or other in-  
strument creating the trust. Where a mortgage  
made in favour of two trustees of a marriage  
settlement, and which contained a power of sale  
exercisable by them, but not by the assignee of  
the mortgage, not being in conformity with the  
Short Form of Mortgage Act, was together  
with the lands therein, on the resignation of the  
trustees, assigned to a new trustee appointed in  
their place:—Held, that the new trustees stood  
in the place of the former trustees, and could  
exercise the power of sale, not as an assignee of  
the estate, but as if appointed a trustee by the  
deed creating the trust. *Re Gilmour and White*,  
14 O. R. 694.—Proudfoot.

G. was assignee of a mortgage made pursuant  
to the Act respecting Short Forms of Mortgages,  
and which contained a power of sale in the  
words "provided that the said mortgagee on  
default of payment for one month may on giving  
notice in writing enter on and lease or sell the  
said lands." In an application under the Ven-  
dors and Purchasers' Act R. S. O. (1877) c. 109:—  
Held, the substitution of "one month" for "—  
months" was not a material variation in the  
form, and that G. could make a good title. *Re*  
*Green and Arkin*, 14 O. R. 697.—Ferguson.

The power of sale contained in a mortgage,  
purporting to be under the Short Forms Act,  
was: "Provided that the mortgagee on default  
for one day may, without any notice, enter on  
and lease or sell said lands":—Held, per Galt,  
C. J., at the trial, that this case was distinguish-  
able from *Gilchrist and Island*, 11 O. R. 537, as the  
sale there was by an assignee of the mortgagee,  
and not as here by the mortgagee himself; and  
that under the power entry on the land was not  
necessary prior to sale. On appeal to the Di-  
visional Court. Per Rose, J. The power was  
operative under the Short Forms Act; and there-  
fore the point as to entry was immaterial.  
*Gilchrist and Island* dissented from. Per Street,  
J. The form was not operative; and the words  
therefore must be confined to their actual mean-  
ing apart from the statute; and that under its  
terms the power did not arise, or at all events  
could not be exercised until entry made on the  
land. *Clark v. Harvey*, 16 O. R. 159.—C.  
P. D.

A power of sale in a mortgage authorized a  
sale without any notice. Default having been  
made in payment of the mortgage moneys no-  
tice of sale was given exercisable forthwith.  
Shortly afterwards an action was brought by the  
mortgagees for the possession of the mortgaged  
premises without the leave of a judge, as re-  
quired by section 30, of R. S. O. (1887), c. 102,  
having been first obtained:—Held, that the Act  
did not apply, there being no proviso for notice  
in the mortgage. *Canada Permanent Building*  
*Society v. Teeler*, 19 O. R. 156.—C. P. D.

See *Re British Canadian Loan and Investment*  
*Co. v. Ray*, 16 O. R. 15, p. 1302.

## 2. Costs.

Where a first mortgagee sells under the power of sale contained in his mortgage, a subsequent mortgagee is entitled to an order to tax the first mortgagee's costs of exercising the power of sale, such costs to be taxed as between solicitor and client. *Re Crerar and Muir*, 8 P. R. 56.—Dalton, Q. C. But see two next cases.

First mortgagees sold under a power in their mortgage, and paid their solicitors' costs of sale. A subsequent encumbrancer obtained from the referee, on motion, an order for the taxation of the mortgagees' costs. This order was reversed on appeal, on the ground that the mortgagees could not tax the bill, and the mortgagor stood in their place. An objection that the order should have been obtained on petition, not notice, was disregarded. *Re McDonald, McDonald & Marsh*, 8 P. R. 88.—Stephens, *Referee*.—Proudfoot.

First mortgagees sold under power of sale, and paid their attorneys' costs. A second mortgagee was held not to be entitled to the right of taxing these costs. *Re McDonald, McDonald & Marsh*, 8 P. R. 88, approved. *Re Cronyn, Kew & Betts, Attorneys*, 8 P. R. 372.—Q. B. D.

See *O'Donohoe v. Whitty*, 2 O. R. 424, p. 1297.

## 3. Disposition of Surplus.

Quere, whether the claim of a second mortgagee for the surplus proceeds of the sale after satisfaction of the prior mortgage is a purely money demand. *Green v. Hamilton Provident Loan Co.*, 31 C. P. 574.—C. P. D.

Where a mortgagee, who had sold under the power in the mortgage, paid over the surplus on the order of I. J., the apparent owner of the equity of redemption.—Held, that even if the deed under which I. J., claimed was voidable, nevertheless the mortgagee was entitled to act on her order, especially as he had served a notice of sale on those who now impeached his conduct, while they had done nothing to assert their claim until after the surplus was so paid over, and as also a suit which had been theretofore commenced to set aside the deed from I. J., as void had been abandoned. *Harperv. Culbert*, 5 O. R. 152.—Ferguson.

Where one mortgaged certain lands in fee, his wife joining to bar dower, and subsequently in his life time conveyed away his equity of redemption, and the mortgagees afterwards sold under the power of sale and had a surplus in their hands, which they desired to pay into court under R. S. O. (1887) c. 133, s. 6:—Held, reversing the decision of the master in chambers, that they should be allowed to do so, in view of the conflict of opinion and decision as to sections 5 and 8 of R. S. O. (1887), c. 133, entitled an Act Respecting Dower. There is a sharp distinction made in those sections between the wife's dower in the legal estate which she has barred in a mortgage for her husband's benefit, and as to which her rights accrue, or rather enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage, and the dower which is given by section 1 in respect of a mere equitable estate; for

by that section such equitable dower arises and attaches at the time of the husband's death, and not before, and non constat that the widow had no claim to the surplus moneys in this case. *Smart v. Sorenson*, 9 O. R. 640, considered. *Re Crookery*, 16 O. R. 207.—Boyd.

Certain lands were subject to a first mortgage, a charge registered by an engine company in respect to the price of an engine supplied by them, and a mortgage to the plaintiff registered subsequently to the said charge; and the lands having been sold under the power of sale in the first mortgage, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage. The engine company had resumed possession of the engine, and sold it, and claimed the balance of the price under the charge out of the said surplus in priority to the plaintiff:—Held, that they were entitled to make that claim, and that having sold the engine without notice to the plaintiff, the latter was entitled to impeach that sale by shewing that a greater sum could have been realized, if it had been properly sold after proper notice. But:—Held, also, that the plaintiff was alone entitled to the value of the interest of the wife of the owner of the equity of redemption in the land as inchoate dower; inasmuch as she had barred her dower in his favour, whereas she had not done so in connection with the charge of the engine company. In the absence of arrangement, the value of this interest must be ascertained and retained in court to be paid out to the plaintiff if the right of dower attached by the wife surviving her husband, and the engine company if it did not attach. *Discher v. Canada Permanent Loan and Savings Co.*, 18 O. R. 273.—Boyd.

See *Re Kingsland*, 8 P. R. 77, p. 1312; *Boulton v. Rowland*, 4 O. R. 720, p. 1318; *Maclean v. Gray*, 16 A. R. 224; 18 S. C. R., p. 561.

## 4. Sale at Under Value.

L. F. D. being the owner of certain valuable property, mortgaged it for \$700, became of unsound mind and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and the property was sold for \$900 to E. R., sister of M. A. D. Two years after E. R. sold the property to M. E. B. for \$5,000, and a mortgage for \$4,000 unpaid purchase money was taken to M. A. D. In an action by L. F. D., by L. D. his next friend, to set aside the sale or for an account, it was:—Held, on the evidence, that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D., but that as M. E. B. was a purchaser for value without notice, the sale must stand, but an account of the proceeds was ordered against M. A. D. *Dufresne v. Dufresne*, 10 O. R. 773.—Ferguson.

See *Parr v. Montgomery*, 27 Chy. 521, p. 1287; *Prentice v. Consolidated Bank*, 13 A. R. 269, p. 140.

## 5. Other Cases.

In proceeding to impeach a conveyance executed in pursuance of a sale, under power of

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sale, the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the deed. *Bartlett v. Jull*, 28 Chy. 140.—Spragge.

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conveyance ex- under power of

After default made in a mortgage, the mortgagee took proceedings under the power of sale and brought an action of ejectment and an action on the covenant. He died during the progress of these proceedings. In the two actions judgments were recovered against the mortgagor and the lands were sold under the power of sale; the purchase money being paid partly in cash and partly by a mortgage for the balance. This mortgage was subsequently turned into cash at a less amount than its face value, and in addition solicitors costs for doing so were charged. In an action for an account by the mortgagor against the mortgagee's executors, who had continued the proceedings. It was:—Held, reversing the judgment of Proudfoot, J., that the defendants were entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but that they must account for the purchase money as cash at the time of the sale, and that they could not charge the mortgagor with the discount on the mortgage or the costs of turning it into cash; and that they were entitled to all three sets of costs; those of the two actions being given to them by the judgments they had obtained; and those of exercising the power of sale under the statutory form of mortgage as a matter of contract, they being made a first charge upon the proceeds of the sale, *R. S. O. (1877) c. 103. Beatty v. O'Connor*, 5 O. R. 731.—Chy. D.

Sale of land on credit by agent under power of attorney not authorizing a sale on credit. See *Rodburn v. Swinney*, 16 S. C. R. 297.

K. gave a mortgage of leasehold premises to the Imperial Loan and Investment Co., with a covenant authorizing the company to sell the premises on default, with or without notice to mortgagor, and either at public or private sale. The mortgage conveyed the unexpired portion of the current term, and "every renewed term." K., shortly after giving the mortgage, conveyed the equity of redemption in the mortgaged premises to one O'S. for a nominal consideration, and in trust to carry out certain negotiations for K., who then left the country and was absent for several years. During his absence the lease of the ground mortgaged to the company expired, and was renewed in the name of O'S. Default having been made in the payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, the mortgagees having knowledge of his want of interest in the premises. Prior to such suit, O'S. fearing that such proceedings would be taken against him, had executed a deed of re-conveyance of the equity of redemption to K., but such deed was never delivered. O'S. then filed an answer and a disclaimer of interest in such suit, but he was afterwards persuaded by the mortgagees to withdraw the same and consent to a decree, and a final order of foreclosure was made against him. Pursuant to this order the company subsequently sold the mortgaged premises to the defendant D. for a sum less than the amount due under the mortgage; the deed to D. recited the proceedings in foreclosure, and purported to be made

pursuant to the final order of foreclosure. K. brought a suit against the company, and D. to have the decree reopened and cancelled, and the deed to D. set aside, and prayed to be allowed to come in and redeem the premises:—Held, affirming the judgment of the Court of Appeal, 11 A. R. 626, (Strong and Henry, JJ., dissenting), that even if the decree of foreclosure was improperly obtained, and consequently void, yet the sale and conveyance to D. were a sufficient execution of the power of sale in the mortgage, and passed the renewed term conveyed by the mortgage. *Kelly v. Imperial Loan and Investment Co. of Canada*, 11 S. C. R. 516.

The vendors were selling lands under the following power of sale contained in a mortgage made under the Short Forms Act: "Provided that the company (the mortgagees) on default of payment for two months may, without any notice, enter on and lease or sell the said lands." After more than two months' default the mortgagees entered, and after having done so made the contract for sale, and served notice of exercising the power of sale on some of the subsequent incumbrancers personally, and upon the solicitors of others:—Held, that if the Act were applicable, the power of sale was properly exercised; if the Act were not applicable, then, taking the words in their strictest sense, the vendors had done all that the power required; and the fact that they did give notice to some of the subsequent incumbrancers did not oblige them to give notice to all:—Quere, whether the variations in the power from the statutory form prevented the Short Forms Act from applying. *Re British Canadian Loan and Investment Company and Ray*, 16 O. R. 15.—Street.

In an action for wrongful proceedings under power of sale in a mortgage, illegal distress upon chattels, and consequent wrongs:—Held, that the plaintiffs were entitled to recover more than their mere money loss. *Edmonds v. Hamilton Provident and Loan Society*, 19 O. R. 677.—Q. B. D. But see *S. C. 18 A. R. 347*.

See *Campion v. Brackenridge*, 28 Chy. 201, p. 95; *Ingalls v. McLaurin*, 11 O. R. 380, p. 1304; *Re Gilmour and White*, 14 O. R. 694, p. 1298; *Re Green and Arkin*, 14 O. R. 697, p. 1298; *Locking v. Halsted*, 16 O. R. 32; *Re Gilchrist and Island*, 11 O. R. 537, p. 1298; *Clark v. Harvey*, 16 O. R. 159, p. 1299.

## XI. REDEMPTION OF MORTGAGES.

### 1. Right to Redeem.

Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:—Held, that the sale was inoperative; that the owner of the equity of redemption had a right to redeem; and that the purchaser at sheriff's sale, who was also the mortgagee, having gone into possession of the mortgage estate, was bound to account for the rents and profits. *Crown v. Chamberlin*, 27 Chy. 551.—Spragge.

In a suit to redeem, the plaintiff was a judgment creditor with execution in the hands of the sheriff against the lands of the defendant S., which lands were subject to a mortgage to L., whose executors were also defendants. At the

hearing the court (Spragge, C.) declared the plaintiff entitled to the same relief as upon a bill by a puisne incumbrancer against a prior mortgagee and the mortgagor, and that notwithstanding R. S. O. (1877) c. 49, s. 5, inasmuch as he could not establish his right in the county court in which he had recovered his judgment, so as to obtain as effectual a remedy as that sought in the redemption suit, he might resort to equity to obtain relief. The executors of B. were also liable upon the judgment recovered by the plaintiff, B. having been a defendant in the action, and by their answer set up that they were liable only as sureties for the defendant S. All parties interested were represented in the suit, and no one objecting thereto, a reference was granted at the instance of B.'s executors, in order that they might establish the fact of suretyship, in which case they would be entitled to the same relief as was granted in *Campbell v. Robinson*, 27 Chy. 634. *Chamberlin v. Soavia*, 28 Chy. 404.

Held (overruling the decision of *Wilson, C. J. C. P.*), that the right of a tenant for years to redeem a mortgage is absolute, and the court has no discretion to grant or refuse redemption. *Martin v. Miles*, 5 O. R. 404.—Chy. D.

Where a tenant for years under a demise made subsequently to a mortgage, sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the present plaintiff was not a party:—Held, the plaintiff had a right to redeem in the event of the mortgagee refusing to accept him as a tenant. *Ib.*

Held, that although the plaintiff had at one time, before commencing this action, offered to give up possession on payment of \$40, yet inasmuch as this offer had not been accepted by the defendant or acted upon at any time, the plaintiff had done nothing to waive or prejudice his right of redemption as such lessee by such offer. *Ib.*

After action brought, however, the defendant offered to confirm and adopt the plaintiff's lease, though before action she had refused to do so, and had, indeed, sold the property to a purchaser without making the sale subject to the lease, of which, nevertheless, the purchaser had full notice:—Held, per *Wilson, C. J. C. P.*, that the lateness of the defendant's assent to affirm the lease only affected the costs; she had done nothing that debarred her from now confirming the lease of which the plaintiff was still claiming the benefit, and accepting the plaintiff as tenant, on behalf of herself and as representing the purchaser, and as she was willing now so to do, the plaintiff could not redeem. *Ib.*

Per *Wilson, C. J. C. P.*—It may be said as a rule that everyone having an interest from the mortgagor in the land can redeem the mortgage. *Ib.*

Plaintiff, being the wife of A. W. C. who mortgaged his lands, she joining therein for the purpose of barring her dower, brought an action to be allowed to redeem the mortgaged premises after foreclosure by the mortgagee against the husband, but during the husband's lifetime. A demurrer to the plaintiff's statement of claim, on the ground that the plaintiff had no interest

in the lands, and that her pleadings affirmed that her husband's interest had been foreclosed, was allowed. *Casner v. Haight*, 6 O. R. 451.—Proudfoot.

I., being the owner of certain property, mortgaged to McL., who sold under the power of sale in the mortgage to G., who attended the sale under instructions from McL., and purchased as his agent. McL. deeded the property to G., and G. reconveyed it to McL. I. was not aware that G. was McL.'s agent. McL. being aware that the sale might not be valid subsequently bargained with I. for the purchase of two other lots, and made it a condition that the deed should cover the two lots and the mortgaged property, and that I.'s wife should join in it, which she had not done in the mortgage. McL. swore that the bargain was that he was to get a clear deed of the mortgaged property. I. swore that nothing was said about a clear deed. Before the deed was delivered I. ascertained that G. was McL.'s agent at the sale, and he refused to deliver it, and brought an action for redemption:—Held, that the plaintiff was entitled to redeem. Per *Boyd, C.*—If the defendant did know, as a matter of fact, the legal effect of G.'s action in buying the property, he should have disclosed it to the plaintiff before he sought to acquire the equity of redemption from him by means of a conveyance of which the obvious intent was only to procure his wife's dower to be barred: if he did not know the effect of it the equity of redemption was not in his contemplation as a property to be acquired from the plaintiff. *Ingalls v. McLaurin*, 11 O. R. 380.—Chy. D.

Per *Cameron, C. J. C. P.*—Though it may be that a mortgagee is not, strictly speaking, a trustee for the mortgagor, but is entitled to enforce his security for his own benefit to satisfy the mortgage money, the right of the mortgagor to redeem is a very pronounced and decided right, and one that he cannot be deprived of by any dealing between him and the mortgagee that is not carried out in a full spirit of fairness without undue pressure, influence, or concealment of anything of which he should be informed by the mortgagee. *Ib.*

In 1856 R. mortgaged certain lands to J. D. C. to secure £550, payable on 1st January, 1863. In 1857 J. D. C. died, having appointed the defendant and another his executors, who duly proved the will. In 1864, after the death of defendant's co-executor, the mortgage was deposited with H. as security for an advance of \$401, as set out in *McLean v. Hime*, 27 C. P. 195, whereby H. was declared entitled to hold the mortgage as collateral security for the said sum. In 1856 R. sold the equity of redemption to Z. In 1877 H., by representing that he controlled the mortgage, procured the executors of Z., for a nominal consideration, to give a conveyance of the equity of redemption to A. B. H. as bare trustee for him; and in 1878 obtained conveyances from other parties interested therein. In 1879 H. sold the equity of redemption to M. for \$5,000. In 1880 S. C., a beneficiary under J. D. C.'s will, having made a claim on defendant for her share of the estate, a settlement was effected by defendant agreeing to pay \$2,050, and assigning the mortgage to her as collateral security. S. C. commenced foreclosure

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proceedings thereon, H. and M. being made parties, when a settlement was effected by H. paying S. C. \$500, and procuring an assignment of the mortgage to be made to plaintiff as bare trustee for him. The plaintiff commenced proceedings against defendant claiming the \$2,050 secured by the agreement made between S. C. and defendant and in default of payment foreclosure:—Held, reversing the judgment of Ferguson, J., that H. by representing himself to be mortgagee obtained the conveyance of the equity of redemption and must therefore account to defendant for the amount realized on the sale thereof to M. The plaintiff's claim was therefore dismissed, and judgment entered for the difference between the \$5,000 with interest and the \$401 with interest, together with the amount payable to S. C. under the agreement. *Wilkins v. McLean*, 10 O. R. 58.—C. P. D. Reversed S. C. 13 A. R. 467. But the judgment of the C. P. D. was restored by the Supreme Court, 14 S. C. R. 22.

Held, affirming the judgment of the court below, where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished a completed house in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the house, and in default of such notice, the right of redemption might be exercised after the expiration of the three months. There was no chose jugée between the parties by the dismissal of a prior action on the ground that the time to exercise the right of redemption had not arrived, and the conditions stipulated had not been complied with. *Leger v. Fournier*, 14 S. C. R. 314.

Where an undivided interest in land is mortgaged by the owner thereof, a co-owner has no right of redemption. A simple contract creditor of a mortgagee, as such, has no right to redeem. *Nichol v. Allenby*, 17 O. R. 275.—Robertson.

In an action for redemption and possession against a mortgagee by the tenant by the curtesy and the heirs of a deceased mortgagor who were infants when possession was taken by the mortgagee, it appeared that the right of the tenant by the curtesy had been barred by the statute as against the mortgagee, but that of the heirs had not:—Held, that the heirs were entitled to redeem subject to the right of the mortgagee and those claiming under him, to hold possession during the life of the tenant by the curtesy whose estate had by virtue of the statute become vested in the mortgagee. Proper judgment, where in such circumstances the heirs-at-law take proceedings for redemption of the lands during the life of the tenant by the curtesy. *Anderson v. Hanna*, 19 O. R. 58.—Robertson.

See *Re Davis*, 27 Chy. 199; *Parr v. Montgomery*, 27 Chy. 521, p. 1287; *Weaver v. Vandusen—Wills v. Agerman*, 27 Chy. 477, p. 1271; *Stevenson v. Stevenson*, 28 Chy. 232; *Faulds v. Harper*, 2 O. R. 405; 9 A. R. 537; 11 S. C. R. 639, pp. 1190, 1191; *Peterkin v. McFarlane*, 9 A. R. 429; 13 S. C. R. 677, p. 1263; *Wright v. Lays*, 8 O. R. 88, p. 1289; *Harvey v. McNeil*, 12 P. R. 362, p. 1311; *Monk v. Benjamin*, 13 P. R. 356, p. 1308.

## 2. Terms of Redemption.

A circular was issued, with the knowledge of the directors of the defendants' company, which, amongst other things, set out that "loans can be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw the circular exposed in the office of an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan:—Held (affirming the decree of the court below), that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, while the evidence shewed that what was put forward in the circular as the rule of the society, was one of the rules referred to in the mortgage; or on the footing of a collateral and independent contract. *Hodgins v. Ontario Loan and Debenture Co.*, 7 A. R. 202.

Held, also, that, although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society agreed to pay him in advance on receiving that security therefor, etc., yet without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on be considered a member when he had received the amount of his shares; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the then existing rules. *Ib.*

Held, that in an action of redemption, if tender is made after action commenced, it must be enough to cover the costs of the plaintiff already incurred; and if it be so, the plaintiff is bound to accept it, and any litigation afterwards must be at his expense. *Martin v. Miles*, 5 O. R. 404.—Chy. D.

T. borrowed money from the defendants and gave a mortgage over certain lands as security, with other securities as collateral, giving a second mortgage over the same lands to the plaintiff. Both mortgages being in default, the defendants agreed in writing with the plaintiff, who began foreclosure proceedings, that if he obtained a final order subject to their claim, they would accept from him a new mortgage over the same property for \$15,000, payable in five years from the date of the order, with interest at eight per cent., and that he was "to have the privilege of paying any part of principal at any time." Upon payment as aforesaid the defendants were to assign to the plaintiff their mortgage from T. and all collaterals. The plaintiff obtained a final order and gave the defendants a mortgage dated 8th January, 1881, for the above amount, payable at the expiration of five years, with interest at eight per cent. half yearly, "until fully paid and satisfied." The mortgage provided, after payment, for assignment to the plaintiff of the original securities, and had a clause that "the mortgagor

may at any time pay off the whole or any part of the \$15,000, before the expiration of the said term of five years, and said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of principal, and interest shall thenceforth cease to grow due upon the sum so paid." After the expiration of five years the plaintiff paid interest at the specified rate, until the 1st January, 1887, and on the 22nd March following, tendered the defendants the principal and interest at that rate up to that day, and demanded an assignment of the original mortgage and securities. The defendants refused to accept, claiming that they were entitled to six months' notice of the mortgagor's intention to pay, or to six months' interest in advance:—Held, *Armour, C. J.*, dissenting. 1st. That the rule followed by Courts of Equity in England that a mortgagor must, after default by him in payment of the principal money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage unless the mortgagee has demanded or taken any steps to compel payment, has the force of law in Ontario. 2. That there were no circumstances in the present case to do away with its effects, the proviso for payment of the principal being limited to the five years within which the plaintiff had covenanted to pay the same. 3. That after the expiration of five years from the date of the mortgage, there was no contract in force for the payment of interest, and the defendants could only claim as damages compensation for nonpayment of principal at the time stated, and that the measure of damages should be the ordinary value of money while it was withheld, and during the currency of the six months' notice. 4. That in this case the defendants were entitled to the six months' notice, and the tender on 22nd March, 1887, was insufficient, and as no evidence was given by the defendants as to the rate of interest after default, and evidence offered by the plaintiff on the point was refused at the trial, the legal rate of six per cent. should be taken as the measure of damages. *Archbold v. Building and Loan Association*, 15 O. R. 237.—Q. B. D.—Reversed 16 A. R. 1. See 51 Vict. c. 15. Ont.

### 3. Costs.

In proceeding under a consent decree to redeem, the defendant being in the position of a mortgagee brought in an account claiming \$905 to be due, while the master found the balance to be only \$1.32:—Held, that as the defendant had advanced his claim honestly, and under a reasonable belief that the sum claimed was justly due, he was entitled, notwithstanding the insignificant sum remaining unpaid, to the benefit of the rule that a mortgagor coming to redeem is liable for the costs of suit where a balance is found in favour of the defendant. *Little v. Brunker*, 28 Chy. 191.—Spragge.

See *Livingston v. Wood*, 27 Chy. 515, p. 424.

## XII. FORECLOSURE.

### 1. Parties.

#### (a) Wife.

Where the wife of a mortgagor is a party to and bars her dower by the mortgage, she is not

improperly made a party defendant to a bill for foreclosure under the mortgage since the coming into force of 42 Vict. c. 22 (Ont.). *Building and Loan Association v. Carswell*, 8 P. R. 73.—Spragge.

The wife of a person to whom the mortgagor conveys his equity of redemption is not a proper party to an action by the mortgagee for foreclosure. Semble, if such person died after judgment but before final order of foreclosure, his widow would have a right to redeem and might be made a party. *Monk v. Benjamin*, 13 P. R. 356.—Robertson.

### (b) Adding Parties.

In a foreclosure suit, after final judgment, an order was obtained ex parte adding two parties as defendants, who had predente life and before judgment become interested in the equity of redemption, and directing that they be bound by the judgment unless, within fourteen days, they should move against the order. On application by the added defendants this order was rescinded; and:—Held, that they should not have been made parties after judgment. *Abell v. Parr*, 9 P. R. 664.—Dalton, Master.

C. recovered judgment against L. in 1882, and placed a fl. fa. lands in the sheriff's hands, which had ever since been regularly renewed; in 1883 L. bought land from the plaintiff, giving back a mortgage for the purchase money. Under a judgment for foreclosure recovered upon that mortgage, C. was added as a subsequent incumbrancer in the master's office, and appealed. Held, that C. was not properly added as a party in the master's office; that the plaintiff was only entitled to have the claim to postpone the execution to the mortgage tried at the hearing. But the plaintiff was allowed, following *Glass v. Freckleton*, 10 Chy. 470, to set aside his judgment, add C. as a party, and amend so as to raise the question of priority. *Lally v. Longhurst*, 12 P. R. 510.—Street.

There is no authority in a mortgage action for foreclosure to make a reference by interlocutory order to a master to add parties with the object of allowing them to redeem or having them foreclosed. *Wylgress v. Crauford*, 12 P. R. 658.—Street.

Where the plaintiff in a mortgage action obtained the usual foreclosure judgment and had his account taken thereby without a reference, and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under Con. Rules 780 and 781 so as to convert it into a judgment under Con. Rule 776, with a reference to the master-in-ordinary to add incumbrancers, take the accounts, etc. *Id.*

### 2. Final Order.

This suit became abated between the date of the report and the time fixed by it for payment by subsequent incumbrancers. On an application for a final order for foreclosure, it was refused, and a new day was appointed, allowing the incumbrancers an additional time for payment, equal to the time the suit remained abated. *Biggar v. Way*, 8 P. R. 158.—Blake.

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A final order of foreclosure should reserve a day for infant defendants to show cause.—*Sprague, C.*, was of opinion that the practice should be changed for the sake of putting an end to litigation, and to the evil of having estates tied up for perhaps many years, but refused to change the practice in the present case. *London and Canadian Loan and Agency Co. v. Everitt*, 8 P. R. 489.

See *Strange v. Radford*, 15 O. R. 145, p. 1312.

### 3. Opening Foreclosure.

On a motion to open foreclosure, the debt and costs amounted to about \$3,000, and the property was worth \$7,000. The master under the circumstances set out in the report refused the motion, the plaintiff having been forbearing, and the defendant negligent throughout. *Miles v. Cameron*, 9 P. R. 502.—Dalton, Master.

The decree declared that the defendant was a trustee of the premises in question for the plaintiff, and that the plaintiff was entitled to redeem on payment of what the master should find due, within six months after report, etc., and in default of payment, the plaintiff was to be foreclosed. The report was dated 4th March, 1882, and appointed 18th April, 1882, for payment. The money was paid into the Bank of Commerce on that day, but by mistake to the credit of a suit of *Johnston v. A. Johnston*. On the 22nd April, 1882, the defendant's solicitor, on the usual affidavit of nonpayment and certificate of bank manager, obtained an order ex parte dismissing the bill with costs. On the 25th April, the defendant's solicitor became aware that the money had been paid in to the credit of the wrong suit, but on the 20th April, he had been aware that the money was paid, though not aware of the exact nature of the mistake. On the 27th April, the defendant sold the premises.—Held, that the defendant must be considered identified with his solicitor as to all the information the solicitor had: that the order made dismissing the bill instead of foreclosing the plaintiff, and that the master's report giving six weeks instead of six months for payment as required by the decree, were irregularities, sufficient to notify the purchaser of something unusual in the proceedings, and therefore that he could not rely on the final order dismissing the bill alone; that even if the order had been for foreclosure, under the facts of this case, it would be a proper exercise of the discretion of the court to open it up; and that a suit commenced by the plaintiff to set aside the sale, did not estop him from obtaining relief under the motion. *Gunn v. Doble*, 15 Chy. 655, distinguished, *Johnston v. Johnston*, 9 P. R. 259.—Dalton, Master.—Proudfoot.

Proceedings were instituted, in 1876, against two persons interested in a mortgage estate, one of whom was resident out of the jurisdiction, and the usual decree and account was made and taken. The application to make such decree absolute was not made until May, 1882, and in the early part of the month following a petition was presented praying that the defendants might be allowed to redeem, alleging the ignorance of the absent defendant of the proceedings

until his return to the country, a few days before signing the petition, and the ignorance of both defendants of any proceedings subsequent to the filing of the bill; and that the defendant upon whom the bill was served was about ninety years old, of feeble intellect, and untried to transact business. It was shown that in March, 1882, before the order making the decree absolute, the plaintiffs had sold to one Grattan, who bought, relying on the plaintiffs' title under the final order of foreclosure, which, on its face, was expressed to be subject to the General Orders of Chancery 114-5-6. Under the circumstances the court (reversing the order of *Boyd, C.*, 2 O. R. 348), made an order to open the foreclosure on the usual terms of paying principal, interest, and costs of plaintiffs, and of the purchaser (not including any costs of the appeal, of which each party should bear their own), together with any costs incurred by the purchaser in connection with his purchase of the property, and in default of payment on or before the day appointed for payment the appeal to be dismissed, with costs. *Trinity College v. Hill*, 10 A. R. 99.

In a foreclosure suit a decree was made in November, 1877, and a final order of foreclosure obtained in June, 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed: (2 O. R. 348.) The Court of Appeal reversed this decision, making an order to open the foreclosure on the usual terms of paying principal, interest and costs, including the plaintiffs' costs of opposing the petition (10 A. R. 99).—Held, affirming the decision of the master in ordinary, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs as found by the decree of November, 1877.—Held, also, reversing the decision of the master-in-ordinary, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recoverable by force of the order made on the petition, which was reversed, but simply owing to the direction of the Court of Appeal.—Held, also, reversing the decision of the master-in-ordinary, that the plaintiffs were not entitled to the costs of a writ of execution issued by them to recover their costs taxed under the order dismissing the petition, for the vacating of that order levelled the writ of execution, which was not part of the taxed costs of the petition but incurred subsequently. *Trinity College v. Hill*, 8 O. R. 286.—Boyd.

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant.—Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action. *Paisley v. Broddy*, 11 P. R. 202.—Wilson.—C. P. D.

See *Kelly v. Imperial Loan and Investment Co. of Canada*, 11 S. C. R. 516, p. 1302; *Warnock v. Priour*, 12 P. R. 264, p. 1213.

## 4. Costs.

See *Trinity College v. Hill*, 8 O. R. 286, p. 1310.

## 5. Other Cases.

In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of the clause, and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest, and costs, whenever tendered, although he does not pray for a personal order for immediate payment. *Drummond v. Quickard*, cited in *Green v. Adams*, 2 Chy. Chamb. 124 overruled. *Cruso v. Bond*, 1 O. R. 384.—Chy. D. Reversing *S. C.*, 9 P. R. 111.

An action for foreclosure of a mortgage is governed by Rule 78 O. J. Act (see Con. Rule 718) and no order allowing service is necessary and on default of appearance judgment may be entered on praecipe according to the former practice in chancery. *Chamberlain v. Armstrong*, 9 P. R. 212.—Boyd.

On motion ex parte for a direction to the registrar to insert in a praecipe judgment of foreclosure in a mortgage suit, an order for immediate payment of the amount due by the defendant, under his covenant, up to judgment, (the registrar to take the account,) where a reference to the master as to subsequent encumbrances was also sought:—Held, that the usual course must be followed, and that the defendant should be ordered to pay the amount found due forthwith after the master should have made his report. *North of Scotland Canadian Mortgage Co. v. Beard*, 9 P. R. 546.—Boyd.

An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254, O. J. Act, and the venue need not therefore in such an action be laid in the county where the lands lie. *Seymour v. DeMar h*, 11 P. R. 472.—Dalton, Master.

Lunatic defendant—Appointment of guardian. See *Warnock v. Prieur*, 12 P. R. 264, p. 1213.

The Creditors' Relief Act applies to execution creditors against lands in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale after payment of the mortgage debt, interest and costs. *Harvey v. McNeil*, 12 P. R. 362.—Boyd.

Semble, in the case of foreclosure the old form of decree giving execution creditors as subsequent incumbrancers liberty to redeem according to their priorities is no longer applicable. *Id.*

See *Cruso v. Close*, 8 P. R. 33, p. 1313; *Gzowski v. Bealy*, 8 P. R. 146, p. 1313.

## XIII. SALE.

## 1. When Directed.

Although by the general rule and course of proceeding in mortgage cases the mortgagor is entitled to six months to redeem, before a sale is ordered, the court will, under special circum-

stances, direct an immediate sale of the property, even as against the infant heirs of the mortgagor. *Swift v. Minter*, 27 Chy. 217.—Blake.

In an action of ejectment by mortgagees, on the application of the infant defendants, an order for immediate possession and sale of the mortgaged premises was made, with a reference to the master to take the usual accounts; but \$80 was ordered to be paid into court to meet the expenses of sale. *Western Canada Loan and Savings Co. v. Dunn*, 9 P. R. 587.—Armour; reversing *S. C.* 1b. 490.

Although in an action on a mortgage of lands situate out of the province judgment of foreclosure will be granted against a defendant residing therein, such judgment merely operating in personam as an extinguishment of a personal right, yet the court will not extend the doctrine by ordering a sale of land over which it has not territorial jurisdiction, not being able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale. *Strange v. Radford*, 15 O. R. 145.—Boyd.

## 2. Parties to Bill.

A mortgagee filed a bill for sale making certain lien holders under the Mechanics' Lien Act parties defendant, therein alleging that the work, by virtue of which their liens arose, was commenced after the registration of his mortgage:—Held, that the lien-holders should have been made parties in the master's office after decree by notice, and the plaintiff's costs of making them defendants by bill were disallowed on revision of taxation. *Jackson v. Hammond*, 8 P. R. 157.—Thom, Tazewell Officer.

## 3. Decree.

Although a decree for sale should direct the same to take place with the approbation of the master, the omission of such direction is no ground for moving to set aside the sale under the decree, where the same really took place with such approbation, even in a case where infants are interested. *Ricker v. Ricker*, 27 Chy. 576.—Proudfoot.

## 4. Costs.

The costs of proceedings to obtain a sale of mortgaged premises are such a charge upon the estate as will entitle the mortgagee to proceed to a sale of the property in the event of nonpayment. *Thompson v. Holman*, 28 Chy. 35.—Spragge.

Where mortgagees had a surplus in their hands after a sale under their mortgage, and S. claimed the surplus, but refused to give such proof as the mortgagees required of his title thereto:—Held, that as the mortgagees had acted reasonably in requiring proper proof, and failing to get it, had paid the surplus into court, they were entitled to their costs of so doing, and to their costs of appearing on S.'s application to have the money paid out to him. *Re Kingland*, 8 P. R. 77.—Spragge.

See *Jackson v. Hammond*, 8 P. R. 157, *supra*; *Gardner v. Burgess*, 13 P. R. 250, p. 1319.

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### 5. Other Cases.

Where a defendant by bill in a foreclosure suit demanded a sale and paid \$80 into court as a deposit:—Held, that although the costs of the sale would exceed that amount, the defendant could not be ordered to increase it, the amount being fixed by schedule S. endorsed on the office copy of the bill under G. O. Chy. 436. *Cruso v. Close*, 8 P. R. 33.—Taylor, *Referee*.—Proudfoot.

In a foreclosure suit the official assignee of an insolvent defendant paid \$150 into court to procure a sale. The proceeds derived from the sale were much more than sufficient to pay the plaintiff's claim in full, but were insufficient to pay the subsequent incumbrancers:—Held, that the deposit should be applied in reduction of the second mortgagee's claim. *Gzowski v. Beaty*, 8 P. R. 146.—Blake.

Where a mortgagee comes in under a decree for partition or sale, and proves his claim and consents to a sale, he is not entitled to six months' interest, or six months' notice. *Re Houston*—*Houston v. Houston*, 2 O. R. 84.—Proudfoot.

## XIV. PROCEEDINGS IN MORTGAGE ACTIONS.

### 1. Taking Accounts.

The plaintiff company having brought an action against I., on a mortgage, and claiming damages for having made a distress on F., the tenant of the premises at the request of I., on the reference to ascertain what damage the company had properly sustained by reason of such distress, the master held that the amount of a judgment recovered by F. against the company was the proper measure, and was conclusive evidence of the amount, although it was proved before him that an offer had been made by I. to the company to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined shewed that their evidence might materially have affected the verdict:—Held, that the ruling of the master was erroneous, and that the case must go back to him to revise his report. *Peterborough Real Estate Investment Co. v. Ireton*, 5 O. R. 47.—Proudfoot.

The special endorsement on a bill claimed a certain amount to be due under the mortgage (which contained the usual covenant to insure). After the service of the bill the plaintiff paid certain premiums of insurance. Blake, V.C., directed notice of settling decree and taking accounts to be served, and the plaintiff's claim to be allowed on proof of the payments being produced. *English and Scottish Investment Co. v. Gray*, 3 P. R. 199.

A decree for redemption was made, which directed an account to be taken of the amount due by the plaintiff, representing the mortgagor, to the defendants. The defendants, on proving their claim in the master's office, produced their mortgages, and filed an affidavit verifying their claim, and stating that \$20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages:—Held, by the master in ordinary, and affirmed by Blake, V. C., that their claim was

prima facie proven, and the onus of reducing the amount of it rested on the plaintiff. *Court v. Holland*—*Ex parte Doran*, 8 P. R. 213.

Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed after decree, in the master's office. *Court v. Holland*, 4 O. R. 688.—Chy. D.

There should be no alteration in the amount found due by the master when such amount has not been appealed against: Proudfoot, J., 11 O. R. 611 upheld in other respects. *Gordon v. Gordon*, 12 O. R. 593.—Chy. D.

On a reference to take accounts in a mortgage case it is not open to the defendants to contend that the original loan was ultra vires; nor can any defence be raised in the master's office which, if allowed, might result in determining that the court had made a nugatory order of reference. *Wiley v. Ledyard*, 10 P. R. 182.—Hodgins, *Master-in-Ordinary*.

The plaintiff, as mortgagee of the defendants, by an instrument dated 30th January, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued duly indorsed under Rule 17 O. J. Act, (Con. Rule 248) and default being made, judgment was obtained under Rule 78 O. J. Act (Con. Rule 718) referring it to the master at Lindsay to make and take the enquiries and accounts as prescribed by G. O. Chy. 441 (Con. Rule 776 and Form 182). The master gave certain execution creditors, who had been made parties in his office and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid; the terms of section 85 of the Canada Joint Stock Companies' Act of 1877, which requires the sanction of a two-thirds vote of the shareholders, not having been complied with:—Held, that under the decree the master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors not having moved against the judgment by virtue of which they were made parties were also bound by the decree. *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247.—Boyd.

Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee who held the title under a deed absolute in form, brought into the master's office with his account certain orders signed by the mortgagor, directing him to pay to the parties named in them, any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered:—Held (1), That such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands, prior to the receipt by the sheriff of the plaintiffs' fi. fa. lands, and that such lienholders should be made parties in the master's office, and prove their claims in their own right. *Canadian Bank of Commerce v. Forbes*, 10 P. R. 442.—Hodgins, *Master-in-Ordinary*.



The T. & L. Co., being mortgagees of land in Ontario, held a collateral mortgage on lands in Kansas. Default occurring they sold the lands in Ontario, through one W., a land agent, who had acted also under a power of attorney for C. the mortgagor, who had agreed to a commission being allowed to him for selling. W. did not, however, actually sell until after C.'s death, when the T. & L. Co. paid him his commission:—Held, on an action for an account brought by an execution creditor, who had obtained his execution after the power of attorney had been given to W., and after the said agreement as to commission, that the commission was a proper item to allow the T. & L. Co., in their account. *Wells v. Trust & Loan Co. of Canada*, 9 O. R. 170.—Boyd.

After the mortgage on the Kansas lands had been executed, the mortgagees discovered that the lands comprised in it had been sold for taxes, and that there were also several executions against them, and they incurred expenses in attempting to stay the executions, and set aside the tax sales. The mortgagor C., had approved of these proceedings being taken:—Held, that these expenses ought to be allowed to the T. & L. Co. in their accounts, for whatever bound the mortgagor in taking the accounts bound the plaintiff to the same extent. *Id.*

The T. & L. Co. further incurred expenses in prosecuting unsuccessful litigation arising out of a claim made by them as landlords under the distress clause in their mortgage, to certain goods of C. seized by the sheriff under executions against him. C. did not sanction this litigation:—Held, that this expenditure could not be allowed to the T. & L. Co. in taking the accounts, but that as they made a certain sum by this litigation, the costs up to that point should be allowed to them. The general rule is, that a mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by himself, and not undertaken with the approval of the mortgagor. *Id.*

A judgment directed that the master should take the usual accounts for redemption or foreclosure of the mortgaged premises, and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the master should take into account a certain sale by the plaintiff, as mortgagee, to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment:—Held, that the proposed inquiry was not within the scope of the pleadings or the judgment, or of Con. Rules 56 and 57; and the questions which it would raise, were questions which ought to have been raised by the pleadings and determined by the court, and not delegated to the master. *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. at p. 725; *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247; *Wiley v. Ledyard*, 10 P. R. 182, referred to. *Rowland v. Burnell*, 12 P. R. 607.—Armour.

This action was brought to recover the principal and interest due upon a mortgage, and also upon certain other claims. The interest was alleged to be overdue, and the principal to have become due by virtue of an acceleration clause. The defendant pleaded payment of the

interest. A reference was directed to a master, and upon such reference the plaintiff proved his mortgage, and it appeared therein that certain instalments of interest were overdue:—Held, that the plaintiff had made out a *prima facie* case and could not be called on to prove the nonpayment of interest. *Markle v. Ross*, 13 P. R. 135.—Rose.

Method of taking mortgage account shewn. See *Edmonds v. Hamilton Provident and Loan Society*, 19 O. R. 677.

See *Court v. Holland*—*Ex parte Holland and Walsh*, 8 P. R. 219, p. 647; *Morton v. Hamilton Provident and Loan Society*, 10 P. R. 636, p. 1318; *MacLennan v. Gray*, 12 P. R. 431; *Superior Loan and Savings Co. v. Lucas*, 15 A. R. 748, p. 497.

See also *Subhead V. li (b)*, p. 1282.

## 2. Multiplicity of Actions

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages, and to sue at law in different actions the same parties on notes held by the plaintiffs, to which the mortgages were collateral:—Held, that only one suit in equity was necessary, as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits, and the court would not be deterred from granting the relief by the circumstances of the decree being complicated. There were consent minutes between the parties except as to costs at law and in this court. *Sprague, C.*, ordered the plaintiffs to pay the costs of the argument before him, unless they were included in the matters the subject of the consent minutes. *Merchants' Bank v. Sparkes*, 28 Chy. 108.

A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in chancery against him for a sale:—Held, that as the mortgagee could, since the Administration of Justice Act, obtain in the chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever. *Hay v. McArthur*, 8 P. R. 321.—Dalton, Q. C.

In an action for an account by a mortgagor, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of \$10 was found in his favour. Plaintiff having made charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him and certain special matter pleaded by the defendants being found against them:—Held, neither party entitled to costs. *Beatty v. O'Connor*, 5 O. R. 747.—Chy. D.

The plaintiff gave to the defendant a note of sale under the power of sale in a certain mortgage, and also began an action against the defendant upon the covenant for payment contained in the same mortgage. The notice of sale was dated 2nd May, the writ was issued on the 3rd May, and both were served on the defendant on the 3rd May. No order was obtained

to a master, plaintiff proved his claim that certain mortgage was overdue.—Held, that at a prima facie on to prove the mortgage. *Ross v. Ross*, 13

account shown. *Prudent and Loan*

*Holland and Morton v. Hamilton*, 10 P. R. 636, p. P. R. 431; *Supra*, *Lucas*, 15 A. R.

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### ACTIONS

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permitting the action to be commenced. Upon motion to set aside the service of the writ as contrary to the provisions of the Ontario Mortgage Act, 1884, 47 Vict. c. 16 (Ont.):—Held, that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute to fulfil the very words of it, that one of the acts should be prior to the other. Service of writ set aside with costs. *Perry v. Perry*, 10 P. R. 275.—Dalton, Master.

See *In re Flint and Jellett*, 8 P. R. 361, p. 1270; *Bratty v. O'Connor*, 5 O. R. 731, p. 1301.

### 3. Costs.

G. the owner of real estate executed a mortgage to the plaintiff, and subsequently created a second mortgage in favour of one H. which he transferred to the plaintiff. Afterwards G. mortgaged the same lands to R. and D.; and subsequently assigned the equity of redemption to them in which assignment the mortgage to the plaintiff and that to R. and D. were recited, but the intermediate one to H. was not, though the amount stated as due to the plaintiff was about the sum secured by both mortgages held by him. Default having been made, a bill was filed against G. upon his covenants and against his assignees R. and D., as the owners of the equity of redemption and entitled to redeem.—Held, that under these circumstances G. having claimed such relief by his answer was entitled as against his co-defendants to an order for them to pay such sum as might be found due the plaintiff under his securities, and the suit having been rendered necessary by reason of the default of R. and D. in not paying the plaintiff, they were also bound to pay G. his costs. *Campbell v. Robinson*, 27 Chy. 634.

On proceeding with the reference under the decree pronounced on the hearing, as reported 28 Chy. 356, the master by his report found that there was due to the plaintiff \$1,104.99, which included a sum of \$171.32 costs incurred in the suit brought by him to redeem.—Held, on appeal—(affirming the report of the master),—(1) that the plaintiff was entitled to claim the costs so incurred, that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption with the concurrence of C., through whom the appellant claimed—and, (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as Jarvis under whom they claimed would have been, the proceeding being not in respect of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument, and that therefore the rules as to estoppel by deed applied. *Pierce v. Canavan*, 29 Chy. 32.—Ferguson.

42 Vict. c. 20, s. 11 (Ont.), authorizing the taxation of a mortgagee's costs by any party interested, without any order to tax, applies to mortgages executed before the passing of the Act. *Ferguson v. English and Scottish Investment Co.*, 8 P. R. 404.—Taylor, Master.

Where a mortgagee sold under a power of sale in his mortgage, and the mortgagor afterwards brought action against him for an account, and

payment over to him, of the surplus which he alleged was in the mortgagee's hands, and on taking the account it was found a balance of \$136 was payable to the mortgagor:—Held, that the mortgagee must pay to the mortgagor his full costs of suit. *Boulton v. Rowland*, 4 O. R., 720.—Ferguson.

A reference in a mortgage suit was directed to take accounts and to inquire whether a sale or foreclosure would be more beneficial. There were no incumbrancers. The defendants claimed credit for payments endorsed on the back of the mortgage, which were in the deceased mortgagee's handwriting, but for all of which the defendants did not hold receipts. The plaintiffs disputed the payments not covered by the receipts. On revision the taxing officer disallowed the costs of the reference as the master had found in favour of the defendants' contention:—Held, on appeal, that under G. O. Chy. 312 (Con. Rule 1209), the revising officer might refer to the papers before the master, and determine from them whether the proceedings were unnecessarily taken and that so much of the reference as related to the question whether foreclosure or sale was most beneficial ought to be allowed:—Held, also, that if the credits endorsed on the mortgage were made by the mortgagee or signed by him, the plaintiff, his executor, ought not to have questioned the amount, and so much of the costs of the reference caused by taking the account should not be allowed. *Purdy v. Parks*, 9 P. R. 424.—Proudfoot.

Mortgagees after the exercise of the power of sale in their mortgage claimed that \$192.61 was still due to them, but on an account being taken \$20.07 was found due to the mortgagor:—Held, that laying aside the question of the whole amount of the mortgage money (\$8,705) the amount involved was \$202.63, and therefore the case was not within Rule 515 O. J. Act (C. S. U. C. c. 15, s. 34, sub-s. 8), (see Con. Rule 1219), and the costs were properly taxed on the higher scale. The claim of a mortgagor against a mortgagee for an account in such a case is not a legal one as for a money demand, but a proper subject for equitable relief. *Morton v. Hamilton Prudent and Loan Society*, 10 P. R. 636.—Proudfoot.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court by making a claim for possession of the land, is one that must be carefully guarded; and, except in cases clearly indicating the necessity for proceeding in the High Court, no costs will be given to the plaintiff. In this case where the amount claimed under a mortgage was within the proper competence of the Division Court, but the suit was brought in the High Court, and there were no circumstances showing the necessity for bringing it therein, no costs were allowed the plaintiff. *Vandewater v. Horton*, 9 O. R. 548.—C. P. D.

Where actions were brought by mortgagees without the leave of the court for sale of mortgaged premises after appointment of a receiver to receive the rents and profits of such premises, an order was made, upon the petition of the mortgagees, allowing the proceedings in the ac-

tions to stand, and allowing the petitioners to proceed with the actions notwithstanding the appointment of the receiver. The receiver was served with notice of the presentation of the petition and appeared thereon by counsel. The petition, besides praying for the relief which was granted, asked in the alternative that the receiver might be discharged, or that he might be ordered to pay the petitioners the arrears of principal and interest due on their mortgages and the costs of the actions and the petition:—Held, that if the petitioners wished to protect themselves from paying costs they should have proceeded under Con. Rule 1193 and tendered the receiver \$5 with the petition; and this not having been done, and the relief asked in the alternative prayers being such as justified the appearance of the receiver, the receiver was entitled to be paid his costs by the petitioners; and the petitioners were allowed to add the sum so paid and their own costs to the mortgage debt. *Gardner v. Burgess*, 13 P. R. 250.—Boyd.

See *Beatty v. O'Connor*, 5 O. R. 731, p. 1301; *Hyde v. Barton*, 8 P. R. 205, p. 560; *Kempt v. Macanley*, 9 P. R. 582, p. 1081; *Trinity College v. Hill*, 8 O. R. 286, p. 1310; *Wells v. Trust and Loan Co. of Canada*, 9 O. R. 170, p. 1315; *Smith v. Smith*, 18 O. R. 205.

See also previous Subhead.

#### 4. Other Cases.

In an action by cestuis qui trustent against executors and trustees of a certain will, a decree had been made for the general administration of the testator's estate real and personal, a portion of the real estate being at the time under mortgage made by the executors. The conduct of the proceedings having been given to certain creditors, a receiver was, at their instance, appointed to collect the rents of the real estate. Afterwards the mortgagees commenced an action upon their mortgage (see 8 O. R. 539), making the executors and trustees and the tenants of the mortgaged property defendants, asking payment, possession and foreclosure, when finding the receiver in possession, they, after some delay, applied for and obtained leave to proceed with their action, a defence, however, being made thereto, at the instance of the receiver, contesting the validity of the mortgage. The mortgagees having succeeded in establishing their mortgage and their right to possession, then applied to be added as parties to the reference in the administration proceedings, claiming to be entitled to all rents collected by the receiver between the commencement of the action on their mortgage, and their obtaining possession from him. They were accordingly added as parties in the master's office, who subsequently made his report, finding them entitled to the rents as claimed:—Held, on appeal, that the mortgagees were only entitled to the rents from the date of the application for the order allowing them to proceed with their action, notwithstanding the appointment of the receiver. *Wallace v. Wallace*, 11 O. R. 574.—Boyd.

Held, that the term, "adult," in G. O. Chy. 645 (See Con. Rule 717), does not include a lunatic or person of unsound mind; and therefore

that a judgment against a lunatic could not be obtained in chambers under G. O. Chy. 434 (See Con. Rule 717). *Warnock v. Prieur*, 12 P. R. 264.—Dalton, Master.—Boyd.

*Clemow v. Booth*, 27 Chy. 15, p. 1270; *Mitchell v. Strathy*, 28 Chy. 80, p. 1086; *Hyde v. Barton*, 8 P. R. 205, p. 560; *Hamilton Provident and Loan Society v. Campbell*, 12 A. R. 250, p. 1080; *Widgress v. Crawford*, 12 P. R. 658, pp. 1308; *Hamilton Provident Loan and Investment Co. v. Smith*, 17 O. R. 1, p. 1277.

#### XV. MISCELLANEOUS CASES.

Suit by creditors of mortgagee to attach mortgage debt. See *Menzies v. Ogilvie*, 27 Chy. 456, p. 90.

Held, that the giving of a mortgage by a devisee was not a violation of a restraint against alienation. See *Smith v. Faught*, 45 Q. B. 484.

A mortgage is a "contract" within the meaning of the Insolvent Act of 1875, s. 130. *Smith v. Harrington*, 29 Chy. 502.—Spragge.

Fiduciary relations between mortgagor and mortgagee. See *Thompson v. Holman*, 28 Chy. 35; *Kibbourn v. Arnold*, 6 A. R. 158.

Held, that the statute 42 Vict. c. 22, (Ont.): "An Act to Amend the Law of Dower" does not apply to mortgages made before it was passed. *Martindale v. Clarkson*, 6 A. R. 1.

Forfeiture of extended terms of payment.—Relief against forfeiture. See *Graham v. Ross*, 6 O. R. 154, p. 425.

Right of municipal corporation to take mortgage from a manufacturer securing performance of conditions on which bonus was granted. See *Village of Brussels v. Ronald*, 14 O. R. 1; 11 A. R. 605.

Rights of parties, when mortgage paid by moneys fraudulently obtained. See *Jack v. Jack*, 12 A. R. 476, p. 756.

Liability of universal legatee for hypothec on immovables bequeathed to a particular legatee. See *Harrington v. Corse*, 9 S. C. R. 411.

Specific bequest of mortgage to mortgagor. Right of executors to insist on payment of other claims against mortgagor. See *Archer v. Severn*, 12 O. R. 615; 14 A. R. 723, p. 715.

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Prior mortgage set aside by execution creditor. Rights as against subsequent bona fide mortgagees. See *Coursolles v. Fookes*, 16 O. R. 691, p. 827.

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## 17. EXTENSION AND SEPARATION OF MUNICIPALITIES.

### 1. *Taking the Census*.

Semble, that the by-law incorporating the village was not necessarily illegal by reason of the mere fact that the census was in reality taken before the by-law authorizing the enumeration of the people had been passed by the county council. But where the census was shewn to be wholly unreliable, and untrue in fact, effect was given to this objection. *Re Fenton and the County of Simcoe*, 10 O. R. 27.—Wilson.

### 2. *Debts and Liabilities*.

The bill alleged that the municipal councils of the respective corporations had adopted and sanctioned certain terms and conditions for dividing and settling the several liabilities and assets of the corporations upon their separating,

and that both parties accepted such settlements as a final settlement between them, and acted thereupon:—Held, on demurrer, that it was not necessary to allege that such acceptance was by by-law; although Semble that at the hearing it might be necessary to establish that such was the fact. *Village of Gravenhurst v. Township of Muskoka*, 29 Chy. 439.—Boyd.

The township of E., the present plaintiffs, in 1873, passed a by-law for issuing debentures to raise \$6,000, for the purposes of a certain school section, in part comprised in it, and in part in the township of G., and providing for payment of interest, and creation of a sinking fund, and levying of the necessary special rate on the property of the school section. In 1874 the village of P. was incorporated out of a portion of the township of E., being a portion of the said school section, and during the currency of the debentures the corporation of P. collected their share of the moneys, on the requisition of the secretary-treasurer of the school board, and paid over the same to that official, instead of to the treasurer of the township of E., which township never made any requisition on the village of P. to collect the moneys, and itself paid over the moneys collected by it to the secretary-treasurer of the school board. In 1883 the said secretary-treasurer died, and it was found that he had converted the sinking fund money to his own uses and had left no assets wherefrom it might be made good. In the same year the debentures fell due, and the township of E. paid them and now sued the village of P. for its pro rata share thereof:—Held, that having regard to 36 Vict. c. 48, s. 56 (Ont.) (R. S. O. 1877, c. 174, s. 55), the plaintiffs were entitled to judgment, except as to sums levied and received by the defendants more than six years before action brought, for the defendants should have paid the moneys over to the treasurer of the plaintiffs' corporation; and even if there had been a positive agreement by and with the township of E. that the money should be paid to the secretary-treasurer of the school board, this would have made no difference; for such an agreement would have been ultra vires the township of E., and void as contrary to the statute law, while the sections of 36 Vict. chapter 48, relating to arbitrations in cases of separations of incorporated villages from townships, did not apply in this case, so as to prevent the action lying:—Held, also, that even if it was impossible to make the judgment productive on the ground that the defendants could not now levy and collect the money, this was no reason why the plaintiffs should not obtain judgment. *County of Frontenac v. City of Kingston*, 30 Q. B. 584, distinguished. *Township of Elderslie v. Village of Paisley*, 8 O. R. 270.—Ferguson.

On the erection of two village municipalities out of a township:—Held, that the moneys derived from "the Ontario Municipalities Fund," which had some years previously been appropriated by by-law to the school purposes of the township were assets property devisable between the township and the new village municipalities. *Re Township of Albermarle and the United Towns of Eastnor, Lindsay and St. Edmunds*, 45 Q. B. 133, distinguished. *Village of East Toronto v. Township of York*, 16 O. R. 566.—Boyd.



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Q. B. 133, p. 1379; *In re Arbitration Between  
the City of St. Catharines and the County of  
Lincoln*, 46 Q. B. 425, p. 1380; *In re Township  
of Sarnia and the Town of Sarnia*, 1 O. R. 411,  
p. 1381; *In re Township of Muskoka and Village  
of Gravenhurst*, 6 O. R. 352, p. 1381.

### 3. Voters in Added Territory.

Where a city made additions to its territory, and thereby included within its corporate limits a portion of an outlying township:—Held, that, regard being had to the provisions of the Municipal Act, R. S. O. (1887), c. 184, ss. 84, 89, persons who, but for such action on the part of the city, would have been entitled to vote in the township, were thereby debarred from voting at the township municipal election next ensuing, notwithstanding that the nomination of candidates for such election took place before such addition. *Regina ex rel. Tavenner v. Willson*, 12 P. R. 546.—Rose.

## IV. MEMBERS OF COUNCILS.

### 1. Property Qualification.

The defendant was not assessed for the year 1880, but in that year was assessed, on the 3rd of September, for the year 1881, upon unincumbered leasehold property of the value of \$4,100. By-law of the city of Ottawa this assessment was revised before the 14th November, and returned before the 31st December as and for the assessment roll for the year 1881. No appeal was had therefrom. The nomination took place on the 27th December, 1880, and the defendant was elected Mayor of Ottawa on the 3rd January, 1881:—Held, that the election commenced on the nomination day; and the assessment roll mentioned, which was to take effect in 1881, and not before, was not the last revised assessment at that time, within the meaning of the by-law and R. S. O. (1877), c. 180, s. 44, and the defendant could not qualify thereon. *Regina ex rel. Clancy v. McIntosh*, 46 Q. B. 98.—Q. B. D.

E. P. being the lessee of certain premises, he assigned his interest to H. P. after the assessment roll for that year had been returned, with E. P. assessed for the property. No notice of appeal against the assessment was served until several days after the time limited for so doing had expired. The court of revision, on appeal, substituted H. P. for E. P. on the roll. On an application to set aside the election of H. P. as an alderman, on the ground that the defendant was not rated on the roll when it was made out, and that he was not sufficiently qualified:—Held, that the assessment roll was absolutely binding; and that its correctness could not be tried upon such an application; and that the want of notice was cured by R. S. O. (1877), c. 180, s. 53. *Regina ex rel. Hamilton v. Piper*, 8 P. R. 225.—Dalton, Q. C.—Armour.

Held, under 43 Vict., c. 24, s. 3 (Ont.), that in estimating the defendant's property qualification, the amount of the mortgages upon the property must be deducted from the assessment, and not from the real value. *Regina ex rel. Kelly v. Ion*, 8 P. R. 432.—Osler.

On the books of the registry office the respondent's freehold property appeared incumbered to nearly its assessed value. It was shown that the mortgages had been reduced, so as to leave the property worth, according to the assessed value, \$963 over and above incumbrances:—Held, that the property qualification was sufficient. *Regina ex rel. Brine v. Booth*, 9 P. R. 452.—Dalton, Master.

The respondent was rated on an assessment roll in respect of a leasehold property, sufficient in value to qualify him for office, but the property of his wife, to whom he was married in 1872, and who acquired the property in 1884:—Held, that the respondent had no estate or interest in the property, and therefore was not qualified for office under section 73 of the Municipal Act, 1883 (Ont.) *Regina ex rel. Feltz v. Howland*, 11 P. R. 264.—Dalton, Master. But see R. S. O. 1887 c. 184, s. 73.

### 2. Disqualification.

#### (a) As Member of Council.

A municipality passed a by-law to exempt from taxation, for a term of years, a mill to be built within its limits by a firm of which defendant was a member:—Held, that there was a contract subsisting between defendant and the municipality, and that he was therefore disqualified from holding the office of reeve. *Regina ex rel. Lee v. Gilmour*, 8 P. R. 514.—Osler.

An unlicensed person who, under the colour of a license to his son, whether in collusion with the latter or on his own responsibility, sells liquor by retail, is not disqualified under section 74 of the Municipal Act (1877) from holding the office of alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Acts. *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85.—Cameron.

The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the licence commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before:—Held, affirming the decision of the master in chambers, 9 P. R. 452, that a license cannot lawfully be transferred except in the cases mentioned in R. S. O. (1877), c. 181, s. 23, none of which had occurred here; that the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor. *Regina ex rel. Brine v. Booth*, 3 O. R. 144.—Q. B. D.

Per Armour, J. The Act disqualifying a licensee should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name. *Id.*

#### (b) From Voting in Certain Cases.

It was alleged that one member of the council was largely interested in the property to be

drained by the by-law, but :—Held, that no interest, which springs solely from his being a ratepayer, can disqualify a councillor or a member of a Court of Revision from performing his duties as such. *Re McLean and the Township of Ops*, 45 Q. B. 325.

### 3. Vacating Office by Non-Attendance.

The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost; whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried :—Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties, and that the injunction might be awarded upon an interlocutory application. *Mearns v. Town of Petrolia*, 28 Chy. 98.—Proudfoot.

## V. CONTROVERTED ELECTIONS.

### 1. Corrupt Practices.

A candidate for a municipal office, though not required by law to make his payments through a special agent, is not absolved from keeping a vigilant watch upon his expenditure; and a candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself, and spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended. And where money given to agents by the candidate was in fact used in bribery :—Held, that the presumption that the candidate intended the money to be used as it was used became conclusive in the absence of denial on his part. *Regina ex rel. Johns v. Stewart*, 16 O. R. 583.—Street.

Gifts by a candidate to one who is at the time exerting his influence in the candidate's behalf are naturally and properly open to suspicion; and in the absence of any explanation, such gifts must be regarded as having been made for the purpose of securing or making more secure the friendship and influence of the donee. *Ib.*

In the election in question every member of certain committees was paid a uniform sum of \$2, nominally for his services as a canvasser, but apparently without regard to the time he devoted to the work, and without inquiry as to whether he had in fact canvassed at all :—Held, that these payments were corruptly made and constituted the offence of bribery as defined by

sub-section 2 of section 209 of the Municipal Act. Under the circumstances above referred to and other circumstances of the case, the defendant was found personally guilty of acts of bribery, and to have forfeited his seat as mayor of the city of Ottawa. *Ib.*

### 2. Practice.

#### (a) Who may be Relator.

Held, that an alderman's right to the office on the ground of an insufficient declaration of qualification and for the want of qualification at the time of his election, might be questioned by a quo warranto at the instance of a ratepayer not a voter of or resident in the ward, and who therefore could not be a relator under the Municipal Act. *Regina ex rel. White v. Roach*, 18 Q. B. 226, and *Kelly v. Macarow*, 14 C. P. 457, distinguished. *Regina ex rel. Clancy v. St. Jean*, 46 Q. B. 77.—Cameron.

#### (b) Time for Moving.

Held, that the relator in this case was not too late, having applied in the next term after the election, and only one day after the time for moving under the statute. *Regina ex rel. Clancy v. St. Jean*, 46 Q. B. 77.—Cameron.

A summons issued within a month after the formal acceptance of office by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declarations. *Regina ex rel. Feltz v. Howland*, 11 P. R. 264.—Dalton, Master.

See *Regina ex rel. Clancy v. McIntosh*, 46 Q. B. 98, p. 1331.

#### (c) Disclaimer.

Defendant was elected to the office of councillor for a town, and accepted the office. Subsequently and before the issue of the writ of quo warranto, the defendant knowing that his election was to be contested, sent the following instrument to the council : "Palmerston, February 7th, 1881. To the mayor and council of the town of Palmerston: Gentlemen, I beg to disclaim my seat at the council board. (Signed) G. S. Davidson."—Held, that the above disclaimer, not being in the form prescribed by R. S. O. (1877), c. 174, s. 194, was not sufficient to relieve the defendant from costs. *Regina ex rel. Mitchell v. Davidson*, 8 P. R. 434.—Osler.

Section 195 R. S. O. (1877) c. 174 provides that the effect of a party disclaiming the office to which he has been elected, shall be to give the same to the candidate having the next highest number of votes :—Held, that this meant the candidate having such number of votes who has not been elected to the council. Therefore, where the plaintiff was the candidate who was fourth in that order, the three highest on the list having been declared elected, and one at the head of the poll resigned his seat, an injunction was granted to restrain the reeve and councillors of

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the village from preventing the plaintiff entering upon and discharging the duties of such office. The notice of the party resigning the office stated that he resigned his "seat" in the council:—Held, sufficient; and that the plaintiff was entitled to his costs, although the Act requires notice of a resignation of the "office" to be given. *Smith v. Petersville*, 28 Chy. 599. —Proudfoot.

#### (d) Powers of Master in Chambers.

The jurisdiction of the master in chambers to grant a quo warranto summons under the Municipal Act, 1883. (Ont.), is established by the 13th section of the O. J. Act, 1885. *Regina ex rel. Felitz v. Howland*, 11 P. R. 264. —Dalton, Master.

The master in chambers is not, in any sense, by delegation or otherwise, a judge of the High Court of Justice to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted municipal elections; nor can such power be given him by the acquiescence of the parties. *Regina ex rel. Wilson v. Duncan*, 11 P. R. 379. —O'Connor.

Section 212 of the Municipal Act, R. S. O. (1887), c. 184, has not been affected by the Consolidated Rules, and under it a reference may be directed to a County Court judge to take evidence where in a quo warranto application a violation of section 209 or 210 is charged; and, as by Con. Rule 30 the master in chambers has in quo warranto matters the jurisdiction of a judge of the High Court, he has power to direct a reference under section 212 to a County Court judge. *Regina ex rel. Whyte v. McClay*, 13 P. R. 96. —Street.

#### (e) Powers of County Judge.

A County Court judge has power to grant a fiat in term time for the issue of a writ of quo warranto to try a contested municipal election:—Held, that Rule 1, M. T. 14 Vict., has become inoperative by the effect of subsequent statutory enactments, to which it is repugnant. *Regina ex rel. McDonald v. Anderson*, 8 P. R. 241. —Osler.

A writ of summons in the nature of a quo warranto having been issued, under R. S. O. (1877) c. 174, s. 179, on the fiat of a County Court judge, returnable before himself, to try the validity of the election of an alderman of one of the wards of a city, the County Court judge, before appearance entered, made an order setting aside his fiat and the writ with costs for irregularity in the proceedings. On appeal from the decision of the chief justice of the Court of Queen's Bench (8 P. R. 497) discharging a summons to set aside such order: Per Wilson, C. J., the County Court judge had the power to make the order. Per Osler, J., he had no such power, his power being limited to trying the validity of the election. The court being equally divided the appeal dropped. *Regina ex rel. O'Dwyer v. Lewis*, 32 C. P. 104. —C. P. D.

The judge of the County Court ordered a writ of quo warranto to test the validity of the election of an alderman; and subsequently, before appearance entered to the writ, set aside all pro-

ceedings in the matter for irregularity. The relator thereupon applied in chambers for a mandamus to compel the county judge to try the case, when the presiding judge (Hagarty, C. J.) refused the writ (8 P. R. 497) and on motion in banc, the court affirmed his ruling (46 Q. B. 175). On appeal from this judgment, the appeal was dismissed on the ground that the order of the county judge, if he had authority to make it, was not subject to review; and if it could be reviewed the application should have been to the court, not to a judge in chambers, as here; and under all the circumstances the appeal was dismissed, but without costs. The writ of quo warranto having been issued and served, the County Court judge had not power to set it aside. *Regina ex rel. Grant v. Coleman*, 7 A. R. 619.

Notwithstanding the provisions of R. S. O. (1887) c. 184, ss. 187 to 208, a county judge has now no authority, as such, to give leave under Con. Rule 1038 to serve a notice of motion to initiate quo warranto proceedings under the Municipal Act; and he has no authority at all to act in proceedings of that nature as a local judge of the High Court, that power being expressly excepted from the powers conferred upon him as a local judge by Con. Rule 41. A county judge assumed to act in such proceedings, which were styled in the High Court of Justice:—Held, that he must be taken to have acted in his capacity as local judge of the High Court, and objection to the proceedings was properly taken by motion to set them aside. *Regina ex rel. Dougherty v. McClay*, 13 P. R. 56. —Street.

See *Regina ex rel. Whyte v. McClay*, 13 P. R. 96, p. 1329.

#### (f) Costs.

A municipal election set aside, but without costs to the relator, on the ground that he was a confidential officer (auditor), of the corporation, following *Regina ex rel. McMillan v. DeLisle*, 8 U. C. L. J. 220. *Regina ex rel. Brine v. Booth*, 9 P. R. 452. —Dalton, Master.

See *Regina ex rel. Mitchell v. Davidson*, 8 P. R. 434, p. 1328; *Smith v. Petersville*, 28 Chy. 599, p. 1329.

#### (g) Other Cases.

Upon an application for a fiat for the issue of a summons in the nature of a quo warranto under the Municipal Act of 1883, to try the validity of the respondent's election as a municipal councillor, the statement of the relator did not shew that he was a candidate or an elector who voted or who tendered his vote at the election, as required by section 185 of the Act; and the recognizance filed by the relator was not entered into before a judge or commissioner for taking affidavits, nor allowed by a judge, in the manner prescribed by sec. 186, nor was it conditioned to prosecute the writ with effect: and the affidavit of the relator in support of the application did not set out fully and in detail the facts and circumstances alleged in the statement, as required by Rule 2 M. T. 14 Vict.:—Held, that these were defects in the material necessary to found the application, not mere irregularities which could be amended at a later stage, and the fiat, the writ, and all proceedings were set aside, with

costs. *Regina ex rel. Chauncey v. Billings*, 12 P. R. 404.—MacMahon.

All proceedings taken to contest the validity of any election mentioned in section 187 of the Municipal Act, R. S. O. (1877) c. 184, whether for bribery, corrupt practices, or any other cause, should be commenced by writ of summons in the nature of a quo warranto, as provided by section 188, and not by information in the nature of a quo warranto, or otherwise. *Regina ex rel. Johns v. Stewart*, 16 O. R. 5.—Q. B. D.

#### VI. ACTIONS FOR PENALTIES AGAINST CLERK AND DEPUTY RETURNING-OFFICERS UNDER R. S. O. c. 184, s. 168.

The plaintiff was a ratepayer of the township and a candidate for the office of reeve but was not elected. He brought this action under section 167 of the Consolidated Municipal Act, 1883, against a deputy returning-officer, who was also clerk of the township, to recover the penalty for a contravention of sections 154, 142, and 245 of the Act. There was no allegation that the plaintiff lost his election, or any votes, or suffered any personal grievance by the acts complained of.—Held, on demurrer to the statement of claim, that the plaintiff was not, by reason only of his being a candidate, a "person aggrieved" within section 167, and that he was thereupon not entitled to recover:—Held, also, that an action for the penalty under that section lies only for a breach of sections 118 to 166, inclusive, of the Act. *Atkins v. Ptolemy*, 5 O. R. 366.—Rose.

#### VII. ACCEPTANCE AND DECLARATION OF OFFICE.

The declaration required by the Municipal Act R. S. O. (1877), c. 174, s. 265, from every person elected under the Act to any office requiring a property qualification, is a prerequisite to the discharge of the duties of such office. Where an alderman elect did not state in his declaration the nature of his estate in, or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the Municipal Laws of Upper Canada":—Held, that the declaration was insufficient. *Regina ex rel. Clancy v. St. Jean*, 46 Q. B. 77.—Cameron.

The acceptance of office by a mayor elect, referred to in R. S. O. (1877), c. 174, s. 180, within a month from which a writ of quo warranto to try the validity of his election must issue, is a formal acceptance by the statutory declaration of qualification and office, and not a mere verbal acceptance by speech to the electors, or such like. *Regina ex rel. Linton v. Jackson*, 2 Chamb. R. 18, dissented from. *Regina ex rel. Clancy v. McIntosh*, 46 Q. B. 98.—Q. B. D.

The declaration of qualification not having been made, leave was given to the defendant to make the same within ten days, otherwise leave was granted to file an information on the ground that the defendant illegally exercised the franchises of the office. *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85.—Cameron.

See *Regina ex rel. Felitz v. Howland*, 11 P. R. 264, p. 1328.

#### VIII. MEETINGS OF COUNCIL AND CONDUCT OF BUSINESS.

See *Mearns v. Town of Petrolia*, 28 Chy. 98, p. 1327.

#### IX. OFFICERS OF THE CORPORATION.

##### 1. Tenure of Office.

Municipal officers appointed by the council hold office during the pleasure of the council and may be removed without notice and without cause. *Willson v. York*, 46 Q. B. 289.—Q. B. D.

(See R. S. O. (1887), c. 184, s. 279.)

##### 2. Treasurer and his Sureties.

Where a township treasurer was by his bond, dated 6th October, 1874, bound to duly account for all moneys coming into his hands and applicable to the general uses of the municipality:—Held, that clergy reserve moneys and money derived from the distribution of the provincial surplus which had by by-law been specifically appropriated to educational purposes, were not within the condition of the bond, and that the operation of this bond was not extended to school moneys by the R. S. O. (1877), c. 180, s. 213, and R. S. O. (1877), c. 204, s. 221. *Township of Oakland v. Proper*, 1 O. R. 330.—Boyd.

A treasurer was appointed by the plaintiffs under R. S. O. (1877), c. 174, by s. 274 of which all officers appointed by a council shall hold office until removed by such council. He furnished a bond dated the 1st of November, 1880, conditioned that if he should "well and truly discharge the duties of township treasurer so long as he shall remain in the said office, and shall render just and true accounts of all moneys, etc., as shall come and have come into his hands during his continuance in said office, and hand the same promptly into the hands of his successor in office, then, etc." He was reappointed annually for several years:—Held, the reappointments were not equivalent to removals and reappointments but were rather a retention in office of the same treasurer, and that the sureties were not in consequence thereof discharged. *Township of Adjala v. McElroy*, 9 O. R. 586.—Boyd.

To determine a man's office as treasurer under the statute, there should be some positive act of removal by which he is displaced and another appointed, or by which the office, though continued in the same person, becomes different in some material point. Mere implication arising from formal reappointment should not be deemed equivalent to such act of removal. *Id.*

The treasurer having failed to account for large sums, the council of the plaintiffs caused a letter to be written to him on the 27th of February, 1882, requiring him to settle all claims by a certain day otherwise a special meeting would be called to consider his case. He failed to settle, and the council did not carry out their threat. In 1883 the council again becoming dissatisfied with the treasurer, passed a resolution that no further payment should be made to him, but all moneys should be paid into a certain bank. In 1884, the council for that year

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rescinded this resolution and permitted the treasurer to receive the accumulated funds. No notice of any kind was given to the sureties:—Held, that the plaintiffs had failed to perform their duty by retaining the treasurer in office after they had become aware of his defalcations and continued default; and that their failure to do so was a breach of duty towards the sureties, which released the latter from all liability after the 27th of February, 1882. A reference was granted at the plaintiff's election to take an account of the amount due under the bond to that date, and in default of such election, the action was dismissed, with costs. *Id.* See also, *Town of Meaford v. Lang*, 20 O. R. 42, 541.

By R. S. O. (1877) c. 180, s. 10, as amended by 44 Vict. c. 25 s. 12 (Ont.), no assessor or collector shall hold the office of clerk or treasurer. The treasurer of plaintiffs, who was also clerk, was in that capacity permitted by resolution of the council to retain the collector's roll for three months and he was granted a percentage on money received by him for taxes. In an action against him and his surety:—Held, that that temporary function was not of such a nature as to terminate his duties as treasurer by necessary implication, and that when the money came to his hands with which he charged himself as treasurer, the responsibility of the surety began, but that the latter should not be charged with any sums which did not appear in the books of the former as treasurer and which were referable to taxes otherwise received by him. *Village of Weston v. Conron*, 15 O. R. 595.—Boyd.

See *Village of Gananoque v. Stunden*, 1 O. R. 1, p. 779.

## 4. Other Cases.

A declaration, after setting out the defendant's duty as town clerk, under the Assessment Act, R. S. O. (1877) c. 180, in the preparation of the collector's roll, alleged that he omitted and neglected in certain years, to set down in said collector's rolls for the said years a large number of persons who appeared by the assessment rolls liable to assessment, etc. A further breach was that the defendant, in breach of his said duty, did not in said collector's rolls, etc., set down the assessed value of all property liable to assessment of a large number of persons whose names were set down in said rolls, whereby the plaintiffs lost large sums of money, payable to them as taxes, and they claimed \$2,000:—Held, declaration bad; for that the first breach did not aver that the omission was made negligently, falsely, or dishonestly, but merely by mistake which would not render defendant civilly liable; while the second breach did not contain any allegation of negligence, bad faith, or even carelessness:—Held, also, that the period for bringing the action was not limited to two years under R. S. O. (1877) c. 61, s. 1. Quere, whether the defendant is only liable to conviction under section 189 of the Assessment Act, at the suit or upon complaint of the crown, or to a civil action by the plaintiffs as well. *Town of Peterborough v. Edwards*, 31 C. P. 231.—Galt.

Liability of corporation for fraudulent act of its clerk and treasurer acting within the scope of his authority, the corporation having received

the benefit of the fraud. See *Molson's Bank v. Town of Brockville*, 31 C. P. 174.

In December, 1884, B. was by-by-law appointed health officer of the township of Seymour, but the by-law did not fix any salary as might have been done under 47 Vict. c. 38, s. 20 (Ont.):—Held, on action brought by B. for remuneration, that the law would fix the salary at a reasonable sum, regard being had to the services performed, and to be performed by the plaintiff. *Fergart v. Township of Seymour*, 10 O. R. 322.—Ferguson.

A pathmaster is "an officer or person fulfilling a public duty" within the meaning of R. S. O. (1877), c. 73, s. 1, and for anything done by him in the performance of such public duty he is entitled to the protection of the statute; but where professing to act as a public officer, he seeks to promote his private interest by some act, he disentitles himself to the protection of the statute, and may be proceeded against for such act as if he were a private individual, and when a pathmaster of a township in the course of his employment so acted as to disentitle himself to the protection of the statute and thereby caused damage to the plaintiff:—Held, that the township corporation as well as the pathmaster was liable; and even if not originally so the corporation made itself liable by sanctioning what was done and refusing to amend it after notice. *Stalker v. Township of Dunwich*, 15 O. R. 342.—Q. B. D.

Exemption of salary from attachment. See *Re Macfie v. Hutchinson*, 12 P. R. 167, p. 543.

A medical health officer is not an employee of the municipal corporation within the meaning of R. S. O. (1877) c. 47 s. 125. *Id.* See *Forsyth v. City of Toronto*, 20 O. R. 478.

See *Re Godson v. City of Toronto*, 16 O. R. 275, p. 1385.

## X. BY-LAWS.

## 1. Signing and Sealing.

Municipality estopped from denying the validity of a by-law, which through inadvertence was not sealed or signed, for purchasing a road, which they dealt with as their own property, and subsequently passed a by-law divesting themselves of the road. See *Regina v. County of Perth*, 6 O. R. 195.

No seal in this case was affixed to the by-law, but an impression of the seal was made thereon:—Held, sufficient. *Re Croome and City of Brantford* 6 O. R. 188.—Rose.

See *Canada Atlantic R. W. Co. v. City of Ottawa*, 12 A. R. 234, p. 1336.

## 2. Creating Debts.

## (a) Promulgation and Submission to Electors.

The by-law voted on by the council was to take effect and come into operation on the 30th December, 1873, while the copy published, stated the 13th December, 1873, to be the day. Per Hagarty, C. J. O.—A variance between the proposed by-law and the copy submitted to the ratepayers to vote upon, as to the day upon



which it was to take effect was fatal to the by-law. *Canada Atlantic R. W. Co. v. City of Ottawa*, 12 A. R. 234; 12 S. C. R. 363.

In 1880 (before the passing of 46 Vict. c. 18 (Ont.)) a municipal council, with the view of granting a bonus to a railway company, caused to be submitted to the vote of the ratepayers a by-law to raise money for that purpose. At the voting thereon the votes for and against it were equal, and the clerk of the municipality, who also acted as returning-officer, verbally gave a casting vote in favour of the by-law:—Held, (reversing the judgment of the C. P. D., 11 O. R. 392) that section 152 of the Municipal Act, R. S. O. (1877), c. 174, is not applicable to the case of voting on a by-law, and therefore the casting vote of the clerk was a nullity, and the by-law did not receive the assent of the electors of the municipality within the meaning of R. S. O. (1877), c. 174, s. 317, as such a defect could not be cured by promulgation of the by-law. *Canada Atlantic R. W. Co. v. Township of Cambridge*, 14 A. R. 299; 15 S. C. R. 219.

Held, following *Canada Atlantic R. W. Co. v. Ottawa*, 12 A. R. 234, and *S. C. 12 S. C. R.*, p. 377, that the by-law was bad for non-compliance with section 330 of the Municipal Act, R. S. O. (1877), c. 174, the section corresponding with section 248 of 36 Vict. c. 48. Per Burton, J. A.—The provisions of section 248 of the Municipal Act of 1873 (36 Vict. c. 48), do not apply to by-laws for granting bonuses to railways, and the judgment of the Supreme Court of Canada in *Canada Atlantic R. W. Co. v. Ottawa*, 12 S. C. R., p. 377, does not so decide. *Ib.*

Held, in this case, that the by-law created a future indefinite and contingent liability, and if such a by-law was valid at all, it ought to have been submitted to the vote of the ratepayers. *In re Carpenter and Township of Burton*, 15 O. R. 55.—*Rose.*

The city derived income from certain sources independent of taxes, but this income with the taxes levied left a deficiency which had been met by borrowing money, which was still unpaid, and no appropriation had been made for the payment of \$5,000:—Held, that this did not validate the by-law without submission to the people. *Ib.*

Semble, that it was a fatal objection to the by-law that the day fixed by it for taking the votes of the electors thereon was more than five weeks after the first publication, contrary to section 293, sub-section 1, of the Municipal Act, R. S. O. (1887), c. 184. *Re Armstrong and the Township of Toronto*, 17 O. R. 766.—*Falconbridge.*

See *Re Oatrom v. Township of Sidney*, 15 O. R. 43; 15 A. R. 372, p. 1341.

#### (b) Registration.

Section 351 of R. S. O. (1887), c. 184, which requires a by-law creating a debt by the issuing of debentures for a longer term than one year to be registered within a fortnight from the final passing thereof, is merely directory. *Re Forlanger and Village of Morrisburg*, 16 O. R. 722.—*Street.*

Held, that any objections to the by-law in this case were cured by its registration under 44 Vict. c. 24, s. 29 (Ont.), no action or suit to set it aside having been made or instituted within three months, and that the statute applied although the debentures had not been issued. *Bickford v. Chatham*, 14 A. R. 32; 16 S. C. R. 233.

See *Harding v. Township of Cardiff*, 2 O. R. 329, p. 1344.

#### (c) Other Cases.

Refusal of council to finally pass a by-law the votes of the electors for passing the same having been procured by bribery. See *In re Langdon and The Arthur Junction R. W. Co. and the Township of Arthur*, 45 Q. B. 47.

Semble, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only but the by-law can be confirmed or rejected irrespective of a favourable vote. *Canada Atlantic R. W. Co. v. City of Ottawa*, 12 S. C. R. 363.

A by-law of the defendant corporation, providing for the delivery of debentures to a railway represented by the plaintiffs as a bonus to aid them in constructing their railway, having been adopted by a vote of the ratepayers on October 16th, 1873, was read a second and third time and passed by the council on October 20th, but was neither signed nor sealed, because a month had not elapsed from its first publication, the notice required by 36 Vict. c. 48, s. 231, sub-s. 3, to be appended to the copy of the by-law as published, having stated that the by-law would be taken into consideration after a month. On November 5th, 1873, a motion made in the council to read the by-law a second and third time and pass it, was lost. On April 7th, 1874, after the election of a new council, it was finally passed, signed, and sealed. Per Patterson, J. A.—The acts of signing and sealing a by-law are formalities which section 248 makes essential to a by-law for contracting a debt, and those acts should be done at the meeting at which the by-law has been passed, or at all events during the tenure of office of the member of the council who presides. *S. C.*, 12 A. R. 234.

The direction in section 236, that a by-law carried by a majority of voters shall, within six weeks thereafter, be passed by the council which submitted the same, refers to the council of the year in which the by-law was submitted, and not merely to the council of the same municipality; it is not intended by section 236 that the passing by the council should be a mere formality, such as would be satisfied by the irregular passing on October 20th, 1873. *S. C.*, 12 S. C. R. 365. But see *R. S. O.* (1887), c. 184, s. 284.

Per Hagarty, C. J. O., and Patterson, J. A.—The by-law was not legally passed, and did not acquire a legal existence until April 7th, 1874. It was subject to the provisions of 36 Vict. c. 48, s. 248 (Ont.), and was invalid under that section, because it did not name a day in the financial year in which it was passed on which it was to take effect. *Ib.*

By section 1 of the Municipal Amendment Act, 1888 (51 Vict. c. 28), that statute came

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into force on 1st August, 1888, except sect. 16 thereof, which was not to take effect until 1st November, 1888, and by sub-section 5 of section 16 the latter section was not to affect any by-law theretofore adopted or passed, the vote taken, or debentures issued or to be issued in pursuance thereof. A by-law granting a bonus to a manufacturing industry was passed by the municipal council of a village on the 29th October, 1888, after having been submitted to and approved by the electors. It provided on its face that it should take effect on 1st December, 1888. For this and similar by-laws an annual levy was required of an amount exceeding ten per cent. of the total annual municipal taxation of the village, contrary to the provisions of sub-section 4 of section 16 of 48 Vict. c. 28 (Ont.):—Held, that although the by-law was in contravention of sub-section 4 of section 16, yet, having regard to the provisions of section 1, and by the operation of section 16, sub-section 5, of that Act, the by-law was withdrawn from the effect of sub-section. Held also that the object of sub-section 1 of section 342 of R. S. O. (1887), c. 184 is to prevent the burthen of the debt incurred by borrowing money to pay the bonus from being irregularly distributed or unduly postponed to later years; and that the by-law in question, which provided for the raising of \$25,000 by the issue of twenty debentures for \$2,006.10 to fall due one in each year for twenty years, "it being estimated that the sale of such debentures will realize the said sum of \$25,000," and for levying \$2,006.10 in each year by a special rate, substantially complied with the sub-section. *Re Farlinger and Village of Morrisburg*, 16 O. R. 722.—Street.

The by-law instead of, as required by section 340 of the Municipal Act (1887), directing specific sums to be raised each year for the payment of the debt and interest to be so raised in each year by a special rate sufficient therefor, leaving the amount of the rate to be determined in each year, directed that during the currency of the debentures a special rate of so much on the dollar, specifying it, over and above all other rates, should be levied and collected in each year:—Held, this rendered the by-law bad. *Re Peck and the Township of Ameliasburg*, 17 O. R. 54.—Street.

Section 340 of the Municipal Act, R. S. O. (1887), c. 184, which authorizes municipal councils to pass by-laws for contracting debts, etc., provides, sub-section 2, that the whole of the debt and the obligations to be issued therefor, shall be made payable in twenty years at furthest, from the day on which such by-law takes effect. A by-law of a municipality to raise by way of loan \$5,000 to aid in repairing harbour works, provided that the debentures should be made payable annually, the first payment to be made on the 15th day of December in the year next succeeding the year in which the "repairs will have been completed":—Held, that, as the time of repayment was uncertain, the by-law was not in accordance with section 340, sub-section 2, and was therefore illegal and should be quashed. *Re Armstrong and the Township of Toronto*, 17 O. R. 766.—Falconbridge.

A by-law to raise a sum of money by way of bonus to aid an industry in a village, after being voted on by the electors, was finally passed on

3rd June, 1889, was promulgated on 20th June, and registered on 14th August following. It stated on its face that it was to come into force on 2nd July, 1889, and provided that the debentures to be issued thereunder should be payable in twenty years from the date of their issue, the 1st of October following:—Held, that, as the period of payment exceeded twenty years from the taking effect of the by-law, it was in contravention of section 340, sub-section 2, of the Municipal Act, R. S. O. (1887), c. 184, and should be quashed. *Re Cooke and the Village of Norwich*, 18 O. R. 72.—Galt.

See *Parish of St. Cesaire v. McFarlane*, 14 S. C. R. 738, p. 481.

### 3. Submission of Matters Generally to Electors.

Quare, whether several matters, each of which requires the assent of the electors, can be enacted in one by-law, or whether there must be separate by-laws separately submitted to the electors. *Re Crome and the City of Brantford*, 6 O. R. 188.—Rose.

The defendants' council passed through two readings by-laws for the limitation of the number of tavern and shop licences, under R. S. O. (1877), c. 181, ss. 17 and 24. Before the third reading the council passed a resolution authorizing the submission to the electors, contemporaneously with the general municipal elections, of the question whether such limitation was desirable or not, reserving, however, to the council, the final decision upon the propriety of passing the by-laws. The council also passed a subsequent resolution authorizing the expenditure of \$300 out of municipal funds in advertising the vote so to be taken. After the expenditure of the greater portion of the sum so voted, an action was brought by the plaintiff, on behalf of himself and all other ratepayers except the individual defendants, against the corporation and against the individual members of a sub-committee appointed by the council to superintend the advertising of the vote, and an interim injunction was moved for to restrain the defendants from submitting the question to the electors and from printing ballot papers, advertising the vote, or otherwise expending municipal moneys for the purposes contemplated by the resolutions:—Held, 1. That in so far as the application depended upon the expenditure of municipal funds for an improper purpose, it was too late, the greater portion of the funds voted having already been expended, and that the plaintiff should be left to obtain such order for repayment to the city by the other defendants as he might appear entitled to at the trial. 2. That the taking of a vote without legislative authority upon a matter over which, without the electoral assent, the council had complete jurisdiction, should not be restrained, there being no express legislative prohibition, and the council having acted bona fide, unless some good reason were shewn for the conclusion that the result would be injurious or unjust to the corporation or some of its members, which was not shewn in this case:—Sembles, that if the resolution had proposed to give to the result of the proposed vote a final and binding effect, thus substituting the direct decision of the electors for that of the council, the submission of the by-law

to the vote of the electors would have been illegal and ultra vires, and would have been restrained. *Helm v. Port Hope*, 22 Chy. 273, distinguished. *Davies v. City of Toronto*, 15 O. R. 33.—Street.

Under 52 Vict. c. 73, s. 14 (Ont.), the Corporation of the City of Toronto, "may by by-law entrust the management and control of the erection and completion of the proposed new combined courthouse and city-hall, \* \* to a commission consisting of three members who shall be appointed by by-law." The council previous to the submission to the vote of the electors of a by-law for the raising of money to erect such courthouse, published a pamphlet which contained under the heading, "Some of the reasons why the buildings should be erected," this clause: "In order that the buildings may be erected in accordance with the plans and specifications, \* \* legislation has been obtained, authorizing the appointment of three commissioners, to whom will be entrusted the supervision of the work." After the by-law was approved of and passed, the council decided not to appoint commissioners. In an action by a ratepayer to enjoin the corporation from proceeding with the work, pending the appointment of such commissioners, or for a mandamus ordering the council to make such appointment. It was:—Held, that as there was no person or class of persons for whose benefit the power under 52 Vict. c. 73, s. 14 (Ont.), was conferred, or upon whom a right was conferred to have it exercised, such power was not obligatory but only permissive:—Held, also, that as the representation contained in the pamphlet formed no part of the by-law, and was not a representation of an existing fact, but a mere statement of intention and formed no part of a binding bargain between the corporation and the ratepayers, there was nothing to bind the former to adhere to it, and they were at liberty to revoke or disclaim that intention and take another course, and that the action should be dismissed; but as the conduct of the corporation was so discreditable in the matter, their costs were refused. *Darby v. City of Toronto*, 17 O. R. 554.—Osler.

Remarks upon the practice of taking a plebiscite upon a subject wholly within the discretion of the corporation. *Ib.*

Relating to sale of liquor. See INTOXICATING LIQUORS.

See *Scott v. Corporation of Tilsonburg*, 13 A. R. 233, p. 1363; *Canada Atlantic R. W. Co. v. City of Ottawa*, 12 S. C. R. 365, p. 1336.

#### 4. Discriminating By-laws.

See *Jonas v. Gilbert*, 5 S. C. R. 356, p. 1367; *Regina v. Pipe*, 1 O. R. 43, p. 1375; *Peoples Milling Co. v. The Council of Menford*, 10 O. R. 405, p. 1362; *In re Clarke v. Township of Howard*, 14 O. R. 598; 16 A. R. 72, p. 1357; *Regina v. Flory*, 17 O. R. 715, p. 1351.

#### 5. Not for the Benefit of the General Public.

A by-law for closing up a square dedicated to the public and disposing of part thereof to a church contained a provision that the trustees of the church should pay all expenses in connection

with the by-law, and that it should not take effect till the municipality had been indemnified against loss by reason of passing it and of any proceedings to quash it:—Held, bad on its face, for it was plainly not passed in the public interest, but for the benefit of a particular class. *In re Peck and the Town of Galt*, 46 Q. B. 211.—Osler.

In 1856, the owner of lot five registered a plan shewing a subdivision of it into six lots with a lane running through the centre, which was intended for the use of the occupants of the lots adjoining it. He afterwards sold some of the lots, but they were all reconveyed to him. The lots were always fenced in as one property till 1876, when he sold all the lots and the lane to a bank, by whom a building was erected, the fences remained as they had been until removed when the building was in progress, and being afterwards replaced by a new closed fence. In 1880, at the instance of one M., the owner of the adjoining lot four, who had recently, at his own expense, laid out a lane across his lot, in continuation of the lane in lot five, and conveyed it to the corporation, a by-law was passed by the council opening the lane on lot five. It was shewn that M. was the only person interested in having the lane opened. Osler, J., quashed the by-law on the ground that it had not been passed in the interest of the public, but simply to subserve the interests of an individual:—Held, dismissing the appeal, that the registration of a plan of a subdivision of a town lot and sales made in accordance with it does not constitute a dedication of the lands thereon to the public, and the council had, therefore, exceeded their powers in passing the by-law in question:—Held, also, that the by-law, being passed in the interest of a particular individual, was properly quashed. *In re Morton and the City of St. Thomas*, 6 A. R. 323.

A road, originally a trespass road, running from Ottawa to Pembroke, through more than one county, following the course of the Ottawa River, had been used for upwards of forty years, and had become a public highway. The road in its course intersected diagonally lots 1 and 2, owned respectively by the applicant and D. In October, 1882, D., who was then, and had been for the three previous years, a member of the township council, petitioned the council to pass a by-law closing up this portion of the road, and procured K. and M., two of the council, to pledge themselves to support the by-law, in the belief that it was for the public benefit—D. agreeing to spend \$100 on the side line, and on which it was voted to have the bulk of the statute labour performed—but on their discovering that it was against the public interest, they asked D. to release them from their pledge, which he refused to do. He, however, pretended that he was not anxious for the passage of the by-law, and petitioned the council representing that his land might be injuriously affected thereby, and asked to be heard by counsel; but as he wished, as he said, "to be let down easy," he arranged that E. should support the by-law, which D. said would be defeated. E. accordingly voted for it, as also did M., and another councillor, D. being absent, and the reeve not voting, and in consequence the by-law was carried. D.'s counsel, who was also counsel for the township, attended the council meeting

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and spoke in favour of the by-law. It appeared that D. had guaranteed the council against all expense in the matter. It also appeared that the applicants had some buildings on his lot adjoining the road, which were used by farmers and others, the approach to which would be cut off by the closing of the road:—Held, under the circumstances, the by-law must be quashed with costs. *Hewison v. Township of Pembroke*, 6 O. R. 170.—Rose.

The municipal council of the township of Sidney passed by-law No. 279, to open a road east and west across four farm lots in the first concession of the township. A travelled road was already open from Belleville westward to the east end of the road to be opened under the by-law, at which point a side road ran north and south through the township. After crossing three lots, the proposed new road would intersect another north and south side road and, crossing this side road, it would extend westward across one more lot as a cul-de-sac. The applicant contended that this by-law was passed, not in the public interest, but to serve the private convenience of two landowners of the locality. It was, in answer, sworn by the members of the township council that they intended to complete the road as soon as possible across five more lots to the westward, till it would reach the next north and south sideroad through the township. This explanation was accepted by the court as answering any apparent presumption that the by-law was not passed in the public interest, as in this case none of the other circumstances were present which in other cases have led to the belief that private interests only were being considered in passing the by-law. *Re Ostrom and the Township of Sidney*, 15 O. R. 43.—Street. *Et see S. C.*, 15 A. R. 372.

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P. owned a small piece of land at the south end of a lane or street called Johnson street, twenty-six feet wide, in the city of Toronto, leading from Adelaide street to King street, extending nearly to the line between these streets, and continued to King street by an irregular private footway. M. and T. owned the adjoining lots on King street, extending back to the centre line, and P. had refused to sell his piece of land to them. They then, with other owners purporting to be owners of adjacent land, petitioned the city council under the local improvement clauses of the Municipal Act, reciting that they "were desirous of securing communication between King and Adelaide streets for vehicles by means of the above street, and certain lanes to the south thereof," and asking that said street might be opened up of the full width of twenty six feet from Adelaide street to the centre line of the block between King and Adelaide streets at the expense of the property benefited. The sub-committee of the council, to whom this petition was referred, and before whom the plaintiff had appeared to oppose it, said that nothing further should be done without notifying him, but about eight months afterwards, without any further notice to him, they passed a by-law opening up the lane to the centre of the block as prayed, but making no provision for extending it to King street. It was shewn that M. and T., through whose land such extension would pass, had refused to give a right of way for vehicles, as expressed in the petition, and had

agreed to pay all costs of opening the lane:—Held, that the by-law had been passed improperly, not in the public interest, but in that of M. and T.; and the corporation, on the application of P., was enjoined from proceeding under it. *Pells v. Boswell*, 8 O. R. 680.—Boyd.

A by-law passed by the council of the township of Mersea providing for the drainage of lands in Mersea and Romney. Per Burton, J. A.—Upon the evidence the corporation intended by the by-law to remedy a private grievance, and upon that ground the by-law was bad. *Re Township of Romney v. Township of Mersea*, 11 A. R. 712.

See *Ontario Natural Gas Co. v. Smart*, 19 O. R. 259.

## 6. Other Cases.

A by-law must be reasonably clear and unequivocal in its language in order to vary or alter the common law or statutable rights. *Croome v. Steeper*, 46 Q. B. 87.—Q. B. D.

Semble, that R. S. O. (1877) c. 174, s. 277, enacting that the powers of township councils shall be exercised by by-law—must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature. *Township of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503.—Osler.

A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. *In re Clark and the Township of Howard*, 9 O. R. 576.—O'Connor.

By-law held bad as opposed to public policy and morality in directing the assessors from time to time to limit their assessment. See *In re Denne and Town of Peterborough*, 10 O. R. 767, p. 1362.

A conviction for violating a by-law was quashed, the by-law having been passed on 27th March, to go into force the 3rd April following, in anticipation of an Act, 45 Vict. c. 24 (Ont.), passed the 10th March, to go into operation the 2nd April then next ensuing. *Regina v. Reed*, 11 O. R. 242.—O'Connor.

Held in this case that even if not ultra vires the by-law would have been objectionable in requiring as a condition precedent to the granting of a licence that an applicant should procure the consent of a number of persons in the neighbourhood. *Re Kelly*, 13 O. R. 451.—Wilson. See also *Regina v. Webster*, 16 O. R. 187, p. 1349.

A by-law should state its purpose on its face. *Jones v. Town of Port Arthur*, 16 O. R. 474.—Ferguson.

See also Subhead, XI. p. 1346.

## 8. Quashing.

### (a) Generally.

Where the plaintiff filed his bill seeking to quash a certain municipal by-law, passed to open a road, and also an award made thereunder:—Held, that there was nothing inconsistent in

this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award. Where, however, under such circumstances, the plaintiff, being called on by the court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor:—Held, he could not afterwards complain of having been forced to elect at the hearing. *Harding v. Township of Cardiff*, 2 O. R. 329.—Chy. D.

Refusal to quash by-law where inconvenience was likely to ensue. See *Begg v. Township of Southwold*, 6 O. R. 184, p. 1359.

The quashing of a by-law is not imperative, but discretionary. *Re Milloy and the Township of Onondaga*, 6 O. R. 573.—Rose.

On an application to quash a by-law incorporating a portion of township territory as a village:—Held, that the power of the court to quash an illegal by-law is not limited to cases where illegality appears upon the face of the by-law, but extends to cases where the illegality shewn is entirely extraneous. *Re Fenton v. County of Simcoe*, 10 O. R. 27.—Wilson.

See *Regina v. Cuthbert*, 45 Q. B. 19, p. 1345; *Colborne v. Town of Niagara Falls*, 9 O. R. 168, p. 1350; *Re O'Meara v. City of Ottawa*, 11 O. R. 603; 15 A. R. 75; 14 S. C. R. 742, p. 1371; *Scott v. Corporation of Tilsonburg*, 13 A. R. 233, p. 1363; *In re Clark v. Township of Howard*, 14 O. R. 598; 16 A. R. 72, p. 1357; *In re Robertson v. Township of North Easthope*, 16 A. R. 214, p. 1352.

#### (b) Who May Move.

Held, that the applicant in this case was not precluded from moving against the by-law by reason of his having expressed an opinion in its favour before its passage. *In re Peck and the Town of Galt*, 46 Q. B. 211.—Osler.

The applicants in this case had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law or had any part in the taking of the census objected to:—Held, that the applicants were not estopped from moving to quash the by-law. *Re Fenton v. The County of Simcoe*, 10 O. R. 27.—Wilson.

Held, that the applicant had not by voting against the by-law disentitled himself to apply to the court to quash it, or to the costs of his motion. *Re Armstrong and the Township of Toronto*, 17 O. R. 766.—Falconbridge.

Held, that a municipal drainage by-law, whether for the construction of an original work or the improvement of an old one, and whether the proceedings are taken under section 583, 585, or 586 of the Municipal Act, R. S. O. (1887), c. 184, is subject to the provisions of sections 571 and 572 requiring notice in writing to be given within ten days by any one intending to apply to have the by-law quashed, of his intention to so apply. And where such notice was

given by a solicitor and signed by him as solicitor for two named persons, stating that the application would be made on behalf of them and "others," and an application to quash was afterwards made to the court by persons other than those named:—Held, that the application was not made to the court by any person who had given the notice required by sections 571 and 572; that another ratepayer could not take advantage of the notice by adopting it as his own; and, the application of which notice had been given not having been made, the by-law became a valid one at the expiration of six weeks from its final passing; and the motion to quash it was dismissed with costs. *Re McCormick and the Township of Howard*, 18 O. R. 260.—Street.

See *In re Funston and the Township of Tilbury East*, 11 O. R. 74, p. 1357.

#### (c) Time for Moving.

The by-law dissolving a union of school sections was passed on the 7th April, and the application to quash was not made until December following:—Sembles, that the delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit. *In re McAlpine and the Township of Euphemia*, 45 Q. B. 199.—Osler.

Held, that a by-law passed to open a road and also an award thereunder not being void on its face, nor ultra vires, and the plaintiff not having attacked it for more than a year after its passing, but having on the contrary appointed an arbitrator to assess compensation thereunder, it had now become absolute and incontrovertible. Held, also, although such a by-law may not become effectual in law till registration thereof, nevertheless non-registration does not prolong the time allowed by R. S. O. (1877), c. 174, s. 323, within which it may be quashed, and such time does not count from the registration. *Harding v. Township of Cardiff*, 2 O. R. 329.—Chy. D.

The cases in which an amending by-law may be moved against after the expiry of a year from the passing of the original by-law considered. *Re Milloy and the Township of Onondaga*, 6 O. R. 573.—Rose.

Sembles, that although a motion to quash by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by shewing laches of the applicant, though in this case no such laches existed. *Re Fenton v. County of Simcoe*, 10 O. R. 27.—Wilson.

Held, that a by-law to raise a sum of money by way of bonus to aid an industry was not one by which a rate was imposed under section 334 R. S. O. (1887), c. 184, requiring an application to quash within three months from promulgation, but was a by-law for contracting a debt under sections 351 and 352, and that an application to quash within three months of its registration was in time. *Re Cooke and the Village of Norwich*, 18 O. R. 72.—Galt.

The meaning of section 572 of R. S. O. (1887), c. 184, is that in case the application to quash is not made within the six weeks prescribed by



section 571, the by-law shall be valid. Service of a notice of motion to quash a drainage by-law, under R. S. O. (1887), c. 184, ss. 571 and 572, and filing the affidavits in support of such motion within six weeks next ensuing the final passing of the by-law, is a sufficient making of the application, although such motion is not made returnable until after the expiry of that period. *Re Sweetman and the Township of Gosfield*, 13 P. R. 293.—Street.

See *Bickford v. Chatham*, 14 A. R. 32; 16 S. C. R. 236, p. 1336; *Re McCormick and the Township of Howard*, 18 O. R. 260, p. 1344.

#### (d) Costs.

Costs were not asked for in the rule, though they were at bar :—Held, that as costs are in the discretion of the court under the Judicature Act, this was no objection. *In re Peck and the Town of Galt*, 46 Q. B. 211.—Osler.

See *In re Workman and the Town of Lindsay*, 7 O. R. 425, p. 1374.

#### (e) Other Cases of Practice.

The validity of a by-law may be questioned on a motion to quash a conviction made under it. *Regina v. Cuthbert*, 45 Q. B. 19.—Osler.

An application to quash a municipal by-law must be by rule nisi, and not by notice of motion :—*Hewison v. Township of Pembroke*, 6 O. R. 170.—Rose.

Enquiry may in every case be had upon affidavits as to the existence of the facts constituting the statutory conditions precedent to the passing of the by-law, and as to any illegality in the manner of its being passed. *Re Fenton v. The County of Simcoe*, 10 O. R. 27.—Wilson.

In moving to quash a by-law, the practice having been adopted of applying to a judge sitting alone, an objection that the application should have been to the Divisional Court was not entertained; but such an application, if required to be made to the Divisional Court, must be to the Common Law Divisional Courts, and not to the Chancery Divisional Court. *In re Fenton and The Township of Tilbury East*, 11 O. R. 74.—O'Connor.

The Divisional Court ought not to entertain applications to quash by-laws, which should be made to a single judge. *Landry v. City of Ottawa*, 11 P. R. 442.—C. P. D.

Section 332 of the Municipal Act, R. S. O. (1887), c. 184, which requires four days' notice of an application to quash, is still in force; and the notice of motion given in this case, being only a two days' notice, was held insufficient. *Re Peck and Township of Ameliasburg*, 12 P. R. 664.—Street.

The proceeding by rule nisi to quash a by-law is no longer in force, and the proceeding by motion is substituted for it. *Id.*

There is no power under Con. Rule 485 to shorten the four days' notice required by R. S. O. (1887) c. 184, s. 332, as modified by Con. Rule 526, to be given of a motion to quash a municipal by-law. *Re Sweetman and the Township of Gosfield*, 13 P. R. 293.—Street.

The applicants to quash the by-law, having followed in their application the notice given by the council under section 572 to intending applicants, should not be prejudiced because that notice was incorrect; the council must be held to their own notice. *In re Robertson and the Township of North Easthope*, 15 O. R. 423.—Street.

The authority to proceed by rule or order nisi in quashing a by-law, conferred by R. S. O. (1887), c. 184, s. 332, is inconsistent with Con. Rule 526, and must therefore be taken to be repealed; for by 51 Vict. c. 2, s. 4, (Ont.), it is declared that all enactments in the Revised Statutes inconsistent with the Rules are repealed. It is therefore not now proper to proceed by order nisi. *Re Peck and Ameliasburg*, 12 P. R. 664, followed. *Hewison v. Pembroke*, 6 O. R. 170, distinguished. *Re Colenutt and Township of Colchester North*, 13 P. R. 253.—Street.

#### 10. Other Proceedings Relative to By-laws.

See *Alexander v. Township of Howard*, 14 O. R. 22, 1360; *Daries v. City of Toronto*, 15 O. R. 33, p. 1339; *Darby v. City of Toronto*, 17 O. R. 554, p. 1339.

### XI. GENERAL POWERS AND DUTIES.

#### 3. Animals Running at Large.

A municipal council by by-law passed pursuant to the Municipal Act, enacted that certain descriptions of animals (naming them), and all four-footed animals known to be breachy, should not be allowed to run at large in the township; and provided for fixing the height of fences. The plaintiff's cattle strayed from the highway into the lands of defendant Williams, whose fences were not of the height required by the by-law. He distrained them and they were impounded, defendant Steeper being the pound-keeper. In an action of replevin :—Held, that as the by-law did not affirmatively authorize these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the plaintiff was liable at common law, and under R. S. O. (1877), c. 195, for the damage done, irrespective of any question as to the height of the defendant's fences. *Croze v. Steeper*, 46 Q. B. 87.—Q. B. D.

By-law No. 84, passed by the township of Onondaga on 29th May, 1882, prohibited certain animals therein named running at large; and provided that, except between the 10th May and the 1st December in any year, it should not be lawful for the owners of any other animals not theretofore mentioned or indicated, to allow or permit the same to run at large. A fine or penalty not exceeding \$5 was imposed for every offence, but the animals were not thereby to be relieved from the operation of any by-law relating to pounds or pound-keepers, or for any trespass or damage committed or done by them through their being permitted to run at large. The recovery of fines and penalties (not adding the words "and costs"), was directed to be under section 421, et seq., of the Summary Convictions Act, with imprisonment, in the event of no distress, unless the fine or penalty and costs,

including costs of cominital, be sooner paid. By-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law No. 84, by striking out the words in italics:—Held, that the by-law was not oppressive or unreasonable as extending to all seasons of the year, in that it was no wider than the statute under which it was passed, Municipal Act, 1883, s. 492, sub-s. 2. *Re Milloy and the Township of Onondaga*, 6 O. R. 573.—Rose.

It was objected that the provisions in by-law 84 as to the levying fines were ultra vires, because section 492, sub-section 2, of the Municipal Act provided a mode of recovery, i. e., by sale of the animals impounded, and hence that section 421, et seq., did not apply; But:—Held, that the objection was taken under a misconception of fact, in that the by-law was not and did not profess to be a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law:—Quere, as to the effect of the omission of the words "and costs" in the clause of the by-law providing for the penalty; but as this was not taken in the rule it was not considered. *Ib.*

It was also objected that the by-law should have been limited in its provisions so as not to extend to Indian lands within the township, but the judge refused to quash on this ground: (1) because the quashing a by-law is not imperative but discretionary; (2) and if it were quashed the original by-law would remain; (3) it could only be quashed as to Indians and Indian lands; (4) the applicant was not prejudiced, and this was not a substantial objection; and (5) the Indians who were alone affected, were not complaining. *Ib.*

Sheep grazing on private unenclosed property in charge of a boy:—Held, not to be "running at large." *Ibbotson v. Henry*, 8 O. R. 625.—Q. B. D.

See also DISTRESS.

#### 5. Assize of Bread.

By-law 1128 of the city of Toronto declared what the weight of loaves should be, and enacted that the weight of each loaf sold or offered for sale should be stamped thereon, and that all bread offered for sale of any less weight than the weight fixed by the by-law should be seized and forfeited:—Held, that the by-law was intra vires and not unreasonable. *In re Naamith and the City of Toronto*, 2 O. R. 192.—Q. B. D.

#### 6. Auctions.

The defendant having sold land by auction under a decree of the Chancery Division of the High Court of Justice, was convicted of a breach of the by-law of the county of Huron, passed pursuant to the Municipal Act, R. S. O. (1877), c. 174, s. 465, sub-s. 2, providing that it should not be lawful for any person to sell by public auction any wares, goods or merchandise of any kind without a license:—Held, that the conviction was clearly bad, for the by-law did

not refer to lands; nor would the statute have authorized such a by-law. *Regina v. Chapman*, 1 O. R. 582.—Q. B. D.

#### 7. Bonus to Manufacturing Companies.

Held, affirming the judgment of Proudfoot, V. C., that a municipality, under 36 Vict. c. 48, s. 372, sub-s. 5 (Ont.), has power to lend money for the encouragement of a manufacturing establishment, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on debentures issued for the purpose of raising money to be so lent. The rate of interest on the debentures was seven per cent.:—Held, that section 217 of 29 & 30 Vict. c. 51, has not been repealed, though marked effete in the schedule prefixed to, and not re-enacted in, 36 Vict. c. 48 (Ont.), and that the above rate was therefore lawful:—Quere, whether the power to give would not include power to lend. If there had been no power to lend, and the mortgage taken by the municipality to secure repayment of the money lent was invalid:—Quere, whether this would afford any defence to the debentures:—Quere, whether the municipality having received the consideration stipulated for, the debenture holders might not have some remedy against the municipality, though not by direct suit on the debentures. *Scottish American Investment Co. v. Village of Elora*, 6 A. R. 628.

The plaintiffs under a by-law granted the defendant a bonus of \$20,000 to aid him in the manufacture of steam fire engines and agricultural implements, subject to a condition in the by-law that he should give a mortgage on the factory premises for \$10,000, and a bond for \$10,000, to be conditioned: (1) for the carrying on of such manufactures for twenty years; (2) during that period to keep \$30,000 invested in the factory; and (3) to insure the buildings and plant in plaintiffs' favour for \$10,000. The defendant gave the bond and mortgage, the latter containing a covenant for insurance, and he invested the \$30,000 as stipulated for. He also made a further mortgage on the premises to the plaintiffs for \$3,000 not mentioned in the by-law. The factory was one in which eighteen or twenty-five men might have been employed, and which could have turned out one hundred mowers in a year. In the course of two years only twenty mowers were constructed, and the number of persons employed dwindled down from eighteen to twenty to two or three:—Held, affirming the judgment of Proudfoot, J., (4 O. R. 1) that the performance contemplated by the parties, of the contract to carry on manufactures was one reasonably commensurate with the capabilities of the factory; and that, upon the evidence, the defendant had failed in the performance:—Held, also, that the \$10,000 mortgage was given as a security for any damages the plaintiffs might sustain by the defendant's default, to an extent not greater than \$10,000, and not as a charge for that specific sum:—Held, also, that as the \$3,000 mortgage was not authorized by the by-law, as to it the plaintiffs were not entitled to any relief. Remarks upon elements to be considered by the master in assessing plaintiffs' damages. *Village of Brussels v. Ronald*, 11 A. R. 605.

See *Re Cooke and the Village of Norwich*, 18 O. R. 72, pp. 1338, 1344; *Parish of St. Cesaire v. McFarlane*, 14 S. C. R. 738, p. 481; *Re Farlinger and Village of Morrisburg*, 16 O. R. 722, p. 1337.

See, also, Subhead XI. 15, p. 1361.

### 9. Buildings and Fire Limits.

A city corporation passed a by-law under R. S. O. (1877), c. 174, s. 467, sub-s. 6, which defined fire limits, within which buildings were to be of incombustible material; the roofs to be of certain metals, or slate, or shingles laid in mortar not less than half-an-inch thick, and no roof of any building already erected within the fire limits to be relaid or recovered except with one of the enumerated materials. The defendant was convicted for having laid new shingles on his wooden house without laying them in mortar. The house had been standing for many years before the by-law was passed:—Held, that the by-law was ultra vires, in so far as it referred to existing buildings or ordinary repairs or changes thereof, not being additions thereto. *Regina v. Howard*, 4 O. R. 377.—Hagarty.

The corporation of the town of P. passed a by-law to "Regulate or Prevent the Carrying on of Manufactures or Trades Dangerous in Causing or Promoting Fire," whereby it was provided that no such manufacture or trade should be allowed to be carried on within 300 feet of any other building, and a fine of from \$5 to \$20 was imposed for each day that a violation of the law continued, with distress on default of payment, and imprisonment in default of sufficient distress. Afterwards they passed another amending by-law, providing that the restriction should not exist if the owners of such buildings within 300 feet consented in writing, the said consent, however, to be submitted for approval by the chairman of the board of works:—Held, that the by-law as amended was invalid within the principles laid down in *Re Kiely*, 13 O. R., at p. 457, and in *Re Nash and McCracken*, 33 Q. B. 181, because, by requiring the consent of the owners of the adjoining buildings to be obtained it constituted these persons the judges of the right asked for, and divested the council of the power they should personally exercise, and by requiring the approval of the chairman of the board of works it permitted favouritism, and all persons who desired to follow the same trade were not placed on the same footing. It was also bad because it delegated in part the exercise of the judgment and discretion that should be exercised by the enacting body alone under R. S. O. (1887) (1887), c. 184, s. 496, sub-s. 14. *Regina v. Webster*, 16 O. R. 187.—Chy. D.

The council also passed another by-law making it unlawful to erect a steam-engine, etc., within the village limits without the leave of the council:—Held, that this by-law was also bad, and unauthorized by R. S. O. (1887), c. 496, sub-s. 14, since it applied to all cases whether there was danger in causing or promoting fire or not. *Id.*

The 10th sub-section of section 496 of the Municipal Act, R. S. O. (1887), c. 184, as regards walls of existing buildings, only applies to external walls thereof and not to internal walls,

and therefore municipal councils have no power to prescribe of what materials or of what thickness such internal walls should be. Sub-section 18 relating to party walls does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners. Where, therefore, a by-law was passed by the corporation of the city of H. prescribing the materials and thickness of the internal walls of every building, which, therefore, included existing buildings, and the defendant was convicted thereunder, by reason of, in the course of dividing a building erected before the passing of the by-law, and owned by him, into three separate shops, making the dividing walls of less thickness than that prescribed by the by-law, the by-law was held bad, and a conviction made thereunder was quashed. *Regina v. Copp*, 17 O. R. 738.—C. P. D.

### 10. Cab Stands.

Where, it was admitted that a by-law was within the power of a municipal council under sub-section 46, s. 496 of the Municipal Act, 1883, "for authorizing and for assigning stands for vehicles kept for hire on the public streets and places," etc., the court refused to quash the by-law on the ground, alleged by the applicant, that the stand interfered with the view of the falls from the hotel in question; that the manure on the stand was offensive, and the noise of the hackmen a nuisance, these being matters of municipal regulation, and the aid of the court if successfully invoked, being an interference with the discretion of the municipal council, and especially so as the stand in question had been there for twelve years, and maintained under successive by-laws. *Colborne v. Town of Niagara Falls*, 9 O. R. 168.—Rose.

### 11. Carts Used for Hire.

The defendant was convicted of a breach of a by-law passed under section 436 of R. S. O. (1887) c. 184, which provided that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," etc. The defendant was the owner of waggons and horses which, at the date complained of, were employed in hauling coal and gas pipes for a gas company, for which defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, and which were so being used on the day complained of:—Held, that the defendant came within the terms of the by-law, and was therefore properly convicted thereunder. *Regina v. Boyd*, 18 O. R. 485.—C. P. D.

### 12. Closing Shops.

A by-law passed by the town of A. under section 2, sub-section 2 of the Ontario Shops Regulation Act, 51 Vict. c. 33 (Ont.) provided, section 1. That all shops, etc., where goods were exposed or offered for sale by retail in the town, should be closed at seven p.m. on each day of the week, excepting Saturday, from the 15th January to the 15th September, etc. Section 3 provided that it should not be deemed an in-

fraction of the by-law for any shopkeeper or dealer to supply any article after seven p.m., to mariners, owners or others of steamboats or vessels calling or staying at the port of A. :—Held, that the by-law was bad, for that section 3 was illegal in discriminating between different classes of buyers, and different classes of tradesmen, and was in contravention of sub-section 9 of said section 2 of the Act. A conviction of the defendant under the by-law was therefore quashed. *Regina v. Flory*, 17 O. R. 715.—C. P. D. See 52 Vic. 44, s. 3 (Ont.)

### 13. *Drainage, Powers.*

See *In re Mackenzie and the City of Brantford*, 4 O. R. 382; p. 1373; *Regina v. Webster*, 16 O. R. 187, p. 1349.

### 14. *Drainage of Lands.*

#### (a) *Petition.*

A petition was presented under section 529 of the Municipal Act of 1877 for the draining of certain lands, by constructing a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shown by the assessment roll to be benefited by the work, viz., thirty-three. A resolution of the council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream and some by informing the council that they would dig their own drains themselves. By a subsequent petition three more desired to do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the work. The names of the six of the original petitioners remaining were not in the schedule to the by-law of those to be benefited. This left the number of petitioners at eleven. The council having procured a second estimate, shewing that by diverting the direction of the drain the work could be done at less expense, passed a by-law reciting that a majority of those to be benefited had petitioned, and providing for the construction of the work according to the altered plans. No debentures had been issued, nor contracts let, when a motion was made to quash the by-law :—Held, that the by-law should be quashed : for (1) the council had no power to authorize the undertaking of any work other than that petitioned for, and if that was impracticable or too costly they should have refused the petition ; (2) the petitioners had the right to withdraw at any time after subscribing the petition, and before the contracts were let or the debentures negotiated, while the council had control of the matters, the preliminary surveys and estimates being as much for the information of the petitioners as of the council ; (3) a sufficient number of petitioners having withdrawn to reduce the number below the majority of those so to be benefited, the by-law untrue recited that a majority, etc., had petitioned. *Re Misener v. Township of Wainfleet*, 46 Q. B. 467.—Wilson.

A petition for a drainage by-law was signed by a majority of the owners of the land designated in the petition, but the applicant was not one of the petitioners, nor was his land part,

nor did he reside on any part of the land described in the petition, but the surveyor who made the examination and prepared the estimates reported that his lands would be benefited by the works, and he was accordingly assessed, and the by-law was finally passed :—Held, that the by-law was valid. *In re White and the Township of Sandwich East*, 1 O. R. 530.—Cameron.

A by-law was passed by the township of Mersea, providing for the drainage of lands in Mersea and Romney, and assessing property owners in both townships :—Held, that the by-law was invalid because the petition therefor did not describe the property to be benefited, and the by-law itself, which did shew the property to be benefited, disclosed that the petitioners were not the majority of the owners of such property. *Re Township of Romney and Township of Mersea*, 11 A. R. 712.

A petition of land owners under 46 Vict. c. 18, s. 570 (R. S. O. (1887), c. 184, s. 569), for the construction of drainage works must include a majority of all the persons found by the engineer to be benefited by the proposed works and not merely a majority of the persons mentioned in the petition itself as being benefited. Unless the petition is signed by such majority the council have no jurisdiction and a by-law founded on a petition not so signed is void and cannot be upheld even though valid on its face. If the petition is not signed by such majority the opponents of the by-law are not restricted to the mode of objection given by sections 292 and 293 of the Act of 1883, (R. S. O. (1887), c. 184, ss. 291, 292), but are entitled to attack the validity of the by-law on this ground by an application to quash even after an unsuccessful appeal to the council. Where a council know that a majority have not signed though no evidence to prove this fact is given by the opponents of the by-law, it is just as much their duty not to pass the by-law as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it and they have no right to impose upon the opponents of the by-law as a term for refusing to pass it, any condition as to payment of expenses theretofore incurred. Decision of Street, J., (15 O. R. 423), reversed. *In re Robertson and the Township of North Easthope*, 16 A. R. 214.

See *Begg v. Township of Southwold*, 6 O. R. 184, p. 1359; *Township of West Nisour v. Township of North Dorchester*, 14 O. R. 494, p. 1353; *Township of Chatham v. Township of Dover*, 12 S. C. R. 321, p. 1356.

#### (b) *Drains Extending through Several Municipalities.*

The township of N., on the petition of seven out of ten property owners, passed a by-law under 46 Vict. c. 18, sec. 570 (Ont.), for construction of a drain which was to extend through the adjoining township of D., forming one entire scheme of drainage through both townships. The property owners directly affected by the work were thirty-nine in D. and ten in N., and the ratable division of the cost of the work was \$1,345 to be paid by N., and \$5,725 by D. This action was brought by N. to compel D. to pass a by-law under 46 Vict. c. 18, s. 581, to raise

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l. *In re White*  
East, 1 O. R.

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its portion of the fund, which it refused to do:—  
Held, (affirming the judgment of Galt, J.), that  
the case was not one contemplated by section  
570 and following sections, but fell within sec-  
tion 598, and the county council was the proper  
authority to pass a by-law for the construction  
of such a drain as that proposed:—Semble, that,  
even under section 570, in cases where the drain-  
age work extends beyond the limits of one town-  
ship, a petition by the majority in number of the  
persons to be benefited in part of the townships  
is required, the parts of both townships being  
considered for the purpose of the Act as forming  
a quasi-municipality for the proper drainage of  
the particular locality, so that a majority of all  
that section formed by the combined parts of the  
two municipalities may ask for, and if the coun-  
cil of the originating township thinks proper,  
obtain the needful relief. Corporation of Dover  
v. Corporation of Chatham, 12 S. C. R. 321,  
commented on. Township of West Nissouri v.  
Township of North Dorchester, 14 O. R. 294.—  
Chy. D.

See *Township of Chatham v. Township of*  
*Dover*, 11 O. R. 248, p. 1356; *Township of Bar-*  
*ton v. City of Hamilton*, 17 A. R. 346, p. 1375.

#### (c) Notice and Publication of By-law.

The omission of the words "during the term  
next ensuing the final passing of the by-law,"  
from the notice with regard to a drainage by-  
law, under R. S. O. (1877), c. 174, s. 531, does  
not render the by-law invalid. *Re McLean and*  
*the Township of Ops*, 45 Q. B. 325.—Armour.

Where a by-law finally passed differs from  
that published only in respect of changes made  
in the assessment by the Court of Revision and  
county judge, it is not necessary to publish such  
by-law again after such changes. *Ib.*

A proposed by-law of the township of Roches-  
ter, in the county of Essex, relating to drainage,  
was published in a newspaper in Windsor, a  
large town, and for all other than judicial and  
municipal business, practically the county town,  
and situate two miles from Sandwich, the county  
town. There was no newspaper published either  
in Rochester or in Sandwich, or in the next ad-  
joining municipality; but there were papers  
published in several small villages, somewhat  
nearer the township of Rochester than Windsor,  
but their circulation was much smaller in  
Rochester than that of the Windsor paper:—  
Held, that the publication was sufficient; since  
if the words "adjoining local municipality," as  
used in 42 Vict. c. 31, s. 27, were construed  
"next adjoining, etc.," it would be impossible to  
publish the by-law as directed by the Act; and  
it did not form sufficient ground of objection  
thereto, that there were other papers a few  
miles nearer to Rochester than Windsor was.  
*Re Gallerno and the Township of Rochester*, 46  
Q. B. 279.—Wilson.

It was objected that no copies of the by-law  
or notices attached were posted up as required,  
but the applicant knew of the by-law before it  
passed, and appealed from his assessment to the  
Court of Revision:—Held, that the objection  
should not be given effect to. *In re White*  
*and Township of Sandwich East*, 1 O. R. 530.—  
Cameron.

See *In re Robertson and the Township of North*  
*Easthope*, 15 O. R. 423, p. 1346.

#### (d) Assessment.

Where the engineer who made the assessment  
under a drainage by-law was not notified, and  
was not present at the Court of Revision, but  
was present on the appeals therefrom to the  
county judge, which were taken by all who ap-  
pealed to the Court of Revision:—Held, no  
ground for setting aside the by-law. *Re Mc-*  
*Lean and the Township of Ops*, 45 Q. B. 325.—  
Armour.

The engineer is the proper party to make the  
assessment. The principle on which the assess-  
ments were made, of assessing against a whole  
lot or a part of a lot owned by one person, when  
only some of its acreage was benefited, the value  
of such benefit:—Held, not erroneous; and this  
would at all events have formed no ground for  
quashing the by-law, as this was a matter of  
which complaint might have been made to the  
Court of Revision. *Ib.*

On appeal to the county judge he reduced the  
assessment on one lot by only half, the owner  
F. consenting, although according to the evi-  
dence it should have been further reduced. In  
distributing the amounts struck off among the  
other properties assessed he added nothing to  
the assessment of this lot, so fixed by consent,  
but he certified that the other owners were as-  
sessed for less than they would have been but  
for F.'s consent:—Held, that R. S. O. (1877), c.  
174, s. 530, sub-s. 13, had been practically com-  
plied with. *Ib.*

The arbitrators appointed by the plaintiff and  
defendant municipalities, on an appeal by the  
defendants from the report of the surveyor,  
made an award pursuant to the Municipal Act,  
whereby they adjudged that the deepening of a  
creek, etc., benefited lands in the defendant  
municipality, and that the latter should pay  
therefor \$350; but the award did not specify  
the lands which in their opinion were so bene-  
fited, nor charge such lands with a just propor-  
tion of the cost of the works:—Held, that for  
this reason the award was invalid. *Township*  
*of Thurlow v. Township of Sidney*, 1 O. R. 249.—  
Cameron.

Held, that the question whether the lands are  
in fact benefited is one for the court of revision,  
or the judge of the County Court on appeal  
therefrom. *In re White and the Township of*  
*Sandwich East*, 1 O. R. 530.—Cameron.

Under the drainage clauses of the Municipal Act  
a by-law was passed by the township of Chatham  
founded on the report, plans and specifications  
of a surveyor, made with a view to the drainage  
of certain lands in that township. The by-law,  
after setting out the fact of a petition for such  
work having been signed by a majority of the  
ratepayers of the township to be benefited by  
the work, recited the report of the surveyor, by  
which it appeared that in order to obtain a suffi-  
cient fall it was necessary to continue the drain  
into the adjoining township of Dover. The  
surveyor assessed certain lots and roads in Dover,  
and also the town line between Dover and  
Chatham, for part of the cost as for benefit to  
be derived by the said lots and roads therefrom



The township of Dover appealed from this report, under section 583 of 46 Vict. c. 18, on the grounds, *inter alia*, that a majority of the owners of property to be benefited by the proposed drainage works had not petitioned for the construction of such work as required by the statute; that no proper reports, plans, specifications, assessments and estimates of said proposed work had been made and served as required by law; that the council of Chatham, or the surveyor, had no power to assess or charge the lands in Dover for the purposes stated in the said report and by law; and that the report did not specify any facts to show that the council of Chatham, or their surveyor, had any authority to assess the lots or roads in Dover for any part of the cost of the proposed work; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived from the proposed work, and that no assessment whatever should be made on the lands or roads in Dover, as the work would, in fact, be an injury thereto, and that the report did not sufficiently specify the beginning and end of the work, nor the manner in which Dover was to be benefited. Three arbitrators were appointed under the provisions of the Act, and at their last meeting they all agreed that the township of Dover would be benefited by the work, but R. F., one of the arbitrators, thought \$500 should be taken off the town line, and W. D., another of the arbitrators, held that while the bulk sum assessed was not too great, the assessment on the respective lands and roads, and parts, thereof, should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award, "if in accordance with the above memoranda."

Later on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line, made by the surveyor, should be sustained and confirmed, and that the appeal should be dismissed, and that the several grounds mentioned in the notice of appeal had not been sustained. The Queen's Bench Division set aside this award on the two grounds, namely, of want of concurring minds in the arbitrators, and of defect in the surveyor's report in not showing specifically the beginning and end of the work. (5 O. R. 325.) The judgment of Cameron, C. J., was sustained by the Court of Appeal. 11 A. R. 248. Per Hagarty, C. J. O., and Osler, J. that the award was bad (a) as formally sanctioning and confirming the particular assessments on lands and roads and the town line, instead of the aggregate amount assessed, the latter being the only award contemplated at the last meeting, at which all three arbitrators were present; (b) because one of the arbitrators had recorded his dissent from the adjustment or scheme of assessment, and yet by the award purported to sanction or affirm it. Per Burton and Patterson, J.J.A., contra, that the duty of the arbitrators was confined to ascertaining the correctness of the proportions payable by each township: that all other objections as to the amounts of the assessment were for the court of revision, and that the award did not substanti-

ally differ from the memorandum signed at the last meeting of the arbitrators. *Essex v. Rochester*, 42 Q. B. 523, and *Thurlow v. Sidney*, 1 O. R. 249, commented on. Held, also, in the Court of Appeal, that the report of the surveyor, incorporated in the by-law, sufficiently shewed the termini of the proposed work, and that under the circumstances it was not open to the objections that it did not expressly state that the work was to be constructed at the expense of both townships and in what proportions, and that it determined, in apparent disregard of section 554, that the work was to be kept in repair by Chatham at the joint expense of Chatham and Dover. Osler, J. A., dissenting. On appeal to the Supreme Court of Canada:—Held, Ritchie C. J. dissenting, that the award should have been set aside upon the ground that it was not shown that a petition for the proposed work was signed by a majority of the owners of the property to be benefited thereby, so as to give to the corporation of Chatham jurisdiction to enter the township of Dover and do any work therein.—That the arbitrators should have adjudicated, upon the merits of the appeal, against the several assessments on the lots and roads assessed, as their award was, by sections 400 and 403 of 46 Vict. c. 18, made final, subject to appeal only to the High Court of Justice, and it was not a matter for the Court of Revision to deal with at all as held by one of the arbitrators.—That the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the Township of Dover upon all the grounds of appeal stated in the notice of appeal, and did in point of fact charge every one of the lots and roads so assessed with the precise amount assessed upon them respectively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to be to submit that to the Court of Revision.—That the arbitrators should have allowed the appeal to them against the surveyor's assessment, and that their award should also have been set aside on the merits, because the evidence not only failed to show any benefit which the lots or roads in Dover, which were assessed, would receive from the proposed work, but the evidence of the surveyor himself showed that he did not assess them for any benefit the work would confer upon them, but for reasons of his own which were not sufficient under the statute and did not warrant them to be assessed. *Township of Chatham v. Township of Dover*, 12 S. C. R. 321.

Held, upon the true construction of the drainage sections of the Municipal Act, that when drainage works are extended and continued into an adjoining township beyond the limits of the township in which they are commenced, the roads in the former township and the town line are liable to be assessed in proportion to the benefits derived by them therefrom. Osler, J. A., dissenting. S. C., 11 A. R. 248.

In a drainage by-law the assessments as made by the engineer, contained in the schedule to the by-law, were revised by the court of revision, and alterations made, but the by-law was not amended before being finally passed so as to correspond with such alterations as required by section 571, sub-section 2, of the Municipal Act of 1883, and it was impossible to discover from

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lot, and therefore the amount to be annually  
levied, to be ascertained by dividing such total  
special rate by the number of years the by-law  
has to run, which in this case was fifteen years :  
—Held, that the defect was fatal to the by-law.  
The locus standi of the applicant herein was ob-  
jected to, but on the evidence, the objection  
was overruled. *In re Fawston and the Township  
of Tilbury East*, 11 O. R. 74.—O'Connor.

The allowance in the engineer's report of a  
lump sum as "chargeable to municipality for  
roads" was sufficiently definite, there being only  
one municipality concerned. *Re Essex  
and Rochester*, 42 Q. B. 523, distinguished. The  
engineer, having himself made an inspection  
of each lot and estimated how much each would  
be benefited by the drain, might properly dele-  
gate to an assistant the duty of making a calcu-  
lation upon the basis established by him. *In re  
Robertson and Township of North Easthope*, 15  
O. R. 423.—Street.

On the 21st September, 1868, a by-law was  
passed by the township council under the pro-  
visions of the Municipal Act of 1866—29 and 30  
Vict. c. 51, ss. 281 and 282—for the construction of  
(among other drains) the M. drain, and the drain  
was thereupon constructed. On the 11th Decem-  
ber, 1883, the township council passed a by-law  
for repairing and cleaning this drain, and directed  
that the amount required for this purpose should  
be assessed and levied on the lands assessed for  
the original construction of the drain. On the  
21st September, 1886, another by-law was passed  
to change, in accordance with the report of an  
engineer, the assessment made for the original  
construction of the M. drain so as to enable the  
assessment for repairing and cleaning the drain  
to be made more equitably, and a new assessment  
for repairing the drain was adopted. This assess-  
ment for repairing and cleaning the drain was  
limited to the lands assessed for the original  
construction of the drain, although the engineer  
in his report pointed out that large tracts of land  
not assessed for the original construction of the  
drain were now benefited by it.—Held, that the  
provisions of the Act of 1869,—32 Vict. c. 43, s.  
17,—as to maintenance and repair, (now R. S. O.  
1887 c. 184, s. 583 (1),) are not retroactive, and  
do not apply to drains constructed before the  
date of that enactment; and that therefore the  
township council had no power to pass the by-  
law in question. Per Hagarty, C. J. O.—The  
by-law was also bad because the assessment for  
repairs was limited to the lots assessed for the  
original construction of the drain, and did not  
embrace the lots subsequently benefited. Per  
Burton, J. A.—Assuming the case to come within  
the Act of 1866, the assessment was properly  
limited to the lots assessed for the original con-  
struction of the drain. Decision of Robertson, J.  
(14 O. R. 598), affirmed on other grounds. *In  
re Clark and the Township of Howard*, 16 A. R.  
72.

In 1886, an application was made to the Chan-  
cery Division to quash the by-law passed in  
1883, which was heard in December, 1886, and  
judgment delivered in February, 1887, declar-  
ing the by-law to be a void proceeding. The  
by-law in question was passed on 21st Septem-  
ber, 1886 :—Quære, whether this by-law was

thereby rendered invalid. *S. C.*, 14 O. R. 598.—  
Robertson.

The owner of certain lands in the defendant's  
township through which a drain had been made  
by them under the drainage sections of the  
Municipal Act, made a claim for damages, upon  
which an arbitration was had and compensation  
awarded him, it being shewn that it would be  
necessary to construct a bridge to cross his  
farm; to put up and maintain flood gates; and  
that he was deprived of about three and a-half  
acres of land :—Held, that the case came within  
sections 591-2 of the Municipal Act, 1887, under  
which he was entitled to the compensation  
awarded, which must be assessed on the lands  
liable to assessment for the drainage work. *In  
re Byrne and Township of Rochester*, 17 O. R.  
354.—C. P. D.

See *Begg v. Township of Southwold*, 6 O. R.  
184, p. 1359; *In re Clark v. Township of How-  
ard*, 9 O. R. 576, p. 1360; *Alexander v. Town-  
ship of Howard*, 14 O. R. 22, p. 1360; *Dillon v.  
Township of Raleigh*, 13 A. R. 53; 14 S. C. R.  
739, p. 1350.

#### (c) Other Cases.

Where, on the petition of the plaintiff and  
other ratepayers, a township corporation had  
passed a by-law for the construction of the B  
drain, and the assessment of the lands to be  
benefited thereby, part of which the plaintiff  
owned, but the drain had not been completed,  
though a reasonable time had elapsed, and a  
portion of the moneys assessed had been applied  
upon a certain other drain, not mentioned in  
the petition, the report of the public land surveyor  
made pursuant to R. S. O. (1877), c. 174, s. 529,  
or in the said by-law, and of no value to the  
said petitioners :—Held, that the plaintiff was  
entitled to an order compelling the corporation  
to complete the B drain according to the by-law,  
to an injunction to restrain further misappli-  
cation of the moneys assessed, and to an account  
thereof, for that the by-law created a trust  
which had been violated :—Held, also, that the  
plaintiff was entitled to maintain the action  
without the attorney-general. Held, also, that  
the fact that the moneys so assessed, were so  
diverted pursuant to a resolution of the council,  
passed in accordance with a promise made to  
certain of the petitioners for the B drain, who  
signed such petition and submitted to assessment  
on the faith of such promise, was no justification  
of such diversion :—Held, lastly, that this was  
not a case for arbitration, or, at all events, not  
a case in which the plaintiff was bound to pro-  
ceed in that manner. *Smith v. Township of  
Raleigh*, 3 O. R. 405.—Chy. D.

A by-law passed for raising the unpaid por-  
tion of the expense of cleaning out and repairing  
a drain, otherwise good on its face, was objec-  
ted to on the ground that while the resolution  
and by-law authorizing the work to be done  
were for such cleaning and repairing only, the  
work actually done included deepening, which  
it was contended could only be done by petition  
therefor under section 570 of the Municipal Act.  
It appeared that the drain, if deepened, which  
was not free from doubt, was done accidentally,  
and not by design. Under the circumstances,  
the objection being without merits, and as much

inconvenience would ensue if the by-law was quashed, an application therefor was refused; but apart from this:—Quere, whether under sections 570, 589, of the Municipal Act, 1883, and 43 Vict. c. 26, 17 (Ont.), the municipality had not power without petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state. A further objection that the assessment was altered without notice, and without affording an opportunity to appeal was disallowed, the evidence failing to establish any such alteration. *Begg v. Township of Southwold*, 6 O. R. 184.—Rose.

On the petition of the plaintiff and other ratepayers in the township of Raleigh, the municipal council passed a by-law for the construction of the Kersey drain and the assessment of the lands which would be benefited thereby, amongst others those of the plaintiff; and in pursuance of such by-law the amount estimated to be requisite for the execution of the work was raised by such assessment. After the drain had been constructed and accepted by the council from the contractors it was completed, a balance remained in the hands of the municipality of about \$2,000, which, in compliance with a petition presented by the plaintiff and other contributories to the fund, was refunded ratably to them. The plaintiff had himself been allotted a section of the work for construction, and had been paid therefor, although he had not fully carried out his contract. Subsequently, and after the defendants had so disbursed the full amount of such assessment, the plaintiff claimed to have discovered that the drain had not been properly constructed according to the plans, specifications, and profiles of the engineer employed to lay out the same, and sought on behalf of himself and other ratepayers to compel the municipality to complete the drain according to such plans, etc.:—Held, reversing the judgment of Ferguson, J., that the plaintiff being himself a defaulter in the performance of his contract and having been a party to procuring a distribution of the surplus of the fund which otherwise might have been devoted to attaining the object sought by him, could not require the council to execute work which they had not the means to pay for. *Dillon v. Township of Raleigh*, 13 A. R. 53. See *S. C.*, 14 S. C. R. 739.

Sections 570, 574, 584, 587, 589, 592 of the Municipal Act 46 Vict. c. 18 (Ont.), relating to the powers of Municipal councils as to drainage, etc., considered and explained. *S. C.*, 13 A. R. 53.

A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. A by-law therefore defining the duties of inspectors of drains and enacting (1) That obstructions wilfully placed in drains should be removed by the parties placing them there or at their expense, without regard to whether such parties owned the lands through or between which such drains were situate; (2) That if such obstructions were removed by the council the cost should, on completion of the work, be paid by the council, instead of enacting that it should be so paid only in the event of the party chargeable with the obstruction failing to do so; (3) That if paid by the council the amount of such cost should be charged on the collector's roll against the lands

of the party chargeable, instead of only against the party himself; (4) Because no appeal was provided for against such charging of such cost upon the collector's roll, was quashed with costs. *In re Clark and the Township of Howard*, 9 O. R. 576.—O'Connor.

Section 589 of the Consolidated Municipal Act, 1883, 46 Vict. c. 18 (Ont.), does not authorize the passing of a by-law for cleaning out or improving a drain without the due observance of the formalities mentioned or referred to in section 584. It must be read in conjunction with the respective sections mentioned in it. *Alexander v. Township of Howard—Galbraith v. Township of Harwich*, 14 O. R. 22.—Ferguson.

Where, the defendants purported to pass and act upon a by-law for the cleaning out or improvement of the McG. drain, and the assessment of certain persons for the necessary costs, and this without any petition being presented therefor, or any assessment of an engineer, or any statement by an engineer of the proportion of benefit to be derived from the work by any lot or part of a lot of land, and without publishing the by-law or assessment, or the holding of any court of revision to which appeals from the proposed assessment might be made:—Held, that such by-law was unauthorized and illegal, and that being a void proceeding an attack upon it was not prevented by secs. 333, 335, or 340 of 46 Vict. c. 18 (Ont.) as to quashing by-laws; and also that though the plaintiffs in this action were not moving to quash the by-law or suing for damages under it, but only asking for a declaration that it was illegal, and an order restraining the defendants from collecting from them the assessment thereunder, and compelling them to remove the charge thereunder upon the plaintiffs' lands, they were entitled to have it declared that they were not liable to pay the assessments against them under the by-law in question, on the ground that the same was illegal and a void proceeding. *Id.*

The plaintiffs brought this action as land-owners injuriously affected by certain drainage works of the defendants and the assessments made under by-laws relating to the same, seeking damages and other relief:—Held, that there was no misjoinder of plaintiffs, nor was it incumbent on the plaintiffs to sue on behalf of any others, and also that the plaintiffs had the right thus to proceed by way of action and not of arbitration. *Id.*

A by-law, founded on the usual petition, was passed by defendants for the drainage of certain lands in the township, and a contract therefor, under defendants' corporate seal, entered into with plaintiff for the construction of the drain. The depths required were marked on the profiles forming part of the contract. Between certain points where the deepest excavation was required, the drain was to be tiled and covered. After the plaintiff had proceeded some distance between these points, the defendants' engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given and that the drain was not deep enough between the said points, and he directed the drains to be deepened and the tiles, so far as laid, to be taken up and relaid at the increased depth, thereby occasioning to the

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the Municipal Acts, councils, in the case of  
drainage works, are authorized to make an  
assessment upon the property of those benefited  
when the means provided are not sufficient;  
and any damages recovered in proceedings re-  
specting such works are to be charged against  
the lands benefited. It was proved that the  
work done was absolutely necessary, for with-  
out it the drain would have been useless. No  
formal resolution of the council was passed  
authorizing this work to be done, nor was there  
any contract therefor under the corporate seal.  
In an action against defendants to recover the  
value of such work:—Held, by the C. P. D. (15 O.  
R. 506), that the defendants were liable therefor.  
An appeal to the Court of Appeal was allowed,  
with costs, the court being of opinion that the  
work in question was work that the plaintiff was  
bound to perform under the contract itself:—  
Quere, whether the work in question was in any  
event "necessary" in such a sense as to impose  
liability for payment therefor upon a municipal  
corporation without an express contract. The  
decision of the C. P. D. upon this point doubted.  
*Green v. Township of Orford*, 16 A. R. 4.

See *In re Brock and the City of Toronto*, 45  
Q. B. 53, p. 1374; *In re White and the Township*  
*of Sandwich East*, 1 O. R. 530, p. 1352; *Van*  
*Eymond v. Town of Seaford*, 6 O. R. 599; *Town-*  
*ship of Barton v. City of Hamilton*, 18 O. R. 199,  
p. 1375; *Re McCormick and Township of How-*  
*ard*, 18 O. R. 260, p. 1344.

#### 15. Exemption from Taxation.

C. applied to the corporation of the town of  
Meaford for a lease of a certain lot of land owned  
by the corporation, alleging that he and others  
proposed to erect thereon a mill and other build-  
ings for the purpose of carrying on the business  
of a flour and grist mill, and a general grain busi-  
ness; they petitioned also for exemption from  
taxation upon the mill for ten years. Under a  
by-law passed the 4th of March, 1885, a lease to  
the applicants was executed by the corporation  
of the lot in question for twenty-one years, re-  
serving a nominal rent, and containing covenants  
on the part of the lessees in reference to the  
nature of the buildings to be erected, to pay  
taxes and other provisions. Another by-law was  
subsequently passed exempting the "manufactur-  
ing establishment of C. and others (naming them),  
established for the purpose of carrying on the  
milling and grain merchant business, including  
the lands leased, etc., and the mill and all build-  
ings and property to be erected and placed upon  
the said land for the purpose of the said busi-  
ness," subject to the performance by the lessees  
of the stipulations in the lease as to maintaining  
and working the mill. Upon the faith of this  
by-law and lease, C. and others, the lessees, pur-  
chased a large amount of material, and entered  
into building contracts for the purpose of erect-  
ing the proposed mill, and proceeded to erect the  
same, and further contracted for the purchase  
of machinery, the whole involving an outlay, as  
was alleged, of some \$17,000. Upon the 20th of  
July following the council by by-law repealed  
the by-law exempting from taxation. Upon an  
application by C. and others, to quash the repeal-  
ing by-law, upon the ground that the same was

a fraud upon the applicants and a breach of con-  
tract, it appeared that there were other tax-  
payers of the same town engaged in the same  
business, and having large amounts of capital  
invested therein, whose interests were injuriously  
affected by the repealed by-law:—Held (1) that  
inasmuch as the applicants were treated in the  
lease and by-law as carrying on two distinct  
kinds of business, viz.: the manufacturing or  
milling business, and the general grain merchant  
business, the first only of which the council had  
power to exempt from taxation, the by-law ex-  
empting from taxation was bad; (2) that the by-  
law was also bad in exempting all the land leased,  
and not the mill only, from taxation, as other  
buildings, suitable alone for the grain business,  
might be erected thereon; (3) the fact that other  
large milling establishments within the same  
municipality were discriminated against also  
made the by-law illegal and bad (4) the repealed  
by-law being therefore illegal, the council had a  
right to repeal, or to go through the form of re-  
pealing it in order to prevent trouble and ex-  
pense. *People's Milling Co. and Council of Mea-*  
*ford*, 10 O. R. 405.—O'Connor.

The Municipal Act of 1883, section 368, as  
amended by 47 Vict. c. 32, s. 8 (Ont.), authorizes  
a municipal council to exempt "any manufactur-  
ing establishment, in whole or in part, from taxa-  
tion for any period not longer than ten years."  
A by-law of the town of P. recited that a com-  
pany had acquired several water privileges on  
the river O., and intended developing same by  
erecting thereon factories of different descrip-  
tions; and it was advisable in the interests of  
the town that the privileges, immunities and  
exemptions thereafter mentioned should be  
granted. It further recited that the total assess-  
ment of the said water privileges and the lands  
in connection therewith amounted to \$50,000.  
The by-law then enacted that the aggregate  
assessment of the said properties should be and  
remain for ten years at \$50,000; and the  
assessors from time to time were required to  
assess the same at said sum, notwithstanding  
the erection of any buildings thereon:—Held,  
not a by-law within the said section as amend-  
ed; and also that it was opposed to public policy  
and morality in directing the assessors from time  
to time to limit their assessment. *In re Denne*  
*and the Town of Peterborough*, 10 O. R. 767.—  
O'Connor.

A by-law valid on its face was passed by a  
municipal corporation with the prescribed for-  
malities under 47 Vict. c. 32, s. 8 (Ont.), for  
exempting the manufacturing establishments of  
one T. for the period of ten years. At the time  
of its passing some negotiations had taken place  
between the Canada Southern Railway and the  
authorities of the corporation for the construc-  
tion of a spur or switch from their railway into  
the town. It was proposed on the part of the  
railway that the town should furnish the right  
of way and contribute \$1,800 towards the con-  
struction, involving, as it was stated, an expendi-  
ture of over \$6,000. The council being un-  
willing to submit a by-law to the people, T.,  
the largest ratepayer in the town, suggested  
that if his manufacturing establishments were  
exempted from taxation for ten years, the taxes  
thereon amounting to about \$280 a year, he  
would himself furnish the right of way and con-

struct the switch. The by-law was accordingly passed upon this understanding, and T. proceeded with and completed the work:—Held, affirming the judgment of the court below (10 O. R. 110), Burton, J. A., dissenting, that the by-law was an evasion of the statute, and therefore illegal and void:—Per Burton, J. A.—That the building of the switch in question was an extension or improvement of the manufacturing establishments of T., not dissimilar in principle from that which is usually looked for (where exemptions of this kind are granted), viz., the expenditure of the taxes in the increase of the manufactory, differing only in this, that the benefit was not confined to his own establishments; that as the exemption might have been granted mero motu of the council, the mere circumstance that the manufacturer agreed to make an improvement, which was a public as well as an individual benefit to himself and his own manufactories, could not invalidate it; that the case was not brought within the sections giving power to the courts summarily to quash; and that even if the courts had power to deal with the question summarily it was a case in which in the exercise of discretion it should not be exercised after the work had been completed; and—Quære, whether the proper course would not have been to apply for an injunction. *Scott v. Corporation of Tilsonburg*, 13 A. R. 233.

#### 16. Expropriation of Land.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the crown in addition to those appropriated by the crown for the purpose of highways in order to the opening up of the country. *Rae v. Trim*, 27 Chy. 374.—Blake.

There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. *Harding v. Township of Cardiff*, 29 Chy. 308.—Proudfoot.

Upon a construction of sections 373 and 456 of the Municipal Act, (R. S. O. (1877), c. 174), a municipal corporation has power to enter upon and take lands for the purposes permitted by the Act without first making compensation to the owner who is not entitled to insist upon payment as a condition precedent to the entry of the corporation. Where a municipal corporation had so entered, and a bill to set aside an award for improper conduct of the arbitrators and inadequacy of compensation failed, the court (Proudfoot, J.), on dismissing the bill, ordered the plaintiff to pay all costs, as the corporation had properly exercised their statutory rights. The question involved being of a public nature, the fact that the award was for an amount which in other cases would be beneath the dignity of the court, was not any reason why the court should not entertain the suit. *Ib.*

Upon the petition of the corporation of the city of Toronto, under the "Consolidated Municipal Act, 1883," s. 488, to be allowed to pay into court money awarded to the estate of B. for the ex-

propriation of certain lands of said estate for a court-house site, on the ground that the executrix and trustee could not under the will appointing her, sell the property until her son was of age, or died, or she herself married again, and therefore had not the absolute estate; and also that one M. had a rentcharge or annuity charged on the land for her life: payable to one S.:—Held, that the Act does not expressly authorize the payment into court of the amount awarded; that the section in question is imperative, and makes it obligatory on the corporation to ascertain whether the person in question was absolute owner or not, and if not that the corporation was a statutory trustee of the money, and liable to pay six per cent. interest until the party entitled to the principal claimed the same:—Held, also, that it was not intended the court should interfere at the instance of the corporation, but at that of the claimant of the money or part of it; but:—Ssemble, that the court might do so at the instance of the corporation. The facts, however, did not shew sufficient ground. *In re Beckett and the City of Toronto*, 10 O. R. 106.—Cameron.

The appellants, the owners of a block of land, laid it out in building lots, dedicating as a street, called D. street, a portion of the land running through it from a street on the east to within one foot of its west limit, the one foot being reserved because at that time, W., the owner of the land adjoining on the west, refused to dedicate any portion of it for the purpose of carrying D. street through to the next street to the west. Subsequently the owner of the land adjoining laid out his property in building lots, dedicating as a street, also called D. street, a portion of it running (in the same line as the portion dedicated by the appellants, through it from the street on the west to within one foot of its east limit, the one foot reserved by him immediately abutting on the strip reserved by the appellants. Subsequently the appellants sold all their land except the one foot strip and afterwards the corporation expropriated the two strips to make D. street a thoroughfare, and the appellants in an arbitration under the Municipal Act were allowed merely nominal damages for their strip:—Held (Burton, J. A., dissenting), that this was right, there being no evidence that the property had any market value in the hands of the owners or was worth anything except for the purpose of opening the street or that it was capable of being put to any other use whatever. The higher price that the appellants might have obtained for their lots if the street had been made a thoroughfare before the lots were sold, or the price that the residents on the street might be willing to give to have the obstruction removed, could not be considered as elements in fixing the damages. Per Osler, J. A.—The appellants' foot of land was useless for the purpose of extending the street so long as W.'s reserve stood in the way; and the contingency of W. selling it, depending, as it did, upon the volition of a person over whom the appellants had no control, was too uncertain to be taken into account as an element of value. Per Osler, J. A., also.—Where works are done under the local improvement clauses of the Municipal Act, compensation for property expropriated is to be ascertained in the same manner, and by the



of said estate for a  
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or annuity charged  
payable to one S.;—  
expressly authorize  
the amount awarded;  
is imperative, and  
corporation to ascer-  
tain was absolute  
that the corporation  
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application of the same principles, as in cases  
where the corporation are not acting under  
those clauses, and this whether the corporation  
initiate the proceedings or they are put in  
motion by the petition of the parties who desire  
the improvements to be made. There is nothing  
to justify the notion that in the latter case  
more is to be paid for the work than if the cost  
had to be borne by the corporation. Order of  
Boyd, C., 16 O. R. 372, affirmed, who approved  
of the decision in *Stebbing v. Metropolitan Board  
of Works* L. R. 6 Q. B. 37. *In re Harvey and  
the Town of Parkdale*, 16 A. R. 468.

Under the authority of 49 Vict. c. 66 (Ont.),  
the city of Toronto expropriated the lands of  
private persons near the river Don, for the pur-  
poses of the "Don Improvement Scheme." By  
the Act the city council were to make a survey  
and plan of the 400 feet on each side of a certain  
line called the "centre line," showing the lands  
taken by them, and were to apportion to each  
lot shewn upon the plan a due share of the  
whole cost of the land, works, and improve-  
ments; and by section 4, sub-section 3, the  
lands not taken within the 400 feet were to be  
specially assessed in respect of such improve-  
ments, but no such special assessment was to  
exceed the actual value of the benefit derived  
from the improvement. The appellants owned  
lands extending from the centre line to a dis-  
tance exceeding 400 feet, and the city took from  
such lands a strip narrower than the 400 feet:—  
Held, that in awarding compensation to the  
appellants under the Municipal Act for the  
parts of their lands taken, the arbitrators should  
allow for any benefit to the parts not taken,  
but in estimating that benefit they should take  
into account, as best they could, the fact that  
the land owners were liable to be charged by  
the city to the extent of the benefit they re-  
ceived, by a rate as for a local improvement  
under section 4, sub-section 3. *Re Richardson  
and The City of Toronto—Re Hospital Trust and  
The City of Toronto*, 17 O. R. 491.—Street.

Where the land itself upon which a trade is  
carried on, is expropriated, damage to the good-  
will may be a proper subject of compensation.  
*Rickett's Case*, L. R. 2 H. L. 175, distinguished.  
*Re McCauley and City of Toronto*, 18 O. R.  
416.—Boyd.

See *Re Beatty and City of Toronto*, 13 P. R.  
316, p. 1383; *Re Smith and City of Toronto*, 13  
P. R. 479, p. 1384.

#### 17. Fences.

See *Crowe v. Steeper*, 46 Q. B. 87, p. 1346.

#### 18. Ferries.

See *Anderson v. Jellett*, 9 S. C. R. 1, p. 747;  
*City of St. John v. Macdonald*, 14 S. C. R. 1;  
*Longueuil Navigation Co. v. City of Montreal*,  
15 S. C. R. 566, p. 317.

#### 19. Fines and Penalties.

Held, that a provision for distress in de-  
fault of payment of the fine and costs imposed,  
did not constitute a part of the penalty or  
punishment imposed by the by-law, but was

merely a means of collecting the penalty as  
authorized by section 2, sub-section 14 of 39  
Vict. c. 33 (Ont.), and section 421 of the *Muni-  
cipal Act*, R. S. O. (1887), c. 184. *Regina v.  
Flory*, 17 O. R. 715.—C. P. D.

A by-law of the city of Brantford enacted that  
any person found drunk on any of the public  
streets, etc., thereof, should be subject to the pen-  
alty thereby imposed, namely to a fine not exceed-  
ing \$50, inclusive of costs, and in default of pay-  
ment forthwith of the fine and costs, distress,  
and in default of sufficient distress, imprison-  
ment in the common jail for a term not exceed-  
ing six months, etc., unless the fine and costs  
were sooner paid:—Held, that under sub-section  
19 of section 479, R. S. O. (1887), c. 184, there  
was power to authorize imprisonment for the  
period mentioned. *Regina v. Grant*, 18 O. R.  
169.—C. P. D.

See *McLellan v. McKinnon*, 1 O. R. 219; p.  
1105; *Re Milloy and the Township of Onondaga*,  
6 O. R. 573, p. 1347; *Regina v. Gravelle*, 10 O.  
R. 735, p. 1371.

#### 20. Granting to Railways Land Expressly Approp- riated for Public Purposes.

See *In re Byrson and City of Ottawa*, 1 O. R.  
415.

#### 21. Hawkers, Pedlars, and Transient Traders.

Where goods are consigned to be sold on com-  
mission, and they are sold in the shop or pre-  
mises of the consignee, and by him or on his  
behalf, the owner of the goods or his manager  
is not an occupant of such premises, nor a tran-  
sient trader within the *Municipal Act*, (R. S. O.  
(1877), c. 174, s. 466, sub-s. 53, as amended by  
42 Vict. c. 31, s. 22), merely because he accom-  
panies the goods and assists in their sale. *Regina  
v. Cuthbert*, 45 Q. B. 19.—Osler.

J. brought an action against G., the police  
magistrate of the city of St. John, for wrong-  
fully causing the plaintiff, a commercial trav-  
eller, to be arrested and imprisoned on a warrant  
issued on a conviction by the police magistrate,  
for violation of a by-law made by the common  
council of the city of St. John, under an alleged  
authority conferred on that body by 33 Vict. c.  
4, passed by the legislature of New Brunswick.  
Section 3 of the Act authorized the mayor of  
the city of St. John to license persons to use any  
art, trade, etc., within the city of St. John, on  
payment of such sum or sums as may from time  
to time be fixed and determined by the common  
council of St. John, etc.; and section 4 em-  
powered the mayor, etc., by any by-law or ordi-  
nance to fix and determine what sum or sums of  
money should be from time to time paid for  
license to use any art, trade, occupation, etc.;  
and to declare how fees should be recoverable;  
and to impose penalties for any breach of the  
same, etc. The by-law or ordinance in question  
discriminated between resident and non-resident  
merchants, traders, etc., by imposing a license  
tax of \$20 on the former, and \$40 on the lat-  
ter:—Held, that assuming the Act 33 Vict. c.  
4, to be intra vires of the legislature of New  
Brunswick, the by-law made under it was invalid,  
because the Act in question gave no power to

the common council of St. John, of discrimination between residents and non-residents, such as they had exercised in this by-law. *Jonas v. Gilbert*, 5 S. C. R. 356.

The defendant, who was a traveller for a tea dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then got the tea which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited "hawkers or petty chapmen and other persons carrying on petty trades," from selling goods in the manner pointed out by the Consolidated Municipal Act (1883), s. 495 (3):—Held, that the defendant was not a "hawker," nor was the word pedlar used in the Act, and if he was a "petty chapman or person carrying on a petty trade," the conviction could not be supported, for he was "not carrying goods for sale." *Regina v. Coutts*, 5 O. R. 644.—Rose.

Held, that a municipality cannot pass a by-law prohibiting unlicensed traders from sending out agents to take orders from private persons for goods, and subsequently delivering the goods ordered. *Ib.*

"The Consolidated Municipal Act, 1883," (46 Vict. c. 18), s. 495, sub-sec. 3, empowered the council of any county to pass by-laws for licensing, etc., hawkers, etc., going from place to place, etc., with any goods, wares, or merchandise for sale, and by 48 Vict. c. 40, s. 1 (Ont.), the word "hawkers" shall include all persons who, being agents for non-residents of the county, sell or offer for sale tea, dry goods or jewellery, or carry and expose samples of any such goods to be afterwards delivered, etc.:—Held, that electrolyte ware was not jewellery within the above enactment, and a conviction for selling this without license was therefore bad, and in this case was quashed, though the fine imposed had been paid:—Held, also, that the words "other goods, wares, and merchandise," in the conviction, were too general. *Regina v. Chayter*, 11 O. R. 217.—Wilson.

The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of section 1 of 48 Vict. c. 40 (Ont.). The defendant, against the protest of his counsel, was called as a witness and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account: that he had formerly sold tea on commission for W., but purchased that in question for the purpose of evading the by-law. The conviction alleged that defendant was the agent of P. W. but did not state that he had not the necessary license to entitle him to do the act complained of:—Held, 1. That defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, s. 495, sub-s. 3, nor within 48 Vict. c. 40 (Ont.). 2. That the conviction was defective in not stating that P. W. was non-resident within the county, and that the ex-

pression "of the city of London" was not sufficient. 3. That defendant had been improperly compelled to give evidence against himself. 4. That the having a license is a matter of defence, and not of proof by the prosecution. 5. That the intention to evade the by-law was immaterial so long as the agency did not in fact exist. *Regina v. McNicol*, 11 O. R. 659.—Wilson.

Held, that under 48 Vict. c. 40, s. 1 (Ont.), amending sub-s. 3 of sec. 495 of the Consolidated Municipal Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth, and to be then delivered to the persons giving such orders:—Held, also, that the term "dry goods," in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing. *Regina v. Bassett*, 12 O. R. 51.—Galt.

Held, that under 48 Vict. c. 40, s. 1 (Ont.), amending sub-s. 3 of s. 495, of the Consolidated Municipal Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, etc., is not within the restriction preventing "agents for persons not resident within the county" from so doing, and is not such an agent. *Regina v. Marshall*, 12 O. R. 55.—Galt.

The by-law under which the defendant was convicted, provided that "no transient trader or other person occupying a place of business in the town of M., for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall \* \* offer goods, wares, and merchandise for sale \* \* within the limits of the town of M., without, or until he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandise, contrary to the by-law:—Held, that the by-law was sufficiently within the powers given by 42 Vict. c. 31, s. 22, to warrant the conviction; and that the words in the by-law, "less than one year," were but a limitation of the words "temporary periods," used in the statute, and did not vitiate the by-law. *Regina v. Caton*, 16 O. R. 11.—Q. B. D.

The defendant a wholesale and retail dealer in teas in the county of W., where he resided, went to the county of H., and sold teas by sample to private persons there, taking their orders therefor, which were forwarded by him to the county of W., and the packages of teas subsequently delivered. All the packages were sent in one parcel to H. county, and there distributed. The defendant was convicted under a by-law passed under statutes which are now R. S. O. (1887), c. 184, s. 495, sub-sec. 3, (a) and (b), for carrying on a petty trade without the necessary license therefor:—Held, that the conviction could not be sustained, and must be quashed. *Regina v. Henderson*, 18 O. R. 144.—C. P. D.

## 22. Hospitals.

Held, that under 45 Vict. c. 29, s. 12 (Ont.), the corporation of one municipality cannot erect or establish a smallpox hospital within the

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359.—Wilson.

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limits of another, either of a temporary or a per-  
manent character, without the sanction of the  
corporation of the latter, and an injunction was  
granted to restrain the same. *Township of*  
*Elizabethtown v. Town of Brockville*, 10 O. R.  
372.—Boyd.

### 23. Livery Stables.

The board of police commissioners in cities is  
the body which alone has the power, under 49  
Vict. c. 37, s. 9 (Ont.) to regulate and license  
livery stables, and this power includes the  
power to declare in what localities such stables  
shall be allowed; therefore, a by-law passed by  
the corporation of the city of Toronto, a city  
having a police board, assuming to declare it  
unlawful for any person to establish or keep  
such stables unless he shall have procured the  
consent of the majority of owners and lessees of  
property situate within the area of 500 feet of  
such stable, was held ultra vires. Even if not  
ultra vires the by-law would have been objec-  
tionable in requiring, as a condition precedent to  
the granting of the license, that an applicant  
should procure the consent of a number of persons  
in the neighbourhood. *Re Kiely*, 13 O. R.  
451.—Wilson. See 52 Vict. c. 36, s. 15.

See *Regina v. Swahell*, 12 O. R. 391, p. 1108.

### 24. Markets and Sale of Meat.

The municipal council of the city of Hamilton  
passed a by-law that no person should, upon or  
after sale thereof, deliver any stove wood in or  
from any wagon, etc., otherwise than in or from  
a wagon of a certain capacity, the sides of which  
should be constructed of slats of a certain width  
and a certain distance apart from each other.  
The defendant was convicted of a breach of the  
by-law:—Held, that the by-law was ultra vires,  
for though the council had the right under the  
Municipal Act, R. S. O. (1877), c. 174, s. 466,  
to provide for the weighing or measuring of wood,  
they had no power to enforce delivery, upon or  
after sale, in a particular kind of wagon. *Re-*  
*gina v. Smith*, 4 O. R. 401.—Hagarty.

A by-law of the city of Ottawa set apart cer-  
tain sections of the city, six in number, as  
markets or market-places. Four of these sec-  
tions were called meat, produce, and fish mar-  
kets, though in the enumeration of the articles  
for the sale of which the markets were establish-  
ed, fish were not named. Section 5 of Art. IV.  
declared that all produce, provisions, or articles  
of any kind brought to any of the meat, fish, and  
produce markets and exposed for sale, should be  
placed in boxes and exposed in carts or other  
vehicles, which should be placed upon said mar-  
kets under the direction of the market inspector.  
Any person refusing to comply therewith, or to  
remove such articles, vehicles, or boxes after  
selling their contents, should be subject to the  
penalty imposed by the by-law, and liable to  
expulsion from the market. Section 1 of Art.  
IX. declared that no person should sell any fresh  
fish elsewhere than in such places as should be  
allotted and designated by the standing com-  
mittee on markets, in any of the aforesaid mar-  
kets. Section 1 of Art. X. declared that the  
vendors of any articles in respect of which a

market fee might, under the Municipal Act, be  
imposed, might lawfully without paying market  
fees, offer for sale any such articles at any place  
within the city excepting the market places  
thereof. The by-law was a consolidation of pre-  
viously existing by-laws passed from time to  
time. It appeared that many years ago certain  
stalls in each market were set apart as fish mar-  
kets; that no application was ever made for  
standing room for carts or other vehicles from  
which to sell fish; and no provision made by the  
council for so bringing fresh fish to the market:  
—Held, that section 5 of Art. IV., though wide  
enough to cover fresh fish, would appear not to  
have been framed with reference to it; and that  
reading section 1 of Art. IX. and section 1 of  
Art. X., together, they could be reconciled by  
construing them as providing that fresh fish  
might be sold in stalls and nowhere else in the  
markets, but outside of the markets no restric-  
tion should be placed on selling. *Re Borthwick*  
*and the City of Ottawa*, 9 O. R. 114.—Rose.

Sub-section 2 of section 8 of 45 Vict. c. 24  
(Ont.), subjects "such vendors of articles in res-  
pect of which a market fee may be now imposed  
as shall voluntarily use the market place for the  
purpose of selling such articles," whereas the  
twelfth section of the by-law in question was,  
"any person or persons who shall voluntarily  
come upon the said market-place, etc., for the  
purpose of selling," etc.:—Held, that "Vendors,  
who shall voluntarily use the market-place for  
the purpose of selling" was not identical with  
or equivalent to "any person or persons who  
shall voluntarily come upon the said market-  
place for the purpose of selling;" nor was the  
expression "use the market-place for the pur-  
pose of selling" the same as "come upon the  
market-place for the purpose of selling;" and  
that the conviction was bad on this ground also.  
*Regina v. Reed*, 11 O. R. 242.—O'Connor.

Held, that the conviction was bad, as differ-  
ing from both statute and by-law, being for re-  
fusing to pay the fees on eight quarters of beef  
"exposed for sale," whereas the 13th section of  
the by-law applied only to cases of butchers'  
meat exposed for sale. *Id.*

Held, that a by-law passed pursuant to sub-  
section 6 of section 503 of the Consolidated  
Municipal Act, 1883, for granting licenses and  
regulating the sale of fresh meat in quantities  
less than by the quarter carcase, and the convic-  
tion thereunder, were not bad because the by-  
law did not embody or refer to the exceptional  
proviso as to time mentioned in section 500;  
for that section 500 did not refer to the subject  
of sub-section 6 of section 503; and that apart  
from that, section 500 was expressly limited to  
municipalities wherein no market fees were  
imposed or charged, whereas here a by-law  
was in existence imposing such fees and charges:  
—Held, also, that the by-law was not ultra  
vires, express power being given by section  
503 to pass a by-law respecting the matters  
mentioned in sub-section 6; and that as the  
reasonable or unreasonable exercise of the power  
could only be considered on a motion to quash  
the by-law, the objection was not open on  
this motion, which was to quash the conviction.  
But:—Held, that the conviction was bad,  
because, while covering two several and distinct  
offences under the same by-law, it imposed only

one penalty. *Regina v. Gravelle*, 10 O. R. 735. —O'Connor.

Section 503, sub-section 5 of the Municipal Act of 1883, empowers the council of a municipality to regulate the place and manner of selling meat, subject to the restrictions in the five next preceding sections. Section 497 authorizes the sale after certain hours at places other than the market of any commodity which has been offered for sale in the market:—Held, affirming the judgment of the Court of Appeal, 15 A. R. 75, which affirmed the judgment of Wilson, C. J., 11 O. R. 603, Strong and Taschereau, JJ., dissenting, that by-law No. 629 of the city of Ottawa requiring everybody offering fresh meat for sale in the city to take out a license, and providing that no meat should be sold in any place except in the stalls of the different city markets, was a valid by-law and within the power of the city council to pass:—Held, per Strong and Taschereau, JJ., that those portions of the by-law fixing the places at which fresh meat should be sold and prohibiting its sale elsewhere, were ultra vires the city council under the said sections of the Municipal Act, 1883. The Ontario Act 50 Vict. c. 29, s. 29, passed since this decision has now settled the law on this subject. *O'Meara v. City of Ottawa*, 14 S. C. R. 742.

Semble, that the court might quash a by-law of this description when plainly insufficient accommodation is furnished, unless in the alternative the municipality should provide reasonably fit and full accommodation; but as a rule the municipality is the judge of its own business and affairs, and it is probably an extreme case in which the court would interfere. *S. C.*, 11 O. R. 603.

By section 503, sub-section 6 of the Municipal Act of 1883, a corporation has power, by by-law to prevent the sale of fresh meat in quantities less than a quarter carcase except by a person holding a license and in such place as the council may specify, and:—Semble, per Osler, J. A.—The same construction would have been placed on the statute law as it stood before the Consolidated Act of 1883. *S. C.*, 15 A. R. 75. See *S. C.* 14 S. C. R. 742.

See *Regina v. Hollister*, 8 O. R. 750, p. 1107; *Pigeon v. Recorder's Court and the City of Montreal*, 17 S. C. R. 495, p. 314.

## 25. Nuisances.

The defendants passed a by-law pursuant to R. S. O. (1877), c. 174, s. 466, sub-s. 17, as amended by 44 Vict. c. 24, s. 12, which by-law, by section 2 provided that "No person shall keep, nor shall there be kept within the city of Toronto any pig or swine or any piggery":—Held, that the by-law was ultra vires, as being a general prohibition against the keeping of pigs, and not restricted to cases that might prove to be nuisances. *McKnight v. City of Toronto*, 3 O. R. 284.—Wilson.

By section 3, sub-section 2, the by-law provided that no cow should be kept in any stable, etc., situate at a less distance than forty feet from the nearest dwelling-house, and where two cows were kept that the stable should not be less than eighty feet from the nearest dwelling-

house:—Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was or might be a nuisance, but that the prohibition was in effect such a declaration, that the distances prescribed were reasonable, and that the by-law as to that was unobjectionable:—Semble, that it was not bad in being so generally expressed that it would restrict the owner from keeping cows within the prescribed distances of his own dwelling-house; and Held, that this objection not being clear should not at any rate be allowed to prevail in favour of the appellant, whose case was not shewn to be within the terms of the objection. *Id.*

47 Vict. c. 32, s. 13, sub-s. 12 (Ont.) enacts that by-laws may be passed "for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants," etc. Section 2 of by-law No. 179 of the city of London, passed under that Act, is as follows: "No person shall, in any of the streets, or in the market-place of the city of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making any unusual noise, or noise calculated to disturb the inhabitants of the said city. Provided always, that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada." The prisoner was convicted under the by-law of beating a drum on a public street in the city of London:—Held, that the by-law so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual, or calculated to disturb was ultra vires, and invalid, and that the refusal to receive evidence on the prisoner's behalf was a valid ground for her discharge:—Held, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction. *Regina v. Nunn*, 10 P. R. 395.—Rose.

See *Colborne v. Town of Niagara Falls*, 9 O. R. 168, p. 1350; *Regina v. Martin*, 12 O. R. 800, p. 1108.

## 27. Public Health.

The members of the council of any municipality are health officers of the municipality by virtue of the Public Health Act, R. S. O. (1877), c. 190, and as such they may enforce the provisions of sections 3 to 7 of that Act without by-law; but if they delegate their powers to a committee, they must do so by a municipal by-law. They cannot, however, delegate any powers except those which they exercise under the Public Health Act. A by-law was passed by the municipal council of the city of Brantford regulating the cleaning of privy-vaults, and imposing a fine of not less than \$1, nor more than \$50 for a breach of its provisions:—Held, valid, as the by-law was one under the Municipal Act, and not under the Public Health Act, which restricts the penalty to \$20. The by-law, as set out in the report, was objectionable, as delegating to persons not members of the council, the board of health, the powers which, as municipal matters, belonged exclusively to the council.

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all. *In re Mackenzie and the City of Brantford*,  
4 O. R. 382.—Wilson.

Where B. brought action against the township  
of S. to recover remuneration for medical ser-  
vices performed on the instructions of the cor-  
poration and of the board of health, and it was  
objected that the by-law professing to appoint  
the board of health was invalid by reason of the  
fact that it merely purported to appoint three  
persons to be a board of health, but did not  
make any mention of the officers who, by 47  
Vict. c. 38, s. 12, sub-s. 2, are made ex officio  
members of the board of health, and because it  
did not specifically state the three individuals  
named to be ratepayers:—Held, that looking  
at the provisions of the said statute, and con-  
sidering that the attack now made upon the by-  
law was not by motion to quash it or of a like  
character, the objections could not be allowed to  
prevail. *Bogart v. Township of Seymour*, 10 O.  
R. 322.—Ferguson.

Injunction granted to restrain a municipality  
from erecting a smallpox hospital within another  
municipality. See *Township of Elizabethtown v.*  
*Town of Brockville*, 10 O. R. 372, p. 1369.

See *In re Workman and Town of Lindsay*, 7 O.  
R. 425, p. 1374; *Re Derby and the Local Board of*  
*Health for South Plantagenet*, 19 O. R. 51, p. 123.

## 28. Public Morals.

The conviction was under a by-law, for writing  
and posting up an indecent placard, and the  
placard was a criminal libel. Quere, per Cam-  
eron, J., whether the municipality could thus  
make a new offence, and award a new or addi-  
tional punishment for what was already a criminal  
offence. *McLellan v. McKinnon*, 1 O. R.  
219.—Q. B. D.

See *Regina v. Matheson*, 4 O. R. 559, p. 832.

## 29. Purchase of Land.

Held, that a municipal corporation has no  
power to pass a by-law for the purchase of land  
to be presented to the Dominion Government as  
a site for a post-office and custom-house. "For  
the use of the corporation" in R. S. O. (1887),  
c. 184, s. 479, (1) does not mean merely "for  
the benefit of." *Jones v. Town of Port Arthur*,  
16 O. R. 474.—Ferguson.

## 32. Sewers.

### (a) In Cities and Towns.

Section 464, sub-section 2, of 36 Vict. c. 48,  
enacts that the council of every city, town, and  
incorporated village, shall have power to pass  
by-laws for assessing upon the real property to  
be immediately benefited by the making, etc.,  
of any common sewer, etc., "on the petition of  
at least two-thirds in number and one-half in  
value of the owners of such real property, a  
special rate," etc. The sub-section is amended,  
so far as the same relates to the city of Toronto,  
by 40 Vict. c. 39, s. 2, by inserting after the  
words "owners of such real property" the words  
"or where the same is in the opinion of the  
said council necessary for sanitary or drainage  
purposes." 40 Vict. c. 6, respecting the revised

statutes, passed in the same session, repealed 36  
Vict. c. 48; and R. S. O. (1877), c. 174, s. 551,  
sub-s. 2, corresponds with the repealed s. 464,  
sub-s. 2:—Held, Armour, J., doubting, and  
Cameron, J., dissenting, 1. That under 40 Vict.  
c. 6, s. 10, the R. S. O. (1877), was substituted  
for the repealed Acts and the amending Act ap-  
plied to the R. S. O. (1877), c. 174. 2. The  
amendment in 40 Vict. c. 39, was a reference in  
a former Act remaining in force to an enact-  
ment repealed, and so a reference to the enact-  
ment in the revised statutes, corresponding to  
the section 464, sub-section 2, within section 11  
of 40 Vict. c. 6. 3. That the city of Toronto,  
therefore, could pass a by-law in 1879 to con-  
struct a sewer, when necessary in their opinion  
for sanitary or drainage purposes, without any  
petition therefor. *In re Brock and the City of*  
*Toronto*, 45 Q. B. 53.—Q. B. D.

A municipal corporation passed a by-law for  
the construction of a sewer without limiting the  
purposes for which it was to be used, and subse-  
quently passed another by-law regulating how  
it might be tapped for drainage purposes, and  
enacting that no one should drain into it without  
permission from the municipal council first ob-  
tained, and specifying a certain rate of payment  
for the use of it when so permitted. The appli-  
cant got no leave from the council or any com-  
mittee thereof to use the sewer, but several  
members of the council gave him permission to  
connect some water-closets with it on condition  
of his paying, whenever called upon, whatever  
was reasonable for the privilege:—Held, that  
the sewer was constructed for general drainage  
purposes, including that of water-closets; but  
that the permission given to the applicant so to  
use it did not bind the council, which could  
compel him to cut off the connection, as he had  
not obtained their consent to make the same,  
nor paid the rate fixed by the by-law; and that  
the fact of his having enjoyed the privilege for  
several years did not place him in any better  
position than he was at the first:—Semble, that  
even if he had the legal right to use the sewer,  
either the corporation or the local board of  
health could, upon the facts stated in the report,  
under 47 Vict. c. 32, s. 13, and c. 38, s. 12, have  
passed a by-law compelling him to cut off his  
connection:—Quere, whether after the forma-  
tion of the local board of health the by-laws  
provided for by 47 Vict. c. 32, s. 13, should be  
passed by the corporation or by the board of  
health under chapter 38, section 12. The motion  
to quash the by-law was therefore refused,  
but without costs, as the applicant had been  
led into his position by the indiscretion of cer-  
tain members of the corporation. *In re Work-*  
*man and the Town of Lindsay*, 7 O. R. 425.—  
Rose.

Sewer rates charged under the by-law 468 of  
the city of Toronto prior to the coming into force  
of 42 Vict. c. 31, s. 25 (Ont.), March 11th, 1879,  
form a personal charge only, the said enactment  
not being retrospective. *Re Armstrong*, 12 O.  
R. 457.—Boyd.

The "territory" of the municipality referred  
to in R. S. O. (1887), c. 184, s. 492, sub-s. 2, is  
the land comprised within the bounds, and  
under the jurisdiction of, the municipality, and  
is not limited to lands that are the property of  
the municipality. One municipality cannot



therefore extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter, or without taking the statutory steps, even although the lands through which the sewer is to run have been purchased by the former municipality from the private owners. Judgment of the Chancery Division, 18 O. R. 199, affirmed, *Burton, J. A.*, dissenting. *Township of Barton v. City of Hamilton*, 17 A. R. 346.

(b) *Extension of into Adjoining Municipalities.*

See *Township of West Nisouri v. Township of North Dorchester*, 14 O. R. 294, p. 1353; *Township of Barton v. City of Hamilton*, 18 O. R. 199; 17 A. R. 346, *supra*.

33. *Soliciting Passengers.*

A city by-law prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing any runner or other person to assist or act in concert with him in soliciting any passenger or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle should be left to choose without any interference or solicitation. An employee of defendants with the consent of a railway company and under instructions from his employer boarded an arriving passenger train at one of the outlying city stations on its way to the union station, and went through the cars calling out "baggage transferred to all parts of the city," and having in his hands a number of the transfer company's checks. No baggage was taken at the time:—Held, that there was no breach of the by-law but merely the carrying out of the defendants' agreement with the railroad company; and further that the railroad train did not come within any of the places mentioned in the by-law. *Per Rose, J.*—If the by-law in terms had covered this case it would have been ultra vires. *Regina v. Verral*, 18 O. R. 117.—C. P. D.

37. *Width of Tires.*

A by-law of a town provided that no one should use any waggon, etc., upon any of the streets of the town for drawing brick, stones, etc., when the weight of the load should exceed 1,500 pounds, unless the tires of the wheels were of a specified width; but the by-law was not to apply to any waggon conveying lumber or goods from the mill or manufactory thereof into the town if distant more than two miles from the town limits, nor to any person passing through the town with vehicles loaded with the said articles:—Held, bad, as discriminating as against residents of the town in favour of others:—Held, also, that a conviction under such by-law was bad, for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour. *Regina v. Pipe*, 1 O. R. 43.—Osler.

XII. CONTRACTS BY AND WITH.

The defendant agreed, subject to certain tests and approval, to purchase from the plaintiffs a steam fire engine, which it appeared it was de-

sirable the municipality should possess; but on submitting a by-law for that purpose to the rate-payers for approval, the same was rejected, although an informal by-law had been previously approved of by them. Meanwhile the engine had been received by the defendants, and by them subjected to the necessary tests, which being satisfactory they, by a minute in council, agreed to accept the engine, and the same was placed in their engine-house, subject to the customs duties thereon. A few days after, on ascertaining the result of the voting, the defendants communicated the same to the plaintiffs, rescinded the resolution, and requested them to remove the engine, which the plaintiffs declined to do, and sued for the price of the engine:—Held (affirming the judgment of the court below, 31 C. P. 301) that the plaintiffs were not entitled to recover; the contract for the purchase of the engine not having been under seal, and there having been no formal acceptance of it under seal; and the purchase thereof not being a matter of such minor importance or daily occurrence as should be binding on the corporation without the formality of a seal. *Silby v. Village of Dunnville*, 8 A. R. 524.

Quere, whether the defendants would necessarily be liable upon a contract not under seal even where the benefit of it had been actually enjoyed, unless in cases where the thing ordered was actually and urgently required, or "for work which if the corporation had not ordered, they would not have done their duty." *Pim v. The Municipal Council of Ontario*, 9 C. P. 304, remarked upon. *Id.*

The financial affairs of a municipal corporation being in disorder a commissioner was appointed by the Government to investigate them, and the plaintiffs professional accountants, were employed by the council to examine and arrange the accounts. Resolutions were passed, not under seal, recognizing that the work was being done by the plaintiffs, who reported to, and were in communication with the council. Their report, as the judge found at the trial, was before the commissioner, and in a by-law one of the plaintiffs was referred to as "having rewritten the books":—Held, *Wilson, C. J.*, dissenting, that the plaintiffs could recover, though there was no by-law directing the work to be done, or appointing the plaintiffs to do it. *Silby v. The Village of Dunnville*, 8 A. R. 524, and *Young v. The Corporation of Leamington*, 8 App. Cas. 577, distinguished. *Robins v. Brockton*, 7 O. R. 481.—Q. B. D.

A municipal corporation is liable on an executed contract for work done by its order, on its behalf and for its benefit, though there be no agreement under seal, if the thing done were urgently required for the purposes of the corporation, and especially so where the price to be paid is not of a large amount. *Robins v. Brockton*, 7 O. R. 481, referred to. *Laurence v. Village of Lucknow*, 13 O. R. 421.—Chy. D.

Agreement by town council with chief of police to pay over to them fees received by him from the county for services performed by him as county constable. See *Town of Stratford v. Wilson*, 8 O. R. 104.

A special statute in Ontario (45 Vict. c. 46) authorized the municipalities of the city of

ld possess; but on purpose to the rate- ad been previously unwhile the engine defendants, and by ary tests, which be- minute in council, and the same was subject to the cus- days after, on av- voting, the defe- to the plaintiffs, e plaintiffs declined ce of the engine;— nt of the court be- plaintiffs were not ntract for the pur- been under seal, rmal acceptance of rchase thereof not mporance or daily ing on the corpora- of a seal. *Sibby v. 524.*

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ario (45 Vict. c. 43) ties of the city of

Toronto and the village of Parkdale jointly or separately, and the railway companies whose lines of railway ran into the city of Toronto, to agree together for the construction of railway subways: provision was made in the Act for the issue of debentures to provide for the cost of the work, and the by-law for the issue of such debentures was not required to be submitted to the ratepayers; there was also provision for compensation to the owners of property injuriously affected by such work, such compensation to be determined by arbitration under the Municipal Act if not mutually agreed upon. The municipalities not being able to agree, the village of Parkdale and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on the application of the village of Parkdale and the railway companies to the Privy Council of Canada purporting to be made under 46 Vict. c. 24 (Dom.) an order of the Privy Council was obtained authorizing the work to be done according to the terms of such agreement. The municipality of Parkdale then contracted with one G. for the construction of the subway, and a by-law providing for the raising of Parkdale's share of the cost of construction was submitted to and approved of by the ratepayers of the municipality. In an action by the owner of property injured by the work:—Held, reversing the Court of Appeal, 12 A. R. 393, and affirming the decision of the Chy. D., 8 O. R. 59, which upheld the judgment of Wilson, C. J., 7 O. R. 570. Per Ritchie, C. J., Fournier and Henry, JJ., that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and the municipality was therefore liable as a wrongdoer. Per Gwynne, J.—That the work should be considered as having been done under the special Act, and the plaintiffs were entitled to compensation thereunder. Per Taschereau, J.—That the work was done by the municipality as agent of the railway companies, and it was therefore not liable. *West v. Parkdale, 12 S. C. R. 250.* Affirmed by the Privy Council, 12 App. Cas. 602.

Agreement by railway company to erect station, etc., on condition of receiving bonus. See *Bickford v. Town of Chatham, 10 O. R. 257; 14 A. R. 32; 16 S. C. R. 236.*

Plaintiff entered into an agreement in writing with the defendants to do certain work under a provisional by-law, and which agreement contained this clause, "Notwithstanding anything hereinbefore contained to the contrary this agreement \* \* is made subject to the final passing of the said by-law \* \* and in the event of the said by-law not being passed \* \* then this agreement shall be null and void \* \* ." The by-law was never finally passed and the agreement was produced at the trial by defendants to prevent the plaintiff from recovering as on a quantum meruit:—Held, (reversing Ferguson, J., who retained his opinion), that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a mandamus to the defendants to raise the money. The stipulation as to the final passing of the by-law should receive a reasonable construction and could only be invoked when the work was

not properly performed. *Quaintance v. Township of Howard, 18 O. R. 95.—Chy. D.*

### XIII. ACTIONS AND PROCEEDINGS BY AND AGAINST.

#### 1. Generally.

Action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the municipal council of A., charging that the defendants' acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees;" that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper:—*Semble*, the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers, except the defendants. *Morrow v. Connor, 11 P. R. 423.—Proudfoot.*

A ratepayer of a municipality cannot maintain an action, on behalf of himself and the other ratepayers, against the municipality for the improper construction of a drain authorized by by-law when such ratepayer has himself been a contractor for a portion of the work and has received his share of the money voted for the work in excess of the amount expended. Judgment of the Court of Appeal for Ontario, 13 A. R. 53 affirmed. *Dillon v. Township of Raleigh, 14 S. C. R. 739.*

An officer of a municipal corporation applied for a mandamus to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council:—Held, that the applicant could maintain an action against the corporation for his salary, and, as he had that remedy, a mandamus would not be granted at his instance. *Re Whitaker and Mason, 18 O. R. 63.—Galt.*

A justice of the peace cannot compel a corporation to appear before him, nor can he bind them over to appear and answer to an indictment; and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them. *Re Chapman and the City of London, and Re Chapman and the Water Commissioners of the City of London, 19 O. R. 33.—Robertson.*

Against surveyor for negligence in making improper survey. See *Township of Stafford v. Bell, 6 A. R. 273.*

Compelling railway to repair highways. Frame of suit. See *Fenton Falls v. Victoria R. W. Co., 29 Chy. 4, p. 920.*

Action for false imprisonment. Void assessment. See *McSorley v. Mayor, etc., of the City of St. John, 6 S. C. R. 531.*

Writ of prohibition to municipal corporation. See *Côté v. Morgan, 7 S. C. R. 1.*

Liability for accidents occurring prior to organization of municipality. See *Simpson v. Village of Huntsville*, 13 O. R. 101.

Liability for injury to workmen employed by city contractor in work over which a corporation officer exercised superintendence. See *Murphy v. City of Ottawa*, 13 O. R. 334, p. 1243.

Liability for libel. See *McLay v. County of Bruce*, 14 O. R. 398, p. 508.

See *Molson's Bank v. Town of Brockville*, 31 C. P. 174; *Scottish American Investment Co. v. Village of Elora*, 6 A. R. 628, p. 1348; *Bogart v. Township of Seymour*, 10 O. R. 322, p. 1373; *Alexander v. Township of Howard*, 14 O. R. 22, p. 1360; *Stalker v. Township of Dunwich*, 15 O. R. 342, p. 1334; *Green v. Township of Orford*, 15 O. R. 506; 16 A. R. 4, p. 1361.

#### XIV. ARBITRATIONS UNDER THE MUNICIPAL ACT.

##### (a) Generally.

The court has power to enlarge the time for making an award, although the same has not been made "within the month after the appointment of the third arbitrator," as required by section 377 of R. S. O. (1887), c. 174. *In re the City of Toronto and Scott*, 8 P. R. 318.—Wilson.

The general enactments relating to arbitration apply to awards under the Municipal Act. *Ib.*

In extending the time in this case the matters referred were remitted to such persons as the court should appoint under the Municipal Act, section 385. *Ib.*

Held, that the arbitrators on the separation of the united townships, under R. S. O. (1877), c. 174, s. 28, should not take into consideration moneys received by the union, under 36 Vict. c. 47 (Ont.), from the government on account of the Municipal Loan Fund, and appropriated by the union to the purposes authorized by that Act; but that they might apportion any part of it remaining unappropriated, and in doing so need not be governed by the population of the several townships according to the census of 1871, as provided for the distribution by the government under that Act. The duty of such arbitrators is to ascertain the assets of the union, real and personal; dispose of the personal property as may be just; make proper allowance for the real estate to the township deprived of it by the separation, and for the personal property assigned to either municipality in excess of its share; and ascertain and apportion the liabilities. They should consider the value of the real property of the union in each township as an asset, and what allowance, if any, should be made by the township retaining it under the statute of the separating township. *Township of Albermarle and United Townships of Eastnor, Lintsey, and St. Edmunds*, 45 Q. B. 133.—Cameron.

The provisions of section 383 of the Municipal Act (1877) requiring arbitrators to take and file for the information of the court full notes of the evidence, or a statement that they proceeded upon skill or knowledge possessed by

themselves, or upon a view, in making their award, are imperative, and the omission to comply with them is fatal to the award. *In re Albermarle and Eastnor*, 46 Q. B. 183.—Armour.

From reading the award made in this matter, and the evidence and documents filed, it was impossible for the court to ascertain the reason for the award, and so impossible to consider the matter upon the merits as required by section 385; and the evidence and documents which were filed appeared not to support the award, which was therefore set aside. *Ib.*

The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the court refused to refer the matter back to them, but ordered that it be remitted to the judge of the County Court, unless counsel could agree upon such facts as would enable the court to deal with the matters in dispute. *Ib.*

Semble, that the combined effect of sections 377 and 380 of the Municipal Act, 1887 is to enable the arbitrators in cases coming within these sections to extend the time for making their award beyond the month. *Township of Thurlow v. Township of Sidney*, 29 Chy. 497.—Proudfoot.

The plaintiff municipality sued upon an award whereby the defendant municipality was ordered to pay their portion of the cost of a drain constructed by the plaintiffs. It was shewn that the arbitrators met frequently and adjourned from time to time, counsel for the defendants appearing before the arbitrators and raising no objection to such adjournments, or that the month from the date of the appointment of the third arbitrator, as prescribed by section 337 of the Municipal Act had elapsed without any award having been made.—Held, that an award made after the expiry of the month was valid. *Ib.*

In proceedings upon arbitration between a city and county under sections 22, 445, 446, and 447 of the Municipal Act (1877), the questions submitted are largely in the discretion of the arbitrators, no principle or rule being laid down by the statute. Where, therefore, arbitrators, in forming estimates of the proportion of expenditure to be borne by the city and county under these sections, took population as a basis instead of the assessment rolls.—Held, that this was no ground for interference. The court refused also to interfere with the compensation awarded for care and maintenance of prisoners. The arbitrators having awarded as to the macadamized road lying in the county and city, a matter not submitted to them, the clause was struck out of the award with costs, which were fixed at \$10. *In re the Arbitration between the City of St. Catharines and County of Lincoln*, 46 Q. B. 425.—Osler.

A portion of the township of Sarnia was added to the town of Sarnia by proclamation of the Lieutenant-Governor. The former municipality was indebted to the province for certain drainage works under the provisions of R. S. O. (1877) c. 33, in respect of roads benefited by the drains. The arbitrators in settling the matters in dispute between the two corporations, refused to con-

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B. 183.—Armour.

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without adjudicating thereon:—Held, that the  
award was invalid, for the liability in respect of  
the roads was an ordinary debt payable out of  
the general funds of the township, to which the  
town should contribute. *Re Township of Sar-*  
*nia and Town of Sarnia*, 1 O. R. 411.—Cameron.

The award directed the township to pay a cer-  
tain sum to the town:—Held, but; for the Muni-  
cipal Act, R. S. O. (1877) c. 174, s. 53, only pro-  
vides for the payment by the town to the town-  
ship. In re the village of Point Edward and  
the township of Sarnia, 44 Q. B. 461, distin-  
guished. *Ib.*

Quære, whether an award made by arbitrators  
pursuant to the Municipal Act, R. S. O. (1877) c.  
174, is invalid though made more than a month  
after the appointment of the third arbitrator,  
notwithstanding section 377 of the Act. *In re*  
*Arbitration between the Township of Muskoka and*  
*the Village of Gravenhurst*, 6 O. R. 352.—  
Cameron.

By section 378 no member, officer, or person in  
the employment of a corporation interested in  
any arbitration, nor any person so interested,  
shall act as an arbitrator under the Act:—  
Sembles, that a ratepayer was disqualified, and  
that the objection would not be waived by mere  
acquiescence. *Ib.* See R. S. O. 1887, c. 184, s.  
396 (2).

By section 383 the arbitrators are to file with  
the clerk of the council the notes of the evidence  
taken. There being two councils interested in  
the arbitration, the arbitrators did not know  
with which clerk to file the evidence, and did  
not file it:—Held, that the award was not there-  
by invalidated. *Ib.*

The award having been directed to be made  
within a year by an order of the Chancery Divi-  
sion, where the parties were litigating concern-  
ing it:—Held, that the motion to set it aside or  
refer back on the above grounds, or on the  
merits, should have been made in that division,  
and should be transferred. *Ib.*

A portion of a drain constructed by a township  
corporation having been dug on the plaintiff's  
land, an arbitration was had under the Municipal  
Act to ascertain the compensation plaintiff was  
entitled to by reason of the damage alleged to  
have been sustained by him: (1) for land taken  
for the drain; (2) for the throwing of earth on  
the land on the site of the drain; (3) the build-  
ing of bridges by the plaintiff to cross the drain;  
and (4) the backing of water into the plaintiff's  
cellar. The arbitrators found that the plaintiff  
had not sustained any damage, and they made  
an award against him imposing on him a large  
portion of the costs:—Held, that the evidence  
sustained all the grounds of damage except the  
last, as to which the evidence was not very  
satisfactory. The judge was therefore of opinion  
that he could not ascertain the compensation  
himself, but set aside the award, and intimated  
that unless the parties would agree on new arbi-  
trators, he was disposed to direct a reference to  
the county judge. *In re Hodgson and the Town-*  
*ship of Bosanquet*, 11 O. R. 589.—Cameron.

A township by-law after reciting that there  
was a difficulty with S. "from alleged damages  
from water flowing from local drains known as

the H. and S. drains," enacted that F. was ap-  
pointed arbitrator for the township. The notice  
given by the reeve to S. was that "the corpora-  
tion had elected that the claims made by you  
for damages to the east half of lot 11," etc., "on  
account of the construction of the drain from P.  
to the S. drain, or consequent thereon, shall be  
referred to arbitration." Before the parties had  
been heard on the merits, the plaintiff's arbitra-  
tor withdrew from the arbitration and refused  
to act; but the other two arbitrators notwith-  
standing proceeded with the reference and made  
an award:—Held, that the reference was wholly  
informal, the subject thereof not being properly  
defined; and though the notice given by the  
reeve to S. would make the matter sufficiently  
clear it could not affect S. for he never entered  
upon the arbitration, but repudiated the arbitra-  
tor's authority at the first meeting of which he  
had notice; but even if the reference were suffi-  
cient, the award was bad by reason of the two  
arbitrators proceeding alone, the Municipal Act  
requiring (in the absence of a special agreement  
to refer) that there shall be three arbitrators  
continuing to act from the time of appointment  
until the award has been made, and enabling the  
County Court judge to appoint another  
arbitrator in the place of one refusing or neglect-  
ing to act. *In re Smith and the Township of*  
*Plympton*, 12 O. R. 20.—Cameron.

Quære, whether it was in the power of either  
party to the reference to revoke the authority  
of the arbitrators. *Ib.*

Sembles, that the provisions in the statute that  
the arbitrators must hold their first meeting  
within twenty days from the appointment of the  
last arbitrator is not imperative, but directory,  
merely; and therefore an omission to hold such  
meeting within such time would not invalidate  
an award made within the month as required  
by the Act. *Ib.*

Sembles, also, that the county judge may ap-  
point the third arbitrator ex parte although this  
is not desirable; and that the power to appoint  
does not depend on the disagreement of the two  
arbitrators, but on their failure to agree within  
the seven days limited therefor. *Ib.*

It was objected that the arbitrators had not  
taken the oath required by the statute; but:—  
Sembles, this objection was not tenable, as the  
oath they took was substantially the same as  
that required. *Ib.*

In the case of an arbitration under the Muni-  
cipal Act, R. S. O. (1887) c. 184, a municipal by-  
law and appointments in writing by the parties  
of the arbitrators constitute such a submission  
to arbitration by consent as may be made a rule  
of court under section 13 of R. S. O. (1877) c. 53.  
R. S. O. (1887) c. 184, s. 404, provides that  
every award made thereunder shall be subject to  
the jurisdiction of the High Court as if made on  
a submission by a bond containing an agreement  
for making the submission a rule or order of  
such court:—Held, upon the language of this  
section, that the submission should be made a  
rule of court before the award is moved upon:—  
Held, also, that any party to the submission has  
prima facie a right to have it made a rule of  
court; and according to the practice existing  
when the Consolidated Rules came into force, no  
person other than the applicant was entitled to

be heard upon a motion for such an order; and therefore by Con. Rule 526 there is no necessity for serving notice of motion, and an order can be made ex parte. Such an order is merely a necessary form in order to give the court jurisdiction over the award; it binds no one and concedes nothing; the granting of it is compulsory on the court upon the production of the proper affidavits; and the court can inquire into and adjudicate upon all matters of substance when the award itself is sought to be attacked or enforced. Therefore, it was immaterial that upon an ex parte application for such an order it was not disclosed that there were certain matters in controversy between the parties as to enlargements of the time for making the award. *Re City of Toronto Leader Lane Arbitration*, 13 P. R. 166.—Q. B. D.

Section 399 of the Municipal Act, R. S. O. (1887) c. 184, provides with regard to arbitrations under the Act, that the arbitrators shall have power to award the payment by any of the parties to the other of the costs of the arbitration, and may either direct the payment of a fixed sum or that the costs shall be taxed on either the scale of the High Court, or of the County Courts in which case the costs shall be taxed by the officer of the proper court. Arbitrators directed that costs of certain landowners of arbitration proceedings to ascertain the compensation to be paid by a municipality for land expropriated should be taxed on the scale of the High Court "as between solicitor and client";—Held, that the judicial discretion of the arbitrators was exercised and expended when costs were adjudged according to a certain scale; and that the arbitrators had no power to give costs "between solicitor and client;" and, as the error appeared on the face of the award, the municipality was not driven to appeal therefrom, but was entitled to claim the benefit of the excess of jurisdiction upon the taxation of the costs. The ruling of the taxing officer that the costs should be taxed as between party and party was affirmed. *Re Beatty and the City of Toronto*, 13 P. R. 316.—Boyd.

By 35 Vict. c. 79, the water-works commissioners of the city of Toronto were authorized to expropriate lands for the purpose of water-works, and in case of disagreement to have the value ascertained by arbitration; and by 41 Vict. c. 41, all the powers of the commissioners were vested in the city corporation. The city corporation, desiring to expropriate certain land for water-works purposes, passed a by-law reciting the above enactments and authorizing the expropriation, and afterwards served a notice offering to pay the landowner \$25,000, and, in the event of his not accepting, requiring him "pursuant to section 393 of the Municipal Act" to appoint an arbitrator. The arbitrators appointed took the oath prescribed by the Municipal Act, which was different in substance from that prescribed by 35 Vict. c. 79:—Held (reversing the judgment of Galt, C. J.), that section 483 of the Municipal Act, R. S. O. (1887) c. 184, had the effect of superseding the procedure for arbitration provided by 45 Vict. c. 79, and of substituting therefor the procedure for arbitration provided by the Municipal Act; and that the city corporation, having adopted and taken advantage of the procedure provided by the

Municipal Act, could not escape the consequences; and therefore the arbitrators had power under section 399 of the Municipal Act to award costs to the landowner, there being no power to do so under 35 Vict. c. 79:—Held, also, that the arbitrators having awarded costs, and their award not having been moved against, it was the duty of the taxing officer to tax the costs. *Re Smith and the City of Toronto*, 13 P. R. 479.—Q. B. D.

Held, that under the circumstances of this matter, the omission to file the evidence taken by the arbitrators, was not irremediable. *Re Muskoka and Gravenhurst*, 6 O. R. at p. 337, approved of. The appointment of the arbitrator by the corporation was not under seal, but the court declined to set aside the award on that ground, as the objection, if valid, could be taken in any proceeding to enforce the award. *Re Eldon and Ferguson*, 6 U. C. L. J. 207, followed. *Re Harvey and Parkdale*, 16 O. R. 372.—Boyd.

See *Harding v. Township of Cardiff*, 29 Chy. 308, p. 1363; *Smith v. Township of Raleigh*, 3 O. R. 405, p. 1358; *Harding v. Township of Cardiff*, 2 O. R. 320, pp. 1243, 1244; *In re the Town of Ingeroll and Carroll*, 1 O. R. 488. *In re Laplante and the Town of Peterborough*, 5 O. R. 634; *McArthur v. Town of Collingwood*, 9 O. R. 368; *Preston v. Corporation of Camden*, 14 A. R. 85; *Township of Chatham v. Township of Dover*, 12 S. C. R. 321, p. 1356.

#### XV. INVESTIGATION OF MUNICIPAL MATTERS BEFORE COUNTY JUDGE.

The corporation of the city of T. passed a resolution whereby, after reciting that one of their officers had been guilty of misconduct in relation to his duties as inspector of materials furnished and work done by contractors in certain specified respects, and amongst others, in permitting a certain contractor to furnish inferior material to the corporation, and in receiving from such contractor bribes, and wrongfully conveying to him information to facilitate him in securing contracts; they referred it to the county judge "to investigate and enquire into the several matters and things therein referred to, and every matter and thing connected therewith, and with the relations which may have existed, or do exist, between the said W. L. (the officer in question) and any contractor having, or having had, contracts with the city of T., in order that the truth or falsity of the alleged charges of malfeasance, breach of trust, gross negligence, and other misconduct made against the said W. L. may be ascertained:—Held, by Robertson, J., that under R. S. O. (1887), c. 184, s. 477, the corporation had power to pass the said resolution, specifically referring, as it did, to the officer, and the county judge had power to make the necessary enquiries, and for that purpose to summon witnesses, etc., and in doing so, to proceed with enquiries against other individuals, besides the contractor, so far and so far only, as it might be necessary to the enquiry against such officer; but the judge was not authorized to branch off into matters between the contractor and the corporation, in which



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#### MUNICIPAL MATTERS JUDGE.

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such officer was in no manner concerned; and on the authority of Re Squier, 46 Q. B. 474, the contractor was entitled to a writ of prohibition to prevent such investigation as to any future proceedings therein, but as to past proceedings, he having appeared and taken part, could not now complain as to them. The corporation, under authority of the same Act, also referred it to the said judge by three resolutions to enquire generally into the relations between the corporation, its officials and contractors, tending to undue influence in favour of contractors, and as to whether contractors or other persons wrongfully obtained money from the corporation by fraudulent means, and as to the whole system of tendering, awarding, fulfilling and inspecting contracts:—Held, that these resolutions were altogether of too general a character to authorize the judge to proceed with any enquiry in reference to the said contractor in the subjects referred to, and that he was in like manner entitled to a writ of prohibition to prevent such enquiry. The statute does not mean, or contemplate, that the corporation shall authorize in such general and undefined terms an investigation and inquiry into corporation affairs which implicate individuals generally without naming the person or persons implicated, and without much greater particularity in specifying the nature of the misconduct to be investigated:—Held, that in holding an investigation under the statute, the judge was acting in a judicial capacity and not as a mere investigator or commissioner. Semble, that if the county judge in the course of such investigations proceeded to the United States "to take evidence, any oath administered by him in the United States would have no legal significance, and any false statement made by a person sworn before him under such circumstances would not have attached to it the consequences of perjury. Re Godson and the City of Toronto, 16 O. R. 275.

But on appeal the Court of Appeal:—Held, Where the County Court judge is making an investigation pursuant to the resolution of a council under R. S. O. (1877), c. 184, s. 477, he is acting a persona designata, and not in a judicial capacity, and is not subject to control by a writ of prohibition. That writ is not to be applied to any proceeding of any person or body of persons, whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual. Re Squier, 46 Q. B. 474, considered. S. C., 16 A. R. 452.

#### XVI. AUDIT OF COUNTY CROWN ATTORNEY'S ACCOUNTS.

See *In re Fenton and the Board of Audit of the County of York*, 31 C. P. 31, p. 405; *In re Stanton and the Board of Audit of the County of Elgin*, 30 R. 86, p. 405.

#### MUNICIPAL LOAN FUND.

See *In re the Township of Albemarle and the United Townships of Eastnor, Lindsay, and St. Edmunds*, 45 Q. B. 133, p. 1379.

#### MURDER.

See CRIMINAL LAW.

#### MUTUAL INSURANCE COMPANIES.

See INSURANCE.

#### NAME.

I. OF COMPANIES—See COMPANY.

II. AS TRADE MARK—See TRADE MARKS.

III. MISNOMER—See MISNOMER.

Remarks as to the serious consequences likely to arise from the constant changes in the names of the streets in the city of Toronto. *Van Koughnet v. Denison*, 11 A. R. 699.—See R. S. O. (1877), c. 184, s. 406, sub-s. 31.

A discharge of mortgage was signed by "Eliza" Switzer, whereas the mortgage purporting to be discharged was made to "Elizabeth" Switzer:—Held, on a vendor and purchaser application, that there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar, and as a matter of family usage the names are synonymous and interchangeable. *Re Clarke and Chamberlain*, 18 O. R. 270.—Boyd.

A promissory note made payable to John Souther & Son was sued on by John Souther & Co.:—Held, that it being clear by the evidence that the plaintiffs were the persons designated as payees they could recover. *Wallace v. Souther*, 16 S. C. R. 717.

#### NATURALIZATION.

See PARLIAMENTARY ELECTIONS.

#### NAVIGATION AND NAVIGABLE WATERS.

See SHIP—WATER AND WATER-COURSES.

#### NE EXEAT REGNO.

The sureties on a statutory bail bond under a writ of ne exeat Provincia have no power to surrender their principal as at common law. An application by sureties for discharge from a bond for repayment of the money paid to the sheriff as collateral security was refused. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot—Spragge.

Where a party is entitled to an assignment of a bond and to realize for his own benefit, his rights are the same in regard to money deposited and where, in an alimony suit, the statutory bond under a writ of ne exeat has been given the plaintiff is entitled to have the moneys deposited as collateral security therefor paid into court and applied in discharging arrears of alimony. *Id.*

## NEGOTIABLE INSTRUMENTS.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES.*

Premium notes. See *Sears v. Agricultural Insurance Co.*, 32 C. P. 585, p. 977.

Deposit receipts. See *Re Central Bank—Morton and Block's claims*, 17 O. R. 574, p. 135.

## NEGLECTANCE.

## I. NATURE OF ACT.

1. *Generally*, 1388.
2. *Proof of Negligence*, 1390.
3. *Contributory Negligence*.
  - (a) *Generally*, 1391.
  - (b) *Of Servant or Employee—See MASTER AND SERVANT.*
  - (c) *In Accidents by Railways—See RAILWAYS AND RAILWAY COMPANIES.*
4. *Proximate Cause of Injury*, 1391.
5. *Delay Generally—See LACHES.*
6. *Presentment of Bills or Notes—See BILLS OF EXCHANGE AND PROMISSORY NOTES.*
7. *Erection of Buildings and Removal of Lateral Support—See BUILDINGS—LATERAL SUPPORT.*
8. *Clearing Land—See FIRE.*
9. *Neglect to Save Property Insured—See INSURANCE.*

## II. PARTIES LIABLE.

1. *The Crown*, 1392.
2. *Husband and Wife*, 1392.
3. *Municipalities*.
  - (a) *Generally*, 1392.
  - (b) *Injuries by Drains—See WATER AND WATER-COURSES.*
  - (c) *Injuries on Highways—See WAY.*
4. *Master for Acts of Servants—See MASTER AND SERVANT.*
5. *Medical Practitioners—See MEDICAL PRACTITIONERS.*
6. *Railways—See RAILWAYS AND RAILWAY COMPANIES.*
7. *Registrars—See REGISTRY LAWS.*
8. *Solicitors—See SOLICITORS.*
9. *Sureties—See PRINCIPAL AND SURETY.*
10. *Trustees—See TRUSTS AND TRUSTEES.*
11. *Valuators—See VALUATOR.*

## III. ABATEMENT OF ACTION, 1393.

## IV. PLEADINGS IN ACTIONS FOR, 1393.

## V. DAMAGES RECOVERABLE.

1. *Actions by Representatives of Persons Killed by Negligence*, 1394.

2. *Right to Deduct Insurance Money*, 1396.3. *Other Cases*, 1397.

## VI. NEW TRIAL IN ACTIONS FOR.—See NEW TRIAL.

## I. NATURE OF ACT.

1. *Generally*.

Action against bank for negligence in not giving notice to endorser. See *Steinhoff v. Merchants' Bank*, 46 Q. B. 25, p. 160.

Alteration of note—Negligence of maker. See *Sveinland v. Davidson*, 3 O. R. 320, p. 158.

Action against a clerk of a municipality for omitting names from the collectors' roll.—Non-avertment of negligence. See *Town of Peterborough v. Edwards*, 31 C. P. 231, p. 1333.

Negligence in investing money. See *Carter v. Hatch*, 31 C. P. 293, p. 1693; *Thompson v. Robinson*, 15 O. R. 662; 16 A. R. 175, p. 1938.

The defendants were the owners of a building on the street. A pipe, connected with the cave troughs, conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known it:—*Held*, *Armour, J.*, dissenting, that the defendants were not liable. Per *Hagarty, C. J.*, the carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants not having knowingly allowed ice to accumulate were not responsible. Per *Armour, J.*, the conducting of water to the sidewalk was a wrongful act, of which the formation of ice on the sidewalk in winter was the natural, certain and well known result, and defendants were responsible. *Skelton v. Thompson*, 3 O. R. 11.—Q. B. D.

In an action for damages sustained by the plaintiff by reason of ice and snow falling from the roof of the defendant's house and injuring him while he was walking on the highway, evidence was given to show that about half-an-hour before the accident happened the defendant was notified of the dangerous character of the roof, but took no precaution to guard against accidents, and a by-law of the municipality was proved requiring the citizens to keep their roofs clear of ice and snow:—*Held*, that there was evidence to go to the jury of negligence in the defendant. A nonsuit entered at the trial, was therefore set aside, and a new trial granted. *Lazarus v. Corporation of Toronto*, 19 Q. B. 9 commented on and distinguished. *Lamirville v. Gouin*, 6 O. R. 455.—C. P. D.

A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract and is only liable for want of reasonable skill or gross negligence. *Township of Stafford v. Bell*, 6 A. R. 273.

The defendants' premises abutted on Clarence street in the city of Toronto. The defendants'

ligence in not giving notice.—*Steinhoff v. Mer-*  
160.

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R. 320, p. 153.

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*the Town of Peter-*  
231, p. 1333.

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193; *Thompson v.*  
R. 175, p. 1938.

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placed a beam at the height of nine and a-half feet from the ground along the north limit of Clarence street, a street twenty-nine feet in width, and hung a gate therefrom, and put up another gate across said street about twenty-seven feet further south, the two gates not being exactly opposite to each other, nor of the same width. A lane ran north from Clarence street. There was an accumulation of rubbish with ice and snow under the beam, which raised up the front wheels, and the plaintiff, while driving along Clarence street was injured by being crushed between the beam and the load upon which he was seated. He said he knew of the beam, having driven there often, but that his attention was called from it by having to steer his way carefully between the two gates. Clarence street had not been adopted as a highway by by-law:—Held, that although by 46 Vict. c. 18, s. 545 (Ont.), the council is prohibited from laying out a road or street of less than sixty-six feet in width, they may consent to the owner of lands laying one out less in width, and that prior to the Act of 1873, the owner was not prohibited from laying out a road of any particular width; and that as Clarence street had been laid out and used as a public street for many years, having several large business establishments fronting upon it, or with a rear access to it, and public conveyances had used it for business purposes in all respects as a highway, it might in an action of this kind, between a person using it in the way of business, as it had so long been used, and one who was charged with obstructing it, be found to be a public highway:—Held, also, that the beam was the proximate cause of the injury, not the ice and snow only, and that defendants were liable though the person who allowed the rubbish to thus accumulate might be liable also:—Held, also, that there was no contributory negligence on the part of the plaintiff. *Bliss v. Boeckh*, 8 O. R. 451.—Q. B. D.

Negligence in towing a ship. See *Sewell v. British Columbia Towing and Transportation Co.*, 9 S. C. R. 527, p. 1930.

Liability for negligence in the use of hired chattels. See *Regnolds v. Roxburgh*, 10 O. R. 649, p. 860.

Although an architect, employed by the owner for reward to superintend the construction of a house may, as between the latter and the contractor by the terms of their own agreement be in the position of an arbitrator, and his decision as between them unimpeachable except for fraud or dishonesty, yet as between himself and his employer he is answerable for either negligence or unskillfulness in the performance of his duty as architect. *Irving v. Morrison*, 27 C. P. 242, approved. *Baileyley v. Dickson*, 13 A. R. 494.

The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6, 7, is in force in the province of Ontario as part of the law of England, introduced by the Constitutional Act, 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence. *Canada Southern R. W. Co. v. Phelps*, 14 S. C. R. 132.

The defendant, who was mortgagee of certain shares in a company, sold them by auction. The plaintiff, who was entitled to the shares subject

to the defendant's claim, knew of and ratified the sale. The purchaser refused upon various grounds to carry out the sale, and no attempt was made by the defendant to compel completion of the contract. Subsequently the shares fell very much in value:—Held (Burton, J. A., dissenting), that there was no duty cast upon the defendant to take proceedings against the purchaser to compel completion, and that he was not liable to account for the shares at the price that would have been realized had the sale been completed. The plaintiff could have paid the defendant's claim and then have herself taken proceedings against the purchaser, and not having done so, was not entitled to complain. Judgment of Rose, J., affirmed. *Daniels v. Noxon*, 17 A. R. 206.

Neglect to search for executions against mortgagor. See *Brown v. McLean*, 18 O. R. 533, p. 1273.

A physician wrote a prescription for the plaintiff and directed that it should be charged to him by the druggist who compounded it, which was done. His fee including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk by mistake put prussic acid in the mixture, and the plaintiff in consequence suffered injury:—Held, that the druggist was liable to the plaintiff for negligence but the physician was not. Under the circumstances of the case no costs were awarded to or against any of the parties. *Stretton v. Holmes*, 19 O. R. 286.—Rose.

Using machinery on highways. See *Lawson v. Alliston*, 19 O. R. 655.

See *O'Byrne v. Campbell*, 15 O. R. 339, p. 1392; *Salerquist v. Ontario Bank*, 15 A. R. 609, p. 136; *Shaw v. McCrory*, 19 O. R. 39, p. 880.

## 2. Proof of Negligence.

Plaintiff while standing on the platform at one of defendants' stations, had his eye injured by the explosion of a fog signal, which had been placed on the track. The only evidence given was, that certain servants of defendants had these fog signals in their possession for lawful purposes, but that no one to the knowledge of several of the defendants' employees who were called as witnesses for the plaintiff, placed this one on the track, and that it was wholly unnecessary for defendants' purposes; and it appeared not impossible that it might have been obtained from defendants' servants by some third party, or might have been put there by a servant of defendants for a frolic:—Held, that a nonsuit was properly directed. *Jones v. Grand Trunk R. W. Co.*, 45 Q. B. 193.—Q. B. D.

While a car of the defendants in charge of another servant of the company, the driver having temporarily gone to the rear of the car, was proceeding westerly at a slow rate along a street in the city of T., on which they had the right of way, the plaintiff whose carriage was waiting at the kerb stone, without observing the near approach of the car got into and drove her carriage for a short distance in the same direction as the car, when she suddenly turned north intending to cross, but in such close proximity to the car that, but for the prompt action of the

driver in charge in turning his horse off the track, the horse would have collided with the plaintiff's carriage; as it was notwithstanding the brake was applied to the car, the whiffletree struck the wheel of the carriage, which was upset, and the plaintiff thrown to the ground, and her leg was fractured. In an action for damages the jury found in favour of the plaintiff, which verdict the Divisional Court refused to disturb. On appeal this court (Oiler, J. A., dissenting), being of opinion that there was no evidence of negligence on the part of the defendant, reversed the judgment of the Queen's Bench, and dismissed the action with costs. *Follet v. Toronto Street R. Co.*, 15 A. R. 346.

The plaintiff while walking on a sidewalk, was knocked down and injured by a runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was that the horse was seen running away; that the sleigh upset, the occupants were thrown out, and that the horse ran on the sidewalk and the accident occurred:—Held, that this was sufficient to make out a *prima facie* case of negligence, and that the onus of disproving that case and explaining the cause of the runaway lay upon the defendant. *Manzoni v. Douglas*, 6 Q. B. D. 145, discussed. Judgment of the Queen's Bench Division affirmed. *Crawford v. Upper*, 16 A. R. 440.

#### 1. Contributory Negligence.

##### (a) Generally.

Knowledge is not per se contributory negligence. *Gordon v. City of Belleville*, 15 O. R. 26.—Q. B. D.

Liability of Accident Assurance Company. See *Neill v. Travellers' Ins. Co.*, 31 C. P. 394; 7 A. R. 570; 12 S. C. R. 55, p. 1005.

In piling lumber too near railway track, or by allowing sawdust to remain on it, or by not having sufficient appliances to extinguish fire. See *McLaren v. Canada Central R. W. Co.*, 32 C. P. 324, p. 1785.

Submitting questions of contributory negligence to jury. See *Bennett v. Grand Trunk R. W. Co.*, 7 A. R. 470, p. 1775; *Maw v. Townships of King and Albion*, 8 A. R. 248, p. 2144; *Edgar v. Northern R. W. Co.*, 4 O. R. 201, p. 1782; *Klein v. Union Fire Ins. Co.*, 3 O. R. 234, p. 941.

See *Township of Stafford v. Bell*, 6 A. R. 273, p. 2011; *McCallum v. Odette*—*In re "The M. C. Upper"*, 7 S. C. R. 36, p. 1931; *Bliss v. Boeckh*, 8 O. R. 451, p. 1389; *Miller v. Reid*, 10 O. R. 419, p. 1244; *Copeland v. Village of Blenheim*, 9 O. R. 19, p. 2143; *Town of Portland v. Griffiths*, 11 S. C. R. 333, p. 2143; *City of Saint John v. Macdonald*, 14 S. C. R. 1, p. 1392; *Follet v. Toronto Street Railway Co.*, 15 A. R. 346, *supra*; *Doan v. Michigan Central R. W. Co.*, 17 A. R. 481, p. 1616; *Lawson v. Alliston*, 19 O. R. 655, p. 2144.

#### 4. Proximate Cause of Injury.

After the time fixed by an award under the Ditches and Water-courses Act, 1883 (46 Vict. c. 27), for the completion of certain drainage

work by neighbouring landowners, the plaintiff, who was one of the parties, interested in the award, in writing required the defendant, as township engineer, to inspect the work, with the object of having it completed according to the award, but as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and there by the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land:—Held, that the provisions of section 13 of the above Act as to the inspection by the engineer is imperative, and an action would lie for breach of his duty; but even if the evidence had shewn such a breach, the damages claimed were not the proximate, necessary, or natural result thereof. The other provisions of section 13 are merely permissive, and no action would lie for their non-performance; nor were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance. Those who, by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages. *O'Byrne v. Campbell*, 15 O. R. 339.—Q. B. D.

See *Skelton v. Thompson*, 3 O. R. 11, p. 1388; *Bliss v. Boeckh*, 8 O. R. 451, p. 1389; *Duck v. City of Toronto*, 5 O. R. 295, p. 2141.

## II. PARTIES LIABLE.

### 1. The Crown.

A petition of right does not lie to recover compensation from the Crown for damages occasioned by the negligence of its servant to the property of an individual using a public work. *Regina v. McFarlane*, 7 S. C. R. 216.

The Crown is not liable for injuries resulting from the nonfeasance or misfeasance, wrongs, negligence or omissions of duty of the appropriate officers or agents employed by the public service on a railway owned by the Crown and operated under the management of the government. See *Regina v. McLeod*, 8 S. C. R. 1.

The Crown is not liable as a common carrier for the safety and security of passengers using such railways. *Ib.*

### 2. Husband and Wife.

See *Shaw v. McCreary*, 19 O. R. 39, p. 880.

### 3. Municipalities.

#### (a) Generally.

The ticket issued to M., a traveller by rail from Boston Mass., to St. John, N. B. entitled him to cross the St. John harbour by ferry, and a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corporation of St. John:—Held, that an action would lie against the corporation for injuries to M. caused by the negligence of the officers of the boat during the passage. *City of Saint John v. Macdonald*, 14 S. C. R. 1.

The approaches of the ferry to the wharf were guarded by a chain extending from side to side

the plaintiff, interested in the defendant, as work, with the according to the aged, the defend- or cause it to yard, and there- were not carried quence suffered remaining on his of section 13 spection by the action would lie if the evidence amages claimed y, or natural re- ons of section 13 action would lie ere it otherwise, es claimed were on-performance. e award, ought e persons prox- imities. *O'Byrne*

R. 11, p. 1388; 1389; *Duck v.* 2141.

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of the boat at a distance of about one and a-half feet from the end. On approaching the wharf the man whose duty it was to moor the boat unloosed the chain at one side, and when near enough jumped on the floats to bring the mooring chain aboard. A number of the passengers rushed towards the floats, and M. seeing the chain down and thinking it safe to land, followed them and fell through a space between the boat and the wharf and was injured. When this happened the boat was not moored:—Held, affirming the judgment of the court below, that the corporation of the city were liable to M. for the injuries sustained by the negligent manner of mooring the boat, and that he was not guilty of such contributory negligence as would avoid that liability. *Id.*

O. was moving a house twenty-five feet high along one of the streets in a city, having obtained the authority of the city engineer to do so, when by reason of its coming in contact with a wire, of the existence of which O. was fully aware, stretched by a telephone company, without any authority from the city, across the street, the wire being nineteen and a-half feet from the ground, though the company's Act of incorporation required it to be at least twenty-two feet, the wire was torn from its fastenings, loosening some bricks, which fell on the plaintiff severely injuring him:—Held, that no liability attached either to the city or the telephone company, and that O. was alone liable for the damage sustained by the plaintiff. Decision of Street, J., at the trial, varied. *Howard v. City of St. Thomas*, 19 O. R. 719.—C. P. D.

See *Preston v. Corporation of Camden*, 14 A. R. 85, p. 2115.

### III. ABATEMENT OF ACTION.

P. brought an action against a conductor of the I. C. R. for injuries received in attempting to board a train, and alleged to be caused by the negligence of the conductor in not bringing the train to a stand still. On the trial, P. was nonsuited, and on motion to the full court the nonsuit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial, P. died, and a suggestion of his death was entered on the record. On appeal to the Supreme Court of Canada from the order of the full court:—Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick (Con. Stat. N. B. c. 86), an entirely new cause of action arose on the death of P., and the original action was entirely gone, and could not be revived. There being no cause before the Court of Appeal, the appeal was quashed without costs. *White v. Parker*, 16 S. C. R. 699.

### IV. PLEADINGS IN ACTIONS FOR.

Statement of claim claiming damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, etc., through defendant's negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statement of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect:—Held, on demurrer to the second

paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence or was immaterial; that it could not embarrass the plaintiff, for if he proved actionable negligence he must prove either actual or presumptive notice. *Beasley v. City of Hamilton*, 9 O. R. 112.—Rose.

In an action for damages for negligence a counter-claim for libel was excluded. See *McLean v. Hamilton Street R. W. Co.*, 11 P. R. 193, p. 1611.

Held, reversing the C. P. D. (18 O. R. 482), that evidence of contributory negligence is properly admissible under the defence of "not guilty by statute" without any special plea of contributory negligence. *Doan v. Michigan Central R. W. Co.*, 17 A. R. 481.

See *Town of Peterborough v. Edwards*, 31 C. P. 231, p. 1333.

### V. DAMAGES RECOVERABLE.

#### 1. Actions by Representatives of Persons Killed by Negligence.

The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them ("The Garland"). Petition against "The Garland"—labelled under the Maritime Court Act at the port of Windsor—on behalf of the appellant claiming \$2,000 damages suffered by her, owing to the death of her son and servant, caused by the negligence of the officers in charge of the said "Garland." The respondent intervened, and demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the Court:—Held (Fournier and Taschereau, JJ., dissenting), that the Maritime Court of Ontario has no jurisdiction apart from R. S. O. (1877), c. 128 (re-enacting in this province Lord Campbell's Act, 9 & 10 Vict. c. 93), in an action for personal injury resulting in death, and therefore the appellant had no locus standi, not having brought her action as the personal representative of the child. Per Fournier, Taschereau, Henry and Gwynne, JJ. (reversing the judgment of the Maritime Court of Ontario), that Vice-Admiralty Courts in British possessions and the Maritime Court of Ontario, have whatever jurisdiction the High Court of Admiralty has over "any claim for damages done by any ship, whether to person or to property." Per Fournier and Taschereau, JJ., dissenting, that apart from and independently of R. S. O. (1877), c. 128, the Maritime Court of Ontario had jurisdiction in a proceeding in rem against a foreign vessel for the recovery of damages for injuries resulting in death; that the appellant either, in the capacity of parent or of mistress, was entitled to claim damages for the loss of her son or servant. *In re The Garland—Monaghan v. Horn*, 7 S. C. R. 409.

Held, affirming the decision of the Court of Appeal (11 A. R. 1), which reversed the decision of the Q. B. D. (1 O. R. 545), that although on the death of a wife, caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be perform-



ed by his wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. (Taschereau and Gwynne, J.J., dissenting.) *St. Lawrence and Ottawa R. W. Co. v. Lett*, 11 S. C. R. 422.

In an action of damages brought for the death of a person by the consort and relations under article 1056 C. C., which is a re-enactment and reproduction of the Con. Stat. L. C. c. 78, damages by the way of solatium for the bereavement suffered cannot be recovered. Judgment of the Court below reversed and new trial ordered. *Canadian Pacific R. W. Co. v. Robinson*, 14 S. C. R. 105.

The plaintiff, as administratrix, sued the defendants, under 44 Vict. c. 22, s. 7 (Ont.), for the death of her illegitimate son, a brakeman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge:—Held, that as the Act was intended to give no greater right to recover than Lord Campbell's Act, therefore the plaintiff's relationship to the deceased prevented her recovery. *Gibson v. Midland R. W. Co.*, 2 O. R. 658.—Q. B. D.

In an action for damages brought against the corporation of the city of Montreal by Z. L. et al., the descendant relations of L. who was killed while driving down St. Sulpice street, alleged to have been at the time of the accident in a bad state of repair, by being thrown from the sleigh on which he was seated against the wall of a building, the judge before whom the case was tried without a jury granted Z. L. et al. \$1,000 damages on the ground that they were entitled to said sum by way of solatium for the bereavement suffered on account of the premature death of their father:—Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, appeal side, that the judgment could not be affirmed on the ground of solatium, and as the respondents had not filed a cross appeal to sustain the verdict on the ground that there was sufficient evidence of a pecuniary loss for which compensation could be claimed, Z. L. et al.'s action must be dismissed with costs. *City of Montreal v. Labelle*, 14 S. C. R. 741.

The deceased had effected a policy of insurance on his life which was in force at the time of his death. At the trial the jury was directed to deduct the amount of the policy from the verdict, which amount was afterwards added by the Divisional Court (8 O. R. 601). On appeal the court being equally divided in opinion on this branch of the case, the appeal was dismissed with costs. Hagarty, C. J. O., and Osler, J. A., were of opinion that the actual loss or injury resulting from the death, can alone be recovered in such a case, and if a large increase of fortune occurs to the parties as a result of such death, or property, or money falls to them as a like result

whether under a settlement or in the shape of a life insurance effected for their benefit, that must be taken into consideration in estimating the loss sustained. Burton, J. A., was of opinion that under the circumstances the Divisional Court were right in increasing the verdict by the amount of the insurance money. Per Patterson, J. A.—The receipt of the insurance money is a proper matter for the consideration of a court or a jury in estimating the damages, and might afford ground for making some reduction from a gross assessment, but in the present case there was nothing shown to warrant any reduction. *Hicks v. Newport*, etc., R. W. Co., in note, 4 B. & S., at p. 403, commented on. *Beckett v. Grand Trunk R. W. Co.*, 13 A. R. 174; 16 S. C. R. 713.

The right conferred by Lord Campbell's Act, adopted by Revised Statutes of Ontario, c. 135, ss. 2 and 3, to recover damages in respect of death occasioned by wrongful act, neglect or default is restricted to the actual pecuniary loss sustained by the plaintiff. Where the widow of deceased is plaintiff and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased. *Hicks v. Newport*, etc., R. W. Co. (4 B. & S. 403, n.), approved. *Grand Trunk R. W. Co. of Canada v. Jennings*, 13 App. Cas. 800. Judgment in 15 A. R. 477, affirmed.

An action for damages, by reason of the death of a person, can be maintained under R. S. O. c. 135, s. 7, by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased. *Lampman v. Township of Guinborough*, 17 O. R. 191.—C. P. D.

The plaintiff's son, who had just come of age, was killed by accident in the defendant's machine shop, where he had been temporarily employed. For about two years previously he had, while attending school, worked on his father's farm, as farmers' sons usually do, without wages, and it was intended that he should study medicine, at an expense to his father of about \$1,000, the course lasting three or four years, and in the vacations, while so engaged in acquiring his intended profession, it was expected that he would work at home as usual. In an action by his father as administrator to recover damages for the death of his son:—Held, that he could have no reasonable expectation of pecuniary or material benefit from the son's life, and a nonsuit was ordered to be entered. *Mason v. Bertram*, 18 O. R. 1.—Chy. D.

## 2. Right to Deduct Insurance Money.

See *Beckett v. Grand Trunk R. W. Co.*, 13 A. R. 174; 16 S. C. R. 713, *supra*; *Grand Trunk R. W. Co. v. Jennings*, 13 App. Cas. 800, *supra*; *Broen v. McKee*, 17 O. R. 712, p. 1397.



9 O. R. 68, p. 2107; *Town of Portland v. Griffiths*, 11 S. C. R. 333, p. 2143; *Bennett v. Grand Trunk R. W. Co.*, 7 A. R. 470, p. 1775; *O'Sullivan v. Lake*, 15 O. R. 544; 15 A. R. 711, p. 1404.

#### 6. Seduction.

A defendant in seduction is not to be prejudiced in an application for a new trial because his counsel has examined him as to his means, after having endeavoured to exclude such evidence. *Ferguson v. Veitch*, 45 Q. B. 160.—Q. B. D.

See *Adair v. Wade*, 9 O. R. 15, p. 2045; *Udy v. Stewart*, 10 O. R. 591, p. 1905.

#### 7. New Trial as to Some Counts and Nonsuit as to Others.

Where there were common counts, on which there was evidence for the jury, but the verdict certainly included some damages upon the special counts, a new trial was granted on the common counts, and a nonsuit as to the others. *Harper v. Davies*, 45 Q. B. 442.—Q. B. D.

### II. FOR WHAT CAUSE.

#### 1. Ruling as to Right to Begin.

See *Miller v. Confederation Life Assurance Co.*, 11 O. R. 120, p. 1000.

#### 2. Excessive Damages.

Breach of warranty on sale of piano. See *McMullen v. Williams*, 5 A. R. 518, p. 2096.

Where the damage consisted in cutting down some ten or twelve ornamental and shade trees growing on the highway opposite to the plaintiff's land, for which he was awarded \$150:—Held, not excessive. *Douglas v. Fox*, 31 C. P. 140.—C. P. D.

In an action of tre-pass to a certain lot of land and expulsion of the plaintiff therefrom, the plaintiff claimed \$500, the jury assessed the damages at \$1,500 and the judge at the trial amended the statement of claim accordingly:—Held, that the damages were excessive and a new trial was granted. *Robinson v. Hall*, 1 O. R. 266.—Q. B. D.

Where the damages are large, and to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection. *Winfield v. Kean*, 1 O. R. 193.—Q. B. D.

Where in an action for damages against a railway company, one of the parties to whom damages were awarded, who was an infant, died after verdict and before judgment, and the verdict was now moved against, on the ground of excessive damages:—Held, that the court to prevent injustice had power to grant a new trial, which was ordered unless the damages given to the deceased child were reduced to a sum commensurate with the expense caused to the mother's estate by its illness and maintenance. *Sibbald v. Grand Trunk R. W. Co.*—*Tremayne v. Grand Trunk R. W. Co.*, 19 O. R. 164.—Chy. D.

For wrongful dismissal. See *Guildford v. Anglo-French Steamship Co.*, 9 S. C. R. 203, p. 1238.

In action for libel. See *Massie v. Toronto Printing Co.*, 11 O. R. 362, p. 516; *Higgins v. Walkem*, 17 S. C. R. 225, p. 510; *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238, p. 507.

See *Tuckett v. Eaton*, 6 O. R. 486, p. 1224.

#### 3. Surprise at Trial.

Held, that the abstaining of a party from proof under the idea that the opposite party has no real intention of putting him to such proof, and being thereby taken by surprise, is not ground for granting a new trial. *Andrew v. Stuart*, 6 A. R. 495.

New hearing on ground of surprise. See *Sherritt v. Beattie*, 27 Chy. 492, p. 1678.

See *McMillan v. Grand Trunk R. W. Co.*, 12 O. R. 103.

#### 4. Discovery of New Evidence.

A cause had been carried down to trial in 1879, when it was postponed at the instance of defendants, and a trial took place in 1880, when a verdict was rendered in favour of the plaintiffs, which the Court of Queen's Bench refused to set aside. The defendants thereupon appealed to this court, and when the appeal came on to be heard (in 1882) an application was made by the defendants to be allowed to adduce evidence alleged to have been recently discovered, tending to relieve the defendants from liability, which evidence it appeared, consisted mainly of entries in the books of the defendants. The court being of opinion that proper diligence had not been used by the defendants, as in such case they must have discovered the evidence at a much earlier date, refused the application with costs. *Murray v. Canada Central R. W. Co.*, 7 A. R. 646.

Held, that the discovery of new evidence which was merely corroborative of evidence given at the former trial was no ground for a new trial. (Hagarty, C. J. O., hesitating.) *Miller v. Confederation Life Ins. Co.*, 14 A. R. 218; 11 O. R. 120.

See *Dumble v. Cobourg and Peterborough R. W. Co.*, 29 Chy. 121, p. 1125; *Synod v. De Blaquiére*, 10 P. R. 11, p. 1409; *Bank of British North America v. Western Ass. Co.*, 11 P. R. 434 p. 1409; *McMillan v. Grand Trunk R. W. Co.*, 12 O. R. 103.

#### 5. To Produce Further Evidence.

An action against the endorser of promissory notes, who alleged that his endorsement had been forged, was tried twice. On the first trial the jury disagreed, and on the second they found for the plaintiff. No expert evidence was offered at either trial, though the defence intended was fully known. The court refused a new trial moved for on affidavits of an expert giving his opinion founded on a comparison and critical analysis of the defendant's handwriting, with the endorsements. *Moser v. Snarr*, 45 Q. B. 428.—Q. B. D.

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S. R. 238, p. 507.

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Held, that T. L. having in his pleadings set up that J. L. had been in possession for twenty-two years as his tenant, could not obtain a new trial on the ground that he could shew by evidence that she had been in as a caretaker for him. *Hickey v. Stover*, 11 O. R. 106.—Chy. D.

At the trial of a case with a jury, the judge of the County Court at the conclusion of the plaintiff's evidence, and without hearing any evidence on the part of the defendants, nonsuited the plaintiff. In the following term the judge set the nonsuit aside and entered judgment for the plaintiff, claiming a right under the circumstances to do so. On appeal this court, while satisfied with the ruling of the judge on the legal liability of the defendants, set the nonsuit aside and ordered a new trial upon the facts, so as to afford the defendants an opportunity of adducing evidence; but, under the circumstances, refused them any costs of the appeal. Rules 311, 312, 319, and 321 of O. J. Act, (Con. Rules 791, 792, 754, 755) discussed, *Baker v. The Grand Trunk R. W. Co.*, 11 A. R. 68.

See *Bond v. Conmee*, 15 O. R. 716, p. 1121; *Hardy v. Filiatrault*, 17 S. C. R. 202.

#### 6. Improper Admission of Evidence.

The plaintiff claimed to recover against the defendant, as administrator of his deceased brother W. G., two sums, one of \$800, which she alleged W. G. received for her from another brother, S. G., also deceased; and the other of \$1,500, which she alleged W. G. promised to leave her in consideration of her remaining with him, taking care of, and managing his house as long as he lived. It was objected that evidence was admitted of statements made by S. G. of the amount he intended leaving the plaintiff. The objection was first taken during the examination of a witness, C., after the plaintiff had been examined and cross-examined as to such statements without objection:—Held, that no substantial wrong or miscarriage was occasioned by the admission of C.'s evidence; and therefore under the O. J. Act, Rule 311, (Con. Rule 791) it was not a ground for a new trial. *Cook v. Grant*, 32 C. P. 511.—C. P. D.

In seduction. See *Ferguson v. Veitch*, 45 Q. B. 160, p. 1399; *Udy v. Stewart*, 10 O. R. 591.

Per Henry, J.—Under the present practice the Supreme Court is bound to uphold a verdict if there is sufficient legal evidence to sustain it independently of evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. Strong, J., contra. *Confederation Life Association of Canada v. O'Donnell*, 13 S. C. R. 218.

I, the maker, and F., the indorser, of a promissory note were sued upon it, and F. denied his indorsement. At the trial an indenture of conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to shew that it was given for anything but the expressed consideration of \$1,500, and it was not pretended that such consideration was paid:—Held, that it was competent for F. to shew what the inden-

ture was given for, that it was not given to secure him against such indorsement; and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness. I. was asked whether F. did not say to him when he asked him to indorse one of the series of notes of which the one in question was a renewal, that he, F., never "backed anybody's note."—Held, that the question was irrelevant, and I.'s answer to it conclusive; and evidence contradicting such answer was inadmissible:—Held, also, that having regard to the whole case and the charge of the trial judge adverting to the evidence so improperly received and to its importance, substantial injury and miscarriage were thereby occasioned and there was sufficient ground for granting a new trial. *Bank of Hamilton v. Isaacs*, 16 O. R. 450.—Q. B. D.

See *Bradley v. McIntosh*, 5 O. R. 227, p. 617; *McDonald v. Murray*, 5 O. R. 559; *Ellis v. Abell*, 10 A. R. 226, p. 658; ; *Pirie v. Wylt*, 11 O. R. 422, p. 612; *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238, p. 507.

#### 7. Improper Rejection of Evidence.

Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. (1877) c. 116, ss. 7, 10, and the Judicature Act, ss. 12, 16, and Rule 127 (Con. Rule 373), can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Osler, J. The right to do so depended wholly upon R. S. O. (1877) c. 116, s. 10. In this case the judge refused to entertain the former evidence, and a new trial was ordered. *Exchange Bank v. Stinson*, 32 C. P. 158.—C. P. D.

In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant C., was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible:—Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered. *Waterloo Mutual Ins. Co. v. Robinson*, 4 O. R. 295.—Q. B. D.

The testimony of a witness, since deceased, taken on a former trial, was rejected by the judge at the trial herein:—Held, that although improperly rejected, yet other evidence to the same effect having been received, it could not be said that the result would have been varied by the admission, and a new trial was accordingly refused. *Copeland v. Village of Blenheim*, 9 O. R. 19.—C. P. D.

Of evidence of witnesses ordered out of court. See *Mahoney v. Macdonell*, 9 O. R. 137, p. 647; *Blark v. Besse*, 12 O. R. 522, p. 647.

See *Bernard v. Coutellier*, 45 Q. B. 453, p. 1219; *Huber v. Crookall*, 10 O. R. 475, p. 513; *Regan v. Waters*, 10 A. R. 85, p. 670; *McDonald v. Johnston*, 16 A. R. 430, p. 778.

### 8. Contradictory Evidence.

See *Grieve v. Molson's Bank*, 8 O. R. 162, p. 1405.

### 9. Misdirection of Judge.

#### (a) Generally.

In an action of trover or conversion against appellant, high sheriff of the county of Cumberland, N. S., to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff and justification under a writ of execution against the execution debtor. The judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shewn the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."—Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shewn title or right of possession to the goods in question, and therefore there was misdirection. *McLean v. Hannon*, 3 S. C. R. 706.

In an action for slander where the defence was that if the defendant had spoken the words (which he denied), the occasion was a privileged one, there had been two trials, each resulting in a verdict for the plaintiff. The defendant moved for a new trial for misdirection by the judge in (among other respects) not fully explaining to the jury that unless the plaintiff proved that the words were spoken with actual malice, he was not entitled to recover:—Held (affirming the judgment of the Chy. D. 14 O. R. 275), that taking the charge as a whole, and without laying undue stress upon isolated expressions, the jury had substantially been told that the occasion was privileged; and that unless they were satisfied that the defendant had abused the privilege and availed himself of it to make the statement maliciously, they should find for the defendant. *Wells v. Lindop*, 15 A. R. 695.

In considering an objection for misdirection, the question is not whether every expression in a charge is perfectly accurate, but whether there is any reason to believe that a verdict, which is warranted by the evidence, has been caused or induced by an erroneous enunciation of the law by the court. *Id.*

Per Patterson, J. A.—The case was one for the application of Rule 311 (Con. Rule 791) as, if there were any misdirection, it did not appear that substantial wrong or miscarriage had been caused by it. *Id.*

The defendant L., who was a professional valuator, was employed by plaintiff personally

investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. The said defendant visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged and was paid a fee. The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood was evidence of negligence:—Held (Galt, C. J., dissenting), this was misdirection. It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was a director, and that the loan was not effected, having been abandoned by the mortgagor. The judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the enquiry: "Why was not the original transaction carried out?"—Held, per Rose and MacMahon, J.J., that these observations tended to create a prejudice in the mind of the jury which was not warranted by the facts. K., a respectable man living in the neighbourhood of the property, in his evidence valued the land at from \$200 to \$300 per acre, but the judge told the jury that K. was not in the land business, and had no knowledge of the value of the property. Per Rose, J.—The observation as to K. was a practical withdrawal of his evidence from the jury. Per Galt, C. J.—There was evidence of negligence to go to the jury, particularly in defendant L. not making enquiries of others in the neighbourhood as to the value of the land. A new trial was therefore directed. *O'Sullivan v. Lake*, 15 O. R. 544.—C. P. D.

On appeal the Court of Appeal held that there was no misdirection in the charge of the trial judge, but under the circumstances of affidavits filed in the court below as to certain matters which defendant pressed upon the Court, required explanation beyond what had appeared at the trial, the court would not interfere with the order of the court below. *S. C. 15 A. R. 711.* The Supreme Court quashed an appeal on the ground that the new trial had been granted as a matter of discretion. *Id.*

When no objection is made at the trial to the judge's charge, the ground of misdirection is untenable on a motion for a new trial. *Wills v. Carman*, 17 O. R. 223.—Q. B. D.

See *Miller v. Confederation Life Assurance Co.*, 11 O. R. 120; 14 A. R. 218, p. 1000; *Furlong v. Reid*, 12 O. R. 607, p. 675; *Scougall v. Stapleton*, 12 O. R. 206, p. 1219; *United States Express Co. v. Donohoe*, 14 O. R. 333, p. 680; *Provident Washington Ins. Co. v. Gerow*, 14 S. C. R. 731, p. 985; *Carter v. Grasett* 14 A. R. 685, p. 1177.



10. *Non-Direction of Judge.*

A notice of motion to a Divisional Court against the verdict and judgment at the trial, on the ground of non-direction, should shew how and in what matter there was non-direction. The court may allow an amendment of the notice in a proper case; but it declined to assist the defendant by doing so where the non-direction was not material in view of other facts and findings, and the rule of law invoked by the defendant would have operated against a meritorious claim of the plaintiff. *Pfeiffer v. Midland R. W. Co.*, 15 Q. B. D. 243, followed. *Furlong v. Reid*, 12 P. R. 201.—Chy. D.

See *Smith v. Keown*, 46 Q. B. 163, p. 1184; *Winfield v. Kean*, 1 O. R. 193, p. 1222; *Campbell v. Prince*, 5 A. R. 330, *infra*.

11. *When Verdict is Against Evidence or the Weight of Evidence.*(a) *When Verdict Does Substantial Justice.*

On application for a new trial upon the weight of evidence, where there has been no miscarriage in law, the question is, does the verdict in the opinion of the court do substantial justice; and, if not, is the evidence in their opinion sufficient to warrant interference. In this case where the verdict rested entirely upon the plaintiff's testimony as opposed to that of two witnesses not interested, the court were of opinion that the verdict did not do substantial justice, and a new trial was granted. *Grieve v. Molson's Bank*, 8 O. R. 162.—C. P. D.

See *Bernard v. Coutellier*, 45 Q. B. 453, p. 1219; *McDonald v. Murray*, 5 O. R. 559; *United States Express Co. v. Donohoe*, 14 O. R. 333, p. 680; *Carler v. Grasett*, 14 A. R. 685, p. 1177; *Bank of Hamilton v. Isaacs*, 16 O. R. 450; *Wells v. Lindop*, 15 A. R. 695, p. 1403.

(b) *Other Cases.*

This case being an action for an assault against a public officer, in which the jury had found a verdict for \$100 and a new trial asked for on the ground that the verdict was against evidence was refused, the Court of Appeal granted a new trial, as the evidence strongly preponderated in the defendant's favour and there was reason to believe the jury had been misled by the charge. *Campbell v. Prince*, 5 A. R. 330.

Upon a rule nisi calling upon the plaintiff in an action upon a policy of life insurance to shew cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for the defendant pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendant; and for misdirection in that the jury had not been directed on the evidence to find for the defendant; the Court of Queen's Bench, 41 Q. B. 197, ordered the verdict for the plaintiff to be set aside and the same to be entered for the defendant, while the Supreme Court eventually reversed this order and restored the verdict for the plaintiff, being of opinion that they had no power to direct a new trial on the ground of the

verdict being against the weight of evidence:—Held, that although the Court of Queen's Bench would have had power to enter this verdict in accordance with what they deemed to be the true construction of the findings coupled with other facts admitted or beyond controversy, they had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendant in direct opposition to the finding of the jury on a material issue. Under 38 Vict. c. 11 (Dom.), the Supreme Court has power to make any order or to give any judgment which the court below might, or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by section 22 in this case, in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject. *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644; 6 S. C. R. 634; 3 A. R. 230.

Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it. *Id.*

Replevin for a piano delivered to the defendant as alleged by plaintiffs under an agreement that the piano was received by the defendant on hire for six months at \$5 a month, with right of purchase at \$265, \$15 cash, and the balance by instalments, and until purchase money paid the piano to remain the plaintiff's property; that default was made in the payments, and that the plaintiffs were entitled to take possession of the same. The defendant stated that she purchased the piano, no mention being made at the time of the agreement, which was subsequently signed without defendant's authority by her daughter. The defendant was unable to read or write, though of fair business capacity. The evidence, as urged by the plaintiffs, shewed authority from the defendant to sign, and also ratification by her. The jury found for the defendant. The court, not being satisfied with the finding, directed a new trial with costs to the successful party in the cause. *Heintzman v. Graham*, 15 O. R. 137.—C. P. D.

The father of the plaintiff applied to the defendant company for a loan of \$2,500 secured by land valued by the company's appraiser at \$3,500. In answer to certain questions put to the applicant, in a printed form of application for loan, he stated himself to be the owner of certain horses, cows, sheep, and other stock. The plaintiff was present with his father at the time of making the application, but swore that he was not aware of the answers given by him as to his personal effects. The defendants sued and obtained execution against the father, under which they seized some of the stock in the possession of the son, who had been residing apart from his father, and from whom, prior to the above application, he had purchased it. In an interpleader issue between the son and the company the jury found in favour of the claim of the

former, which verdict the judge of the County Court refused to set aside. On appeal this court, although they considered that a verdict for the defendants would have been more satisfactory, refused to disturb the judgment, the question being one proper for the decision of the jury. *Malcolmson v. Hamilton Provident and Loan Society*, 10 A. R. 610.

See *Baillie v. Dickson*, 46 Q. B. 167, p. 161; *Mara v. Coz*, 6 O. R. 359, p. 202; *Campbell v. Cole*, 7 O. R. 127, p. 878; *Garland v. Thompson*, 9 O. R. 376, p. 774. *Town of Portland v. Griffiths*, 11 S. C. R. 333; *Wills v. Carman*, 17 O. R. 223; *Sun Life Ass. Co. v. Page*, 15 A. R. 704, p. 997.

## 12. Jury.

### (a) Inconsistent Findings.

See *McQuay v. Eastwood*, 12 O. R. 402, p. 1252.

### (b) Improperly Influencing.

The defendants objected that by reason of frequent interruptions and reading of text books by plaintiff's counsel during the delivery of the judge's charge injustice was done defendants, and the jury improperly influenced thereby:—Held, that this was a matter for the judge at the trial, and it would have to be a very strong case for the court to interfere, and the judge had made no complaint. *McDonald v. Murray*, 5 O. R. 559.—C. P. D.

The defendant, in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give the defendant the benefit of any doubt:—Held, not sufficient to justify the court in interfering with the verdict. *Vannere v. Farewell*, 12 O. R. 285.—C. P. D.

See *United States Express Co. v. Donchoe*, 14 O. R. 333, p. 680; *O'Sullivan v. Lake*, 15 O. R. 544, p. 1404.

### (c) Other Cases.

At the trial it appeared that the counsel for P. had left the court before the judge's charge, having authorized F., counsel for two other defendants, to take on his behalf any objections he might think proper to the charge. The jury, after hearing the judge's charge, were allowed to separate and be at large from Saturday till Monday, before giving their verdict, which was against the defendants P. and R.:—Held, reversing the decision of the Queen's Bench Division, 7 O. R. 356, that such a proceeding could not be upheld except upon clear affirmative evidence of consent expressly and knowingly given; and therefore, where counsel for the defendant P. had left the court before the judge's charge, and it did not appear that he had authorized any one to represent him or his client, or that any one had consented or assumed to consent on behalf of P. to the jury separating, a new trial as to P. was directed:—Per Osler, J. A.—Had F. assumed to represent the counsel for P. in assenting to a separation of the jury, P. would have been bound to the same extent as if his own counsel had taken a similar course, contrary to instructions. *Stilwell v. Rennie*, 11 A. R. 724.

At the trial of an action the defendant's counsel challenged a jurymen for cause. On the trial judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the jurymen, but accepted the opinion of the judge, and the jurymen remained on the jury:—Held, that on a motion for a new trial an objection to the jurymen could not be entertained. *Wood v. McPherson*, 17 O. R. 163.—C. P. D.

The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because the jury there were biased against defendant:—Held, that this formed no ground for a new trial. *Id.*

The court will not grant a new trial because one of the jurors has not been sworn, where no injustice is done thereby. *Goose v. Grant Trunk R. W. Co.*, 17 O. R. 721.—C. P. D.

See *Farquhar v. Robertson*, 13 P. R. 150, p. 379.

## 13. To Amend Pleadings.

A part of the claim in this case extended beyond six years, but no application was made at the trial for leave to plead the Statute of Limitations as to this. The court, under the circumstances, refused to grant a new trial to enable this defence to be set up. *Cook v. Grant*, 32 C. P. 511.—C. P. D.

The plaintiff consigned goods to parties in England and shipped them by defendant companies on bills of lading, describing them as shipped by the plaintiff to be delivered to —, order, or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading to various parties in England to whom he had sold the goods, the consignees paid the drafts drawn upon them for the price and the goods having been seriously damaged in transit they made claim upon the plaintiff for the loss. The plaintiff now sued for the damages and was nonsuited on the ground that he had not sufficient interest, or was not the proper person to sue. The court, without deciding as to the plaintiff having no right of action, or the effect of R. S. O. (1877), c. 116, s. 5, set aside the nonsuit and directed a new trial, with leave to the plaintiffs to add as co-plaintiffs, any or all of the consignees, or endorsees of the bills of lading, the evidence already given to stand, with any additions the parties might desire, reserving all costs. The validity of R. S. O. (1877), c. 116, s. 5, was disputed on the ground that it was ultra vires as interfering with trade and commerce, but the court refused to decide the point without notice to the attorney-general and minister of justice under 46 Vict. c. 6, s. 6 (Out.), which would involve great delay, and adopted the above course as being the speediest and least expensive. *Hotely v. Merchants' Despatch Co.*, 2 O. R. 385.—Q. B. D.

A new trial was granted in this case, there being circumstances requiring further consideration, with leave to so amend the pleadings and add such parties as might be necessary. *Ward v. Hughes*, 8 O. R. 138.—C. P. D.

defendant's counsel or cause. On the did not think any counsel had better counsel did not efficiency of any cause the juryman, but edge, and the jury. —Held, that on a motion to the jury. *Wood v. Mc-*

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goods to parties in by defendant com- describing them as delivered to —, they paying freight. ills of lading to vari- om he had sold the the drafts drawn t the goods having transit they made the loss. The plain- s and was nonsuited t sufficient interest, to sue. The court, plaintiff having no of R. S. O. (1877), nonsuit and directed he plaintiffs to add of the consignees, or ding, the evidence n any additions the ing all costs. The e. 116, s. 5, was dis- e was ultra vires as commerce, but the point without notice minister of justice (Int.), which would adopted the above and least expensive. *Ch Co.*, 2 O. R. 385.—

in this case, there g further considera- t the pleadings and e necessary. *Ward P. D.*

See *Carter v. Grasett*, 14 A. R. 685, 722; *McDonald v. Johnston*, 16 A. R. 430, p. 778.

#### 14. Other Cases.

The jury having found no damages, an order nisi obtained by the plaintiff for a new trial was discharged, without costs. *Lemay v. Chamberlain*, 10 O. R. 638.—Q. B. D.

The objection that the judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone v. VanAllen*, 12 A. R. 133.

See *Clarke v. Rama Timber Transport Co. (Limited)*, 9 O. R. 63.

#### III. PRACTICE.

Where an indictment for obstructing a high-way had been removed by certiorari, at the instance of the private prosecutor, into this court, and defendant had been acquitted:—Held, that there was no power to impose payment of costs on such prosecutor. The court, however, has power to make payment of costs a condition of any indulgence granted in such a case; such as the postponement of the trial, or a new trial. *Regina v. Hart*, 45 Q. B. 1.—Q. B. D.

The plaintiff was permitted to proceed with a new trial pending an appeal where he showed that he had already been inconvenienced by delay, that further delay would prejudice him financially, and that by it he might lose important oral evidence. *McDonald v. Murray*, 9 P. R. 464.—Winchester, Registrar Q. B. D.—Hagarty.

Held, that a defendant is not entitled to remove proceedings by certiorari to a Superior Court from a police magistrate, or a justice of the peace, after conviction or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court, and no motion made to quash it. *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

A petition by the plaintiffs for leave to produce newly discovered evidence, and to reopen the case for its admission after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada, was brought on for hearing before Proudfoot, J., in court:—Held, that as the application might, before the O. J. Act, have been made to a single judge, and as there is no provision in that Act specially applicable to the subject, the original practice of the court remains, and the application was properly made to a single judge. *Synod v. DeBlaquiere*, 10 P. R. 11.

An application to open the case and put in further evidence, and for a new trial upon fresh evidence, or for leave to bring a new action upon a part of the original claim founded upon such evidence, is properly made to the judge who heard the original cause. *Bank of British North America v. Western Ass. Co.*, 11 P. R. 434.—Proudfoot.

In moving against the ruling of the judge at the trial with respect to the reception or rejection of evidence, or on the ground that he has misdirected the jury, it is still necessary to state the grounds in the notice of motion or rule. *Scott v. Cregar*, 11 O. R. 541.—C. P. D.

Death of plaintiff between verdict and giving judgment on an application for a new trial. See *White v. Parker*, 16 S. C. R. 699, p. 17.

See *Cole v. Campbell*, 9 P. R. 498, p. 1020; *Norton v. McCabe*, 12 P. R. 506, p. 401; *Farquhar v. Robertson*, 13 P. R. 156, p. 379.

#### IV. DETERMINING QUESTION IN DISPUTE ON MOTION FOR NEW TRIAL.

Under Rule 321, O. J. Act, (Con. Rule 755), the court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the materials necessary for finally determining the question in dispute \* \* \* give judgment accordingly; but per Wilson, C. J., unquestionably that power must be most sparingly and cautiously exercised. *Stewart v. Rounds*, 7 A. R. 515.

#### V. APPEALS ON APPLICATIONS FOR NEW TRIAL.

##### 1. Generally.

In an action for negligence in not keeping a road in repair, the jury found for the plaintiff. A rule nisi having been subsequently obtained to enter a nonsuit, or for a new trial, the C. P. D. made it absolute to enter a nonsuit. On appeal this judgment was reversed (6 A. R. 181), but the C. of A. made no order as to that portion of the rule nisi in which a new trial was asked, leaving it to be disposed of by this court:—Held, that the rule nisi was completely and finally disposed of, so far as this court was concerned, by the rule to enter a nonsuit, which the defendants, by taking it without asking for any reservation so far as regarded the new trial had acquiesced in:—Held, also, Wilson, C. J., dissenting, that the Court of Appeal have no power, under section 23 of the Court of Appeal Act, R. S. O. (1877), c. 38, to direct this court to reopen the rule or reconsider the question whether, in their discretion, a new trial should be granted. *Walton v. County of York*, 32 C. P. 35.—C. P. D.

The plaintiff being in possession of land as tenant of H. was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial. On appeal to the Court of Appeal:—Held, that the court could not interfere. *Robinson v. Hall*, 6 A. R. 534.

See *Murray v. Canada Central R. W. Co.*, 7 A. R. 646; *Regina v. City of London*, 15 A. R. 414, p. 454; *O'Sullivan v. Lake*, 15 A. R. 711, p. 1404.

#### VI. MISCELLANEOUS CASES.

The court below dismissed a bill filed to enforce a claim for damages sustained by an

excessive valuation of land by the brother and partner of the paid valuator duly appointed by the plaintiffs, on the ground that it was not shewn that the valuation was made fraudulently. The court, while differing from such view, declined to reverse the decree and ordered a new trial, at which the evidence of one of the defendants already taken might be used, in the event of his then being out of the jurisdiction; but ordered the defendants to pay the costs of the appeal; the new trial to be without costs in the court below. *Canada Landed Credit Co. v. Thompson*, 8 A. R. 696.

A conveyance direct from husband to wife is not necessarily void to all intents and purposes; in equity it may be void. Therefore, in this action, in which the plaintiff claimed possession of the lands against J. M., who, in 1884, had conveyed to S. M., his wife, for an expressed consideration of \$100, S. M. having, in 1887, conveyed to the plaintiff, and in which J. M. now contended his deed to S. M. was void, and the judge at the trial on that ground nonsuited the plaintiff at the opening of the case:—Held, that there must be a new trial, especially as it was stated by counsel that the legal estate was outstanding in a mortgagee, at the time of the conveyance from J. M. to S. M. *Jones v. McGrath*, 15 O. R. 189.—Chy. D.

See *v. Creighton v. Chittick*, 7 S. C. R. 348. p. 117; *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644, p. 1406.

### NEXT FRIEND.

See HUSBAND AND WIFE—INFANT.

### NIAGARA FALLS PARK.

EXPROPRIATION OF LAND FOR.—See CROWN.

### NISI PRIUS.

See COURT OF ASSIZE.

### NON-RESIDENT LANDS.

See ASSESSMENT AND TAXES.

### NONSUIT.

NEW TRIAL AS TO SOME COUNTS AND NONSUIT AS TO OTHERS.—See NEW TRIAL.

The verdict herein was set aside by the County Court, and a nonsuit entered upon a ground not taken as a defence at the trial or in the rule nisi:—Held, reversing the judgment that the judge erred in giving effect to the objection, which, if taken at the trial, would have been met by an amendment. As the evidence shewed that the plaintiff was entitled to succeed upon

the merits, the appeal was allowed and the rule in the court below discharged. *Clarke v. Barron*, 6 A. R. 309.

In an action on a life policy tried before a judge and a jury, in accordance with the provisions of 37 Vict. c. 7, s. 32 (Ont.), the judge in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favour of the plaintiff, the judge entered a verdict for the plaintiff. Upon a rule nisi to shew cause why this verdict should not be set aside and a nonsuit or a verdict entered for defendants pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the Court of Queen's Bench (41 Q. B. 497) made the rule absolute to enter a verdict for the defendants. The appellant then appealed to the Court of Appeal for Ontario, and the court being equally divided, the appeal was dismissed (3 A. R. 331). Per Gwynne, J., that the plaintiff never could have been nonsuited in virtue of 37 Vict. c. 7, s. 33 (Ont.), as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a nonsuit can be entered; and that in this case, the proper verdict which the law required to be entered upon the answers of the jury was one in favour of the plaintiff. *Moore v. Connecticut Mutual Life Ins. Co. of Hartford*, 6 S. C. R. 634. See S. C. 6 App. Cas. 644, p. 1406.

Where in a jury case the judge at the trial enters a nonsuit, a notice of motion, and not an order nisi, is the proper mode of moving against it. *Clarkson v. Snider*, 10 O. R. 561.—C. P. D.

At the trial of a case with a jury the judge of the County Court at the conclusion of the plaintiff's evidence and without hearing any evidence on the part of the defendants nonsuited the plaintiff. In the following term the judge set the nonsuit aside and entered judgment for the plaintiff claiming a right under the circumstances to do so. On appeal this court while satisfied with the ruling of the judge on the legal liability of the defendants set the nonsuit aside and ordered a new trial upon the facts so as to afford the defendants an opportunity of adducing evidence, but under the circumstances refused them any costs of the appeal. Rules 311, 312, 319 and 321 O. J. Act (Con. Rules 791, 792, 754, 755), discussed. *Baker v. Grand Trunk R. W. Co. of Canada*, 11 A. R. 68.

See *Ryan v. Canada Southern R. W. Co.*, 10 O. R. 745.

### NOT GUILTY BY STATUTE.

See PLEADING.

### NOTICE.

#### I. MATTERS OF PRACTICE.

1. *Of Action*—See ACTION.
2. *Of Appeal*—See COURT OF APPEAL—SUPREME COURT OF CANADA.
3. *To Produce*—See EVIDENCE.

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4. *Of Taxation*—See COSTS.
5. *Of Trial*—See TRIAL.
6. *Term's Notice*—See PRACTICE.
7. *Disputing Jurisdiction*—See DIVISION COURTS.
8. *Of Motion*—See JUDGMENT—PRACTICE.
9. *Jury Notice*—See TRIAL.
10. *Of Exceptions*—See PLEADING.

## II. OTHER NOTICES.

1. *Advertisement*—See ADVERTISEMENT.
2. *Of Claims*—See BANKRUPTCY AND INSOLVENCY.
3. *Of Dishonour*—See BILLS OF EXCHANGE AND PROMISSORY NOTES.
4. *Of Desistment*—See RAILWAYS AND RAILWAY COMPANIES.
5. *Of Allotments and Calls on Stock*—See COMPANY.
6. *To Electors*—See PARLIAMENTARY ELECTIONS.
7. *Under Policies*—See INSURANCE.
8. *Notice to Quit*—See LANDLORD AND TENANT.
9. *In Proceedings on Mortgages*—See MORTGAGE.
10. *Of Closing Roads*—See WAY.
11. *Publication and Notice of By-laws*—See MUNICIPAL CORPORATIONS.
12. *Registration as Notice*—See REGISTRY LAWS.
13. *Of Trusts*—See TRUSTS AND TRUSTEES.

Notice of loss or non-delivery in contract for carriage of goods. See *Steele v. Grand Trunk R. W. Co.*, 31 C. P. 260; *Grand Trunk R. W. Co. v. McMillan*, 16 S. C. R. 543.

Purchase of land with notice of will destroyed, but not registered. See *Re Davis*, 27 Chy. 199.

In case of proposed expulsion of members of a corporation. See *Cannon v. Toronto Corn Exchange*, 5 A. R. 268, p. 271; *Marsh v. Huron College*, 27 Chy. 605, p. 269; *L'Union St. Joseph d'Montreal v. Lapiere*, 4 S. C. R. 164, p. 150.

Of meeting of directors of company. See *McLaren v. Fiske*, 28 Chy. 352, p. 263.

The notice of the party resigning the office of councillor for a village to which he had been elected, stated that he resigned his "seat" in the council.—Held, sufficient; and that the plaintiff was entitled to his costs, although the Municipal Act requires notice of a resignation of the "office" to be given. *Smith v. Petersville*, 28 Chy. 599.—Proudfoot.

Notice to Attorneys-General of constitutional questions arising in cases before the courts. See *Hately v. Merchants' Despatch Co.*, 2 O. R. 385; *Goring v. London Mutual Ins. Co.*, 11 O. R. 82, p. 980.

Of alteration in promissory note. See *Swaisland v. Davidson*, 3 O. R. 320, p. 153.

Notice to solicitor—notice to client. See *Brown v. Sweet*, 7 A. R. 725, p. 805; *Real Estate Invest-*

*ment Co. v. Metropolitan Building Society*, 3 O. R. 476, p. 1290.

Held, that the defendant in this case having notice of an actual travelled way across his land was affected also with notice of the origin as well as the existence of the right. *Dixon v. Cross*, 4 O. R. 465.—Chy. D.

To accountant of Supreme Court of Judicature. See *Coltingham v. Coltingham*, 11 O. R. 294.

To voter and revising officer. See *Simmons v. Dalton*, 12 O. R. 505, p. 1429.

The Quebec Street Railway Company were authorized under a by-law passed by the corporation of the city of Quebec and an agreement executed in pursuance thereof to construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that at the expiration of twenty years (from the 9th February, 1835), the corporation might, after notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment of its value, to be determined by arbitration, together with ten per cent. additional.—Held, reversing the judgments of the courts below, Fournier, J., dissenting, that the company were entitled to a full six months' notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1835, and therefore a notice given in November, 1834, to the company that the corporation would take possession of the railway in six months thereafter was bad. Per Strong and Henry, J.J.—That the court had no power to appoint an arbitrator or valuator to make the valuation provided for by the agreement after the refusal by the company to appoint their arbitrator. Fournier, J., contra. *Quebec Street R. W. Co. v. City of Quebec*, 15 S. C. R. 164.

Three persons occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interest a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of the moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint-stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator.—Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that no actual notice to them or to the company being shown the bank had no lien. Judgment of the County Court of York reversed. *In re Herr Piano Company*, 17 A. R. 333.

Notice to partner to leave the firm. See *O'Keefe v. Curran*, 17 S. C. R. 593, p. 839.

## NOVATION.

See *Purdum v. Nichol*, 15 A. R. 244; 15 S. C. R. 610; 16 O. R. 699; *Sutherland v. Coz*, 15 A.



R. 541, p. 203; *Henderson v. Killey*, 17 A. R. 456; *Venner v. Sun Life Ins. Co.*, 17 S. C. R. 394, p. 1001; *Canadian Bank of Commerce v. Marks*, 19 O. R. 450.

### NUISANCE.

- I. RESTRAINING—See INJUNCTION.
- II. POWERS AND DUTIES OF MUNICIPALITIES  
See MUNICIPAL CORPORATIONS.
- III. WATER — See WATER AND WATER-COURSES.

Railways on highways—Acquiescence of Municipal Council. See *Township of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503; *Fenelon Falls v. Victoria R. W. Co.* 29 Chy. 4.

Held, that barbed wire fences constructed by a railway upon an ordinary country road could not be treated as a nuisance. See *Hillyard v. Grand Trunk R. W. Co.*, 8 O. R. 583.

See *Attorney-General v. International Bridge Co.*, 6 A. R. 537, p. 1010.

### OATH.

- I. AFFIDAVITS—See AFFIDAVIT.
- II. OF ALLEGIANCE—See PARLIAMENTARY ELECTIONS.

### OCCUPATION RENT.

See LANDLORD AND TENANT.

### OFFICE AND PUBLIC OFFICER.

- I. PRESUMPTIONS ARISING FROM OFFICIAL APPOINTMENTS—See EVIDENCE.
- II. DELEGATION OF POWERS—See DELEGATION—MUNICIPAL CORPORATIONS.
- III. DISCLAIMER—See MUNICIPAL CORPORATIONS.
- IV. AMOTION — See MUNICIPAL CORPORATIONS—QUO WARRANTO.
- V. PUBLIC OFFICERS.
  1. *Notice of Action to*—See ACTION.
  2. *Prohibition*—See PROHIBITION.
  3. *Magistrates* — See JUSTICE OF THE PEACE.
  4. *Municipal Officers*—See MUNICIPAL CORPORATIONS.
  5. *Other Officers*—See THE SEVERAL TITLES.

Per Ritchie, C. J. Neither the engineer nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada have any power or authority, express or implied, under the law to bind the

crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the crown and the contractor, according to law, and then only in the specific manner provided by the express terms of the contract. *O'Brien v. The Queen*, 4 S. C. R. 529.

Held, that R. S. O. (1877) c. 189, which forbids the profanation of the Lord's day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and therefore a conviction of a government locktender on the Welland Canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superior, was quashed. *Regina v. Berriman*, 4 O. R. 292.—Q. B. D.

Purchase by township clerk of lands at tax sale. See *Beckett v. Johnston*, 32 C. P. 301, p. 77.

Action for assault against a public officer.—New trial. See *Campbell v. Prince*, 5 A. R. 330, p. 1405.

Action for slander against public officer.—Privileged communication. See *Dewar v. Waterbury*, 6 S. C. R. 143, p. 409.

The plaintiffs appointed the defendant chief of police of the town of Stratford, at a named salary, but stipulated that he should act as a county constable within the town only, and account for and pay over to the plaintiffs all fees received by him from the county as a reward for services performed by him as county constable.—Held, that under 5 and 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, the agreement to account for fees was invalid. Quære, whether the plaintiffs, or the Board of Police Commissioners had the power to appoint the defendant; and whether, apart from the statutes mentioned, it was not ultra vires the plaintiffs to bargain with the defendant for the accounting to them for the fees of another office not under their control. *Town of Stratford v. Wilson*, 8 O. R. 104.—Rose.

An affidavit cannot be required from a public officer as to the proper discharge of his duty. *Re Morton and Lot No. 6 on Plan No. 589 in the County of York*, 7 O. R. 59.—Proudfoot.

Per Cameron, C. J. Quære, whether this court has the right to interfere with election officers except when the express statutory power to do so is given. *In re the Revision of the Voters' List for the City of St. Thomas for 1886—Re Alexander Boyes*, 13 O. R. 3.

Official acting as persona designata. See *Johnson's Vote. Lincoln Election.*—*Pauling v. Rykert*, H. E. C., 500, p. 1436; *Re Parquette*, 11 P. R. 463, p. 321; *Re Godson and the City of Toronto*, 16 O. R. 275, p. 1385.

An assignment for the benefit of creditors made to a sheriff under R. S. O. (1887), c. 124, is made to him as a public functionary, and on his death the care and administration of the estate assigned devolves upon his deputy, and thereafter upon his successor in office. It is not competent to the sheriff to disclaim or decline to act as such assignee. *Brown v. Grove*, 18 O. R. 311.—Chy. D.

A pathmaster is "an officer or person fulfilling a public duty" within the meaning of R. S. O.

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(1887), c. 73, s. 1, and for anything done by him  
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titled to the protection of the statute; but where,  
professing to act as a public officer, he seeks to  
promote his private interest by some act, he dis-  
entitles himself to the protection of the statute,  
and may be proceeded against for such act as if  
he were a private individual. And where a  
pathmaster of a township in the course of his  
employment so acted as to disentitle himself to  
the protection of the statute, and thereby caused  
damage to the plaintiff:—Held, that the town-  
ship corporation as well as the pathmaster was  
liable; and even if not originally so, the corpora-  
tion made itself liable by sanctioning what was  
done, and refusing to amend it after notice.  
*Stalker v. Township of Danurich*, 15 O. R. 342.—  
Q. B. D.

See *The Township of Adjala v. McElroy*, 9 O.  
R. 580, p. 1332.

## OFFICIAL DOCUMENTS.

See EVIDENCE.

## OFFICIAL GUARDIAN.

See INFANT—LUNATIC.

## OIL LANDS.

Right of tenant to bore for oil. See *Lancey*  
*v. Johnston*, 29 Chy. 67.

See *Ontario Natural Gas Co. v. Smart—On-*  
*tario Natural Gas Co. and Township of Gosfield*  
*South*, 19 O. R. 591.

## ONTARIO FACTORY ACT.

See MASTER AND SERVANT.

## ONUS PROBANDI.

See EVIDENCE.

## OPENING FORECLOSURE.

See MORTGAGE.

## OPENING PUBLICATION.

Held, that upon the discovery of material evi-  
dence publication may be opened even after judg-  
ment affirmed by the two courts above. The  
judge here considered that what was proposed  
to be introduced as new evidence was not material,  
and dismissed the petition, with costs.  
*Synod v. DeBlaquiere*, 10 P. R. 11.—Proudfoot.  
See also *Bank of British North America v. Wes-*  
*ters Assurance Co.*, 11 P. R. 434.

## ORDERS.

- I. OF JUDGE—See PRACTICE.
- II. TO PRODUCE—See EVIDENCE.
- III. FOR EXAMINATION—See EVIDENCE—  
EXAMINATION OF JUDGMENT DEBTOR.
- IV. OF REFERENCE—See ARBITRATION AND  
AWARD.

## ORDERS IN COUNCIL.

A magistrate cannot take judicial notice of  
Orders in Council or their publication without  
proof thereof by production of the Official Gazette.  
See *Regina v. Bennett*, 10 O. R. 445, p. 611.

## ORDNANCE LANDS.

See RIDEAU CANAL.

Rights of Northern Railway over ordnance  
lands in the vicinity of Toronto. See *Grand*  
*Trunk R. W. Co. v. Credit Valley R. W. Co.*,  
27 Chy. 232.

## OTTAWA (CITY OF).

Easterly boundary of. See *Regina v. County*  
*of Carleton*, 10 O. R. 277.

## OVERHOLDING TENANT.

See LANDLORD AND TENANT.

## OYER AND TERMINER.

See COURT OF ASSIZE.

## PARENT AND CHILD.

- I. TRANSACTIONS BETWEEN.
  1. *Agreements for Maintenance*, 1419.
  2. *Claim for Wages*—See MASTER AND  
SERVANT.
  3. *Other Transactions*, 1421.
  4. *Undue Influence*—See FRAUD AND MIS-  
REPRESENTATION.
- II. LIABILITY OF PARENT FOR SUPPORT OR  
DEBTS OF CHILD, 1422.
- III. CUSTODY OF CHILD—See INFANT.
- IV. ACTION BY PARENT FOR DEATH OF CHILD  
FROM NEGLIGENCE—See NEGLIGENCE.
- V. SEDUCTION OF CHILD—See SEDUCTION.
- VI. INFANT—See INFANT.
- VII. ILLEGITIMATE CHILD—See BASTARD.

## I. TRANSACTIONS BETWEEN.

1. *Agreements for Maintenance.*

G. had recovered a judgment against his father for costs in an action instituted by the latter, and under the execution issued thereon seized a horse as the property of the father in the possession of the plaintiff A., another son. It was shewn that several years before the father had agreed to convey his farm to A. and another brother W., both of whom assumed possession and control of the property before any conveyance was executed, and so continued in possession, the father continuing to reside on the place with the two sons, part of the consideration for the conveyance being that they should support him. The sons also bought the chattel property from their father, the horse in question having been purchased by A. for \$50, and this he kept upon the premises, as had always been done, using him in the work of the farm, and occasionally working for others with him for hire, the father sometimes using him for his own purposes. On this state of facts the judge of the County Court of Hastings in an interpleader issue, left the question of property to the jury, who found a verdict for A. The court being of opinion that the claim of G. having arisen long after the alleged sale of chattels, it would require a preponderance of evidence in favour of G., to induce the court to interfere with the finding of the jury (but which did not exist) refused to disturb the conclusion of the judge as to the finding of the jury, and dismissed an appeal with costs. *Dunford v. Dunford*, 8 A. R. 518.

H. S. by deed dated November 4, 1863, granted his farm and some chattels to his son T. S. in consideration of \$300, "subject to be defeated and rendered null and void upon the nonperformance by the said party of the second part of the following condition, or any part thereof, viz., the said party of the second part covenants to feed, clothe, support and maintain the said party of the first part \* \* \* during the term of his natural life \* \* \*." T. S. having fulfilled the condition during his lifetime, died on October 5, 1865, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house, and have him provided for there, or to allow him to go to her brother's house in the same way, both of which offers were declined, and as no maintenance was provided for him by her at the farm he treated the condition as broken, and brought an action of ejectment, and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. H. S. was subsequently supported, part of the time on the farm, by the defendant, and died in 1880. In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was:—Held, affirming the judgment of Armour, J., Proudfoot, J., dissenting, that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited. Per Armour, J., (at the trial), the deed must be construed as being made upon condition and as being defeated and rendered void by the nonperformance of the covenant. The effect of the covenant is, that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor

or his representatives might require him to go, and he was justified in refusing to accept the offers made. Per Boyd, C., the parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the court ought to respect them in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is, that the conditions of the deed were broken and the land forfeited. Per Proudfoot, J., the life interest of H. S. was not reserved out of the land, it rested solely on the condition, with probably an equitable charge on the land. The condition is to maintain without specification of place; it imposes no personal obligation on the grantee, it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representative might reasonably offer. Per Ferguson, J., it was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor, or those claiming from him the reversion in the lands; the grantor was not bound to accept the offer that was made, and there was a breach of the condition, the effect of which was to revert the estate. *Millette v. Sabourin*, 12 O. R. 248.—Chy. D.

The plaintiff conveyed his farm to his son, subject to the payment of an annuity of \$60 a year; and the plaintiff's "maintenance in board, washing and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of same date whereby defendant covenanted to furnish such maintenance, or pay such sum. The defendant sold the farm and went to reside elsewhere. The plaintiff went and lived with him on the new farm for some years, receiving his maintenance, etc., but becoming dissatisfied left:—Held, that the plaintiff was not bound to reside with the defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year. At the trial, the defendant's counsel raised the objection that the amount, if any, was only payable at the end of the year. The trial judge overruled the objection, and decreed that plaintiff was entitled to receive \$2 a week, payable weekly. The defendant's counsel then asked to have the amount payable monthly, to which the judge acceded, and gave judgment accordingly:—Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it. *Sweeney v. Sweeney*, 16 O. R. 92.—C. P. D.

In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would, during her life, provide her with a house on the farm, and with necessities, and support his brothers and sisters thereon, until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it:—Held, that the mother had no right or power to release the petitioner



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## I. LAW GOVERNING ELECTIONS.

The common law of England relating to parliamentary elections is in force in Ontario, and applies to elections for the House of Commons. *Cornwall Election (Dom.)—Bergin v. Macdonald, H. E. C. 547.—Spragge.*

The Dominion Elections' Act of 1874 does not affect the rights of parties in pending proceedings, which must be decided according to the law as it existed before the passing of that Act;—section 20 of that Act referring to candidates at some future election. *North Victoria Election (Dom.)—Cameron v. MacLennan, H. E. C. 584.—Richards.—Spragge.—Hagarty.*

See *Cardwell Election (Dom.)—Hewitt v. Cameron, H. E. C. 944, p. 1437.*

## II. VOTERS.

## 1. Assessment Roll and Voters' List.

## (a) Generally.

Held, (1) That the proper list of voters to be used at an election is "the last list of voters made, certified, and delivered to the clerk of the peace at least one month before the date of the writ to hold such election." (2) That an irregular voters' list had been used in one of the townships in the electoral division; but that the result of the election had not been affected thereby, and that the election was not avoided. *Monck Election (Ont.)—Colliar v. McCallum, H. E. C. 154.—Galt.*

Held, following the last case, that the list of voters to be used at an election must be the list made, certified and delivered to the clerk of the peace at least one month before the date of the writ to hold such election. *Prince Edward Election (2) (Ont.)—Dorland v. McCuaig, H. E. C. 160.—Morrison.*

The list of voters used at the election in the township of Hillier was not filed until the 28th November, 1871, and the writ of election was dated 9th December, 1871:—Held, that the list of voters of 1871 should not have been used, and the seat was thereupon awarded to the other candidate, he having obtained on a scrutiny a majority of the votes. *Ib.*

Special report, and observations on making the revised lists of voters final, except as to matters subsequent to the revision. See *Stormont Election (Ont.)—Bethune v. Colquhoun, H. E. C. 21.*

(5)

The name of the voter being on the poll-book is *prima facie* evidence of his right to vote. The party attacking the vote may either call the voter, or offer any other evidence he has on the subject. *Ib.*

A voter being duly qualified in other respects, and having his name on the roll and list, but by mistake entered as tenant instead of owner or occupant, or vice versa:—Held, not disfranchised merely because his name was entered under one head instead of another. *Ib.*

The only question as to the qualification of a voter settled by the court of revision under the Assessment Act, is the one of value.—*Stewart's vote. Ib.*

Being rated as tenant instead of owner:—Held, not to affect the vote. *Blair's vote. Ib.*

Where the voter had only received a deed of the property on which he voted on the 16th August, 1870, but previous to that date had been assessed for and paid taxes on the place, but had not owned it:—Held, that not possessing the qualification at the time he was assessed, or at the final revision of the roll, he was not entitled to vote.—*Cahey's vote. Ib.*

Where a voter properly assessed, who was accidentally omitted from the voters' list for polling sub-division No. 1, where his property lay, and entered on the voters' list for polling division No. 2 voted in No. 1, though not on the list, his vote was held good.—*Little's vote. Brockville Election (Ont.)—Flint v. Fitzsimmons, H. E. C. 129.—Hagarty.*

A's name appeared on the assessment roll and voters' list as owner, but no property appeared opposite his name. Just below A's name, the name of B. was entered as tenant, with certain property following it, but B's name was not bracketed with A's. Evidence was admitted to shew that A. owned the property next below his name, for which B. his tenant was assessed as tenant, and A's vote was held good.—*Baker's vote. Ib.*

The mistake of the number of the lot in the assessment roll does not come under the same rule as the mistake of a name, as the latter is provided for in the statute and the voter's oath. *Place's vote. South Grenville Election (Ont.)—Ellis v. Fraser, H. E. C. 163.—Mowat.*

Parol evidence is inadmissible on a scrutiny to alter the value assessed against property in the assessment roll.—*Stewart's vote. Ib.*

Where a voter was assessed for property which he sold on the 27th February, 1871, before the revision of the assessment roll, and was not assessed for other property of which he was in possession as owner or tenant, he was held not entitled to vote.—*Place's vote. Ib.*

A person assessed for land he does not own, though receiving rent for it from a tenant, is not qualified to vote.—*Clark's vote.—Lincoln Election (2) (Ont.)—Pawling v. Rykert, H. E. C. 500.—Patterson.*

A voter was assessed in two wards of a town; he parted with his property qualification in one of the wards, but voted in such ward:—Held, that the vote might be supported on the qualifi-

cation in the other ward, which, if the voter had voted on it, would have made it necessary for him to vote in another polling division.—*Gibson's vote. Ib.*

Particulars for a scrutiny of votes were delivered by the respondent objecting to certain voters, as (1) aliens; (2) minors; (3) not owners, tenants or occupants of the property assessed to them; and (4) farmers' sons not residing with their fathers upon the farm, as required by law. On a motion to strike out such particulars:—Held, that under the "Voters' Lists Finality Act" (41 Vict. c. 21, s. 3), the legality of the votes so objected to could not be inquired into, and that the particulars should be struck out;—Held, further, that the effect of the said Act was to render the voters' lists final and conclusive of the right of all persons named therein to vote, except where there had been a subsequent change of position or status, by the voter having parted with the interest which he had (or by the assessment roll appeared to have) in the property, and becoming also a nonresident of the electoral division. *South Wentworth Election (Ont.)—Olmstead v. Carpenter, H. E. C. 531.—Moss—(alt.*

The assessment roll is conclusive as to the amount of the assessment; but the mere fact of the name of a person being on the roll is not conclusive as to his right to vote. The returning-officer is bound to record the vote if the person takes the oath, but that is not conclusive. *North Victoria Election (Dom.)—Cameron v. Maclellan, H. E. C. 584.—Richards—Spragge—Hagarty*

Mistakes in copying the voters' lists should not deprive legally qualified voters of their votes any more than the names of unqualified voters being on the list would give them a right to vote. But the mere fact that the lists were not correct alphabetical lists, or had not the correct number of the lot, or were not properly certified, or the omitting to do some act as to which the statute is directory, is no ground for setting aside an election, unless some injustice resulted from the omission, or unless the result of the election was affected by the mistake. *Ib.*

The court will not go behind the voters' list to inquire whether a voter's name was entered upon the assessment roll in a formal manner or not. *North Simcoe Election, (Dom.)—Edwards v. Cook, H. E. C. 617.—Richards—Spragge—Hagarty.*

The names of certain persons who were qualified to vote at the election, appeared on the last revised assessment roll of the municipality, but were omitted from the voters' list furnished to the deputy returning-officer, and used at the election. They tendered their votes at the poll, but their votes were not received; and a majority of them stated to the deputy returning-officer that they desired to vote for the petitioner. The petitioner had a majority without these votes:—Held, by the Court of Queen's Bench (affirming Wilson, J.), no ground for setting aside the election. *North Victoria Election, (2) (Dom.)—Cameron v. Maclellan, H. E. C. 671.*

The respondent was elected by four votes. At the election the names of twelve persons who were entered on the assessment roll as "freeholders," appeared on the voters' lists, owing to a printer's mistake, as "farmers' sons." Their

votes were challenged at the poll, and they were required by the petitioner's scrutineers to take the farmers' sons' oath, which they refused. Subsequently they offered again to vote and to take the owner's oath, and the deputy returning-officer, who was also clerk of the municipality, knowing them, gave them ballot papers and allowed them to vote:—Held, (1) that having been rightly entered on the assessment roll, the mistake as to their qualification on the voters' list did not disfranchise them. (2) That their refusal to take the farmers' sons' oath was not a refusal to take the oath required by law. A refusal to swear is where a voter refuses to take the oath appropriate to his proper description. (3) That having a right to vote, although they voted in a wrong capacity, their votes could not be struck off:—Semble, that the provisions of the law as to how voters are to be entered on the voters' list in respect to their property, and as to the manner in which they are to vote, are directory. *Prescott Election (Dom.)—Hagar v. Routhier, H. E. C. 780.—Armour.*

Any one of the three voters' lists regularly prepared, and certified to by the County Court Judge under the Voters' Lists Acts, "is the proper list to be used," and in case of irregularity in, loss or destruction of, or other accident to, the other or others, may be resorted to for the purpose of the election. *Collins v. Campbell, East Durham Election (Ont.), 1 E. C. 489.—Maclellan—Falconbridge.*

Where all the requisite preliminaries in the preparation of voters' lists under the Act had been duly observed, but in one of the printed copies delivered to the County Court judge, and certified to by him, two pages containing voters' names, were accidentally omitted, and this defective copy was sent by the judge to the clerk of the peace, who from such copy certified to the returning-officer similarly defective lists, which were used at the election:—Held, that the voters whose names were so omitted were not disfranchised:—Held, also, that those voters so omitted, were entitled to vote by "tendered ballot," and their votes should be counted on a scrutiny. *Ib.*

Semble—The effect of sections 72 and 103 of the "Ontario Elections' Act," (1887) is that where a person who has a right to vote is omitted from the list he may vote by tendered ballot. *Ib.*

#### (b) Revising Officer and Notice of Complaint.

A revising officer under the Electoral Franchise Act, 48-49 Vict. c. 40 (Dom.), having declined to entertain the application of S. to have the name of D. struck off the voters' list on the ground that the notice to D. provided for by section 26 of the Act was not proved, and that the notice to the revising officer provided for by same section was not duly served on or given to him in time; on an application for a mandamus to the revising officer, although it appeared no copy of the notice to D. was kept, and no notice to produce the original was served, it was shewn by two witnesses that a notice to D. filled up on a printed form with his name, address, and the objection to his vote had been mailed to him by a prepaid registered letter on 26th June, for the sittings of the revising officer on 12th July fol-

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lowing, and the certificate of registration was produced, although the witnesses had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the revising officer:—Held, that in the absence of evidence to the contrary such proof was sufficient. *Re Simmons and Dalton*, 12 O. R. 505.—Proudfoot.

The notice to the revising officer was left with his clerk at his office during the absence from town of the revising officer, on Monday, 28th June, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said what was done was sufficient:—Held, that the last day for service for the sittings for the final revision to be held 12th July was Sunday, 27th June, but that under section 2 sub-section 2 of the Act, the time was extended, and S. had all the next day, and that the notice was well given on Monday. *Ib.*

Held, that the service of the notice on the clerk of the revising officer was, under sections 19 and 26, a sufficient "depositing with" the revising officer to satisfy the statute, and the conduct of the revising officer amounted to an adoption of the action of the clerk, and was equivalent to personal service if such were required by the statute. *Ib.*

Held, that the revising officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to D. should have been given which were not findings of fact, and such mistakes or errors are not such decisions as prevent the granting of the writ of mandamus. If he had found as a matter of fact that notice was not given to D., there might have been some difficulty in interfering with his conclusion. The Centre Wellington Case, 44 Q. B. 132, referred to and distinguished. *Ib.*

It was contended that the revising officer was an appointment of the dominion government, and that his sittings were sittings of a Court of Record, and that there was no jurisdiction in a provincial court to issue a mandamus to him:—Held, that the dominion parliament had, by the Electoral Franchise Act, interfered with civil rights in this province, and having made no provision for a court to superintend the conduct of the officials, and following *Valin v. Langlois*, 3 S. C. R. 1, that until such a court is created the provincial courts by virtue of their inherent jurisdiction have a right to superintend the discharge of their duties by any inferior officer or tribunal. *Ib.*

#### (c) Court of Revision and County Judge—Complaints and Appeals.

Held, that the notice required by R. S. O. (1877), c. 9, s. 9, of a complaint of any error or omission in the voters' list must be signed by the voter giving the same or his agent. The name in the beginning is not a sufficient signature. *In re Simpson and the County Judge of Lanark*, 9 P. R. 358.—Osler.

Semble, that the question of the validity of the notice can be raised before the judge hear-

ing the appeal, after it has been received and entered in the list of appeals, the clerk who receives and enters it having no judicial duty to perform. *Ib.*

The assessment roll of a municipality was finally revised and corrected by the court of revision on the 31st May, 1882. The clerk of the municipality prepared the voters' list therefrom, and on the 7th September, 1882, posted a copy thereof in his office as required by R. S. O. (1877), c. 9, s. 3. He transmitted copies of the list to some, but not to all the persons entitled to receive them under sections 3 and 4, and no complaints having been received by him up to the 30th October, he on that day signed the certificate and report mentioned in section 11 of the Act, and obtained the certificate of the deputy judge of the County Court on three copies of the list as being the revised list of voters for the municipality. The judge of the County Court found that the clerk's certificate was false, and made with intent to deceive the deputy judge, and that the clerk had designedly withheld the lists; and he therefore set aside the clerk's certificate and the certificate of the deputy judge:—Held, that as soon as the list is posted up in the clerk's office the time for making complaints in respect of it begins to run; that such time being by section 9 expressly limited to thirty days from the posting up of the list, and no complaint having been made within it, the deputy judge was bound to certify; that the omission to transmit the copies, whether negligent or wilful, not being essential to the legal revision or authentication of the list, could not authorize an extension of the time, and that the deputy judge's certificate was final, and could not be set aside. *In re the Voters' List of the Village of L'Orignal. In re Johnson*, 9 P. R. 425.—Osler.

The voters' lists for the city of St. Thomas were posted up in the office of the city clerk, on 23rd October, 1886. On the 19th November, three days before the time for giving, by a voter, notice of any complaint against the list, had expired, the clerk made a report to the county judge in the form No. 7 in the schedule to the Voters' Lists Act, R. S. O. (1877), c. 9; and the said judge thereupon, on said 19th November, made an order appointing the 30th November, 1886, for the holding of a court to hear complaints of errors and omissions in the said voters' list, and notice of the time and place thereof was duly published in a newspaper published in said city. Previous to the 19th November, notice of a number of complaints of errors and omissions in the list was given to the clerk. On an application for a writ of prohibition to prohibit the county judge from holding the court, on the ground that he had no jurisdiction to make the order, inasmuch as the thirty days for filing appeals had not then expired:—Held, that the County Court judge had jurisdiction to make the order; and the application was therefore refused with costs. *Per Cameron, C. J.*—The appeal or complaint made within the thirty days after the clerk has posted the voters' list would be in time, and should be disposed of, whether made after the order for holding the court or not; but quere, whether the judge could deal with such appeals at the 30th November Court. *Per Cameron, C. J.*

Quere, whether this court has the right to interfere with election officers, except where express statutory power to do so is given. Per Rose, J.—Under the Voters' Lists Act, the judge is not confined by the report of the clerk, but may and should hear all appeals. *In re Revision of the Voters' List for the City of St. Thomas. In re Boyes*, 13 O. R. 3.—C. P. D.

By section 13, sub-section 1, of "The Manhood Suffrage Act," 51 Vict. c. 4 (Ont.), it is provided that complaints of persons not having been entered on the roll as qualified to be voters who should have been so entered, may, by any person entitled to be a voter or to be entered on the voters' list, be made to the Court of Revision as in the case of assessments, or the complaints may be made to the county judge under the Voters' Lists Act. By section 61 of the Assessment Act, R. S. O. (1877), c. 193, it is provided that the Court of Revision of each municipality shall meet and try all complaints in regard to persons wrongfully omitted from the roll; and by section 68, sub-section 1, that an appeal to the county judge shall lie, not only against a decision of the Court of Revision on an appeal to that court, but also against the omission, neglect, or refusal of said court to hear or decide an appeal. The Court of Revision of a municipality refused to hear or adjudicate upon a complaint made by M. under section 13 of "The Manhood Suffrage Act," that the names of certain persons had been wrongfully omitted from the assessment roll:—Held, that it was the duty of the Court of Revision under section 61 to try the complaint made by M.; and that if no other complete, appropriate, and convenient remedy had existed, M. would have been entitled to a mandamus to compel the court to perform its duty; but as the legislature by section 68 had given a specific remedy for this very breach of duty, by appeal to the county judge, M. was not entitled to a mandamus. The right which M. was seeking to enforce was to have the names of certain persons placed on the assessment roll; not, as was contended, to have his complaint disposed of by the Court of Revision; the complaint to the Court of Revision was a means of enforcing his right, not the right itself. Decision of MacMahon, J. reversed. *In re Marter and the Court of Revision of the Town of Gravenhurst*, 18 O. R. 243.—Q. B. D.

#### (d) Property Qualification.

*Husband and Wife.*—Where the owner died intestate, and the husband of one of his daughters leased the property and received the rents, such husband was held not entitled to vote.—*Leslie's vote. Brockville Election (Ont.)—Flint v. Fitzsimmons*, H. E. C. 129.—Hagarty.

Where a husband had possession of a lot for which he was assessed as occupant and his wife as owner, but which belonged to the wife's daughters by a former husband his vote was held good.—*Whaley's vote. Ib.*

*Parent and Son.*—Where a father was by a verbal agreement "to have his living off the place," the son being owner and in occupation with the father, the father was held not entitled to vote.—*Wiltse's vote. Ib.*

Where it was proved that an agreement existed (verbal or otherwise) that the son should have a share in the crops as his own, and such agreement was bona fide acted on, the son being duly assessed, his vote was held good; the ordinary test being: had the voter an actual existing interest in the crops growing and grown? *Caldwell, Moore and Smith's votes. Ib.*

Where it was proved that for some time past the owner had given up the whole management of the farm to his son, retaining his right to be supported from the product of the place, the son dealing with the crops as his own, and disposing of them to his own use, the son's vote was held good. *Ib.*

But where such crops could not be seized for the son's debt, the son was held not entitled to vote.—*Fraucis' vote. Ib.*

Where the agreement did not shew what share in the crops the son was to have with his father, and it appeared to be in the father's discretion to determine the share, such son was held not entitled to vote.—*Johnson's vote. Ib.*

The widow of an intestate owner continuing to live on the property with her children, who own the estate and work and manage it, should not, till her dower is assigned, be assessed jointly with the joint tenants, nor should any interest of hers be deducted from the whole assessed value. Where, therefore, four joint tenants and such dowress occupied property assessed for \$900, the joint tenants were held entitled to the qualification of voters.—*Gilroy's vote. Ib.*

Where the father had made a will in his son's favour, and told the son if he would work the place and support the family he would give it to him, and the entire management remained in the son's hands from that time, the property being assessed in both names, the profits to be applied to pay the debt due on the place:—Held, that as the understanding was that the son worked the place for the support of the family, and beyond that for the benefit of the estate, which he expected to possess under his father's will that he did not hold immediately to his own use and benefit, and was not entitled to vote. *Weert's vote. Stormont Election, (Ont.)—Bethune v. Colquhoun*, H. E. C. 21.—Richards.

Where the objection taken was, that the voter was not at the time of the final revision of the assessment roll the bona fide owner, occupant, or tenant of the property in respect of which he voted; and the evidence shewed a joint occupancy on the part of the voter and his father on land rated at \$240:—Held, that the notice given did not point to the objection that if the parties were joint occupants, they were insufficiently rated, and as the objection to the vote was not properly taken, the vote was held good. The Chief Justice intimated that if the objection had been properly taken, or if the counsel for petitioner (whose interest it was to sustain the vote) had stated that he was not prejudiced by the form of the objection, he would have held the vote bad.—*Baker's vote. Ib.*

Where a certain occupancy was proved on the part of the son distinct from that of the father, but no agreement to entitle the son to a share of the profits, and the son merely worked with the rest of the family for their common benefit:—

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Held, that, although the son was not merely assessed for the real but the personal property on the place (his title to the latter being on the same footing as the former), he was not entitled to vote.—*Raney's vote. Ib.*

Where the voter and his son leased certain property, and the lease was drawn in the son's name alone, and when the crops were reaped the son claimed they belonged to him solely, the voter owning other property, but being assessed for this only and voting on it:—Held, that, although he was on the roll and had the necessary qualification, but was not assessed for it, he was not entitled to vote.—*Hill's vote. Ib.*

Where father and son live together on the father's farm, and the father is in fact the principal to whom money is paid, and who distributes it as he thinks proper, and the son has no agreement binding on the father to compel him to give the son a share of the proceeds of the farm, or to cultivate a share of the land, but merely receives what the father's sense of justice dictates:—Held, the son has no vote.—*Emmon's vote. Ib.*

In a milling business where the agreement between the father and son was, that if the son would take charge of the mill, and manage the business, he should have a share of the profits, and the son, in fact, solely managed the business, keeping possession of the mill, and applying a portion of the proceeds to his own use:—Held, that the son had such an interest in the business, and while the business lasted, such an interest in the land, as entitled him to vote.—*Bullock's vote. Ib.*

Where the voter was the equitable owner, the deed being taken in the father's name, but the son furnishing the money, the father in occupation with the assent of his son, and the proceeds not divided:—Held, that being the equitable owner, notwithstanding the deed to the father, he had the right to vote.—*Blair's vote. Ib.*

Where the voter had been originally, before 1865 or 1866, put upon the assessment roll merely to give him a vote, but by a subsequent arrangement with his father, made in 1865 or 1866, he was to support the father, and apply the rest of the proceeds to his own support:—Held, that if he had been put on originally merely for the purpose of giving a vote, and that was the vote questioned, it would have been bad; but being continued several years after he really became the occupant for his own benefit, he was entitled to vote, though originally the assessment began in his name merely to qualify him.—*Gore's vote. Ib.*

Where a verbal agreement was made between the voter and his father in January, 1870, and on this agreement the voter from that time had exercised control, and took the proceeds to his own use, although the deed was not executed until September following:—Held, he was entitled to vote.—*Gollinger's vote. Ib.*

Where a father had made a will of a lot to his son who was assessed for it, and the son took the crops except what was used by the father, who resided on the lot with his wife, the son residing and working on another farm:—Held, that the son had not such a beneficial interest in the lot as would entitle him to vote.—*Mullin's*

*vote. South Grenville Election (Ont.)—Ellis v. Fraser, H. E. C. 163.—Mowat.*

Where the owner of a lot, told his son that he might have the lot, and advised him to get a deed drawn, and the lot had been assessed to the son for three or four years, and was rented to a tenant by the father with the assent of the son, who paid to the father his wages but the father collected the rent:—Held, that as there was nothing but a voluntary gift from the father to the son, without possession, the son's vote was bad.—*Lundy's vote. Ib.*

Where the owner of mortgaged property died intestate, leaving a widow and sons and daughters, and the property was sold under the mortgage, and the deed made to the widow, but three of the sons furnished some of the purchase money and all remained in possession, and the eldest son was assessed as occupant:—Held, that as the eldest son did not show that the property was purchased for him, and the presumption from the evidence being that it was bought for the mother, such eldest son had no right to vote.—*Morrore's vote. Ib.*

*Partners and Joint Owners.*—Where a son was assessed at \$700 for a farm in which he and his father were partners, in the proportion of three-fourths of the profits to the father and one-fourth to the son, and the objection to the voter was non-ownership:—Held, that the partnership was established by the evidence, and in view of the objection taken, the vote was sustained.—*Smale's vote. Ib.*

Where two partners in business occupied premises, the freehold of which was vested in one of them, and the assessment of the premises was sufficient to give a qualification to each, both partners were held qualified to vote.—*Fitzgerald's vote. Ib.*

Where one of two joint owners was assessed for property at \$200:—Held, that neither of such joint owners was entitled to vote.—*Steele's vote. Ib.*

*Trustees.*—A trustee under a will having no present beneficial interest in the real property assessed to him, was held not entitled to vote.—*Jones's vote. Ib.*

Where A., who resided out of the riding, had made a contract in writing to sell to B. the property assessed to him as owner, but had not at the time of the election executed the deed, B. having been in possession of the property for several years under agreements with A.:—Held, that A. was a mere trustee for the purchaser, and had therefore no right to vote.—*Holden's vote. Ib.*

*Tenants.*—Where the voter was the tenant of certain property belonging to his father-in-law, and before the expiration of his tenancy the father-in-law, with the consent of the voter (the latter being a witness to the lease), leased the property to another, the voter's lease not expiring until November, and the new lease being made on the 28th March, 1870:—Held, that after the surrender by the lease, to which he was a subscribing witness, he ceased to be a tenant on the 28th of March, 1870, and that to entitle him to vote he must have the qualification at the



time of the final revision of the assessment roll, though not necessarily at the time he voted, so long as he was still a resident of the electoral division.—*Rupert's vote. Stormont Election (Ont.)—Bethune v. Colquhoun, H. E. C. 21.—Richards.*

A tenant from year to year cannot create a sub-tenancy nor create a right to vote by giving another a share in the crops raised on the leased property.—*Dunham's vote. Brockville Election (Ont.)—Flint v. Fitzsimmons, H. E. C. 129.—Hagarty.*

Where a man occupied a house as toll collector, and not in any other right, he was not qualified to vote.—*McArthur's vote. Ib.*

Where a vendor before the revision of the assessment roll had conveyed and given possession of the property to a purchaser, and such purchaser had afterwards given him a license to occupy a small portion of the property, such vendor was held not entitled to vote.—*Noblin's vote. South Grenville Election (Ont.)—Ellis v. Fraser, H. E. C. 163.—Mowat.*

## 2. In Unorganized Townships.

Held, by Patterson, J. A., and Ferguson, J., that (1) a person, the owner of real estate of the value of \$200 or upwards, anywhere within the electoral district, has the right to vote at any polling place in the unorganized townships in the electoral district where he may happen to be on polling day; (2) That where the real estate on which such person relies as his qualification to vote is situate in one of the unorganized townships his right is to vote in any of the unorganized townships without being restricted to the township where his property may be situate; (3) That to entitle a person to vote in the unorganized townships on the qualification of householder, he must be a householder—i. e. have his qualification as such—within the limits of the unorganized township. *Muskoka and Parry Sound Election (Ont.)—Payet v. Panquier, 1 E. C. 197.*

## 3. Income Qualification.

A voter whose qualification is successfully attacked may shew a right to vote on income; but in such case he must prove that he has complied with all the requirements of the Act which are essential to qualify him to vote on income.—*Gryll's vote. Lincoln Election (2) (Ont.)—Pauling v. Rykert, H. E. C. 500.—Patterson.*

## 4. Naturalized Subjects and Aliens.

Where the voter was born in the United States, his parents being British-born subjects, his father and grandfather being U. E. Loyalists, and the voter residing nearly all his life in Canada:—Held, entitled to vote.—*Place's vote. Stormont Election (Ont.)—Bethune v. Colquhoun, H. E. C. 21.—Richards.*

An alien who came to Canada in 1850, and had taken the oath of allegiance in 1861, but had taken no proceedings to obtain a certificate of naturalization from the Court of Quarter Sessions, was held not qualified to vote.—*Bacon's*

*vote. Brockville Election (Ont.)—Flint v. Fitzsimmons, H. E. C. 129.—Hagarty.*

An alien, whose father had taken the oath of allegiance on obtaining the patent for his land under 9 Geo. IV., c. 21:—Held, not qualified to vote. *Healey's vote. Ib.*

The evidence that the parents of a voter had stated to such voter that he was born in the United States, but that his father was born in Canada, received, and the vote held good.—*Wright's vote. Ib.*

Where evidence was given of parol admissions made by certain voters, some years before the election, that they had been born in a foreign country, and also evidence that since the parol admission the voters had voted at parliamentary elections, and had taken the voter's oath as to being British subjects by birth or naturalization:—Held, (1) That the oath at the polls could not be treated as testimony, not having been given in any judicial proceeding. (2) That by swearing at the polls he was a British subject by birth or naturalization, the voter only stated the legal result of certain facts. (3) That there was therefore no presumption of naturalization sufficiently strong to rebut the presumption of the continuance of the original status of alienage.—*Shenck's vote. Lincoln Election (2) (Ont.)—Pauling v. Rykert, H. E. C. 500.—Patterson.*

Where a voter, in support of his own vote, swore that he was born in the United States but that his parents were British subjects:—Held, that the whole statement of the voter must be taken, and that it amounted to this: "I was born in the United States of British parents."—*Mulrennan's vote. Ib.*

Certain aliens had taken the oaths of allegiance, &c., before a justice of the peace of a town, which oaths were administered to them in a township, but within the same county:—Held, that under the Alien Act, 34 Vict. c. 22, s. 2 (Dom.), the justice of the peace, in administering the oaths, was acting ministerially and not judicially; and that the oaths were properly administered.—*Johnson's vote. Ib.*

See *Hamilton Election (Ont.)—Patterson v. Stronon, 1 E. C. 499, p. 1493.*

## 5. Disqualification.

By order in council the defendant was appointed agent for the location and sale of lands under the Free Grants and Homesteads Act, R. S. O. (1877), c. 24. By letter from the crown lands department, the defendant was instructed to enter upon his duties respecting the location of free grants, but not to sell lands or receive money until he had given the usual security. By R. S. O. (1877), c. 10, s. 4, all "agents for the sale of crown lands," amongst other persons, are disqualified from voting at elections for the legislature, under a penalty. The defendant before he had given the necessary security, voted at an election for the legislature:—Held, that he was an agent for the sale of crown lands within the meaning of the Act, R. S. O. (1877), c. 10, s. 4, and therefore liable to the penalty imposed. Whether or not the defendant was such an agent

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the jury. *Brigley v. Taylor*, 6 O. R. 108.—  
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By reason of corrupt practices. See Sub-  
head VII. 16, (b), p. 1497.

### III. CANDIDATES.

#### 1. Property Qualification.

Held, as in the North Victoria Election—  
*Cameron v. Maclellan*, H. E. C. 584, that the  
Dominion Elections' Act of 1874 not being re-  
trospective, the question of property qualifi-  
cation of candidates at elections held before the  
passing of the Elections' Act of 1873, could still  
be raised in pending cases. *Cardwell Election*  
(Dom.)—*Hevitt v. Cameron*, H. E. C. 644.—  
*Richards—Spragge—Hagarty*.

Held, that it is not necessary for an elector,  
demanding the property qualification of a candi-  
date, to tender the necessary declaration for the  
candidate to make; the intention of the statute  
being that the candidate must prepare his own  
declaration. *Ib.*

#### 2. Disqualification.

##### (a) Office or Contract.

By commission or instrument under the hand  
and seal of the Lieutenant-governor of P. E. I.,  
one E. C. was constituted and appointed ferry-  
man at and for a certain ferry for the term of  
three years, pursuant to the Acts relating to  
ferries, and it was by the commission provided  
that E. C. should be paid a subsidy of \$95 for  
each year of said term. E. C. had given to the  
government a bond with two sureties for the  
performance of his contract. By articles of  
agreement between E. C. and S. F. P. (the re-  
spondent), E. C. for valuable consideration as-  
signed to S. F. P. one-fourth part or interest in  
the ferry contract, and it was agreed that one-  
fourth part of the net proceeds or profits of said  
contract should be paid over by the said E. C.  
to the said S. F. P. or his assigns. At the time  
the agreement was entered into S. F. P. was a  
member of the house of assembly of P. E. I.,  
having been elected at the general election held  
on the 30th June, 1886. Subsequently S. F. P.  
was returned as a member elect for the House  
of Commons for the electoral district of Prince  
County, P. E. I., and upon his return being  
contested:—Held, affirming the judgment of the  
court below, *Taschereau, J.*, dissenting, that, by  
the agreement with E. C., S. F. P. became a  
person holding and enjoying within the meaning  
of section 4 of 30 Vict. c. 3, (P. E. I.) a contract  
or agreement with Her Majesty, which disquali-  
fied him and rendered him ineligible for election  
to the House of Assembly or to sit or vote in  
the same, and by section 8 of the said Act, to  
be read with section 4, his seat in the Assembly  
became vacated; and he was therefore eligible  
for election as a member of the House of Com-  
mons. *Prince County (P. E. I.) Election (Dom.)*,  
*Hackett v. Perry*. 14 S. C. R. 265.

See *West York Election (Ont.)*. *Grahame v.*  
*Patterson*, H. E. C. 156, p. 1438.

##### (c) Notice of to Electors.

The respondent a postmaster in the service of  
the Dominion of Canada, became a candidate at  
an election held on the 14th and 21st March,  
1871, and was elected. On the 11th March he  
resigned his office of postmaster, which was ac-  
cepted by the postmaster-general on the 13th  
March. His accounts with the postoffice de-  
partment were closed and his successor appoint-  
ed after the election. Evidence of the notoriety  
of the alleged disqualification of the respondent  
was given, which was that such alleged disquali-  
fication was a matter of talk, and that all the  
people at the meeting for the nomination of can-  
didates were supposed to be aware of the sup-  
posed difficulty as to such disqualification:—  
Held, that even if the respondent was disquali-  
fied for election, the judge could not on such  
evidence declare that the electors voting for the  
respondent had voted perversely, and had there-  
fore thrown away their votes, so as to entitle the  
petitioner to claim the seat. *West York Election*  
(Ont.)—*Grahame v. Patterson*, H. E. C. 156.—  
*Hagarty*.

At the nomination a protest was handed to the  
returning officer, signed by the defeated candi-  
date and three electors, claiming that respondent  
was disqualified, and that the opposing candi-  
date was entitled to the seat. Notice thereof  
was posted at some of the polls, and some elec-  
tors were told of it:—Held, on the evidence, the  
trial judges having refused to award the seat to  
the defeated candidate, the court in appeal would  
not interfere. *South Renfrew Election, (Ont.)*—  
*Harvey v. Dowling*, 1 E. C. 359.—C. of A.

#### 3. Nomination.

The nomination paper of B., one of the can-  
didates at the election complained of, was signed  
by twenty-five persons, and had the affidavit of  
the attesting witness duly sworn to as required  
by the statute. The election clerk found that  
one of the twenty-five persons was not entered  
on the voters' lists, and thereupon the returning  
officer and election clerk compared the names  
on the nomination paper with the certified voters'  
lists in his possession, and on finding that only  
twenty-four of the persons who had so signed  
were duly qualified electors, he rejected B.'s  
nomination paper, and returned the respondent  
as member elect:—Held, (1) That as the policy  
of the law is to have no scrutiny, or as little as  
possible, in election cases, and to give the peo-  
ple a full voice in choosing their representatives,  
the defect in the nomination paper was one to  
which the returning-officer should not have  
yielded. (2) That if the election had gone on  
the defect in the nomination paper would not,  
according to 37 Vict. c. 9, s. 80, have affected  
the result of the election. *South Renfrew Election*  
(2) (Dom.)—*McKay v. McDougall*, H. E.  
C. 705.—*Wilson*.

Semble, that the returning officer is both a  
ministerial and a judicial officer; and that he  
might decline to receive the nomination of per-  
sons disqualified by status or office, and also  
nomination papers signed by unqualified persons  
if he had good reasons for so doing. *Ib.*

Under section 33 of R. S. O. (1877) c. 10, the  
returning officer is to fix the place and time of

nomination, such time to be between eleven a.m., and two p.m., of the day fixed therefor. The returning officer, who lived at B., owing to inevitable accident arising from the train being blocked with snow, did not reach O. the place of nomination till two p.m. and the hustings until ten minutes afterwards. The two candidates who contested the constituency were then nominated in the presence of a large number of electors, including the petitioner, who made no protest. It did not appear that any injury had been caused thereby. Per Boyd, C. The requirement was merely directory or regulative: that noncompliance therewith might or not be fatal, and so avoid the election, according to circumstances; and that as no one was prejudiced, it could have no fatal effect. In any event the petitioner, under the circumstances, was stopped from raising the objection; and:—Semble, he was also precluded from raising the objection by reason of, as it appeared, his claiming the seat for the defeated candidate, thus ratifying and adopting what was done at the election. Per Cameron, J. The requirement was imperative, and noncompliance therewith avoided the election; and the petitioner was not estopped from raising the objection. On appeal to the Court of Appeal, the judgment proceeded on another ground. Per Burton, J. A. The point was now covered by section 48 of 47 Vict. c. 4 (Ont.). Per Patterson, J. A.—Quere, whether section 48 was intended to apply to this point, this being a matter specially dealt with by section 15 of R. S. O. (1877) c. 10. *East Simcoe Election (Ont.)—Reid v. Drury*, 1 E. C. 291.

See also Subhead III. 2. (c), p. 1438.

#### IV. VOTING.

##### 1. Opening Poll.

See *East Simcoe Election (Ont.)*, *Reid v. Drury*, 1 E. C. 291, p. 1500.

##### 2. Declaration of Secrecy by Returning Officer and Others.

See *East Simcoe Election (Ont.)*, *Reid v. Drury*, 1 E. C. 291, p. 1500.

##### 3. Marking Ballots.

###### (a) By Voters.

The Election Act in its enacting part requires ballots to be marked with a cross on any place within the division which contains the name of the candidate. Ballots marked with a straight line within the division, or with a cross on the back, were rejected. Observations on the difference between the English and Ontario statutes in this respect. *South Wentworth Election (Ont.)—Olmstead v. Carpenter*, H. E. C. 531.—*Moss—Galt*.

The following ballots were held invalid: (1) Ballots with a single stroke; (2) ballots with the candidate's name written thereon in addition to the cross; (3) ballots with marks in addition to the cross, by which the voter might be identified, although not put there by the voter in order that he might be identified; (4) bal-

lots marked with a number of lines; (5) ballots with a cross for each candidate. *North Victoria Election (2) (Dom.)—Cameron v. Maclellan*, H. E. C. 671.—*Wilson*.—Q. B. D.

Quere, whether ballots with a cross to the left of the candidate's name should be rejected, as the deputy returning officer is not bound to reject such ballots under section 55 of the Dominion Elections' Act, 1874. *Id.*

The following irregularities in the mode of marking ballot papers, held to be fatal: (1) Making a single stroke instead of a cross; (2) any mark which contains in itself a means of identifying the voter, such as his initials or some mark known as being one used by him; (3) crosses made at left of name, or not to the right of the name; (4) two single strokes not crossing. *Monck Election (Dom.)—Grant v. McCallum*, H. E. C. 725.—*Blake*.

The following ballots were held invalid: (1) ballots with a cross in the right place on the back of the ballot paper instead of on the printed side; (2) ballots marked with an x instead of a cross. *Queen's County Election (Dom.)—Jenkins v. Brecken*, 7 S. C. R. 247.

The following ballots were held valid: (1) Ballots with a cross to the right just after the candidate's name, but in the same column, and not in the column on the right-hand side of the name; (2) ballots with an ill-formed cross, or with small lines at the ends of the cross, or with a line across the centre or one of the limbs of the cross, or with a curved line like the blades of an anchor. *North Victoria Election (2) (Dom.)—Cameron v. Maclellan*, H. E. C. 671.—*Wilson*.—Q. B. D.

The following irregularities held not to be fatal: (1) An irregular mark in the figure of a cross, so long as it does not lose the form of a cross. (2) A cross not in the proper compartment of the ballot paper, but still to the right of the candidate's name. (3) A cross with a line before it. (4) A cross rightly placed with two additional crosses, one across the other candidate's name, and the other to the left. (5) A cross in the right place on the back of the ballot paper. (6) A double cross or two crosses. (7) Inadvertent marks in addition to the cross. (8) Cross made with pen and ink instead of a pencil. *Monck Election (Dom.)—Grant v. McCallum*, H. E. C. 725.—*Blake*.

In ballot papers containing the names of four candidates the following ballots were held valid: (1) Ballots containing two crosses, one on the line above the first name, and one on the line above the second name valid for the two first-named candidates. (2) Ballots containing two crosses, one on the line above the first name, and one on the line dividing the second and third compartments valid for the first-named candidate. (3) Ballots containing properly made crosses in two of the compartments of the ballot paper with a slight lead pencil stroke in another compartment. (4) Ballots marked in the proper compartments thus X. *Queen's County Election (Dom.)—Jenkins v. Brecken*, 7 S. C. R. 247.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inver-

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ted V, or because the cross was not directly op-  
posite the name of the candidate, there being  
only two names on the ballot paper and a line  
drawn dividing the paper in the middle:—*Held*,  
affirming the ruling of the judge at the trial,  
that these ballots were valid. Per Ritchie,  
C. J., Fournier, Henry, and Gwynne, J.J., con-  
curring.—Whenever the mark evidences an at-  
tempt or intention to make a cross, though  
the cross may be in some respects imperfect,  
the ballot should be counted, unless from the  
peculiarity of the mark made it can be reason-  
ably inferred that there was not an honest de-  
sign simply to make a cross, but that there was  
also an intention so to mark the paper that it  
could be identified, in which case the ballot  
should be rejected. But if the mark made indi-  
cates no design of complying with the law, but  
on the contrary a clear intent not to mark with  
a cross as the law directs, as, for instance, by  
making a straight line or round O, then such  
noncompliance with the law renders the ballot  
null. *Bothwell Election (Dom.)—Harkins v.*  
*Smith, 8 S. C. R. 676.*

On this appeal, certain ballot papers being  
objected to:—*Held*, that it will require a clear  
case to reverse the decision of the trial judge  
who has found as a question of fact whether  
there was or was not evidence that the slight  
pencil marks or dots objected to had been made  
designedly by the voter. Also, that where the  
x is not unmistakably above or below the line  
separating the names of the candidates, the  
ballot is bad. *Haldimand Election Case (Dom.)*  
—*Walsh v. Montague, 15 S. C. R. 495; 1 E. C.*  
*529.*

#### (b) Marks by Deputy Returning Officers.

On a recount before the County Court judge,  
J., the appellant, who had a minority of votes  
according to the return of the returning officer,  
was declared elected, all the ballots cast at three  
polling districts, in which the appellant had  
polled only 131 votes, and the respondent, B.,  
345, having been struck out on the ground that  
the deputy returning officer had neglected to  
place his initials upon the back of the ballot.  
On appeal to the Supreme Court of P. E. Island,  
it was proved that the deputy returning officer  
had placed his initials on the counterfoil before  
giving the ballot paper to the voter, and after-  
wards, previous to his putting the ballot in the  
ballot box, had detached and destroyed the coun-  
terfoil, and that the ballots used were the same  
as those he had supplied to the voters, and Mr.  
Justice Peters held that the ballots of the said  
three polls ought to be counted, and did count  
them. Thereupon J. appealed to the Supreme  
Court of Canada, and it was:—*Held*, affirming  
the judgment of Mr. Justice Peters, that in the  
present case the deputy returning officer having  
had the means of identifying the ballot papers as  
being those supplied by him to the voters, and  
the neglect of the deputy returning officers to  
put their initials on the back of these ballot  
papers, not having affected the result of the  
election, or caused substantial injustice, did not  
invalidate the election. The decision in the  
Mock Election Case H. E. C. 725, commented  
on and approved of. *Queen's County Election*  
*(Dom.)—Jenkins v. Brecken, 7 S. C. R. 247.*

In a polling division, No. 3 Dawn, there was no  
statement of votes either signed or unsigned in  
the ballot box, and the deputy returning officer  
had endorsed on each ballot paper the number  
of the voter on the voters' list. These votes  
were not included either in the count before the  
returning officer, the re-summing up of the votes  
by the judge of the County Court, nor in the  
recount before the judge who tried the election  
petition:—*Held*, affirming the decision of the  
court below, that the ballots were properly  
rejected. *Bothwell Election (Dom.)—Harkins*  
*v. Smith, 8 S. C. R. 676.*

Division No. 1, Sombra—During the progress  
of the voting, at the request of one of the agents,  
who thought the ballot papers were not being  
properly marked, the deputy returning officer,  
who had been putting his initials and the num-  
bers on the counterfoil, not on the ballot papers,  
initialled and numbered about twelve of the  
ballot papers, but finding he was wrong, at the  
close of the poll, he, in good faith and with an  
anxious desire to do his duty, and in such a way  
as not to allow any person to see the front of the  
ballot paper, and with the assent of the agents  
of both parties, took these ballots out of the box  
and obliterated the marks he had put upon  
them:—*Held*, Gwynne and Henry, J.J., dis-  
senting, that the irregularities complained of  
not having infringed upon the secrecy of the  
ballot, and the ballots being unquestionably  
those given by the deputy returning officer to  
the voters, these ballots should be held good,  
and that said irregularities came within the  
saving provisions of section 80 of the Dominion  
Elections' Act, 1874. *Queen's County Election*  
*(Dom.) Jenkins v. Brecken, 7 S. C. R. 247,*  
followed. Per Henry, J., that although the bal-  
lots should be considered bad, the present ap-  
pellant having acted upon the return and taken  
his seat, was not in a position to claim that the  
election was void. *Id.*

The petitioner had received a majority of the  
ballots cast at the election; but on a recount  
before the county judge, certain ballots, with  
other marks on the back than the initials of the  
deputy returning officers, were rejected by the  
county judge, thereby giving a majority to the  
respondent. Evidence was given on the hearing  
of the petition that the deputy returning officers  
had, from a mistaken idea of their duty, placed  
the numbers of the voters, as marked in the  
voters' list, on the backs of the ballots:—*Held*,  
that under 42 Vict. c. 4, s. 18 (Ont.), the marks  
so made did not avoid the ballots, and that such  
ballots should now be counted:—*Semle*, that  
the county judge, acting ministerially on the  
recount of ballots, could not have investigated  
by whom or for what motive such marks had  
been made on the ballots. *Russell Election (2)*  
*(Ont.)—Baker v. Morgan, H. E. C. 519.—Moss.*  
—*Blake.*

Certain deputy returning officers, before giv-  
ing out ballot papers to the voters at the elec-  
tion in question, placed numbers on the ballots  
corresponding with the numbers attached to the  
names of such voters on the voters' lists:—  
*Held*, (1) That the deputy returning officers had  
acted contrary to law in numbering the ballots,  
and that the ballots so numbered should be  
rejected as tending to the identification of the  
voters. (2) That such conduct of the deputy

returning officers having had the effect of changing the result of the election, a new election should be ordered. *East Hastings Election (Dom.)*.—*Aylesworth v. White*, H. E. C. 764.—*Armour*.

The neglect or irregularities of a deputy returning officer in his duties under the Dominion Elections' Act, 1874, will not invalidate an election, unless they have affected the result of the election or caused some substantial injustice:—*Held*, therefore, that the neglect of a deputy returning officer to initial the ballot papers, and the providing pen and ink instead of a pencil to mark them, would not avoid the election. *Monck Election (Dom.)*.—*Grant v. McCullum*, H. E. C. 725.—*Blake*.

See *Soulanges Election (Dom.)*.—*Cholette v. Bain*, 10 S. C. R. 652, p. 1494; *Prescott Election (Ont.)*.—*Cunningham v. Hagar*, 1 E. C. 88, p. 1444.

See also next Subhead.

#### (c) Illiterate Voters.

One B., a voter who could neither read nor write, came into a polling booth, and in the presence of the deputy returning officer asked for one C. who was not present to give him instructions how to mark his ballot. The deputy returning officer gave the voter a ballot paper, who then stated he wished to vote for the respondent. One W., an agent of the respondent, in the polling booth, took the pencil and marked the ballot as the voter wished, and the voter then handed it to the deputy returning officer. No declaration of inability to read or write was made by the voter:—*Held*, that no one but the deputy returning officer was authorized to mark a voter's ballot, or to interfere with or question a voter as to his vote; and the deputy returning officer permitting the agent of a candidate to become acquainted with the name of the candidate for whom the voter desired to vote, violated the duty imposed on him to conceal from all persons the mode of voting, and to maintain the secrecy of the proceedings. *Hulton Election (Ont.)*.—*Bussell v. Barber*, H. E. C. 283.—*Draper*.

The deputy returning officer in polling the votes of some fifty illiterate voters, instead of taking from each illiterate voter a declaration "that he was unable to read," asked each if he was able to read or write, and having received an answer in the negative, requested him to put his mark to the declaration of illiteracy explaining what he conceived to be its effect thus "you hereby sign that you are unable to read or write sufficiently to mark your ballot paper." He then openly marked the ballot paper as instructed by the voter in the presence of both candidates, their agents and the poll clerk, all of whom had taken the usual declaration of secrecy. One witness also said the constable was in the room:—*Held*, (at the trial before Patterson and Ferguson, J.J., and by the Court of Appeal) that substantially there was no violation of the principle of secret voting laid down in the Act R. S. O. (1877), c. 10, and that the votes were not improperly taken. Per Osler, J. A.—There is nothing in the Act which makes it necessary that the deputy returning officer should with-

draw with the agents of the candidates and the voter to another room, or which forbids the poll clerk or other persons lawfully present in the polling booth from remaining there while the voter announces for whom he wishes to vote. Per Spragge, C. J. O.—The illiterate voters were not misled, but the conduct of the deputy returning officer was perverse. The manifest policy of the Act is that the voting shall be in all cases as secret as under the circumstances it can be. It was not necessary that more than the three persons named in the Act besides the voter himself should be present: the deputy returning officer and one representative of each candidate. The presence of any others was not in accordance with the spirit and policy of the Act and should not have been permitted by the deputy returning officer. Per Burton, J. A.—Beyond the slight mistake made by the deputy returning officer in explaining the declaration, there appears nothing in the course pursued which was not warranted by the Act, there was no one present except the deputy returning officer, the candidates and their agents and the poll clerk, all of whom had taken the oath of secrecy except the constable, who was in another part of the room. *Prescott Election (Ont.)*.—*Cunningham v. Hagar*, 1 E. C. 88.

#### 4. Ballot Paper Inadvertently Torn.

A voter who had inadvertently torn his ballot and whose ballot was rejected on the counting of votes, was allowed his vote, the evidence proving that no trick was intended for the purpose of shewing how he intended to vote. *South Wentworth Election (Ont.)*.—*Olmstead v. Carpenter*, H. E. C. 531.—*Moss*—*Galt*. See also *Monck Election (Dom.)*.—*Grant v. McCullum*, H. E. C. 725.

#### 5. Refusal to take Oath.

Freeholders who appeared on the voters' lists, owing to a printer's mistake, as farmers' sons, being challenged at the poll refused to take the farmers' sons' oath:—*Held*, that their refusal to take such oath was not a refusal to take the oath required by law. A refusal to swear is where a voter refuses to take the oath appropriate to his proper description. *Prescott Election (Dom.)*.—*Hagar v. Routhier*, H. E. C. 780.—*Armour*.

#### 6. Refusing Ballot Paper.

An elector duly qualified, who has been refused a ballot paper by the deputy returning officer, cannot be deprived of his vote; otherwise it would follow that because the deputy returning officer had wrongfully refused to give such elector a ballot paper, his vote would not be good in fact or in law. *North Victoria Election (2) (Dom.)*.—*Cameron v. MacLennan*, H. E. C. 671.—*Wilson*.

#### 7. Tendered Ballots.

See *East Durham Election (Ont.)*.—*Collins v. Campbell*, 1 E. C. 489, p. 1428; *Secord's vote, Lincoln Election (2) (Ont.)*.—*Pawling v. Rykert*, H. E. C. 500, p. 1445.



## 8. Secrecy in Voting.

Where a voter offered to vote at a poll, but did not ask for or put in a tendered ballot paper:—Held, that the Ballot Act required the vote to be given secretly, and that the parol declaration of the voter as to his vote could not be received in order to add it to the poll.—*Secord's vote, Lincoln Election (2) (Ont.)*—*Pawling v. Rykert, H. E. C. 500.*—Patterson.

Secrecy of the ballot is an absolute rule of public policy, and it cannot be waived. See R. S. C. c. 9, s. 71. *Haldimand Election (Dom.)*—*Walsh v. Montague, 1 E. C. 529.*

Semble, per Wilson, J., That though the only mode of voting is by ballot, if it became necessary to decide the election by determining the right to add these votes, it should be determined in that manner most consistent with the old law, and which would have saved the disfranchisement of electors, and the necessity of a new election. If the right of voting can only be preserved by divulging from necessity for whom the elector intended to vote, the necessity justifies the declaration the elector is forced to make as there is nothing in the Act which prevents the elector from saying for whom he intends to vote. *North Victoria Election (2) (Dom.)*—*Cameron v. MacLennan, H. E. C. 671.*

See also Subhead IV. 3, p. 1439.

## V. RECOUNT AND SCRUTINY.

On a scrutiny the practice is for the person in a minority to first place himself in a majority, and then for the person thus placed in a minority to strike off his opponent's votes. *Stormont Election (Ont.)*—*Bethune v. Colquhoun, H. E. C. 21.*—Richards.

On a scrutiny an objection that the persons objected to were not owners, tenants, or occupants within section 5 of 32 Vict. c. 21, excluded an objection as to the value of the assessed property. *Morrow's vote, South Grenville Election (Ont.)*—*Ellis v. Fraser, H. E. C. 163.*—Mowat.

Where a petition claims the seat a scrutiny of votes may be ordered to be taken in each municipality by the registrar acting for the judge on the rota. During the scrutiny of votes the respondent abandoned the seat to his opponent, after his opponent had secured a majority of eight votes, and agreed that such should stand as his opponent's majority, and that the court should declare such opponent duly elected; and the same was ordered by the court. *West Elgin Election (Ont.)*—*Cascaden v. Munroe, H. E. C. 227.*—Spragge.

A petitioner claiming the seat on a scrutiny may shew, as to votes polled for his opponent: (1) that the voter was not twenty-one years of age; (2) that he was not a subject of Her Majesty by birth or naturalization; (3) that he was otherwise by law prevented from voting; and (4) that he was not actually and bona fide the owner, tenant, or occupant of the real property in respect of which he is assessed. *North Victoria Election (Dom.)*—*Cameron v. MacLennan, H. E. C. 584.*—Richards—Spragge—Hagarty.

Quere, whether the county judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of 37 Vict. c. 10, s. 56, at the time of the counting of the votes by the deputy returning-officer. *Queen's County Election (Dom.)*—*Jenkins v. Brecken, 7 S. C. R. 247.*

Per Strong, J.—That reading section 41 in conjunction with section 45 sub-section 2, and the oath in schedule A of R. S. C. chapter 8 in an enquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shown that a larger number of unqualified farmers' sons' votes than the majority were admitted the election will be void. (Taschereau, J., contra.) *Haldimand Election (Dom.)*—*Walsh v. Montague, 1 E. C. 529.*

See *Russell Election (2) (Ont.)*—*Baker v. Morgan, H. E. C. 519, p. 1442; Bothwell Election (Dom.)*—*Hawkins v. Smith, 8 S. C. R. 676, p. 1441.*

## VI. AGENCY.

## 1. Generally.

To sustain the relation of agency, the petitioner must shew some recognition by the candidate of a voluntary agent's services. The Westminster case, (1 O.M. & H. 89) as to agency followed. *Welland Election (Ont.)*—*Beatty v. Currie, H. E. C. 47.*—Strong.

Observations on the reasons why candidates should be held liable for acts done by their agents. The Taunton case (1 O.M. & H. 184), approved. *West Toronto Election (Ont.)*—*Armstrong v. Crooks, H. E. C. 97.*—Richards.

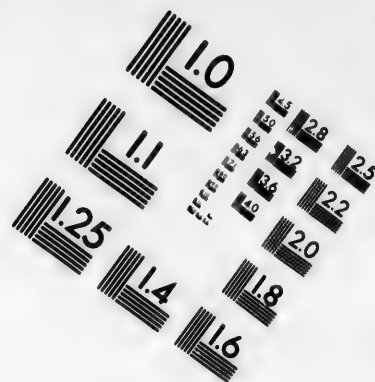
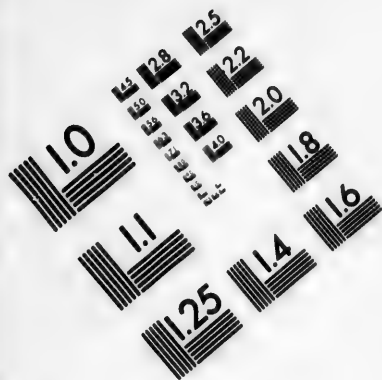
Agency in election matters is a result of law to be drawn from the facts of the case, and the acts of the individuals. *East Peterborough Election (Ont.)*—*Stratton v. O'Sullivan, H. E. C. 245.*—Draper.

Act of agency and the decisions bearing thereon discussed. *North Ontario Election (Ont.)*, *McCaskill v. Paxton, H. E. C. 304.*—C. of A.

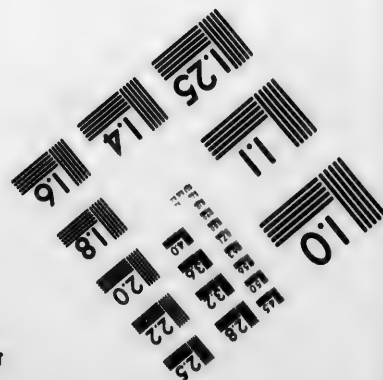
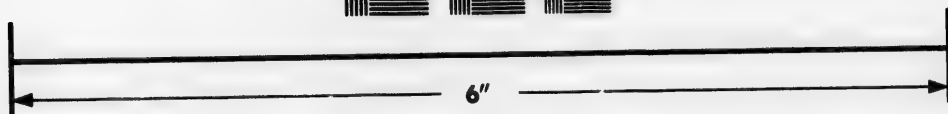
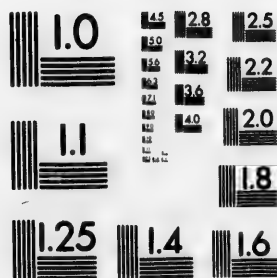
The law of election agency is not capable of precise definition, but is a shifting elastic law, capable of being moulded from time to time to meet the inventions of those who in election matters seek to get rid of the consequences of their acts. *North Ontario Election (Dom.)*—*Gibbs v. Wheeler, H. E. C. 785.*—Armour.

Per Gwynne, J. That if an act, made a corrupt practice by statute, is done by an agent of a candidate, but not in pursuit of the object of the agency or the interest of the candidate, or in any way in relation to the election, but solely for the purpose, interest, or gratification of the agent, such act, not being done by such agent qua agent, is not within the penalties of 36 Vict. c. 2, s. 3. *Lincoln Election (Ont.)*—*Rykert v. Neelon, H. E. C. 391.*

Allegation, that the government of the Province of Ontario, in the interest and on behalf of the respondent, used undue influence to secure his return. Objection, that no agency was alleged, and because no such agency, if alleged, could in law exist:—Held, that this objection should be left to be disposed of by the judge at



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the trial; and :-Semble, that evidence of agency could be given under the allegation. *In re West Huron Election (Dom.)*—*Mitchell v. Cameron*, 1 O. R. 433.—Cameron.

The parliamentary law of agency is a special law, and is different from the ordinary law of agency. In parliamentary elections the principal is liable for all acts of his agent, even where such acts are done contrary to the express instructions of such principal. *Cornwall Election (Dom.)*—*Bergin v. Macdonald*, H. E. C. 547.—Spragge.

No formal appointment or any particular words are necessary to constitute agency, and less positive evidence of appointment or recognition and adoption of a delegate to a party convention as an agent is required than in the case of one not a delegate. *West Simcoe Election (Ont.)*—*Bedford v. Phelps*, 1 E. C. 128.—Patterson—Ferguson.—C. of A.

## 2. Powers of Agent.

Per Burton, J. A.—It is only for those acts of the agent which are done by him whilst acting or professing to act within the scope of his duties, that the candidate is responsible. It is contrary to all principle to hold any person affected by the act of an agent, unless it was shewn that the act was done in the course of the employment, and within the scope of the authority, although it may be in abuse of it. *West Simcoe Election (Ont.)*—*Bedford v. Phelps*, 1 E. C. 128.—Patterson—Ferguson.—C. of A.

Agency in election cases differs from agency in ordinary commercial or other transactions of business, inasmuch as in the case of an election the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to him, but which may be directly contrary to the express directions of the person whose agent he is held to be. *Muskoka and Parry Sound Election (Ont.)*—*Paget v. Fauquier*, 1 E. C. 197.—Patterson—Ferguson.—C. of A.

Held, that an agent who is not a general agent, but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority. *Berthier Election (Dom.)*—*Genereux v. Cuthbert*, 9 S. C. R. 102.

Effect of acts done by scrutineer who was also an agent. See *South Ontario Election (Ont.)*—*Fairwell v. Brown*, H. E. C. 420, p. 1487; *Haldimand Election (Dom.)*—*Walsh v. Montague*, 15 S. C. R. 495, p. 1492.

See *North Ontario Election (Ont.)*—*Trealeaven v. Gould*, 1 E. C. 1, p. 1471.

## 3. What Constitutes.

### (a) Members of Political Associations.

The delegates to a political convention assembled for the purpose of selecting a candidate, who never had intercourse with the candidate selected, and who never canvassed in his behalf, cannot be considered as agents for such candi-

date. *Welland Election (Ont.)*—*Buchner v. Currie*, H. E. C. 187.—Gwynne.

Where a political organization, after nominating their candidate, divided into committees "to look after voters in the particular wards in which they resided;" and the respondent had not given authority to any member of such committees, nor to any canvasser, to canvass generally:—Held, that one K., who was a member of the committee for ward No. 2, and who was alleged to have committed an act of bribery in ward No. 6, having no authority to canvass in the latter ward, was an agent with limited authority to canvass in ward No. 2 only, and therefore the respondent could not be made liable for his alleged acts. *London Election (Ont.)*—*Jarman v. Meredith*, H. E. C. 214.—Spragge.

One M. was a member of a township committee, organized by direction of the convention which nominated the respondent, and the work of the election was put into the hands of these township committees. M. canvassed his school section, and had a voters' list, which was taken from him by the committee on the allegation that he was not doing much. The respondent never asked M. to work for him, but M. asked the respondent what success he had. The respondent had no one acting for him except these committees and some volunteers, and he never objected to the aid they were giving him, nor did he repudiate their services:—Held, on the evidence, that the respondent was responsible for the committees, and that M., as a member of one of such committees, was an agent of the respondent. *North Ontario Election (Ont.)*—*McCaskill v. Paxton*, H. E. C. 304.—Wilson.—C. of A.

The fact of a political association putting forward and supporting a particular candidate does not make every member of the association his agent; but the candidate may so avail himself of their services in canvassing for him and promoting his election, as to make them his agents. *North Grey Election (Ont.)*—*Boardman v. Scott*, H. E. C. 362.—Gwynne.—C. of A.

By the constitution of a reform association, each delegate to the convention was actively to promote the election of the candidate appointed by the convention. The respondent had himself been for six years a member of the association, and was familiar with its objects and constitution. He had also as a delegate acted and canvassed for other candidates in the promotion of their elections, and expected the like assistance from the present members of the association, and to the perfection of that system as an electioneering agency, the respondent owed his election:—Held, that the delegates to the association, acting as such in promoting the election of the respondent, were his agents, for whose acts he was responsible; and that an act of bribery committed by one R., a delegate, and who canvassed and otherwise acted for the respondent, avoided the election. *East Northumberland Election (Ont.)*—*Casey v. Ferris*, H. E. C. 357.—Gwynne.

The respondent was nominated by a conservative association, and he accepted the nomination. The delegates to the association were to do all they could to secure his election. A committee

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was appointed in O. to canvass the town, and a committee-room was engaged and paid for by the association, voters' lists were procured and used as canvassing books, and members were appointed to canvass parts of the town, and reports were made to the committee of the result of the canvassing. The respondent, who resided at W., did not attend the meetings, but knew they were canvassing for him, and gave them blank appointments of scrutineers to fill up, which they did, but the respondent did not know who composed the committee:—Held, per Wilson, J., that the respondent, by authorizing such committee at O. to appoint scrutineers, made them his special agents for that particular matter and for that occasion only, and did not adopt them as his general agents for all the purposes of the election. *South Ontario Election (Ont.)—Farwell v. Brown, H. E. C. 420.*

One T., a member of such committee, canvassed actively for the respondent and to his knowledge, and on the nomination day attended a meeting of the respondent's friends in W., at which the respondent was present, and at which arrangements were made about canvassing and getting out votes, and generally about the election:—Held, by the Court of Appeal, Wilson, J., dubitante, that T. was an agent of the respondent for the purposes of the election. *Ib.*

One G., a member of the same committee, had a voters' list, and canvassed for the respondent, and stated he had no doubt the respondent expected him to vote and work for him:—Held, per Wilson, J., that G. was not an agent of the respondent. *Ib.*

The committee of the town of W., having been recognized and attended by the respondent, were held to be his agents. *Ib.*

#### (b) Members of Committees.

About a dozen of the electors met some time before the election and nominated the respondent as the candidate who should contest the election in the interest of the political party to which they belonged. The respondent accepted and acted upon the nomination. They met occasionally for the purpose of promoting the respondent's election, procured voters' lists, canvassed voters, and got reports on which they estimated their chances of success:—Held, that if they did not style themselves a committee, they had assumed the functions which usually devolve upon such bodies. *North Wentworth Election (Ont.)—Christie v. Stock, H. E. C. 343.—Draper.—C. of A.*

If a meeting of electors assemble and has the sanction of the candidate, such candidate is responsible for its acts and the acts of the agents appointed by it. But where the meeting is large, then all present cannot be considered as agents; only those to whom certain duties, either as a committee or as individual canvassers, are assigned. *Cornwall Election (Dom.)—Beryin v. Macdonald, H. E. C. 547—Sprague.*

The respondent nominated no committees to promote his election; but he was aware that committees were acting for him in each municipality. On one occasion he went to the door of one of the committee rooms, and left some print-

ed bills to be distributed. One P. who attended the meeting of this committee, and who said he was considered on the committee, committed an act of bribery:—Held, that the committee were agents of the respondent, that P. was a member of the committee; and an act of bribery having been committed by him, the election was avoided. *East Northumberland Election (Dom.)—Gibson v. Biggar, H. E. C. 577.—Hagarty.*

Certain supporters of the respondent met in a room over a tavern to promote the election of the respondent. Their meetings were presided over by an agent of the respondent, and the respondent attended at least one of such meetings:—Held, that the persons who attended such meetings were agents of the respondent. *North Ontario Election (Dom.)—Gibbs v. Wheeler, H. E. C. 785.—Armour.*

See also Subhead VI. 3 (a), p. 1447

#### (c) Other Acts or Appointments.

When a candidate puts money into the hands of his agent, and exercises no supervision over the way in which the agent is spending that money, but accredits and trusts him, and leaves him the power of spending the money, although he may have given directions that none of the money should be improperly spent, there is such an agency established that the candidate is liable to the fullest extent not only for what that agent may do, but also for what all those whom that agent employs may do. *South Grey Election (Ont.)—Hunter v. Lauder, H. E. C. 52.—Mowat.*

Evidence was given to shew that certain parties had attended meetings with the respondent and canvassed for him, and had performed other acts of alleged agency, as set out in the evidence:—Held, that the acts of alleged agency relied on in the evidence were not sufficient to constitute such parties the agents of the respondent. The petition, nevertheless, was dismissed without costs. *North York Election (Ont.)—Gorham v. Boulbee, H. E. C. 62.—Galt.*

A voter who had a claim of \$3 from a former election of respondent, when canvassed to vote, said he did not think he should vote, evidently putting forth the \$3 that was due to him as a grievance. The clerk of an agent of the respondent promised to pay it to him, and he voted, and the money was paid after the election, and charged by the clerk in the agent's accounts as "paid J. Landy \$3," but without the knowledge of such agent. Another agent of the respondent (McD.), who was treasurer of the ward, and was aware of the claim, and had told the voter it would be made right, paid the first agent's account, but did not then take particular notice of the payment, and it was not explained to him. The clerk had been requested by his employer, (the agent first mentioned) to canvass a particular voter, but was not employed as a canvasser generally by anyone:—Held (1), that such clerk was not an agent or sub-agent of the respondent; (2) that the payment of the account by the agent (McD.) was not under the circumstances a ratification by him after the act, so as to affect the election. *West Toronto Election (Ont.)—Armstrong v. Crooks, H. E. C. 97.—Richards.*



One C. accompanied the respondent when going to a public meeting, and canvassed at some houses. On the journey, the respondent cautioned C. not to treat nor do anything to compromise him or avoid the election. The respondent's election agent paid for C.'s meals at the place where the meeting was held:—Held, that the evidence shewed that the respondent had availed himself of C.'s services, and was therefore responsible for his acts. *East Peterborough Election (Ont.)—Stratton v. O'Sullivan*, H. E. C. 245.

A witness stated that he had asked the people in his neighbourhood to vote for the respondent, had attended a meeting of the respondent's friends and made arrangements for bringing up voters on polling day, and had a team out on polling day:—Held, that the evidence of his being an agent of the respondent was not sufficient. *Ib.*

O. S., who desired nomination as a candidate by a reform convention, was not nominated, and thereupon, from hostility to the convention and its nominee, opposed the candidate of the convention, which thereby had the effect of supporting the respondent. At the close of the poll, the respondent publicly thanked S. for being instrumental in bringing about his election. S. owned a shop and tavern, but the license for the latter was in his clerk's name; and during the polling hours on polling day spirituous liquors were sold and given in the shop and tavern:—Held, that what was done by S. at the election was in pursuance of a hostile feeling against the convention and its candidate, and did not constitute him an agent of the respondent. *Cardwell Election (Ont.)—O'Callaghan v. Fletcher*, H. E. C. 269.—Draper.

One M., the reeve of a township, exerted himself strongly in favour of the respondent, to whom he was politically opposed, and against the other candidate, and attended meetings where the respondent was, and spoke in his favour. The reason for his supporting the respondent and opposing the other (ministerial) candidate, with whom he was politically in accord, was, that the ministry of the day had separated the township of which he was reeve from the riding. He was annoyed and indignant at this separation, and announced his intention of using all his influence against the ministerial candidate. The respondent asked M. to attend a public meeting, which he did; and at another meeting which he attended, M. stated (but not in the respondent's hearing) that he was acting there on the respondent's behalf. M. was once in the respondent's committee-room, and signed and circulated circulars issued by the respondent's friends:—Held, that the question of agency being one of intent, the respondent, under the circumstances, never conferred upon M. the authority, nor did M. accept the delegation of an agent for the purpose of the election. *North Grey Election (Ont.)—Boardman v. Scott*, H. E. C. 382.—Gwynne—C. of A.

More canvassing of itself does not prove agency, but it tends to prove it. A number of acts, no one of which might in itself be conclusive proof of agency, may, when taken together, amount to proof of such agency. Persons who canvassed and went to meetings with the respondent, and attended meetings to promote the election, at which meetings the respondent attended; and

persons who canvassed with and introduced voters to the respondent, called meetings and appointed canvassers, and did other acts to further the election, and examined the results of the canvass, were held to be agents of the respondent; and corrupt practices committed by them, and by sub-agents appointed by them, avoided the election. *Cornwall Election (Dom.)—Bergin v. Macdonald*, H. E. C. 547.—Spragge.

A year before the election the respondent paid part of the charges of a lawyer retained by one O. to attend the revision of the assessment rolls. O. at the time of the election attended one of the respondent's meetings at which he stated that his own mind was not made up, but he urged that the respondent ought to have the support of the voters, he being a local man; and in three or four instances O. asked voters to vote for the respondent. The respondent and his friends distrusted O., and in no way recognized him as acting with them:—Held, that O. was not an agent of the respondent for the purposes of the election. *Halton Election (Dom.)—Cross v. McCraney*, H. E. C. 736.—Patterson—C. of A.

One C. canvassed for the respondent, and told the respondent he was going to support him, and the respondent expected and understood that he would do everything he could for him legitimately. C. did not attend any meetings of the respondent's committees, and made no returns of his canvassing:—Held, on the evidence set out in the judgment, that C. was an agent of the respondent for the purposes of the election. *Cornwall Election (3) (Dom.)—MacLennan v. Bergin*, H. E. C. 803.—Armour.

One P., a tavern-keeper, took the petitioner's side at the election and at a meeting called by the petitioner, at which he was appointed chairman. Notices of this meeting were sent by the petitioner to P. to distribute, some of which P. put up at his house and some he sent to other places. On polling day P. desired to give a free dinner to some of the petitioner's voters, and asked the petitioner if he might do so. The petitioner did not approve of it in case it should interfere with his election, and warned P. that although he was not his (petitioner's) agent, he would rather he should not do it. P. notwithstanding this, paid for free dinners to forty of the petitioner's voters:—Held, by the Court of Queen's Bench (affirming *Wilson, J.*), that P. was not an agent of the petitioner. *North Victoria Election (2) (Dom.)—Cameron v. MacLennan*, H. E. C. 671.

Semble, if a candidate in good faith undertakes the duties which his agent might undertake, the acts of a few zealous political friends in canvassing for him, introducing him to electors, attending public meetings and advocating his election, or bringing voters to the poll, would not make such candidate responsible for prohibited acts contrary to his publicly declared will and wishes, and without his knowledge and consent. *South Norfolk Election (Dom.)—Deane v. Wallace*, H. E. C. 660.—Draper.

The respondent in his evidence stated that he objected to committees; that he knew certain persons were his supporters, and believed they did their best for him, but he did not personally know that they acted for him. Other evidence shewed that these persons took part in the elec-

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tion on behalf of the respondent; some spoke for him at one of his meetings; and one of them stated that he and some of the others canvassed for the respondent, and that he gave the respondent to understand he was taking part in the election for him:—Held, that as it did not appear that any one of these persons was authorized by the respondent to represent him, and as they did not claim to have any such authority from him, but supported the respondent as the candidate of their party, the said persons were not agents of the respondent for the purposes of the election. *Ib.*

Remarks on the evidence of agency:—Semble, that if a candidate who had appointed no agents was aware that some of his supporters were systematically working for him, and by any act, or forbearance, could be fairly deemed to recognize and adopt their proceedings, he would make them his agents. *Ib.*

L. being a municipal councillor, and as such a member of an association which had brought out the respondent as a candidate for election, had a personal disagreement with the respondent, and refused to attend the meeting of the nominating committee when the respondent received the nomination, and when asked by the respondent to support him refused so to do, saying that he now had an opportunity of getting even with him; but without the knowledge of the respondent he took an interest in the election and bribed a voter:—Held, that he was not an agent of the respondent, and that there was evidence tending to shew that he was acting treacherously towards him. *Lennox Election (Ont.)—Miles v. Roe*, 1 E. C. 41.—*Galt—Osler*.—C. of A.

S., who was a political friend and supporter of the respondent, treated a meeting of electors with the knowledge, though not with the direct assent, of the respondent. It was proved at the trial that S. was a noisy, talkative man, employed as a travelling agent through the country; he had a bet or bets on the election; the respondent saw him at the meeting, and had some conversation with him in the crowd. Some time during the contest, and later than the date of the meeting, he went to respondent's office to make some suggestions, and asked his opinion as to the result, as he said some men wanted to bet with him. While there he saw some "campaign literature" on the table, and took some of it away with him, with the assent of the respondent. No evidence was given that he canvassed voters, and the respondent swore that he never gave him express authority to canvass or to do any thing for him, and that he was not a man he would employ as an agent:—Held, at the trial, before Patterson and Ferguson, J.J., and by the Court of Appeal, that at the time of the meeting S. was nothing more than a volunteer, for whose acts the candidate was not responsible. *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.

The petition in this case charged that one H., as agent of the respondent in violation of R. S. O. (1877), c. 10, s. 157, sold or gave drink at his tavern within the limits of a polling subdivision on polling day, which by R. S. O. (1877), c. 11, s. 2, sub-s. 6, is made a "corrupt practice." It appeared that H. was present, and had acted as a delegate at the convention of

representative reformers, whereat the respondent was nominated. The latter did not undertake a personal canvass, or appoint any particular persons or association of persons his agents for the purpose of carrying on the contest, but at the said convention he made a speech intimating that he expected his friends to work for him:—Held, at the trial and by the Court of Appeal (Burton, J. A., dissenting), that this constituted an appointment by him of every one of those who constituted the convention as his agent for the purpose of the contest, and no proof of acts done by the persons thus addressed and recognized by the candidate, was necessary to establish the agency, and as H. undoubtedly did sell the liquor as alleged, and as this corrupt act was not shewn to be of such trifling nature and extent as to come within R. S. O. (1877), c. 10, s. 159, the election must be declared void under s. 158. *Per Patterson, J. A., and Ferguson, J.*, (at the trial) the question of agency is one of fact, and must be decided in every case upon the circumstances immediately in question. *West Simcoe Election (Ont.)—Bedford v. Phelps*, 1 E. C. 128.—*Patterson—Ferguson*.—C. of A.

*Per Burton, J. A.*—Even if H.'s agency generally for canvassing and assisting in the elections were established in this case, he did not stand in the relation of agent in respect of the matter complained of. The only evidence was that he sold liquor for his own purpose under a mistaken idea that he had a right to do so, and there was nothing whatever to shew that it was in connection with his character as agent. It is in fact the words spoken by the respondent at the convention to the delegates, did not constitute them his agents. *Ib.*

It appeared that when the candidate accepted the nomination of the convention of the party he intimated to those present, among whom was N., that he looked for their active exertions in carrying on the contest:—Held, *per Patterson, J. A., and Ferguson, J.*, that this amounted to an authorization of those present, including N., to canvass and thus to act as agent, for the authorization to canvass covers agency, and even without any such express declaration the agency of those persons who were actually attending and taking part in the convention was established in the absence of anything shewing a repudiation or rejection of the offer of services which is implied by the very fact of their attending and making the nomination. *Muscat v. Parry Sound Election (Ont.)—Paget v. Fauquier*, 1 E. C. 197.

One A. had hired teams and taken voters to the polls contrary to R. S. O. (1877) c. 10, s. 154, and it was proved that the candidate being in the village of G., was told that A. was there for the above purposes, and that he went to see A. in his hotel and discussed the election and the probable results, with lists of voters, etc.:—Held, *per Ferguson, J.*, that this was sufficient to prove the agency of A. in the matter:—Held, *per Patterson, J. A.*, that this, and other circumstances of the case, established such agency. *Ib.*

The charge was that F., a licensed hotel-keeper about four o'clock on the polling day served H. and a voter with drinks in the barroom. F. was a member of the reform association, and generally took part in elections. He attended

the meeting called for the nomination of the respondent, but he took no active part in it. On the election day he drove electors to the poll, but it did not appear on which side he was voting. The president of the reform association said he did not think that F. worked for the respondent, and understood he was a friend of the defeated candidate; and H. said he thought he was working for the respondent. Per Boyd, C.—The evidence failed to shew that F. was an agent of the respondent. Per Cameron, J., that it was sufficient to establish such agency. On appeal, Osler, J.A., concurred with Boyd, C. The other judges did not consider the point. *East Simcoe Election (Ont.)—Reid v. Drury*, 1 E. C. 291.

A reform association existed in the constituency as an organized body for bringing forward candidates and doing everything in their power to elect their nominees. B. was present at meetings of the association, and one witness swore "he took as much part as any of us." It was not shewn that the organization was well defined, or what was necessary to constitute membership. A committee and sub-committee were appointed for the township in which B. resided, but he was not on them, or any committee for election purposes. Committee meetings were held at his hotel at which he was present, but it was not shewn that he did any more at the meetings than any owner of a hotel would do at a meeting held in his house. B. swore that, with the exception of one man, he did not canvassing outside his own house; he did not report to the committee meetings in his house, because he had been doing nothing, but that he gave the respondent the name of one person who wished to see him. It was not shewn that he had any authority from the respondent, or any committee, or that the respondent expected his assistance, or gave him any instructions, or recognized any act done by him. At the trial, it was proved that B. had been guilty of a corrupt practice, without the knowledge or consent of the respondent.—Held, following the North Ontario Case, H. E. C. at p. 323, that B. was not an agent of the respondent. *Welland Election (Ont.)—Hobson v. Morin*, 1 E. C. 383.—Patterson.—Ferguson.

D. heard of a meeting, went there, and found about half-a-dozen people present going over a voters' list, in which he did not take part. It was not shewn that he had any authority from the respondent, or any committee or association, or any one on his behalf, or that any act he did was recognized. D. was found to have been guilty of corrupt practices without the knowledge or consent of the respondent.—Held, following the North Ontario Case, H. E. C. at p. 317, that he was not an agent. *Id.*

The respondent was nominated by a convention of the Conservative party, composed of fifty or seventy-five persons, among whom was R., who was well known as a prominent member of the party, and was on intimate terms with the respondent, both of them being physicians. R. was one of the persons nominated at the convention, but the choice fell on the respondent, who then made a speech of acceptance in which he said he expected his friends to take an interest in the election and to work for him. R. made no systematic canvass, but he asked several people for their votes, was at various informal

meetings of voters held in the interest of the respondent, and with the respondent visited the houses of several voters:—Held, that R. was an agent of the respondent. *East Northumberland Election (Ont.)—Richmond v. Willoughby*, 1 E. C. 434.—Boyd.—Osler.

F. D. was at the convention which nominated the respondent, and he and W. D. were among the supporters of the respondent in a particular locality who held meetings at which the voters' lists were discussed and arrangements were made for looking up doubtful voters:—Held, that these men were both to be regarded as agents of the respondent. *Id.*

A scrutineer appointed for a polling place at an election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable. *Haldimand Election (Dom.)—Walsh v. Montague*, 1 E. C. 529.—S. C. C.

At the election in question there was no formal organization of the party supporting the appellant. The county reform association had been disbanded and the minutes, regularly kept since 1882, destroyed, as were the rough minutes of every meeting of a convention of the party held since that date. In lieu of local committees vice-presidents were appointed for the respective townships, and on the approach of a contest the vice-presidents called a meeting of the county association, composed of all reformers in the riding, to go over the lists and do all the necessary work of the election. The evidence of H.'s agency relied on by the petitioner was, that he had always been a reformer, had been active for two elections, had attended one important committee meeting and been recognized by the vice-president of the township as an active supporter of the appellant, and that he acted as scrutineer at the polls in the election in question. The trial judge held that all these elements combined, in view of the state of affairs regarding organization, constituted H. an agent of the appellant:—Held, Ritchie, C.J., dissenting, and Taschereau, J., hesitating, that the circumstances proved justified the trial judge in holding the agency of H. established. *Haldimand Election (Dom.)—Colter v. Glenn*, 1 E. C. 572.

See *South Ontario Election (Ont.)—Farnell v. Brown*, 1 H. E. C. 420, p. 1449; *Russell Election (Ont.)—Ogilvie v. Baker*, H. E. C. 199, p. 1487; *North Ontario Election (Dom.)—Gibbs v. Wheeler*, H. E. C. 785, p. 1474; *Halton Election (Dom.)—Cross v. McCraney*, H. E. C. 736, p. 1474; *North Ontario Election (Ont.)—Treleaven v. Gould*, 1 E. C. 1, p. 1471; *West Northumberland Election (Dom.)—Henderson v. Guillet*, 10 S. C. R. 635, p. 1471.

#### 4. Sub-Agents.

On a charge of bribery against one T., and one A., upon which this appeal was decided, the judge who tried the petition found as a fact that A. had been directed by T., an admitted agent of the respondent, to employ a number of persons to act as policemen at one of the polling places in the parish of Bay St. Paul, on the polling day, and had bribed four voters previously known to be supporters of the appellant, by giving them \$2 each, but:—Held, that A. was

the interest of the respondent visited the fact, that R. was an agent of Northumberland and Wiltoughby, 1 E.

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(Ont.)—Fairwell v. 49; Russell Election 3. C. 199, p. 1487; —Gibbs v. Wheeler, Election (Dom.)— 36, p. 1474; North Heaven v. Gould, 1 umberland Election , 10 S. C. R. 635,

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not agent of the respondent, and, therefore, his acts could not void the election:—Held, on appeal, that as there was no excuse or justification for employing these voters, their employment was merely colourable, and these voters having changed their votes in consequence of the moneys so paid to them, and the sitting member being responsible alike for the acts of A., the sub-agent, as for the acts of T., the agent, and they having been guilty of corrupt practices, the election was void. (Taschereau and Gwynne, JJ., holding that A., the sub-agent alone, had been guilty of bribery.) *Charlevoix Election (Dom.)*—*Cimon v. Perrault*, 5 S. C. R. 133.

The respondent gave to one H. some canvassing books, with directions to put them into good hands to be selected by him for canvassing. H. gave one of the books to B., a tavern-keeper, and B. canvassed for the respondent. B. was found guilty of a corrupt practice in keeping that part of his tavern wherein liquors were kept in store so open that persons could and did enter the storeroom and drink spirituous liquors there during polling hours:—Held, that H. was specially authorized by the respondent to appoint sub-agents, and had under such authority appointed B. as sub-agent, and the corrupt practices committed by B. avoided the election. *Welland Election (2) (Ont.)*—*Buchner v. Currie*, H. E. C. 187.—Gwynne.

Held, that the persons amongst whom the respondent's moneys had been distributed by W., and persons acting under them, were sub-agents of respondent, and that their corrupt acts avoided the election. Semble, that no limit can be placed to the number of parties through whom the sub-agency may extend. *Niagara Election (Dom.)*—*Black v. Plumb*, H. E. C. 509.—Hagarty.

See *South Grey Election (Ont.)*—*Hunter v. Lauder*, H. E. C. 52, p. 1450; *Cornwall Election (Dom.)*—*Bergin v. Macdonald*, H. E. C. 547, p. 1452; *West Toronto Election (Ont.)*—*Armstrong v. Crooks*, H. E. C. 97, p. 1450; *Niagara Election (Dom.)*—*Black v. Plumb*, H. E. C. 568, p. 1461.

## VII. BRIBERY AND CORRUPT PRACTICES.

### 1. Generally.

The respondent entrusted about \$700 to an agent for election purposes without having supervised the expenditure:—Held, that this did not make him personally a party within 34 Vict. c. 3, s. 46, to every illegal application of the money by the agent, or by those who received money from him. But if a very excessive sum had been so entrusted to the agent, the presumption of a corrupt purpose might have been reasonable. *South Grey Election (Ont.)*—*Hunter v. Lauder*, H. E. C. 52.—Mowat.

The plain and reasonable meaning of the statute, 32 Vict. c. 21 (Ont.) is, that when the prohibited things are done in order to induce another to procure, or to endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election, the person so doing is guilty of bribery. *East Toronto Election (Ont.)*—*Kennick v. Cameron*, H. E. C. 70.—Richards.

The difference between the Imperial statute (17-18 Vict. c. 102, s. 2, sub-s. 3, proviso), and

the Ontario statute (32 Vict., c. 21, s. 67, sub-s. 3, proviso), as to "legal expenses" in elections, pointed out. *Ib.*

Held, that "illegal and prohibited acts relating to elections," in the definition of corrupt practices in the Ontario Controverted Elections' Act, 1871, were confined to bribery, hiring of teams, and undue influence, as defined by sections 67 to 74 of the Election Act of 1868. *North York Election (Ont.)*—*Gorham v. Boulton*, H. E. C. 62.—Galt.

The words "illegal and prohibited acts in reference to elections," used in 34 Vict. c. 3, s. 3 (Ont.), mean such acts done in connection with, or to affect, or in reference to election; not all acts which are illegal and prohibited under the election law. *Brockville Election (Ont.)*—*Flint v. Fitzsimmons*, H. E. C. 139.—Q. B.

Quere, whether the word "employment" used in the bribery clauses of 32 Vict. c. 21 (Ont.), refers to an indefinite hiring, or would include a mere casual hiring. *West Peterborough Election (Ont.)*—*Scott v. Cox*, H. E. C. 274.—Draper.

The definition of "corrupt practices" in section 3 of the Dominion Controverted Elections' Act, 1873, considered. See *North Victoria Election (Dom.)*—*Cameron v. Maclellan*, H. E. C. 584.

The Imperial and Dominion election laws, as to corrupt practices and their consequences, compared and considered. *Kingston Election (Dom.)*—*Stewart v. Macdonald*, H. E. C. 625.—Richards.

Where corrupt practices by agents, and others in the interest of the respondent, affected less votes than the majority obtained by the respondent at the election:—Held, under 39 Vict. c. 10, s. 37 (Ont.), that such corrupt practices did not extend beyond the votes affected thereby, and did not avoid the election. *Lincoln (2) Election (Ont.)*—*Pawling v. Ryker*, H. E. C. 489.—Patterson—Blake.

Where a candidate in good faith intended that his election should be conducted legally, and had printed and circulated throughout the constituency a synopsis of the new law as to corrupt practices, and had caused an editorial article to be printed in a newspaper, and had taken trouble to have the law explained to the electors:—Held, that although many of the acts done during the election created doubt and hesitation in the judge, yet as the return of a member ought not to be lightly set aside, the judge ought to be satisfied that the acts done were done to influence the electors and so done corruptly, and this election was upheld. *West Toronto Election (Ont.)*—*Armstrong v. Crooks*, H. E. C. 97.—Richards.

Semble, that the term "wilful," as used in section 98 of 37 Vict. c. 9 (Dom.), cannot be construed in a narrower sense than the term "corruptly" in section 92, sub-section 1; and that the term "corruptly" does not mean wickedly, or immorally, or dishonestly, but doing that which the legislature plainly meant to forbid; as an act done by a man knowing that he is doing what is wrong, and doing it with an evil object. *Halton Election (Dom.)*—*Cross v. McCraney*, H. E. C. 736.—Patterson—C. of A.

Per Richards, C. J. The intention of the legislature was, that votes should be given from the conviction in the mind of the voter that the candidate voted for was the best person for the situation, and that the public interest would be best served by electing him, and the evil to be corrected was supporting a candidate for causa lucri, or for personal gain in money or money's worth to the voter. *Halton Election (Ont.)*.—*Bussell v. Barber*, H. E. C. 283.

Semble, where a corrupt act is committed during an election contest by an agent with the knowledge of the candidate and it turns out that the person committing it was in fact or in contemplation of the election law the agent of the candidate, it is not necessary that the candidate should at the time have knowledge that the person committing the act is his agent or even that he should know such person individually. The Londonderry Case, 1 O.M. & H. 278, and the Dunganon Case, 3 O.M. & H. 101, referred to and followed. *Prescott Election (Ont.)*.—*Cunningham v. Hagar*, 1 E. C. 88.—*Patterson*.—*Ferguson*.—C. of A.

Per Spragge, C. J. O.—When we find these two things concur, an act that comes within the designation "corrupt practice," and that the doer of the act is an agent for the candidate, we are not at liberty to say that the act was done in order to promote the objects of the agent, and not in order to promote the interest of the candidate, that, though true it is the act of the agent, it is not the act of the agent, qua agent. It being an act which is profitable to the doer of the act, and the making of the profit being assumed to be the motive of the doer of the act, cannot dissociate the act from the election. The Lincoln Case, H. E. C. 391, commented on: The Harwich Case, 3 O.M. & H. 69, distinguished. *West Simcoe Election (Ont.)*.—*Bedford v. Phelps*, 1 E. C. 128.

Held, affirming the judgment of the court below, when an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to. *Levis Election (Dom.)*.—*Belleau v. Dussault*, 11 S. C. R. 133.

The suggestion of names and recommendation of deputy returning officers by political associations commented on and disapproved of. *North Ontario Election (Ont.)*.—*Treleaven v. Gould*, 1 E. C. 1.—*Burton*.—*Osler*.

See *Muskoka Election (Ont.)*.—*Starratt v. Miller*, H. E. C. 458, p. 1460; *West Hastings Election (Ont.)*.—*Wesley v. Wille*, H. E. C. 211, p. 1500; *Halton Election (Ont.)*.—*Bussell v. Barber*, H. E. C. 283, p. 1525.

## 2. Proof of.

Per Moss, C. J.—*Prima facie* corrupt practices avoid an election: and the onus of proof that they are not sufficient to affect the majority of votes rests upon the respondent. *West Hastings Election (2) (Ont.)*.—*Holden v. Robertson*, H. E. C. 539.

Where a charge of bribery is only the unaccepted offer of a bribe, the evidence must be

more exact than that required to prove a bribe actually given or accepted. *South Grey Election (Ont.)*.—*Hunter v. Lauder*, H. E. C. 52.—*Mowat*.

Where the evidence as to bribery consists of offers or proposals to bribe, the evidence should be stronger than with respect to actual bribery. Where three voters swore to three separate offers of bribery made to each of them separately by an agent of the respondent, which such agent swore were never made by him:—Held, that the evidence was not sufficient to justify the setting aside of the election. The language of Martin, B., in the Wigan case 1 O.M. & H., 192, adopted as a general rule applicable to this case. *East Toronto Election (Ont.)*.—*Rennick v. Cameron*, H. E. C. 70.—*Richards*.

Where the evidence as to the offer of bribes was contradictory, and the parties making charges of bribery appeared to have borne indifferent characters:—Held, that the offer of bribes was not satisfactorily established. *Welland Election (2) (Ont.)*.—*Buchner v. Currie*, H. E. C. 187.—*Gwynne*.

Where one party affirmed and the other party denied a corrupt offer between them as to voting for the respondent:—Held, that the offer was not sufficiently proved. *Dundas Election (Ont.)*.—*Cook v. Broder*, H. E. C. 205.—*Spragge*.

Where in evidence of offers of bribery, an assertion on one side is met by a contradiction on the other, the uncorroborated assertion is not sufficient to sustain the charge. *West Peterborough Election (Ont.)*.—*Scott v. Cox*, H. E. C. 274.—*Draper*.—C. of A.

A charge of bribery against the respondent, where the evidence was unsatisfactory and repugnant in itself, and rested more on suspicion than on clear positive proof, was held not proven. *North Ontario Election (Ont.)*.—*McCaskill v. Paxton*, H. E. C. 304.—*Wilson*.—C. of A.

The respondent was charged with several acts of corrupt practice. Each separate charge was supported by the evidence of one witness, and was denied or explained by the respondent. The judge trying the petition:—Held, that if each case stood by itself, oath against oath, and each witness equally credible, and their being no collateral circumstances either way, he would have found that each case was not proved; but as each charge was proved by a credible witness, the united weight of their testimony overcame the effect of the respondent's denial; and on the combined testimony of all the witnesses, he held the separate charges proved against the respondent:—Held, by the Court of Appeal (reversing Wilson, J.), that in election cases, each charge constitutes in effect a separate indictment, and if a judge on the evidence in one case dismisses the charge, the respondent cannot be placed in a worse position because a number of charges are advanced, in each of which the judge arrives at a similar conclusion, and therefore the separate charges above referred to were held not sustained. *Muskoka Election (Ont.)*.—*Starratt v. Miller*, H. E. C. 458.

Where evidence of an act of keeping open his tavern on polling days and selling liquor therein



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as usual, by P., an agent of the petitioner, came out on cross-examination, and during the argument the evidence was objected to because the charge was not in the particulars, the case was not considered. The evidence respecting a charge of bribery, by payment of a disputed debt, was held insufficient to sustain the charge. *North Victoria Election (Ont.)*.—*McRae v. Smith*, H. E. C. 252.—Draper.

On a charge that one O. bribed a voter by promising him to procure a deed of his land for him if he would procure votes for the respondent:—Held, on the evidence, that though the voter had so represented, the procuring of the deed had nothing to do with the election:—Sembly, that O. was not an agent for whose acts the respondent was responsible. *North Middlesex Election (Ont.)*.—*Cameron v. McDougall*, H. E. C. 376.—Spragge.

A witness stated that he had received a letter from a voter, asking for the fulfilment of an offer as to his vote, but the letter was not produced:—Held, that it was not proved that the letter in question was written by the voter referred to. *Id.*

One S., an alleged agent of the respondent, made offers of sheepskins to two voters as to their votes at the election, but he swore the offers were made in jest; but as the evidence did not shew that S. was an agent of the respondent at the time of the alleged offers, no effect was given to the charge. *Id.*

A statement that an offer to bribe was made in jest should be received with great suspicion; a briber may make an offer which he intends should be taken seriously, and then, if not accepted, he may assert it was made in jest. *Id.*

A promise to work for a voter, made without reference to the election and as a joke, not evidence of bribery. *Halton Election (Dom.)*.—*Cross v. McCraney*, H. E. C. 736.—Patterson.—C. of A.

The respondent, in a constituency where 642 persons voted, received 336 votes, and his election expenses were about \$2,000. The money was entrusted by him to one G., with a caution to see that it was used for lawful purposes only. About \$1,200 of this money was given by G. to one W., who distributed it to several persons in sums of \$40, \$100, \$200 and \$250. No instructions as to expenditure were given by G. to W., or by W. to the persons amongst whom he distributed the money; and by the latter several acts of bribery were committed. The respondent publicly and privately disclaimed any intention of sanctioning any illegal expenditure; but made no inquiries after the election as to how the money had been spent until a week or two before the election trial. He denied any act of bribery, direct or indirect, or any knowledge thereof; and no proof was given of a personal knowledge on his part of any of the specific wrongful acts or payments proved to have been committed by persons amongst whom his money had been distributed:—Held, that under the peculiar circumstances of the respondent's canvass, and on a review of the whole evidence, the respondent's emphatic denial of any corrupt motive or intention should be accepted. *Niagara Election (Dom.)*.—*Black v. Plumb*, H. E. C. 568.—Hagarty.

Evidence of corrupt practices committed by persons in the interest of both candidates at the previous election, may be given at the trial of the second petition, with the view of striking off the votes of any such persons who may have voted at the second election. *Cornwall Election (2) (Dom.)*.—*Bergin v. Macdonald*, H. E. C. 647.—Spragge.

The respondent canvassed a voter, who at the trial swore that after he had agreed to vote for him, the respondent promised to give the voter some work; the respondent denied the promise:—Held, although the voter appeared to be a truthful witness and was not shaken on cross-examination, that the promise of employment was not made out beyond all reasonable doubt. *North Ontario Election (Dom.)*.—*Gibbs v. Wheeler*, H. E. C. 785.—Armour.

A charge that the respondent promised to give a voter certain work to do if he voted for him, was disproved by the evidence of the respondent and another, and by the admissions of the voter made to other parties. *Halton Election (Dom.)*.—*Cross v. McCraney*, H. E. C. 736.—Patterson.—C. of A.

The charge against the respondent and one B., of an offer of money to, and to procure an appointment as justice of the peace for, a voter in consideration of his voting for the respondent, was supported by the evidence of the voter who shewed bitter hostility to B.; but the charge was denied by the respondent. The evidence shewing the statement to be improbable, and that the election contest was carried on by the respondent with a scrupulous and honest endeavour to avoid any violation of the law against corrupt practices, the charge was dismissed. *Id.*

A charge against an agent of the respondent, that he had promised to procure the office of police magistrate for one W., was denied by the agent and the respondent; and it further appearing that W. had acted on the committee of, and voted, for the opposing candidate, the charge was dismissed. Charges against the respondent, that he had promised an office to the son of a voter, and a contract to the voter himself, were contradicted by other evidence and dismissed. *South Ontario Election (Dom.)*.—*McKay v. Glen*, H. E. C. 751.—Galt.

The respondent was charged with corrupt practices, in that, when canvassing one C., a voter who said he would not vote unless he was paid, respondent said he was not in a position to pay him anything, but that if C. would support him, one of his (the respondent's) friends would come and see about it. The respondent as he was leaving the voter's house, met one K., a supporter, who, after some conversation, went into C.'s house and gave him \$5 to vote for the respondent. The charge depended upon the evidence of the voter C. and his wife. The respondent denied making such a promise; and he was sustained by K. as to a conversation outside C.'s house, in which the respondent cautioned K. not to give or promise C. any money. Hagarty, C. J., on the evidence found that the respondent was not personally implicated in the bribery of the voter C. by K. *Centre Wellington Election (Dom.)*.—*Ironside v. Orton*, H. E. C. 579.

Before an election judge finds a respondent or any other person guilty of a corrupt practice

involving a personal disability, he ought to be free from reasonable doubt. *Ib.*

A number of separate charges of corrupt practices against an agent of the respondent, based upon offers or promises, and not upon any act of such agent, each of which depended upon the oath of a witness to the offer or promise, but each one of which such agent directly contradicted, or gave a different colour to the language, or a different turn to the expressions used, which quite altered the meaning of the conversations, detailed or constituted in effect a complete or substantial denial of the charges attempted to be proved against such agent:—Held, 1. That although in acting on such conflicting testimony, where there was a separate opposing witness in each case to the testimony of the witness supporting the charge, the election judge might be obliged to hold each charge as answered and repelled by the counter evidence, he could not give the like effect to the testimony of the same witness in each of the cases where the only opposing witness is confronted by the adverse testimony of a number of witnesses, who, though they do not corroborate one another by speaking to the same matter, are contradicted in each case by the one witness. 2. That the more frequently a witness is contradicted by others, although each opposing witness contradicts him on a single point, the more is confidence in such witness affected, until, by a number of contradicting witnesses, he may be disbelieved altogether. 3. That acting on the above and on a consideration whether the story told by the witness in support of the charge is reasonable or probable in itself, the charges of corrupt practices against the agent of the respondent, set out in the judgment, were proved. *North Renfrew Election (Dom.)*.—*White v. Murray*, H. E. C. 710.—*Wilson*.—Q. B. D.

See *West Toronto Election (Ont.)*.—*Armstrong v. Crooks*, 1 H. E. C. 97, pp. 1458, 1516; *Weland Election (2) (Ont.)*.—*Buchner v. Currie*, H. E. C. 187, p. 1497.

### 3. Bribery.

#### (a) Generally.

Bribery is not confined to the actual giving of money. Where a grossly excessive price has been paid for work or for an article, it is clearly bribery. *Cornwall Election (Dom.)*.—*Bergin v. Macdonald*, H. E. C. 547.—*Spragge*.

Where money was paid to voters for services agreed to be rendered but such services were not rendered owing to the misconduct of the voters, such payment was not bribery. *West Toronto Election (Ont.)*.—*Armstrong v. Crooks*, H. E. C. 97.—*Richards*.

Where half a cord of wood was given to a voter in poor circumstances during the election, and the giver swore that it was given out of charity:—Held, not an act of bribery. *London Election (Ont.)*.—*Jarman v. Meredith*, H. E. C. 214.—*Spragge*.

Where a voter was bailed out of gaol on the day of polling by a friend, but according to the evidence without reference to the election:—Held, not an act of bribery. *Ib.*

The giver of a bribe as well as the receiver may be indicted for bribery. *North Victoria Election (Dom.)*.—*Cameron v. Maclellan*, H. E. C. 534.—*Richards*.—*Spragge*.—*Hagarty*.

The first principle of parliamentary law is that elections must be free; and, therefore, without referring to statutory provisions, if treating was carried on to such an extent as to amount to bribery, and undue influence was of a character to affect the election, the election would be void. *Ib.*

See *London Election (Ont.)*.—*Jarman v. Meredith*, H. E. C. 214, p. 1468; *West Northumberland Election (Dom.)*.—*Henderson v. Guillet*, 10 S. C. R. 635, p. 1471; *Halton Election (Dom.)*.—*Cross v. McCraney*, H. E. C. 736, p. 1474.

#### (b) By Candidate.

The respondent after announcing himself as a candidate, gave \$10 in two \$5 bills to a child of a voter, then three or four years old, which had been named after him. He had two years previously intimated that he would make the child a present:—Held, that the gift, under such circumstances, was not bribery. *Glenarry Election (Ont.)*.—*McLennan v. Craig*, H. E. C. 8.—*Hagarty*.

The respondent while canvassing had refreshment for his man and two horses at a tavern for part of a day and night, for which he paid the tavern-keeper \$5, and next day \$5 more, in all \$10, without asking for a bill. The bill would have amounted to about \$3. The respondent stated that the tavern-keeper was an old friend of his, and was just starting in business, and that he thought it right to pay him as it were a compliment on his first visit to his tavern, and that he believed he would have done the same thing if it was not election time:—Held, that being an isolated case in an election contest, free from profuse expenditure, and this being a quasi-criminal trial, involving grievous results to the respondent if found a corrupt practice, such payment was not—after the explanations of the respondent—an act of bribery. *Ib.*

At a late hour on the day preceding the election some agents of the respondent determined to resort to bribery, and they carried out such determination at an early hour on the morning of the polling day. There was no evidence of the respondent's knowledge of, or consent to, this act of his agents:—Held (reversing *Gwynne*, J.), that the shortness of the interval between the resolve and the execution of the bribery, which was carried out at a place several miles away from where the respondent lived, rendered improbable the fact of the respondent's actual knowledge of such bribery. *Lincoln Election (Ont.)*.—*Rykert v. Neelon*, H. E. C. 391.—*C. of A.*

The wife of one S., a voter, had been injured some years before the election by the horses of the respondent, and in 1872 the respondent gave S. compensation for the injury partly by cancelling a debt and partly in cash, for which S. signed a receipt "in full of all accounts and claims whatsoever." The respondent canvassed S. during the election, saying: "I would like to have you with me at the election," but S. de-

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to do, and could do, what was right. After-  
wards the respondent sent his salesman to the  
wife of S., who told her that the respondent  
was still able to do justice, to which she replied  
she would write a letter, which she did, and in  
which she referred to her husband's vote. After  
the election the respondent gave S. \$30 partly  
by cancelling a debt and partly in cash. The  
respondent denied that he gave S. to understand  
that he would give him anything to induce him  
to vote for him at the election.—Held, by the  
Court of Appeal, affirming Gwynne, J., that the  
evidence shewed that an indirect offer of money  
or other valuable consideration was made by the  
respondent to S., to induce him to vote for the  
respondent. *Ib.*

The evidence shewed that extensive bribery  
was practised by the agents of the respondent  
and by a large number of persons in his interest,  
but no acts of personal bribery were proved  
against him, and he denied all knowledge of such  
acts. It was in evidence that he had warned  
his friends, during the canvass, not to spend  
money illegally. The judge (dubitante) held  
that no corrupt practice had been committed  
with the respondent's knowledge or consent,  
and avoided the election for corrupt practices  
by the respondent's agents. On appeal to the  
Court of Common Pleas, it was:—Held, 1. That  
the circumstantial evidence in this case was  
sufficient to shew that corrupt practices had  
been committed by the respondent's agents with  
his knowledge and consent. 2. That wilful in-  
tentional ignorance is the same as actual know-  
ledge. 3. That the assent of a candidate to the  
corrupt acts of his agents may be assumed from  
his non-interference or non-objection when he  
has the opportunity. And such candidate's  
knowledge of and assent to the corrupt acts of  
his agents, may be established without connect-  
ing him with any particular act of bribery.  
*London Election (Dom.)—Pritchard v. Walker,*  
H. E. C. 560.

A single bribed vote brought home to a candi-  
date would throw doubt on his whole majority,  
and would therefore annul his return. *North*  
*Victoria Election (Dom.)—Cameron v. Maclean,*  
H. E. C. 584. — Richards—Spragge—Hagarty.

Held, that the settlement by payment of a  
just debt by a candidate to an elector without  
any reference to the election is not a corrupt act  
of bribery, and especially so when the candidate  
distinctly swears he never asked the elector's  
support, and the elector says he never promised  
it and never gave it. *South Ontario Election*  
*(Dom.)—McKay v. Glen,* H. E. C. 751; *S. C.*  
*R. 641.*

One P., some years before the election, claimed  
that the respondent was indebted to him, but  
the respondent denied all liability, and the dis-  
pute caused a coolness between them. One H.,  
four months before the election, was employed  
by P. to collect another account from the re-  
spondent, and did so. H. stated to P. that as  
the respondent was in a good humour, it would be  
a good opportunity to get the old account settled,  
and asked P. if he would support the respondent  
in case the old account was settled. P. replied

that he might promise what he liked. H. then  
took the account to the respondent, who looked  
it over and gave his note for it. H. and the re-  
spondent never referred to the election, nor to  
the settlement as affecting the election.—Held,  
that the respondent had not been guilty of bribery  
in this transaction. *Taschereau and Gwynne,*  
*JJ.,* doubting whether the transactions proved  
were not within the prohibitory provisions of the  
Act. *Ib.*

The respondent owed one M. a debt, which  
had been due for some time. He was sued for it  
about the time of the election, and was informed  
that his opponents were using the nonpayment  
of it against him in the election. The respon-  
dent stated he would not pay it until after the  
election as it might affect his election.—Held,  
that the promise to pay the debt was not made  
to procure votes, but to silence the hostile criti-  
cism, and was therefore not bribery. *North*  
*Ontario Election (Dom.)—Gibbs v. Wheeler,* H.  
E. C. 785.—Armour.

The respondent had in 1873 compromised with  
his creditors for fifty cents on the \$, and then  
promised to pay all his creditors in full. About  
the time of the election he paid one S., who had  
at the two previous elections supported the op-  
posing candidate, a portion of the promised  
amount:—Held, under the circumstances, the  
payment was not bribery. *Dundas Election*  
*(Ont.)—Cook v. Broder,* H. E. C. 205.—Spragge.

The charge was that the respondent bribed  
one J. F. G., by the payment of a promissory  
note for \$89. The evidence shewed that J.  
F. G. had been canvassing for respondent a  
long time before the note fell due, and had  
always supported him. He was on his way  
to retire his note, which was overdue or  
falling due that day, when respondent asked  
him to canvass that day, and promised to send  
into town and have the note arranged for him.  
At the same time J. F. G. was negotiating for  
a loan on a mortgage to respondent, and it was  
at first stipulated that the amount of this note  
should be taken out of the mortgage money.  
The agent of the respondent, after the election,  
at the request of J. F. G., paid the mortgage  
money in full and allowed the matter of the note  
to stand until J. F. G. could see respondent. J.  
F. G. stated that neither the note nor the mort-  
gage transaction influenced him in any way, and  
that he had to pay the note and did not expect  
respondent to make him a present of it:—Held,  
that the evidence did not shew that the advance  
of money was made in order to induce J. F. G.  
to procure, or endeavour to procure the return  
of the respondent, and was not therefore bribery  
within the meaning of sub-section 3 of section  
92 of the Dominion Elections Act, 1874. *Selkirk*  
*Election (Dom.)—Young v. Smith,* 4 S. C. R. 494.

One Mireau, a blacksmith, who was a neigh-  
bour of the respondent, had in his possession  
for two years, several pieces of broken saws  
which the respondent had left with him for the  
purpose of making scrapers out of them on  
shares. A few days prior to nomination the re-  
spondent went into Mireau's shop with a scraper  
he wanted to be sharpened, and in return for  
sharpening the scraper told him to keep the old  
pieces of saw which he might still have. Mireau  
in his evidence answered as follows:—"Q. He

did not speak of your vote? A. No. Q. What has he said? A. He said that Mr. Magnan was coming like mustard after dinner. Q. M. Dugas did not ask you for whom you were? A. No. \* \* Q. Do you swear on the oath you have taken that M. Dugas left with you these two pieces of saw in question with the intent to buy (bribe) you? A. I think so, I cannot say that it is sure, I don't know his mind (son idée). It is all I can swear. Q. It has not changed your opinion? A. No. Q. For whom were you in the last election? A. For M. Magnan. The scrapers were worth in all about two dollars, and were of no use to the respondent, and no other conversation took place afterwards between the parties. The judge who tried the case found that there was no intention on the part of the respondent to corrupt Mireau, which decision was upheld by the Supreme Court. *Montcalm Election—Magnan v. Dugas*, 9 S. C. R. 93.

Before setting out on a canvassing tour, the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, \$100 to be used for the purpose of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality, who indicated to B. his dissatisfaction with the candidate of his party, and stated that, although he would vote for the liberal party, he would not exert himself as much as in the former elections. The appellant then went outside, and B. asked his host: "Do you want any money for your church?" And having received a negative reply, added, "Do you want any money for anything?" K. then answered: "If you have any money to spare there is plenty of things we want it for. We are building a town hall, and we are scarce of money." B. then said: "Will \$25 do?" K. answered: "whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant and B. good-bye, K. said: "Gentlemen, remember that this money has no influence as far as I am concerned, with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of \$25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent of the appellant:—Held, affirming the judgment of the court below, that the giving of the \$25 by B. to K. was not an act of liberality or charity, but a gift out of appellant's money, with a view to influence a voter favourably to the appellant's candidature, and that although the money was not given in the appellant's presence, yet it was given with his knowledge, and therefore that the appellant had been personally guilty of a corrupt practice. *Megantic Election (Dom.)—Côté v. Goulet*, 9 S. C. R. 279.

See *Halton Election (Ont.)—Bussell v. Barber*, H. E. C. 283, p. 1625; *North Ontario Election (Dom.)—Wheler v. Gibbs*, H. E. C. 785, p. 1473; *Bellechasse Election (Dom.)—Larue v. Deslauriers*, 5 S. C. R. 91, p. 1525; *Niagara Election (Dom.)—Black v. Plumb*, H. E. C. 1461; *Kingston Election (Dom.)—Stewart v. Macdonald*, H. E. C. 625, p. 1470; *Regina ex rel. Johns v. Stewart*, 16 O. R. 583, p. 1327.

## (c) By Agents.

One M., a carter, who voted for respondent, at the request of P., the respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election P., the agent, gave M. \$2, intending it as compensation for the conveyance of such voter to the poll, but M. thought it was in payment for work which he had done for P. as a carter. The candidate knew nothing of the matter:—Held, that there was properly no payment by P. to M. for any purpose, the money being given for one purpose and received for another; but that if there had been, it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay, to which it could relate back. If such payment had been established as a corrupt practice, it would have avoided P.'s vote, but not M.'s; and it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary. *Brockville Election (Ont.)—Flint v. Fitzsimmons*, H. E. C. 139.—Q. B. D.

An agent of the respondent, while canvassing a voter, gave \$8 to the widowed sister of the voter, an old friend of his, who was then in reduced circumstances. The agent stated that this was not the first money so given, and that it was in no way connected with the election:—Held, under the circumstances, not an act of bribery. *North Victoria Election (Ont.)—McRae v. Smith*, H. E. C. 252.—Draper.

An offer by an agent of the respondent when canvassing a voter, that he "would see him another time and things would be made right," is not an offer of bribery. *Id.*

An elector when asked to vote for respondent said that it would be a day lost if he went to vote, which would cost him \$1. To which the canvasser replied: "Come out, and your \$1 will be all right":—Held, not sufficient to establish a charge of bribery. *Monck Election (Ont.)—Colliar v. McCallum*, H. E. C. 154.—Galt.

K., an agent, while canvassing a voter in ward No. 6, gave him money to get beer, for which the voter paid a lesser sum, and as the voter was poor, told him to keep the change:—Held, under the circumstances, not an act of bribery. *London Election (Ont.)—Jarman v. Meredith*, H. E. C. 214.—Sprague.

One M., the financial agent of the petitioner, agreed with a voter who had a difference with the petitioner about a right to cut timber on the voter's land, to settle the matter—the voter when canvassed to vote for the petitioner referred to this difference. M. signed an agreement in the petitioner's name, whereby he surrendered any claim to cut timber except as therein mentioned:—Held, 1. That a surrender of the right to cut timber on the lands of another was a "valuable consideration," within the meaning of the bribery clauses of 32 Vict., c. 21, (Ont.) 2. That the agent M. was guilty of an act of bribery. *North Victoria Election (Ont.)—McRae v. Smith*, H. E. C. 252.—Draper.

One H., a voter, held a claim against the respondent, and M., a member of a township committee, and another, for five years, which

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claim against the re-  
member of a township  
for five years, which

he had been endeavouring to procure pay-  
ment of. When canvassed at the time of the  
election, he stated that if he did not get it  
settled he would not vote for the respondent.  
M. induced the respondent to give his promi-  
sory note to H. for the debt, but did not give  
the respondent to understand directly or in-  
directly that the note had anything to do with  
the election:—Held, 1. That it is always open  
to enquire, under statutes similar to the Election  
Acts, whether the debt was paid in accordance  
with the legal obligation to pay it, or in order  
to induce the voter to vote or refrain from  
voting. 2. (affirming Wilson, J.) That on the  
evidence, the motive which induced M. was that  
of procuring the voter H. to vote at the election,  
and that thereby an act of bribery was com-  
mitted by M. as such agent, which avoided the  
election. *North Ontario Election (Ont.)—Mc-  
Caskill v. Paxton, H. E. C. 304.—C. of A.*

One L., a tavern-keeper, was told by H., one  
of respondent's canvassers, that he thought L.  
could get \$18 or \$20 from P., if he would stay  
at home during the election. L. expected that  
the money would be spent at his tavern, and  
shewed that he did not know what was in-  
tended. Neither H. nor P. were examined:—  
Held, on the evidence, there was no actual offer  
to bribe. *North Victoria Election (Dom.)—  
Cameron v. MacLennan, H. E. C. 612.—Mor-  
rison.*

A large sum of money, averaging \$3 per  
head, had been spent by two of the agents  
of the respondent, and money had been given  
by them to parties without any instructions:—  
Held, that where such money had been applied  
improperly, it must be considered that it was  
intended to be so applied. *Cornwall Election  
(Dom.)—Bergin v. Macdonald, H. E. C. 547.  
—Spragge.*

The agent C. employed one W. to go with him  
on the evening before the election to several  
electors, from whom both C. and W. made  
colourable purchases, but with the corrupt in-  
tention of inducing the persons from whom the  
purchases were made to vote or refrain from  
voting at the election:—Held, that C. and W.  
were guilty of bribery, and that the election  
was avoided in consequence of their corrupt  
acts. *Cornwall Election (3) (Dom.)—MacLennan  
v. Bergin, H. E. C. 803.—Armour.*

Money had been contributed by the respon-  
dent and by his friends for the purposes of the  
election, which had been placed in the hands of  
one C., a personal and political friend of respon-  
dent, who gave it without any instructions or  
warnings to such committee-men as applied for  
it. A great deal of the money was spent in  
corrupt purposes, in bribery, and in treating to  
the extent of avoiding the election. The respon-  
dent in his evidence stated that he did not,  
directly or indirectly, authorize or approve of or  
sanction the expenditure of any money for bribe-  
ry, or a promise of any for such purpose, nor  
did he sanction or authorize the keeping of any  
open house, and that he was not aware that any  
open houses had been kept, and that he always  
impressed on everybody that they must not vio-  
late the law. There was no affirmative evidence  
to shew that the money which the respondent  
knew had been raised for the purposes of the  
election was so large that as a reasonable man he

must have known that some portion of it would  
be used for corrupt purposes:—Held, that look-  
ing at the whole case, and at this branch of it,  
as a penal proceeding, the respondent should not  
be held personally responsible for the corrupt  
practices of his agents. *Kingston Election (Dom.)  
—Stewart v. Macdonald, H. E. C. 825.—Richards.*

The avoidance of an election for an act of  
bribery committed by the agent of a candidate  
is a civil proceeding, and is not brought about to  
punish the candidate, but to secure an unbiased  
election. *Ib.*

Where N. who appeared to have been agent  
of a candidate called upon M., an elector, and,  
without directly asking him to vote, handed him  
one of the candidate's cards, and stated that he  
was going to give M.'s wife a present, but that he  
could not give M. a present, because it was elec-  
tion time, and that M. could get a present for  
his wife any day he was in B. (one of the places  
where voting was to take place); and M. went  
to B. the night of the election and got the pre-  
sent, which was tea and sugar, etc., worth about  
\$2:—Held, (at the trial) per Patterson, J. A.,  
and Ferguson, J., that this came within the acts  
spoken of in R. S. O. (1877), c. 10, s. 149, (a)  
and that the goods having been given to M.  
under the idea that he had voted, it was imma-  
terial whether it was proved that M. had actually  
voted or not. *Muskoka and Parry Sound Elec-  
tion (Ont.)—Paget v. Fauquier, 1 E. C. 197.*

P., an agent of the respondent, on the morning  
of the election, called on the wife of one K., and  
asked her to use her influence with her husband  
to induce him to vote for the respondent, say-  
ing: "I will make it all right." She told her  
husband, who laughed, and replied that he in-  
tended to vote for the respondent any way, or  
that he would do as he liked, and he did vote.  
After the election the wife called at P.'s store,  
and having reminded him of his promise, she went  
into the grocery department and got goods to  
the value of \$4.49. Subsequently an account  
was rendered including this \$4.49, and the hus-  
band objected to pay it. She then told a clerk  
of P.'s that that part of the account was "set-  
tled off election time," and a new account was  
subsequently rendered by the attorney of the  
estate, as P. had failed in the meantime, with  
that item omitted. Per Burton, J. A.—The  
words of the promise in themselves alone did  
not amount to "an offer or promise of money or  
other valuable consideration," but being followed  
after the election by the present of goods, the  
gift was made in pursuance of the promise, and  
therefore corruptly: but that as P.'s agency had  
terminated with the election, it was not such a  
corrupt practice as to affect the candidate unless  
done with his privity and assent. Per Osler,  
J. A.—P. intended to convey and did convey to  
the wife the idea that if she procured or would  
induce her husband to vote as he wished, she  
would receive something of value; the giving of  
the groceries after the election was an act of  
bribery, and if it stood alone it would have been  
necessary to carry the evidence of agency further,  
but following the promise it shewed what both  
parties understood, and to that extent the res-  
pondent was affected by what was done after the  
election:—Held, also, under all the circum-  
stances, that this being the single corrupt act  
proved the case was a proper one for the appli-



cation of section 159, though the majority was only twenty, and the election should not be avoided. *North Ontario Election (Ont.)—Treleaven v. Gould, 1 E. C. 1.*

D., an agent of respondent, bribed M., a voter, by payment of money. The same D. gave one L., after he had voted, \$1, which both D. and L. said was a loan and not a gift:—Held, as to the first payment, per Boyd, C., and Cameron, C. J., a corrupt practice; as to the latter payment, per Boyd, C., not a corrupt practice, the evidence not connecting the payment with the vote given. Per Cameron, J., that it did. *East Middlesex Election (Ont.)—Rhoder v. McKenzie, 1 E. C. 250.*

H., a voter, was paid \$4 by an agent of respondent for one day's work posting bills:—Held, per Boyd, C., not a corrupt practice; per Cameron, C. J., an unreasonably large payment for the work done, though not sufficient, if it were the only charge, to avoid the election. *Ib.*

The following acts were relied on as sufficient to have the election set aside. H., a conservative, prior to the election, canvassed in company with the respondent, one B. On election day H. was selected by the assistant secretary of the association (an acknowledged agent of the respondent) to represent the respondent at the Burnley poll, and obtained from him a certificate under section 42 of the Dominion Elections' Act, entitling him to vote at the Burnley poll. He there met B. and treated him by giving him a glass of whiskey, and after B. had voted, he gave him \$2, and subsequently sent him \$50. The treating, according to B.'s evidence, was nothing more than an act of good fellowship; and according to H.'s account, that B. was not feeling well, and the whiskey was given in consequence. B. negatived that the \$2 were paid him for his vote, and H. said that he supposed it was a dollar bill, and told B. to "go and treat the boys" with it, and that it was not given on account of any previous promise or for his having voted. Per Cameron, C. J. That none of these acts constituted corrupt acts so as to avoid the election. On appeal to the Supreme Court of Canada:—Held, per Ritchie, C. J., and Henry and Taschereau, JJ., There was sufficient evidence of H.'s agency, but it was not necessary to decide this point. Per Strong, J. There was no proof of H.'s agency. Agency was not to be presumed from the fact that the respondent permitted H. to canvass B. in his presence, and there was an entire absence of proof of any sufficient authority to H. to bind the respondent by his acts at the polling place in the matters of treating and the payment of the \$2. Per Pournier, J., that the treating of B. on polling day, both before and after he had voted, by H., an agent, and the giving of the sum of \$2 immediately after he had voted, were corrupt acts sufficient to avoid the election. *West Northumberland Election (Dom.)—Henderson v. Guillet, 10 S. C. R. 635.*

The payment by an agent of a sum of \$147 to a voter claiming the same to be due for expenses at a previous election, and who refuses to vote until the amount is paid, is a corrupt practice. *Levis Election (Dom.)—Belleau v. Dussault, 11 S. C. R. 133.*

A payment of \$10 was made to P. H. to go some miles for voters, although another messen-

ger was sent and paid by another agent for the same purpose, who failed to get through on account of the roads, and returned the money:—Held, that there was no reason to suppose that the money was paid colourably. *North Ontario Election (Ont.)—Treleaven v. Gould, 1 E. C. 1.—Burton—Osler.*

An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered and paid \$5 to induce a voter to refrain from voting. The evidence showed that H. was in the habit of assisting this particular voter, and that being told by the voter that he contemplated going away from home on a visit a few days before the election, and being away on election day, H. promised him \$5 towards paying his expenses. Shortly after the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him \$5. He went away and was absent on election day:—Held, that the offer and payment of the \$5 formed one transaction and constituted a corrupt practice under the Election Act. *Haldimand Election (Dom.)—Cotter v. Glenn, 1 E. C. 572; 17 S. C. R. 170.*

See *West Simcoe Election (Ont.)—Bedford v. Phelps, 1 E. C. 128, p. 1491; Prescott Election (Ont.)—Cunningham v. Hagar, 1 E. C. 88, p. 1459; Megantic Election (Dom.)—Côté v. Goulet, 9 S. C. R. 279, p. 1467; West Toronto Election (Ont.)—Armstrong v. Crooks, H. E. C. 97, infra; Kingston Election (Dom.)—Stewart v. Macdonald, H. E. C. 625, p. 1480; East Simcoe Election (Ont.)—Reid v. Drury, 1 E. C. 291, p. 1495.*

#### 4. Paying Canvassers.

A candidate may if there is no intent thereby to influence voters or to induce others to procure his return, employ men to act as canvassers to distribute cards and placards, and to perform similar services in connection with the election. *East Toronto Election (Ont.)—Rennick v. Cameron, H. E. C. 70.—Richards.*

The friends of the candidate formed themselves into committees, and some of them voluntarily distributed cards and canvassed different localities, with books containing lists of voters, noting several particulars as to promises, etc. These canvassers often met in public-houses, and while there, according to custom treated those whom they found there, and thus spent their money as well as their time. On this being represented to those who had charge of the money for election expenses, the latter, in several cases, reimbursed the canvassers:—Held, these general payments, if not exceeding what would be paid to a person for working the same time in other employments, would not be such evidence of bribery as to set aside an election. *Ib.*

The bonâ fide employment and payment of a voter to canvass voters belonging to a particular religious denomination, or to the same trade or business, or to the same rank in life, or to canvass voters who only understand the French or Celtic languages, is not illegal. The fact that such a voter has skill or knowledge and capacity to canvass would not make his employment illegal. *West Toronto Election (Ont.)—Armstrong v. Crooks, H. E. C. 97.—Richards.*

other agent for the to get through on earned the money:—son to suppose that bly. *North Ontario v. Gould*, 1 E. C.

argued that H., an use election was at- paid \$5 to induce ting. The evidence e habit of assisting that being told by ated going away from before the election, n day, H. promised expenses. Shortly the house of H. to ey, and H.'s brother ay and was absent on the offer and payment nsaction and consti- under the Election (Dom.)—*Colter v. U. R.* 170.

h (Ont.)—*Bedford v. 91*; *Prescott Election ayar*, 1 E. C. 88, p. Dom.)—*Colé v. Goulet*, *Vest Toronto Election* Es, H. E. C. 97, infra; *Stewart v. Macdonald*, *Simcoe Election (Ont.)* 201, p. 1495.

canvassers.

re is no intent thereby induce others to pro- en to act as canvassers acards, and to perfor- tion with the election. t.)—*Rennick v. Came-* ds.

andidate formed them- and some of them vol- s and canvassed differ- s containing lists of ticulars as to promises, n met in public-houses, to custom treated there, and thus spent air time. On this being o had charge of the eses, the latter, in sev- he canvassers:—Held, if not exceeding what n for working the same nts, would not be such o set aside an election.

ment and payment of a belonging to a particular or to the same trade or rank in life, or to can- derstand the French or illegal. The fact that knowledge and capacity ke his employment ille- tion (Ont.)—*Armstrong* —Richards.

Money was paid by an agent of the respon- dent (\$7 each) to certain voters for canvassing, they observing that "a little money in election time was allowed for knocking around," which observation the agent considered was "going about to solicit votes." The agent denied it was paid with any corrupt intent, although his evidence was not satisfactory. The voters swore the money was paid to their wives, and the agent was not recalled to explain it:—Held, that although such payments might be paid to unfavourable interpretation, it was not, according to the evidence, inconsistent with being made without any improper motive. *Id.*

The respondent and one M. employed one H., a lawyer and professional public speaker, to address meetings in the respondent's interest, and promised to pay H.'s travelling expenses, if it were legal to do so:—Held (by the Supreme Court), Taschereau and Gwynne, JJ., dissenting, reversing Armour, J.), that such a promise was not bribery. *North Ontario Election (Dom.)*—*Gibbs v. Wheeler*, H. E. C. 785; *S. C. sub nom. North Ontario Election (Dom.)*—*Wheeler v. Gibbs*, 4 S. C. R. 430.

Held, per Armour, J., that the hiring of orators and canvassers at an election is bribery. *S. C. H. E. C. 785.*

Per Fournier, J., candidates may legally employ and pay for the expenses and services of canvassers and speakers, provided the agreement be not a colourable one intended to evade the bribery clauses of the Act. Per Taschereau and Gwynne, JJ. such a payment would be illegal. *S. C. 4 S. C. R. 431.*

Certain parties were paid as canvassers on behalf of the respondent:—Held not a corrupt practice. *Lennox Election (Ont.)*—*Miles v. Roe*, 1 E. C. 41.—*Galt-Osler*.—C. of A.

See *Regina ex rel. Johns v. Stewart*, 16 O. R. 593, p. 1327.

##### 5. Hiring Rooms.

The candidate is not restricted to his purely personal expenses, but may (if there is no intent thereby to influence voters or to induce others to procure his return) hire rooms for committees and meetings in connection with the election. *East Toronto Election (Ont.)*—*Rennick v. Cameron*, H. E. C. 70.—Richards.

##### 6. Hiring Conveyances.

The evidence showed that M.'s team was hired some days before the opening of the poll by C., an agent of the respondent, for the purpose of bringing two voters to the polls. M. went for the voters, returned the day previous to the polling day without the voters, and was paid fifteen dollars:—Held, that the term "six preceding sections," in section 98 of "The Dominion Elections' Act, 1874," means the six sections immediately preceding the 98th, and therefore the hiring of a team to convey voters to the polls, prohibited by section 96 was a corrupt practice within the meaning of section 98, Henry, J., dissenting. *St. Kirk Election (Dom.)*—*Young v. Smith*, 4 S. C. R. 494.

Cabs and carriages were hired for the use of committee-men and canvassers during the election and on the day of polling, with instructions to the drivers that they were not to convey voters to and from the poll. One cab was however used for that purpose for the greater part of the day, but without the assent of the agent of the respondent, who had charge of the cab:—Held, that as the evidence did not shew that the cabs and carriages were colourably hired for the purpose of bribery or conveying voters to the poll, or that the one cab was so used with the assent of the agent of respondent, the hiring was not an illegal act within 32 Vict. c. 21, s. 71, (Ont.) *West Toronto Election (Ont.)*—*Armstrong v. Crooks*, H. E. C. 97.—Richards.

On polling day, one W. asked two voters to go with him and vote for the respondent, and he would bring them back, and they could feed their horses and have dinner. W. sent one of his horses on some of his own business, and hired from one of his voters a horse, for which W. paid him fifty cents, and then drove with the two voters to the poll:—Held, not a hiring of a horse, etc., to carry voters to the poll within 32 Vict. c. 21, s. 71, nor a furnishing of entertainment to induce voters to vote for the respondent, within section 61 of the Ontario Election Law of 1868. *North Victoria Election (Ont.)*—*McKae v. Smith*, H. E. C. 252.—Draper.

Where the amounts paid for hiring teams were fair and reasonable, such hiring was not bribery under the Dominion Controverted Elections' Act, 1873. *North Victoria Election (Dom.)*—*Cameron v. MacLennan*, H. E. C. 612.—Morrison.

Where a canvasser for the respondent received money for hiring teams, and hired from those indebted to him, and agreed with them to give them credit for the respective amounts to be paid for the teams, such an arrangement was not evidence of corrupt practices. *Id.*

Money given to a person to hire a team and to go round canvassing, held, on the evidence, not bribery. *Id.*

One L., a voter, hired a horse and cutter on the day of the election, and with M., a scrutineer for the respondent, drove to the poll and voted. The day after the polling L. and M. returned to their homes, and on the way M. gave L. \$4 to pay for the horse and cutter:—Held, 1. That the payment of \$4 having been made after the election, and not having been made corruptly to influence the voter to vote for the respondent, was not a corrupt practice or a wilful violation of 37 Vict. c. 9, s. 96 (Dom.) 2. That M.'s agency was a limited one, and had ceased before the payment in question. *Halton Election (Dom.)*—*Cross v. McCrancy*, H. E. C. 736.—Patterson.—C. of A.

A room was procured at which private meetings were held of the friends of the respondent to promote his election, some of which meetings he attended. One W. attended these meetings, and was appointed to procure the vote of a certain voter who was absent from the riding. W. hired a vehicle to convey the voter to the poll:—Held, that W. was an agent of the respondent, and that his hiring such a vehicle was a corrupt practice. *North Ontario Election (Dom.)*—*Gibbs v. Wheeler*, H. E. C. 785.—Armour.

Held, by Patterson, J. A., and Ferguson, J., that what is referred to in R. S. O. (1877), c. 10, s. 154, is hiring vehicles to convey persons with the intention of their voting, and the qualification of such persons, or their right to vote, is immaterial, whereas section 153 requires persons therein referred to to be voters. *Muskoka and Parry Sound Election (Ont.)*.—*Payet v. Fauquier*, 1 E. C. 197.

The hiring and paying of carter's by an agent to convey voters who are known to be supporters of the agent's candidate is a corrupt practice. *Selkirk Election (Dom.)*.—*Young v. Smith*, 4 S. C. R. 494, followed. *Levis Election (Dom.)*.—*Belleau v. Dussault*, 11 S. C. R. 133.

W., an agent of the respondent, was in partnership as a livery-stable keeper with G. Under an agreement between them if either partner took out carriages for his own use he was to pay his co-partner half hire for them. On election day W. took out carriages of the partnership and conveyed voters to the poll, and afterwards, after the election, duly accounted to G. for half hire for the same:—Held, that this constituted a corrupt practice under R. S. C. c. 8, ss. 88, 91, being a hiring of carriages to carry voters to the poll, and that the election of the respondent was void. *West Middlesex Election (Dom.)*.—*McNeil v. Roome*, 1 E. C. 465.—*Falkenbridge*.

#### 7. Paying Travelling Expenses.

Held, that hiring by an agent of the respondent of a railway train to convey voters to and from places along the line of railway where they could vote, was a payment of the travelling expenses of voters in going to and from the election, within the meaning of 32 Vict. c. 21, s. 71 (Ont.), and was a corrupt practice, and avoided the election. *North Simcoe Election (Ont.)*.—*Sissons v. Ardagh*, H. E. C. 50.—*Strong*.

The payment of a voter's expenses in going to the poll is illegal, as such, and a corrupt practice, even though the payment may not have been intended as a bribe. *South Grey Election (Ont.)*.—*Hunter v. Lauder*, H. E. C. 52.—*Mowat*.

The court declined, in the present state of the law, to exclude inquiry as to the payment of travelling expenses of persons going to and returning from the poll, inasmuch as such payment might amount to bribery. *North Victoria Election (Dom.)*.—*Cameron v. MacLennan*, H. E. C. 584.—*Richards*—*Sprague*—*Hagarty*.

In appeal, four charges of bribery were relied upon, three of which were dismissed in the court below, because there was not sufficient evidence that the electors had been bribed by an agent of the candidate; and the fourth charge was known as the Lamarche case. The facts were as follows: One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railroad, to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the tickets without any promise being exacted from or given by them. The tickets shewed on their face that they had been paid

for, but there was evidence L. had received them gratuitously from one of the officers of the company. The learned judge who tried the case found as a fact that the tickets had not been paid for, and were given unconditionally, and, therefore held it was not a corrupt act:—Held, 1. (Fournier and Henry, JJ., dissenting.) That the taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 39 Vict. c. 9 (Dom.) 2. That if a ticket, although given unconditionally to a voter by an agent of the candidate has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98 a corrupt practice, and would avoid the election. *Berthier Election (Dom.)*.—*Genereux v. Cuthbert*, 9 S. C. R. 102.

The obtaining by an agent of a candidate from the president of a railway company, six passes, for which nothing had been or was ever intended to be paid, three of which were used in bringing as many voters to the poll is not a corrupt practice within the meaning of the Election Act, section 154. The mischievous effects that might arise from such a practice on the part of railways remarked upon. *South Victoria Election (Ont.)*.—*Rodden v. McIntyre*, 1 E. C. 182.—*Patterson*—*Ferguson*.—C. of A.

S., an agent of the respondent, with his own conveyance, brought a voter from N. to his own house, where he remained as a guest until after the polling day:—Held, not within either sections 153 or 154 of the Act. *North Ontario Election (Ont.)*.—*Trelaevan v. Gould*, 1 E. C. 1.

When the agent of a candidate asked a voter if he intended to vote, and the voter said he did not think so, as he could not spare the money to go, but that if he went he would not vote for the opposing candidate, and the agent thereupon lent him the cost of a return ticket; and the evidence shewed that the transaction was a bona fide loan and not a gift, and was not made with the intention of influencing the voter in favour of the principal, and that the money was repaid shortly after the election without any demand made therefor:—Held, that the above did not constitute a corrupt practice under R. S. O. (1877), c. 8, s. 84, sub-section (a) or section 88. The voter had the will to go and vote for the agent's principal, but he had not the means to enable him to do so, and these were furnished to him by the agent, but as a bona fide loan, not as a gift. Thus he was not induced but merely enabled to vote by a temporary loan, and no breach of the law contained in the above sections was committed. *East Elgin Election (Dom.)*.—*Merritt v. Wilson*, 1 E. C. 475.—*Street*.

See *South Renfrew Election (Ont.)*.—*Harvey v. Dowling*, 1 E. C. 359, p. 1522.

#### 8. Betting.

Where in addition to other corrupt acts, bets were made by agents of the respondent and others, with a number of voters who were sup-

had received the officers of the who tried the ets had not been additionall, and, apt act:—Held, issenting). That a gratuitously of y company or an tion may be, or a railway, or by accompanied by that shall affect to the vote to be Vict. c. 9 (Dom.) even uncondition- the candidate has tice would be un- virtue of section ld avoid the elec- n.).—*Genereux v.*

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on (Ont.).—*Harvey v.* 2.

her corrupt acts, botâ the respondent and voters who were sup-

porters of N., the opposing candidate, the effect of the bets being that in order to win the bets, the voters must vote for the respondent:—Held, that these bets were for the purpose of getting votes for the respondent, and were corrupt practices; and that in connection with the other corrupt acts proved, they affected the result of the election; and that the election was therefore avoided. *Lincoln Election (2) (Ont.).—Pauling v. Rykert,* H. E. C. 489.—*Patterson—Blake.*

Money was given to certain voters to make bets with others on the result of the election, but as there was no evidence of a previous understanding as to the votes, such bets were not bribery. *South Norfolk Election (Dom.).—Decow v. Wallace,* H. E. C. 660.—*Draper.*

The practice of making bets on an election condemned as like a device to commit bribery. *Id.*

One Pringle, an acknowledged agent of the respondent and the president of the conservative association, whose candidate the respondent was, made a bet of \$5 with one Parker, a liberal, that he would vote against the conservative party, and deposited with the stakeholder the \$5, which, after the election, was paid over to Parker. At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and alleged that the bet was made as a sporting bet on the spur of the moment, and with the expectation that, as he said, Parker would warm up and vote; but he also admitted in evidence that it passed through his mind that some one on the voter's side would make the money good if he voted. Parker said he had formed the resolution not to vote before he made his bet but the evidence shewed that he did not think lightly of the sum which he was to receive for his not voting, his answer to one question put to him being: "Oh! I don't know that \$5 would be an insult to any one not to vote."—Held, reversing the judgment of the court below (1 E. C. 32) that the bet in question was colourable bribery within the enactments of sub section 1 of section 92, of the Dominion Elections' Act, 1874, and a corrupt practice which avoided the election. *West Northumberland Election (Dom.).—Henderson v. Guillet,* 10 S. C. R. 635.

#### 9. Intimidation.

The respondent was charged with intimidating government servants during his speech at the nomination of candidates, by threatening to procure the removal of all government servants who should not vote for him, or who should vote against him. The evidence shewed that, though in the heat of debate, and when irritated by one U., he used strong language, there was no foundation for the corrupt charge; and as it should not have been made, the costs in respect of the same were given to the respondent against the petitioner. The respondent was ordered to pay the costs of the petition and trial, except the costs of certain issues found in favour of the respondent, part of which costs were to be paid by petitioner to the respondent; and as to part, each party was ordered to bear his own. *Weld Election (2) (Ont.).—Buchner v. Currie,* H. E. C. 187.—*Gwynne.*

One W., a voter, who was in arrears to the crown for the purchase money of a lot of land,

was canvassed by B., an alleged agent of the respondent, who told him that the government would look sharply after those in arrears for their land who did not vote for the supporters of the government:—Held (reversing *Wilson, J.*), that what occurred was at most a brutum fulmen, if intended as a threat at all, and only an expression of opinion upon a subject on which every one was competent to form his own judgment. *North Ontario Election (Ont.).—McCaskill v. Paxton,* H. E. C. 304.—C. of A.

C. occupied as a boarding-house, a house of a lumber company rent free, and was paid for boarding the men by the men themselves, but through the company retaining the amount thereof out of their wages. C. acted as scrutineer for the defeated candidate, and while so acting, but after he had voted, was sent for by P. the company's manager, an agent of the respondent, and given to understand that his so acting was not satisfactory to the company and against their interest. No threat of any kind was made. C. returned to the polling place and continued to act, but on reflection, about twelve o'clock, he ceased to do so. C. had canvassed the men at the boarding-house for the defeated candidate, for whom some had promised to vote, and a good many of the men had voted before he left. It did not appear that what P. had said to C. was communicated to any voter, or that any voter was influenced thereby:—Held, that a charge of intimidation was not proved. *East Simcoe Election (Ont.).—Reid v. Drury,* 1 E. C. 26.—*Boyd.*—*Cameron.*—C. of A.

After the election C. received notice of dismissal from the company, and was informed by P. that it was for talking too much in the election about one of the hands having been sent away to prevent his voting. It was charged that C. was dismissed on account of his having voted at the election:—Held, that the charge was not proved. *Id.*

See *Halton Election (Ont.).—Russell v. Barber,* H. E. C. 283, *infra*; *Soulanges Election (Dom.).—Cholette v. Bain,* 10 S. C. R. 652, p. 1494; *Muskoka Election (Ont.).—Starratt v. Miller,* H. E. C. 458, p. 1479.

#### 10. Undue Influence.

A candidate's appeal to his business, or to his employment of capital in promoting the prosperity of a constituency, if honestly made, is not prohibited by law. *West Peterborough Election (Ont.).—Scott v. Cox,* H. E. C. 274.—*Draper.*

One B. claimed the right to vote in respect of his wife's property, and was told by W., an agent of the respondent, that he could not vote unless he could swear the property was his own. The voter's oath was read to him, and the agent repeated his statement, and said he would look after the voter if he took the oath. The voter appeared to be doubtful of his right to vote, and withdrew:—Held, that the agent was not guilty of undue influence. Quere, whether the act of the agent as above set out was undue influence under 32 Vict., c. 21, s. 72. *Halton Election, (Ont.).—Russell v. Barber,* H. E. C. 283.—*Draper*—C. of A.

The respondent stated at a public meeting of the electors with reference to an alleged local grievance, that he understood it to be the constitutional practice, here and in England, for the ministry to dispense as far as practicable the patronage of the constituency on the recommendation of the person who contested the constituency on the government side; and that he being a supporter of the government would have the patronage in respect of appropriations and appointments whether elected or not:—Held, 1. That the respondent by such words did not offer or promise directly or indirectly any place or employment, to or for any voter, or any other person in induce such voter to vote, or refrain from voting. 2. (reversing Wilson, J.) That the respondent was not guilty of undue influence as defined by section 72 of the Ontario Election Law of 1868, nor as recognized by the common law of the Parliament of England. 3. That to sustain such a general charge of undue influence, it would be necessary to prove that the intimidation was so general and extensive in its operation that the freedom of election had ceased in consequence. *Muskoka Election (Ont.)—Starratt v. Müller, H. E. C. 458.—C. of A.*

Observations on the impropriety of Division Court bailiffs canvassing voters during an election. *North Victoria Election (Dom.)—Cameron v. MacLennan, H. E. C. 612.—Morrison.*

Two agents of the respondent gave a voter M. some whiskey on polling day, and took him in a boat to an island, where they stayed for some time. One of the agents then left, and the other sent M. to another part of the island for their coats. During M.'s absence the latter agent left the island with the boat, but M. got back in time to vote, being sent for by the opposite party:—Held, that the two agents were guilty of undue influence.—*North Ontario Election (Dom.)—Gibbs v. Wheeler, H. E. C. 785.—Armour.*

See *North Victoria Election (Dom.)—Cameron v. MacLennan, H. E. C. 584, p. 1464.*

#### 11. Fraudulent Device.

Shortly before polling day the respondent's agents issued a circular, the substance of which was that they had ascertained upon undoubted authority that W., an independent candidate, despairing of election himself, was procuring his friends to vote for C., the opposition candidate. W. denied the truth of this report:—Held, that this was not a "fraudulent device," within the meaning of 32 Vict. c. 21, s. 32 (Ont.), to interfere with the free exercise of the franchise of voters. *East Northumberland Election (Ont.)—Casey v. Ferris, H. E. C. 387.—Gwynne.*

See *Cornwall Election (3) (Dom.)—MacLennan v. Bergin, H. E. C. 803, p. 1469.*

#### 12. Treating.

##### (a) Generally.

Treating at an election, in order to be criminal, must be done corruptly, and for the purpose of corruptly influencing the voter. *South Norfolk Election (Dom.)—Decow v. Wallace, H. E. C. 660.—Draper.*

Treating is not per se a corrupt act, except when so made by statute; but the intent of the party treating may make it so, and the intent must be judged by all the circumstances by which it is attended. *North Middlesex Election (Ont.)—Cameron v. McDougall, H. E. C. 376.—Spragge.*

Where a charge of a corrupt intent in treating is made, the evidence must satisfy the judge, beyond reasonable doubt, that the treating was intended directly to influence the election, and to produce an effect upon the electors, and was so done with a corrupt intent. *Glenagarry Election (Ont.)—McLennan v. Craig, H. E. C. 8.—Hagarty.*

Treating, when done in compliance with a custom prevalent in the county and without any corrupt intent, will not avoid an election. *Welland Election (Ont.)—Beatty v. Currie, H. E. C. 37.—Strong.*

The general practice which prevails here of persons drinking in a friendly way when they meet, would require strong evidence of the profuse expenditure of money in drinking, to induce a judge to say it was corruptly done, so as to make it bribery or treating at common law. *Kingsion Election (Dom.)—Stewart v. Macdonald, H. E. C. 625.—Richards.*

See *North Victoria Election (Ont.)—McRae v. Smith, H. E. C. 252, p. 1468; North Victoria Election (Dom.)—Cameron v. MacLennan, H. E. C. 584, p. 1464.*

##### (b) By Candidates.

The treating of persons by the candidate at a tavern during his canvass:—Held, under the evidence, not to be a treating of electors with corrupt motives. *London Election (Ont.)—Jarman v. Meredith, H. E. C. 214.—Spragge.*

About an hour after a meeting of a few friends of the respondent at a tavern, one of their number was sent some distance to buy oysters for their own refreshment, of which the parties and others partook. The following day a friend of the respondent treated at a tavern, and not having change, the respondent gave him twenty-five cents to pay for the treat:—Held, not to be corrupt treating, nor a violation of 36 Vict. c. 2, s. 2 (Ont.). *Welland Election (2) (Ont.)—Buchner v. Currie, H. E. C. 187.—Gwynne.*

Semble, where treating is done by a candidate in order to make for himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, it is a species of bribery which would avoid his election at common law. *North Middlesex Election (Ont.)—Cameron v. McDougall, H. E. C. 376.—Spragge.*

When the respondent who, in the course of his business as a drover, had been in the habit of treating at taverns, treated during his canvass, but to a less extent than was his habit, and not apparently for the purpose of ingratiating himself with the electors:—Held, under the circumstances, that such treating was not corrupt, and his election was not avoided. *Id.*

A respondent during his canvass and on the same evening that a public meeting was held for the purposes of promoting the election treated a number of persons, many of whom were voters



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collected in a barrroom. It was shewn that it was not the respondent's general habit to treat, and all persons were invited to drink, and that he had not treated more than twice or perhaps three times during the canvass:—Held, not a corrupt practice, and that in view of the ordinary custom of treating in the country it might be regarded more as an expression of good feeling to those who were supporting him. *North Ontario Election (Ont.)—Treleven v. Gould*, 1 E. C. 1.—Burton—Oaler.

See *Glengarry Election (Ont.)—McLennan v. Craig*, H. E. C. 8, p. 1482; *Dundas Election (Ont.)—Cook v. Broder*, H. E. C. 205, p. 1483; *North Ontario Election (Ont.)—Treleven v. Gould*, 1 E. C. 1, p. 1484; *Muskoka and Parry Sound Election (Ont.)—Paget v. Finquier*, 1 E. C. 197, p. 1485; *East Middlesex Election (Ont.)—Rhoder v. McKenzie*, 1 E. C. 250, pp. 1485, 1485.

#### (c) By Agents.

The furnishing of refreshment to voters by an agent of a candidate, without the knowledge or consent of the candidate and against his will, will not be sufficient ground to set aside an election, unless done corruptly or with intent to influence voters. *East Toronto Election (Ont.)—Rennick v. Cameron*, H. E. C. 70.—Richards.

Where the object of an agent in treating is to gain popularity for himself, and not with any view of advancing the interest of his employers, such treating is not bribery. *Id.*

One F., an agent of the respondent, on the day of the nomination of candidates to contest the election, and while the speaking was going on, treated a large number of persons at a tavern across the street from the place of the nomination, for which he paid \$7 or \$8:—Held, a corrupt practice by an agent of the respondent, which avoided the election. *Dundas Election (Ont.)—Cook v. Broder*, H. E. C. 205.—Spragge.

One D., who had been a candidate for various offices for twenty years prior to the election in question, and had freely employed treating as an element in his canvassing, became an agent of the respondent, and treated extensively, as was his common practice, during the election. The respondent was aware of D.'s practices, and once in the early part of the canvass, cautioned D. as to his treating, but never repudiated him as his agent:—Held, on the evidence, that as D. did no more in the way of treating during the election than he had done on former occasions, and had employed treating as he ordinarily did as his argument, and had not used it as a means of corruptly influencing the electors, he was not guilty of a corrupt practice. *East Elgin Election (Dom.)—Blue v. Arkell*, H. E. C. 769.—Blake.

Semble, the treating proved in this case, if practised by one not theretofore given to such practice would have been sufficient to have avoided the election. *Id.*

Observation on the law as it now stands, as holding out inducements to candidates to employ men who are habitual drinkers to canvass by systematic treating, and thus cause electioneering to depend upon popularity aroused by treating, rather than the merits of the candidates, or the measures they advocate. *Id.*

See *East Toronto Election (Ont.)—Rennick v. Cameron*, H. E. C. 70, p. 1472; *West Northumberland Election (Dom.)—Henderson v. Guillet*, 10 S. C. R. 635, p. 1471; *North Ontario Election (Ont.)—Treleven v. Gould*, 1 E. C. 1, p. 1490; *London Election (Ont.)—Jarman v. Meredith*, H. E. C. 214, p. 1468.

Treating on day of polling. See Subhead VII. 12 (f) p. 1485.

Treating at meetings. See Subhead VII. 12 (e) *infra*.

#### (d) By Other Persons.

The giving of free dinners to a number of electors who had come a long distance in severe winter weather, in the absence of evidence that it was done for the purpose of influencing the election either by voting or not voting, or that such electors voted:—Held, not a corrupt act. *North Victoria Election (2) (Dom.)—Cameron v. Macleanman*, H. E. C. 671.—Wilson.—Q. B.

Certain voters met at a tavern on polling day, and one B. said he did not know how to mark his ballot. One of the voters, after shewing B. how to mark his ballot, according to the candidate he desired to vote for, treated:—Held, that the treating was not a violation of section 94 of the Dominion Elections' Act, 1874, nor a corrupt practice under section 98 of the Act. *North Ontario Election (Dom.)—Gibbs v. Wheler*, H. E. C. 785.—Armour.

See *North Ontario Election (Ont.)—McCaskill v. Paston*, H. E. C. 304, p. 1484.

#### (e) At Meetings.

Reasonable refreshments furnished bonâ fide to committees promoting the election are not illegal. *South Grey Election (Ont.)—Hunter v. Lauder*, H. E. C. 52.—Mowat.

Refreshments provided at a meeting of electors, all of one political party, or at a meeting of a committee to aid in returning a candidate, by and at the expense of one or more of their number, unless in some extreme case cannot be deemed a breach of the provisions of the statute against treating. *Halton Election (Ont.)—Bussell v. Barber*, H. E. C. 283.—Draper.—C. of A.

The respondent who was then representing the county in the legislature, on two several occasions at the close of public meetings of electors called by him to explain his conduct as such member, treated all present to liquor at taverns. He had not at the time made up his mind to be a candidate at the then coming election, but told the electors that "if they gave him their support he would expect it":—Held, under the circumstances, that such treating was not done with a corrupt intent. Quere, whether such treating was in any case a corrupt practice, under 32 Vict., c. 21, s. 61 (*Ont.*); or other than an illegal act which subjected the party to a penalty of \$100 under section 65—the statute pointedly omitting all mention of treating.—*Glengarry Election (Ont.)—McLennan v. Craig*, H. E. C. 8.—Hagarty.

Violations of the Ontario Controverted Election Act, 1871, s. 61 (treating at meetings),

is not a corrupt practice within the meaning of that Act and of the Election Act of 1868, unless committed in order to influence voters at the election complained of. *North York Election (Ont.)—Gorham v. Boulton, H. E. C. 62.—Galt.*

One F., an agent of the respondent, brought a jar of whiskey to a meeting of electors assembled for the purpose of promoting the election, and gave drinks from the same to the electors present, which was held a corrupt practice, and a violation of the Ontario Election Act of 1868, as amended by the Election Act of 1873, so that the election was avoided thereby. *West Wellington Election (Ont.)—Moore v. McGowan, H. E. C. 231.—Gwynne.*

A meeting of the electors was held in a town hall, and C. (an agent of respondent) and a number of electors went from the meeting to a tavern, where they were treated by C. :—Held, 1. That this was a meeting of electors assembled for the purpose of promoting the election; and, 2. That the treating by C. was a corrupt practice, and a breach of the 32 Vict. c. 21, s. 61, as amended by 36 Vict. c. 2, s. 2. *East Peterborough Election (Ont.)—Stratton v. O'Sullivan, H. E. C. 245.—Draper.*

After a meeting of electors in a town hall, some friends of the respondent remained together consulting about the election, and afterwards went to a tavern, where some of them boarded, and had an oyster supper :—Held, that the evidence was not sufficient to sustain the charge that this was an entertainment furnished to a meeting of electors under 32 Vict. c. 21, s. 61 (Ont.), as amended by 36 Vict. c. 2, s. 2. *North Victoria Election (Ont.)—McRae v. Smith, H. E. C. 252.—Draper.*

The respondent, who was a member of a temperance organization, held an election meeting in a locality within the electoral division, and about an hour after the meeting had dispersed, went to a tavern where he met about ten or fifteen persons in the barroom, to whom he made the remark, "Boys, will you have something?" Nothing was then taken; but one E., a supporter of the respondent, said he would treat, and he did treat the persons present, and the respondent gave him the money to pay for the treat :—Held, 1. That as the meeting for promoting the election had dispersed an hour before the respondent went to the tavern, this was not a meeting of electors. 2. That the treating not having been done with a corrupt intent, was not an offence under 32 Vict. c. 21, s. 61, as amended by 36 Vict. c. 2, s. 2, nor at common law : Quære, whether the Treating Act, 7 Will. III., c. 4, is in force in this province. *Dundas Election (Ont.)—Cook v. Broder, H. E. C. 205.—Spragge.*

A meeting of the electors was held at a tavern, at which both candidates were present. A dispute arose, and the meeting broke up and the parties left the room as a disorderly crowd, and began pulling off their coats and talked of fighting. A treat was proposed to quiet the people, and one F. (held by Wilson, J., to be an agent of the respondent), treated, and the crowd quieted down and dwindled away :—Held (per Wilson, J.), that the treating under the circumstances, was not furnishing drink to a meeting of electors assembled for the purpose of promoting

the election. On appeal the court, without expressing any opinion as to the treating, held, on the evidence, that F. was an agent of the respondent at the time of the alleged treating. *North Ontario Election (Ont.)—McCaskill v. Pazon, H. E. C. 304.—C. of A.*

One W., a member of a political association, treated the members of the association present at a meeting in a tavern :—Held, that the members so present were electors assembled to promote the election of the respondent within s. 61 of the Election Law of 1868, and that such treating was a corrupt practice by W. *North Grey Election (Ont.)—Boardman v. Scott, H. E. C. 362.—Gwynne.—C. of A.*

After the nomination of candidates on the nomination day, and on another occasion, after a "meeting assembled for the purpose of promoting the election," and after the business for which the electors had assembled was over, the electors left the building in which the meeting was held and dispersed to various taverns, at which their vehicles had been put up, and then before leaving for home treated each other; and at one of the taverns the respondent himself partook of a treat :—Held, 1. Not furnishing drink or other entertainment to meetings of electors within section 61 of the Ontario Election Act of 1868. 2. That the meeting of electors for the nomination of candidates, is a "meeting assembled for the purpose of promoting the election." *North Middlesex Election (Ont.)—Cameron v. McDougall, H. E. C. 376.—Spragge.*

An association formed "for the greater diffusion of liberal principles and the social and intellectual improvement of its members," being prevented by an accident from meeting at the town hall, held a meeting in a tavern, and was treated by the respondent :—Held, not a meeting of electors within section 151 of the Act. *North Ontario Election (Ont.)—Treleaven v. Gould, 1 E. C. 1.—Burton—Osler.*

It appeared that on 15th February, the respondent was chosen by a convention of his supporters for their candidate. On 23rd February, a public meeting was held by him in a room in a hotel, which meeting was composed of about seven persons, some belonging to the opposite political party. A chairman was appointed and the respondent addressed the meeting, as did others also. As soon as the proceedings closed, i.e., when the speaking was over, nearly all present crossed the hall, and went into the barroom. The respondent followed, first inviting the few who remained to join them, and then in the barroom invited them to drink, which they did, he paying for the liquor. On 27th February the nomination took place, and the polling on 13th March :—Held, at the trial by Patterson, J. A., and Ferguson, J., and by the Court of Appeal, Galt, J., dissenting, that this was a violation of R. S. O. (1877), c. 10, s. 151. Per Hagarty, C. J. O., and Burton, J. A.—R. S. O. (1877), c. 10, s. 151, refers clearly to a meeting of electors, whether the formalities of appointing a chairman or secretary are observed or not :—Held, also, Galt, J., dissenting, that though the act of treating appeared to have been committed in ignorance that it was a violation of the statute, it did not appear to have been in an ignorance which was involuntary or

court, without excuse treating, held, on agent of the respondent treating. *North Caskill v. Paxon*,

political association, association present held, that the members assembled to respondent within s. 61 and that such treating. *W. North Grey v. Scott*, H. E. C.

candidates on the other occasion, after the purpose of profiting the business for the meeting was over, the meeting was held in various taverns, then put up, and then each other; and respondent himself participated. Not furnishing drink to meetings of electors. *Ontario Election Act of 1868*, s. 3, c. 21, provides that "no spirituous or fermented liquors or drinks shall be sold or given to any person during the day appointed for polling in the wards or municipalities in which the polls are held; and by 36 Vict. c. 2, s. 1, "corrupt practice" means "any violation of section 66 of the Election Law of 1868 during the hours appointed for polling; and by section 3 of the latter Act any corrupt practice committed by any candidate at an election, or by his agent, whether with or without the actual knowledge or consent of such candidate," avoids the election. On the day of the election in question, and during the hours appointed for polling, one M., an agent of the respondent for the purposes of the election, was offered by a person unknown to him spirituous liquor (whiskey) in a bottle, which such agent, after remonstrating with such person, accepted and drank at the polling place where such agent then was. The unknown person also gave spirituous liquor from the same bottle to other persons then present:—Held, that as the legislature had, by the provisions as to the selling or giving of liquor during the hours of polling, provided for the punishment of one particular class, which was defined to be the seller or giver, it did not intend to include the other class, the purchaser or receiver, to which no reference was made, except inferentially, and that therefore such agent, as the receiver of spirituous liquor during such polling hours, was not guilty of a corrupt practice. *West Toronto Election (2) (Ont.)—Adamson v. Bell*, H. E. C. 179.—Draper.

for the greater diffidence and the social and political members," being from meeting at the in a tavern, and was:—Held, not a meeting. *Ont. 151 of the Act. (Ont.)—Treleaven v. Osler*.

On February, the respondent, on a convention of his, On 23rd February, a by him in a room in a composed of about ing to the opposite in was appointed and the meeting, as did e proceedings closed, was over, nearly all went into the bar-allowed, first inviting in them, and then in to drink, which they or. On 27th February, place, and the polling the trial by Patterson, J., and by the Court 7), that this was s. 10, s. 151. Per Burton, J. A.—R. S. 151. The meeting was to all intents and purposes at an end, and moreover, even conceding the corrupt act, it was done in ignorance, which was involuntary and excusable. *ib.*

excusable. *Muskoka and Parry Sound Election (Ont.)—Paget v. Fauquier*, 1 E. C. 197.

Per Burton, J. A., under the present enactment in R. S. O. (1877), c. 10, s. 151, it need not be shown that the meeting in question was assembled for promoting the election of the candidate furnishing the entertainment, but the meeting referred to is a meeting assembled for the purpose of promoting the election of a representative of the electoral district. Per Galt, J.—Refreshment was not furnished to the meeting while it was assembled, and therefore there was no offence under R. S. O. (1877), c. 10, s. 151. The meeting was to all intents and purposes at an end, and moreover, even conceding the corrupt act, it was done in ignorance, which was involuntary and excusable. *ib.*

On different occasions a few members of one of respondent's local committees met together at different taverns, to go over voters' lists and arrange as to doubtful votes, and on each occasion liquor was furnished to the committee men thus engaged, at the expense of different agents of respondent:—Held, per Boyd, C., that such committee meetings were not "meetings of electors" within the meaning of section 151 of R. S. O. (1877) c. 10; per Cameron, C. J., that section 151 was specially directed against the treating of such committee meetings. On appeal:—Held by the court, Patterson, J. A., dissenting, that such meetings were within the meaning of the section:—Held, at the trial, per Boyd, C., and Cameron, C. J., that particulars and evidence shewing the furnishing of liquor to such meetings of committees, were admissible under the general allegation of the petition, that respondent by himself and his agents had been guilty of "treating." *East Middlesex Election (Ont.)—Rhoder v. McKenzie*, 1 E. C. 250.

A meeting of some thirty-five or forty electors had assembled for the purpose of promoting the election. During the meeting an agent of the respondent went into an adjoining room with four or five friends and treated and was treated by them:—Held, by the Court of Appeal, not to be a furnishing of entertainment "to a meeting of electors assembled," etc., under section 151, R. S. O. (1877) c. 10. Per Osler, J. A. The question must always be, whether the entertainment has been furnished to the general body of the electors composing such meeting, whether before, during, or after the business of the meeting, and while as a body such electors remain together at the place of meeting or elsewhere. *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.

(f) *Selling Liquor or Treating on Polling Day.*

The distribution of spirituous liquors on the polling day, with the object of promoting the election of a candidate, will make his election void. *South Grey Election (Ont.)—Hunter v. Lander*, H. E. C. 52.—Mowat.

Held, that the violation of section 66 of 32 Vict., c. 21 (giving or selling liquor at taverns on polling day), is not a corrupt practice within the meaning of the Ontario Controverted Elections' Act, 1871, or the Elections' Act of 1868, unless committed in order to influence voters at the election complained of. *North York Elec-*

*tion (Ont.)—Gorham v. Boulton*, H. E. C. 62.—Galt.

Upon questions reserved by the rota judge under the Ontario Controverted Elections' Act of 1871, it appeared that H. and B. voted for respondent. H. kept a saloon, which was closed on the polling day; but upstairs, in his private residence, he gave beer and whiskey without charge to several of his friends, among whom were friends of both candidates. B., who had no license to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; and the candidates did not know of or sanction their proceedings:—Held (though with some doubt as to B.), that neither H. nor B. had committed any corrupt practice within 34 Vict. c. 3, s. 47, and therefore had not forfeited their votes; for they had not been guilty of bribery or undue influence, and their acts, if illegal and prohibited, were not done "in reference to" the election, which, under 34 Vict. c. 3, s. 47, is requisite in order to avoid a vote. *Brockville Election (Ont.)—Flint v. Fitzsimmons*, H. E. C. 139.—Q. B.

Section 66 of 32 Vict. c. 21 (Ontario Election Law of 1868), provides that "no spirituous or fermented liquors or drinks shall be sold or given to any person during the day appointed for polling in the wards or municipalities in which the polls are held; and by 36 Vict. c. 2, s. 1, "corrupt practice" means "any violation of section 66 of the Election Law of 1868 during the hours appointed for polling; and by section 3 of the latter Act any corrupt practice committed by any candidate at an election, or by his agent, whether with or without the actual knowledge or consent of such candidate," avoids the election. On the day of the election in question, and during the hours appointed for polling, one M., an agent of the respondent for the purposes of the election, was offered by a person unknown to him spirituous liquor (whiskey) in a bottle, which such agent, after remonstrating with such person, accepted and drank at the polling place where such agent then was. The unknown person also gave spirituous liquor from the same bottle to other persons then present:—Held, that as the legislature had, by the provisions as to the selling or giving of liquor during the hours of polling, provided for the punishment of one particular class, which was defined to be the seller or giver, it did not intend to include the other class, the purchaser or receiver, to which no reference was made, except inferentially, and that therefore such agent, as the receiver of spirituous liquor during such polling hours, was not guilty of a corrupt practice. *West Toronto Election (2) (Ont.)—Adamson v. Bell*, H. E. C. 179.—Draper.

One F., a tavern-keeper, was given \$5 by the respondent, and requested to appoint a scrutineer to act for the respondent at the poll on polling day. F. kept his tavern open on polling day, and various persons treated there during polling hours. Counsel for the respondent, after the evidence of the above facts had been given, admitted that F. was an agent of the respondent, and that his acts were sufficient to avoid the election:—Held, that although the court did not adjudicate that the respondent, [by

giving the \$5 and requesting F. to appoint a scrutineer, had constituted him an agent for all purposes, it was the practice of the court to take the admission of counsel in place of proof of agency, and therefore the admission of counsel as to F.'s agency was sufficient. Held, further, that F., as such agent, had been guilty of a corrupt practice in keeping his tavern open on polling day, and that such corrupt practice avoided the election. *Russell Election (Ont.)—Ogilvie v. Baker*, H. E. C. 199.—Spragge.

Where a member of the respondent's committee, on the day of election, invited some of his friends to his house, which was opposite the polling booth, and gave them beer, etc., during or soon after polling hours:—Held, not a contravention of 32 Vict. c. 21, s. 66 (Ont.) *London Election (Ont.)—Jarman v. Meredith*, H. E. C. 214.—Spragge.

Two agents of the respondent went for a voter, having a flask of brandy in their conveyance. The voter having said he was unwell was asked if he would have a drink, which the trial judges held meant a drink from the flask, and which he declined:—Held, that this offer did not fall within the provisions of section 155 R. S. O. (1897) c. 9, as there was no "giving or causing to be given":—Held, also, that it did not come within section 151, sub-section (a) a drink not being a valuable consideration. *Hamilton Election (Ont.)—Patterson v. Stinson*, 1 E. C. 499.—Ferguson—MacMahon.

One M. canvassed a voter on polling day, and urged him to vote for the respondent, and while canvassing treated the voter four times; the voter then went and voted:—Held, that the treating was for the purpose of corruptly influencing the voter to vote or refrain from voting at the election. *North Ontario Election (Ont.)—Gibbs v. Wheeler*, H. E. C. 785.—Armour.

A scrutineer for the respondent had some whiskey with him on polling day, and treated the deputy returning officer, poll clerk, and another in the polling station:—Held, not a corrupt practice. *Id.*

One B. was a member of the committee at W. for the respondent's election, canvassed for him, and met him at the committee-rooms once or twice. B. was also appointed in writing by the respondent to act as scrutineer for him on the polling day, and during polling hours gave whiskey to the deputy returning officer in the polling booth:—Held, per Wilson, J., that B., while acting as such scrutineer, was not acting in his former capacity as committee-man or agent of the respondent, and that his appointment as scrutineer did not empower him to do an act of treating so as to make the respondent answerable for it. *South Ontario Election (Ont.)—Farwell v. Brown*, H. E. C. 420.

The respondent, on polling day and during polling hours, went to a tavern at W., and partook therein of spirituous or fermented liquor, for which he did not then pay:—Held, per Wilson, J., that he did not "sell or give" spirituous liquors within the meaning of section 66 of the Ontario Election Law of 1868. *Id.*

One C., a member of respondent's committee at W., partook of whiskey in the kitchen of a tavern at W. during polling hours, and also,

when bringing a voter from the town of O. to the town of W. within the same electoral division) to vote at W., treated himself and the voter in O.:—Held, (Draper, C. J. A., dissentiente) that C. was not guilty of corrupt practices within section 66 of the Ontario Election Law of 1868. *Id.* C., *Id.*—C. of A.

On the day of the election, and during the hours of polling, one W., an agent of the respondent, was offered a treat in a tavern within one of the polling divisions, of which such agent and others then partook:—Held, that giving a treat in a tavern during polling hours was a corrupt practice, and being an act participated in by an agent of the respondent, the election was avoided. *South Essex Election (Ont.)—McGee v. Wight*, H. E. C. 235.—Spragge.

One M., an agent of the respondent, treated at a tavern during polling hours on polling day. The evidence was, that decanters were put down, and people helped themselves, but there was no evidence that spirituous liquors were used. The evidence was objected to at the time, as the charge was not mentioned in the particulars, but admitted subject to the objection:—Held, 1. That the nature of the treat in the barroom of a country tavern raised the presumption that the treat was of spirituous liquors, and was a corrupt practice, which avoided the election. 2. That had an application been made in regular form to add a particular embracing the charge, it would have been granted. *North Victoria Election (Ont.)—McRae v. Smith*, H. E. C. 252.—Draper.

The respondent, during polling hours on the polling day, met one P., a supporter of the opposing candidate, and told him he would like a drink; and both of them, not thinking it illegal, went to a tavern, and the bar being closed, P. treated the respondent in the hall of the tavern:—Held, by the Court of Appeal (reversing Gwynne, J., H. E. C. 343), that the receiving of a treat by the respondent during the hours of polling, was a corrupt practice and avoided the election. Semble, per Gwynne, J., that as to the seller or giver of the treat, the only person liable to the penalty of \$100 would be the tavern-keeper, as the statute does not authorize two penalties for the same act. *North Grey Election (Ont.)—Boardman v. Scott*, 1 H. E. C. 362.

One L., an alleged agent of the respondent, went into the tavern of one D. during polling hours on polling day, and purchased spirituous liquor, with which he treated himself and several persons there present:—Held, per Gwynne, J., at the trial that the penalties provided by sec. 66 of the Election Law of 1868 (Ont.) apply only to the tavern-keeper, who as such is able to control what is done on his own premises in violation of the Act, and that the treating by L. was not a corrupt practice. Per Draper, C. J. A.—(1) That section 66 must be construed distributively. (2) That under the first part of the section the tavern-keeper is the only person who can incur the penalty, for not keeping his tavern closed during the prescribed time. (3) That under the second part of the section the persons who incur the penalty are (1) the tavern-keeper who sells liquor in violation of the statute, and (2) the purchaser who gives the liquor purchased by him to persons in the tavern. *Lincoln Election (Ont.)—Rykert v. Neelon*, H. E. C. 391.

the town of O. to the electoral division) and the voter in (1), (dissentiente) that practices within section Law of 1868. 8.

on, and during the agent of the respondent within one of such agent and, that giving a treat hours was a corrupt participated in by an election was avoided. —*McGee v. Wigle*,

respondent, treated hours on polling day. Deacons were put themselves, but there ituous liquors were ected to at the time, oned in the partic- to the objection: of the treat in the ern raised the pre- of spirituous liquors, which avoided the application been made particular embracing en granted. *North McKee v. Smith*, H.

polling hours on the supporter of the op- him he would like a not thinking it ille- the bar being closed, in the hall of the of Appeal (revers- 3), that the receiving t during the hours of and avoided the nne, J., that as to the he only person liable be the tavern-keeper, horize two penalties *Grey Election (Ont.)*—C. 362.

t of the respondent, t. during polling hours sed spirituous liquor, if and several persons Gwynne, J., at the ided by sec. 66 of the t.) apply only to the h is able to control omises in violation of by L. was not a raper, C. J. A.—(1) nstructed distributive- st part of the section ny person who can keeping his tavern bed time. (3) That e section the persons (1) the tavern-keeper n of the statute, and the liquor purchased vern. *Lincoln Election*, H. E. C. 391.

The decision of Gwynne, J., in the Lincoln Election Case, H. E. C. 391, that tavern-keepers alone are liable for the violation of 32 Vict. c. 21, s. 66 (Ont.), as amended by 3<sup>rd</sup> Vict. c. 2, s. 1, not approved of. *North Wentworth Election (Ont.)*—*Christie v. Stock*, H. E. C. 343.—*Draper*.—C. of A.

On the polling day, and during the hours of polling, the respondent drove up to a tavern at C., where he met one S., a member of his committee, and addressing him or the assembled people, said, "Boys, this is the first time I came to C. when I dare not treat, and some one will have to treat me." S. replied that he would treat, and, with the respondent and a number of persons variously estimated at from thirty to fifty went into the tavern, where S. treated some of the people, and the respondent drank with the rest:—Held, that going into the tavern for the purposes of the treat, when the law directed that such tavern should be kept closed, and joining in and accepting such treat, was a literal as well as a substantial violation of the law, and a corrupt practice: that the concurrence of the respondent in the commission of such corrupt practice made him liable to the disqualification imposed by the statute for "a corrupt practice committed with the actual knowledge and consent of a candidate." *Ib.*

Held, by the Court of Appeal (Draper, C. J. A., dissenting), that section 66 of the Ontario Election Law of 1868, 32 Vict. c. 21, as amended by 36 Vict. c. 2, applies only to shop, hotel and tavern-keepers, who alone are liable to the penalties for keeping open the tavern, etc., and for selling or giving spirituous liquors during the prohibited hours. *South Ontario Election (Ont.)*—*Farewell v. Brown*, H. E. C. 420.

Held, by the Court of Appeal, reversing Wilson, J., that the prohibition in such section (66) as to opening taverns and giving or selling liquor "in the municipalities in which the polls are held," applies to all the municipalities within the constituency, irrespective of the place where the vote is given, or to be given. *Ib.*

By 39 Vict. c. 10, s. 3 (Ont.), which is substituted for section 66 of the election law of 1868, tavern-keepers or persons acting in that capacity for the time, who sell or give liquor at taverns on polling day and within the hours of polling, are guilty of corrupt practices; but persons who treat or are treated at such taverns are not affected by the statute.—*Ford's note*. *Lincoln Election (2) (Ont.)*—*Pawling v. Rykert*, H. E. C. 500.—*Patterson*.

One B. was appointed, in writing, by the respondent to act as his agent for polling day. During the day he went to a tavern and asked for and was given a glass of beer:—Held, that B. treated himself, and neither gave nor sold, and was not therefore guilty of a corrupt practice. *East Peterborough Election (Ont.)*—*Stratton v. O'Sullivan*, H. E. C. 245.—*Draper*.

The majority of the respondent was 337: but it appeared in evidence that two agents of the respondent had bribed between forty and fifty voters; that in close proximity to the polls spirituous liquor was sold and given at two taverns during polling hours, and that one of such agents took part in furnishing such liquor;

and that such agent had previous to the election furnished drink or other entertainment to a meeting of electors held for the purpose of promoting the election:—Held, that the result of the election had been affected thereby, and that the election was void. *West Hastings Election (2) (Ont.)*—*Holden v. Robertson*, H. E. C. 539.—*Moss*—*Galt*.

Section 157 of R. S. O. (1877), c. 10, forbids the selling or giving of liquor at any time during the polling day, under a penalty of fine or imprisonment, and the same Act provides that any violation of that section during the hours appointed for polling, is a corrupt practice:—Held, at the trial, that a violation of the section during the polling hours by an agent of the candidate, must be conclusively presumed to have been intended corruptly to influence the election. *Prescott Election (Ont.)*—*Cunningham v. Hagar*, 1 E. C. 88.—*Patterson*—*Ferguson*.—C. of A.

On the morning of the polling day, S. met McN. in an hotel, and asked him to vote for the respondent, to which he agreed; he then took him to (S.'s) house, and afterwards to a tavern where he treated him, and then to a poll where he voted. S. was a man who always took an active part in every election on the reform side, and during this election he had, on one occasion, attended a meeting of the local political organization, or committee for whose acts in the management of the election the respondent would be answerable, when some election work was done, but it was not shewn that he had canvassed except in this particular case, or that he was a member of the committee, and he swore that he was not asked to do any work. On the polling day he was actively engaged in driving voters to the polls in his own conveyance, which he said he did as a mere volunteer:—Held, that the treating was a corrupt act, but that S.'s agency was not proved. *North Ontario Election (Ont.)*—*Treleaven v. Gould*, 1 E. C. 1.—*Burton*—*Osler*.

S. being an agent of the respondent, on the election day brought some whiskey to a blacksmith shop near a poll, being a place where the neighbours were in the habit of congregating to warm themselves, etc., there being no tavern or public-house in the neighbourhood, and treated those present (most of them being voters) without reference to their voting, and without distinction as to which side they supported:—Held, not a corrupt practice. *Lennox Election (Ont.)*—*Miles v. Roe*, 1 E. C. 41.—*Galt*—*Osler*.—C. of A.

It appeared in the evidence that at the place of polling the respondent's firm had a house in connection with their mills, where their workmen were boarded, and where the respondent himself had rooms. A short time before the election, Mrs. B., who had formerly been house-keeper of the house, had become tenant of it, or was allowed to occupy it, and have the use of the furniture, and was paid a certain sum per week or month for each man boarding there, and a sum per day for casual boarders, and she was in this position at the time of the election. On polling day, H., a nephew and partner of the respondent, who spent the day at the polling place, told voters that if they went to the said



boarding-house they could warm themselves and would find dinner if they wished, it, and meat and drink was accordingly caused to be given to the voters at the boarding-house by H., who was clearly the respondent's agent throughout:—Held, at the trial, that the voters having come to the place for the purpose of voting, and that being their errand there, and the election being the occasion on which the provision was made and the hospitality extended to them, the act in question was done on account of each man so entertained "having voted or being about to vote," and inasmuch as it was impossible to say that the result may not have been affected by the above offer of hospitality, R. S. O. (1877), c. 10, s. 159, the election would have been void by reason thereof under section 158, had the matter been properly charged in the petition:—Held, however, that the evidence did not show that the corrupt act was committed with the actual knowledge and consent of the respondent, and therefore he had not incurred the penal consequences of R. S. O. (1877), c. 10, s. 161. *West Simcoe Election (Ont.)—Bedford v. Phelps*, 1 E. C. 128.—Patterson—Ferguson—C. of A.

See *South Oxford Election (Ont.)—Hopkins v. Oliver*, H. E. C. 243, p. 1516; *Welland Election (2) (Ont.)—Buchner v. Currie*, H. E. C. 187, p. 1457; *West Northumberland Election (Dom.)—Henderson v. Guillet*, 10 S. C. R. 635, p. 1471; *East Simcoe Election (Ont.)—Reid v. Drury*, 1 E. C. 291, p. 1455.

### 13. Subscriptions to Churches and Charities.

The respondent was charged with using means of corruption at his election (1) by giving up a promissory note and also \$20 to one M., on condition of M. and his sons voting for him; the charge depended upon the contradictory oaths of M. and the respondent; (2) by giving a large subscription to an election fund, some of which was expended for illegal purposes; and (3) by subscriptions to churches. The respondent denied any corrupt motive in these subscriptions. The election judge, on the evidence, found that the respondent was not personally guilty of corrupt practices, but he avoided the election on the ground of bribery by agents. *South Huron Election (Dom.)—Ritchie v. Cameron*, H. E. C. 576.—C. P.

Per Hagarty, C. J.—Candidates and agents should select less suspicious seasons than election times for exercising their liberality towards charitable and religious objects. *Ib.*

Held, that if gifts and subscriptions for charitable purposes, made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to, or on condition that, any body of men, or any individual, should vote or act in any way at an election, or on any express or implied promises or undertaking that such body of men, or individual, would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice, within the meaning of that expression as defined by the Dominion Election and Controverted Elections' Acts, 1874. *South Ontario Election (Dom.)—McKay v. Glen*, H. E. C. 751; 3 S. C. R. 641.

### 14. Other Corrupt Practices.

'One T., who was on the roll as an elector, and had sold his property in June, 1874, before the final revision of the assessment roll by the county judge, was, with the knowledge of the respondent—who was aware a doubt existed as to T.'s right to vote—given an appointment to act as scrutineer at a distant polling place, and also a certificate from the returning-officer under 38 Vict. c. 3, s. 28 (Ont.), to enable T. to vote at the place where he was to act as such scrutineer, at which place T. voted without taking the voter's oaths and returned without entering upon the duties of scrutineer. On a question of law reserved on the above facts for the Court of Appeal:—Held, that the act complained of was not a corrupt practice under the statute; but under the circumstances, the court gave the respondent no costs in appeal. *West Peterborough Election (Ont.)—Scott v. Cox*, H. E. C. 274.—Draper—C. of A.

Meetings for promoting the respondent's election were held at public houses with the object of inducing the owners to support the respondent at the election, and because the weather was cold and meetings could not be held in the open air. No evidence was given by the petitioner that equally convenient places, and such as were more proper to be used for that purpose, could be obtained:—Held, that as the respondent and his friends had a legitimate motive for holding their meetings at such houses, although their other motives might not be legitimate, no corrupt act had been committed. *Kingston Election (Dom.)—Stewart v. Macdonald*, H. E. C. 625.—Richards.

The appointment of a voter as an agent so as to allow him to vote in a division other than his own, and near where he was employed, is not a corrupt practice. *North Ontario Election (Ont.)—Treleaven v. Gould*, 1 E. C.—Burton—Osler.

The insisting by a scrutineer upon the taking of the farmers' son's oath T., by a hesitating voter whose vote is objected to and who is registered on the list as a farmer's son and not as owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list leaving the son owner of the property, is a wilful inducing or endeavouring to induce the voter to take a false oath so as to amount to a corrupt practice within sections 90 and 91 of R. S. C. c. 8, and such corrupt practice will avoid the election under section 93. *Strong and Gwynne, J.J., dissenting. Haldimand Election (Dom.)—Walsh v. Montague*, 1 E. C. 529.—S. C. C.

A number (300) of forms of oaths of residence and allegiance were printed and paid for by the association supporting the respondent as part of the election expenses, and some of the respondent's agents actively canvassed a number of foreigners, who were aliens; and by getting them to swear to these affidavits, and by conversations induced them to believe that they were thus naturalized, and had the right to vote, and several of them did vote. The evidence did not shew how many were sworn, but 235 unused forms were produced, and the remaining sixty-five were not accounted for:—Held, that the procuring of the affidavits just before the polling day when the agents knew that no court would sit in time to complete the naturalization

## Practices.

roll as an elector, and in 1874, before the assessment roll by the knowledge of the fact a doubt existed as to an appointment to a polling place, and returning officer under enable T. to vote to act as such scrutineer without taking notice without entering. On a question of facts for the Court of the complaint of was after the statute; but the court gave the result. *West Peterborough* case, H. E. C. 274.—

the respondent's elector with the object support the respondent because the weather did not be held in the as given by the petition places, and such used for that purpose, that as the respondent legitimate motive for such houses, although not be legitimate, no committed. *Kingston v. Macdonald*, H. E.

voter as an agent so as division other than his was employed, is not a *Ontario Election* (Ont.) 3. C.—Burton—Osler.

utineer upon the taking T, by a hesitating voter and who is registered person and not as owner. the voter's father had revision of the list the property, is a willing to induce the voter to amount to a corrupt 90 and 91 of R. S. C. practice will avoid the Strong and Gwynne, *mand Election* (Dom.)—C. 529.—S. C. C.

ms of oaths of residence ted and paid for by the respondent as part of and some of the respondent canvassed a number of aliens; and by getting affidavits, and by convincing to believe that they had the right to vote. id vote. The evidence were sworn, but 253 uced, and the maintaining ounted for :—Held, that idavits just before the ents knew that no court mplete the naturalization

proceedings by that day, was a plan, design, or scheme to induce aliens to vote for the respondent: that the knowledge, referred to in section 160 R. S. O. (1877) c. 9, is not a knowledge of the statute, but a knowledge of the facts disentitling the person to vote; that although that section contains a penalty of \$100, still it is partly penal and partly remedial: that in enforcing the penalty, the person against whom it is inflicted is the only person concerned, and it should be strictly construed; but in ascertaining whether a corrupt practice has been committed the whole constituency has concern, and only the remedial part of the section is invoked: that on the evidence an agent had the knowledge that one of the aliens had no right to vote at the time he induced him to vote. *Hamilton Election* (Ont.)—*Patterson v. Stinson*, 1 E. C. 499.—*Ferguson*—*MacMahon*.

Before the trial notice was given that if the evidence failed to show that the money received by the persons named in charge No. 8 for the purpose of influencing voters as therein stated, an application for an amendment would be made substituting a charge under sections No. 11 and 13 of the petition, that those persons were paid for their services, and so were guilty of corrupt practices in voting for the respondent, knowing that they had no right to vote :—Held, that two agents of the respondent who were paid for their services, knowing the facts and being presumed to have known the law, were each guilty of a corrupt practice when they voted for him; and that the amendment as to them should be allowed, as it was really giving particulars under paragraph thirteen of the petition, and could be made without any amendment of the petition, and that the evidence sustained it, and as notice had been given the respondent was not prejudiced. *Id.*

Held, that the acts of the two paid agents in voting, had they stood alone, not being part of any comprehensive scheme, the court would have hesitated before deciding that they did not fall within section 163, in which case the election would not have been avoided; but following the *East Simcoe* case, 1 E. C. 291, that the inducing the aliens to vote was an overt act, part of an arranged system of operations, and was such a corrupt practice as could not be considered "of such trifling nature," or "of such trifling extent," that the result could not be supposed to be affected by it. Had the corrupt practice indicated above not been sufficient of itself to avoid the election, the two other corrupt practices proved, together with certain other illegal practices committed by a person not an agent of the respondent, the evidence as to which was uncontradicted, would have sufficed. *Id.*

In an election petition it was charged that the respondent personally, as well as acting by C. A. C., D. F. and others, his agents, did undertake and conspire to impede, prevent, and otherwise interfere with the free exercise of the franchise of certain voters, and that, in furtherance of a premeditated scheme, which the respondent and his agents well knew to be illegal, they did, in fact so impede, prevent, and interfere with the exercise of the franchise of certain voters, by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of

these voters was unjustifiably interfered with. At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested, was set aside, and certain voters were reported by the judges as having been guilty of corrupt practices, but had not been found guilty of such corrupt practices under section 104 of the Dominion Elections Act, (1874.) At a public meeting before the election, C. A. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters. On the polling day D. P., who had been appointed deputy returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with C. A. C., and on his advice and in collusion with him, marked the ballots of certain of these voters :—Held, that the election was void by reason of the attempted intimidation practised by C. A. C., and by reason also of the conspiracy between the said agent and the deputy returning officer to interfere with the free exercise of the franchise of voters, violations of section 95 of the Dominion Elections Act, 1874, and corrupt practices under section 98 of the said Act. *Soudanay Election* (Dom.)—*Cholette v. Bain*, 10 S. C. R. 652.

See *West Hastings Election* (Ont.)—*Wesley v. Wills*, H. E. C. 211, p. 1500; *East Northumberland Election* (Ont.)—*Richmond v. Willoughby*, 1 E. C. 434, p. 1496.

### 15. Acts of Trifling Nature not Affecting the Result of the Election.

Per Spragge, C. J. O.—The power of saving an election under R. S. O. (1877), c. 10, s. 159, should be exercised very cautiously, and a fortiori by the judges of the Appellate Court where the rota judges have deemed the case to be not proper for the application of the power given by this section of the Act. *West Simcoe Election* (Ont.)—*Bedford v. Phelps*, 1 E. C. 128.

Per Patterson, J. A., and Ferguson, J., the object and purpose of R. S. O. (1877), c. 10, s. 159, do not require anything in the shape of an attempt to estimate the number of votes which can be shewn or surmised to have been affected by the corrupt act in question, and to balance that act against the actual majority. Although, no doubt, the word "trifling" must be construed in each case with some reference to the majority, particularly when considering the extent of the corrupt acts, the court is not called upon to enter into a quasi scrutiny for the purposes of this section. *Id.*

Although the irregularities of the deputy returning officer could not, by themselves, be said to have affected the election :—*Quære*, whether in conjunction with another corrupt act which was found to have been committed by an agent of the candidate, they could under R. S. O. (1877) c. 10, s. 159, conjointly be said to have done so :—Held, at the trial, that the irregularities were not "illegal practices," as mentioned in that section, but were rather defaults than acts or practices, and entirely unconnected with corrupt practices. What is referred to in section 159, is systematic

illegality, whether amounting to corruption or falling short of it, to such an extent that the particular acts which are proved, may be reasonably considered merely to be instances in connection with the general system of corruption or illegality which has been prevalent during the contest. *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.—*Patterson—Ferguson—C. of A.*

Held, per Boyd, C., that but one corrupt practice was proved in this case, and that in view of the provisions of section 159 of the Act that one was not sufficient to avoid the return. *East Middlesex Election (Ont.)—Rhoder v. McKenzie*, 1 E. C. 250.

Held, per Boyd, C., that inasmuch as respondent's personal expenses had not amounted to \$100, and as, during the canvass, although he had treated friends, he had not done so to any greater extent than had previously been his habit, neither his personal conduct during the election nor the absence from the trial of one of his chief agents, against whom considerable suspicion was raised by the evidence, ought to prevent the court from applying the provisions of R. S. O. (1877) c. 10, s. 159 to the circumstances of this case:—Held, per Cameron, C.J., that although nothing corrupt or unusual was proved as to respondent's expenses or treating, he had not properly returned his personal expenses, and this circumstance, coupled with the keeping out of the way at the time of the trial of one of his chief agents, should prevent respondent receiving the benefit of section 159 of the Act, and the election should be avoided. On appeal:—Held, Osler, J.A., dissenting, that upon the evidence the election was saved under the provisions of section 159. *Ib.*

H. was a prominent supporter and agent of the respondent, secretary of the reform association of the riding, delegate to the convention which nominated respondent, and an active organizer and manager of the election contest. H. a voter, well known to H., as what he called a "loose fish," and belonging to a family reputed to sell their votes, came to H., and asked for money for his vote; not succeeding, he returned next day and made a similar request. Finally he asked for \$5, because, he said, he was sick and hard up, and wanted to pay his taxes. Whereupon H. gave him \$5, but on R. pledging his word that it had nothing to do with his vote. R. told T., another voter, that if he wanted \$4 or \$5 now was his time, and introduced him to H.. T. asked if any money was going, and offered his own vote for \$10, and his father and three brothers for \$20. H. gave him \$4, calling it a loan, and on T.'s word of honour that it would not influence him in the election. H. also hired the team of a man named C. for the election day. The election was very close, over 2,700 votes being polled, and respondent's majority about twenty-three:—Held, that these were clearly corrupt acts. Per Boyd, C., that though these several acts of the agent in this case were clearly corrupt acts, they did not avoid the election as they came within the protection of R. S. O. (1877) c. 10, s. 159; and per Cameron, J., that they did avoid the election, as they were not within the safe protection. Per Boyd, C.—The scope of the section was that an election should not be set aside for two or three illegal acts of a trifling nature or extent, where the majority is consider-

ably more than the votes affected, unless these illegal acts and practices prevailed, and were so influential, extensive and insidious as to induce the probable and reasonable belief that but for such acts and practices the result might have been different, while here, after striking off the corrupt votes, the respondent would still have a majority. Per Cameron, J.—The extent of the influence of the corrupt acts is not to be measured or estimated merely by the number of corrupt votes, but in connection with the influence of the party proved to be guilty of its commission, and by the opportunities he may have had of resorting to like practices in other cases. On appeal to the Court of Appeal:—Held, affirming the finding of Cameron, J. (Barton, J. A., dissenting), that the corrupt acts in this case did not come within the protection of section 159, and therefore the election was avoided. *East Simcoe Election (Ont.)—Reid v. Drury*, 1 E. C. 291.

Irregularities at nomination and at polling. See *S. C., Ib.*, pp. 1439, 1500. See also *West Election (Ont.)—Collier v. McCallum*, H. E. C. 154, p. 1425.

R. committed two clearly proved acts of bribery. F. D. and W. D. entered into a scheme for violating the secrecy of the election by inducing voters to exhibit their ballots, after they were marked, at a window; and the evidence developed at least two other acts of bribery, though not by agents, and some suspicious circumstances; but all these were without the knowledge or consent of the respondent. The vote polled was about 4,500, out of which there was a majority of fifty-one for the respondent:—Held, that the election was void because of the corrupt acts of R.; and in view of the conduct and details of the contest, the saving provisions of section 159 of the Election Act, R. S. O. (1877), c. 10, could not be applied. Per Curiam.—The scheme for violating the secrecy of the ballot was an illegal act under section 146, and had no little significance when taken in connection with the proved acts of bribery. In estimating the application of section 159 it was impossible to leave out of sight the illegal practices under section 146. The *West Simcoe Case*, 1 E. C. 153, referred to and followed. *East Northumberland Election (Ont.)—Richmond v. Willoughby*, 1 E. C. 434.—*Boyd—Osler*.

At the trial of the petition one corrupt act, namely, the payment of the travelling expenses of a voter M. by F., an agent of the respondent, was proved; it was also found that C. D. was guilty of bribery, in giving a dollar to each of two voters and offering money to another, but no agency was proved, and that L. B. gave liquor at his tavern during polling hours, but he was not proved to be an agent. It was contended that these latter acts, and the evidence as to the acts and conduct of three other parties in connection with other charges which were not proved, should all be taken into consideration with the proved corrupt act, in order to take the case out of section 159 of the Election Act, R. S. O. (1877), c. 10, and prevent the respondent from saving his seat under the provisions of that section:—Held, that the election was not avoided. *Welland Election (Ont.)—Hobson v. Morris*, 1 E. C. 383.—*Patterson—Ferguson*.

affected, unless those prevailed, and were so insidious as to induce belief that but for the result might have been, after striking off the respondent would still have been on, J.—The extent of corrupt acts is not to be merely by the number in connection with the proved to be guilty of the opportunities he may be like practices in other the Court of Appeal:—*Kingston Election (Don.)*—*Stewart v. Macdonald*, 1 H. E. C. 625.—*Richards*.

ation and at polling, 1500. See also *Meek v. McCallum*, H. E. C.

early proved acts of bribery entered into a scheme for the election by inducing ballots, after they were and the evidence developed acts of bribery, though suspicious circumstances without the knowledge of the respondent. The vote polled which there was a majority for the respondent:—*Held*, because of the corrupt conduct and the deliberate saving provisions of the Election Act, R. S. O. (1877), c. 10, s. 161. *Per Curiam*.—The secrecy of the ballot under section 146, and had then taken in connection with bribery. In estimating the illegal practices under the Simcoe case, 1 E. C. 150. *East Northumberland v. Richmond v. Wiltoughby*, 1 E. C. 151.

petition one corrupt act, of the travelling expenses of the respondent, so found that C. D. was giving a dollar to each of the respondents, and that L. B. gave liquor bottles, and he was the agent. It was contended and the evidence as to the three other parties in connection with the respondent, which were not taken into consideration at act, in order to take the of the Election Act, R. S. O. (1877), c. 10, s. 161, to prevent the respondent from the provisions of that the election was not avoidable. *(Ont.)*—*Hobson v. Morris*, 1 E. C. 152.—*Ferguson*.

*Per Patterson, J. A.*—The "result" referred to in section 159 is the result which touches the right to the seat which is being contested, i. e., the majority of legal and honest votes. The petitioner could not insist on giving evidence of any corrupt practice which he has not charged—and for this purpose illegal acts are corrupt practices—but whether the evidence given upon any charge is sufficient to establish it, or falls short of doing so, any facts or any course of conduct shown by that evidence may be properly considered in connection with any other corrupt or illegal practice which has been proved, and the nature or probable extent of which it may serve to elucidate; but on consideration of all the facts in this case this election should be held good and the respondent duly elected. 16.

*Per Ferguson, J.*—The words "other illegal practices at the election," at the end of section 159, must be illegal practices the existence of which is ascertained and known, and the way their existence becomes known is by the evidence. This cannot rest in conjecture, it must be proved. Whenever, in giving evidence to prove a corrupt practice charged as having been committed by an agent, it appears that illegal practices took place, though the evidence is not to prove the agency, these illegal practices are comprehended in the meaning of the words "other illegal practices at the election," and must be taken in connection with the corrupt act of the agent. On the whole case, the corrupt act proved was so trifling that the result cannot have been affected by it, either alone or in connection with the other illegal practices at the election; the election should not be avoided. 16.

See *West Hastings Election (2) (Ont.)*—*Holden v. Robertson*, H. E. C. 539, p. 1459; *Dufferin Election (Ont.)*—*Sleightholm v. Barr*, H. E. C. 530, p. 1515; *Lincoln Election (2) (Ont.)*—*Lawling v. Rykert*, H. E. C. 489, p. 1455; *North Ontario Election (Ont.)*—*Treadwell v. Gould*, 1 E. C. 1, p. 1471; *Hastings Election (Ont.)*—*Patterson v. Simson*, 1 E. C. 499, p. 1493.

#### 16. Disqualification by Reason of Corrupt Practices

##### (a) Of Candidate.

Before subjecting a candidate to the penalty of disqualification, the judge should feel well assured, beyond all possibility of mistake, that the offence charged is established. If there is an honest conflict of testimony as to the offence charged, or if acts or language are reasonably susceptible of two interpretations, one innocent and the other culpable, the judge is to take care not to adopt the culpable interpretation unless, after the most careful consideration, he is convinced that in view of all the circumstances it is the only one which the evidence warrants his adopting as the true one. *Welland Election (2) (Ont.)*—*Buchner v. Currie*, H. E. C. 187.—*Gwynne*.

*Per Burton and Patterson, JJ. A.*—The 2nd sub-section of section 3 of 36 Vict., c. 2 (Ont.), applies equally to the elected and defeated candidates at an election; and, if found assenting parties to any practice declared by the statute to be corrupt, each of them is liable to the disqualifications mentioned in the statute. *North West-*

*worth Election (Ont.)*—*Christie v. Stock*, H. E. C. 343.

It is a general rule that no man can be treated as a criminal, or mulct in penal actions for offences which he did not connive at; and it is settled law that enactments are not to be given a penal effect beyond the necessary import of the terms used. But the election laws are not to be so limitedly construed by an election judge; and for civil purposes they are more comprehensive, and reach a candidate whose agents bribe in his behalf, with or without his authority. Where the disqualification of a candidate is sought they are to be construed as any other penal statutes, and the candidate must be proved guilty by the same kind of evidence as applies to penal proceedings. *Kingston Election (Don.)*—*Stewart v. Macdonald*, 1 H. E. C. 625.—*Richards*.

An election was held in January, 1874, under the Act of 1873, at which the petitioner and the respondent were candidates at which the respondent was elected. This election was avoided on the ground of corrupt practices by agents of the respondent, committed without his knowledge or consent, (H. E. C. 547.) A new election was held, under the Act of 1874, at which the petitioner and the respondent were again candidates, when the respondent was again elected. Thereupon another petition was presented, charging that the respondent was guilty of corrupt practices at this last election: that he was ineligible by reason of the corrupt acts of his agents at the former election; that persons reported guilty of corrupt practices at the former election had improperly voted at the last election; and claiming the seat for the petitioner:—*Held*, on the preliminary objections, (1) That the two elections were one in law; and it was not material that they had been held under different Acts of Parliament; (2) That the respondent was not ineligible for re-election, as the corrupt practices of his agents at the former election had been committed without his knowledge or consent. *Cornwall Election (2) (Don.)*—*Berger v. Macdonald*, H. E. C. 647. But see R. S. C. c. 8, s. 95.

It appearing that a number of persons visited the district, and that the object of their visit was to influence the electors by corrupt means, and that there was an organized and systematized plan to employ corrupt means to influence and carry the election in various ways, and that the trial judges, Patterson, J. A. and Ferguson, J., were not satisfied that the respondent was ignorant that such practices were likely to be committed by persons acting in his behalf in the conduct of the election, and found that corrupt practices prevailed at the election and declined to relieve the respondent under section 162, of the penalties incurred by him under section 161, the Court of Appeal now declined to interfere (Galt, J., dissenting.) *Per Hagarty, C. J. O.*, when a corrupt practice is proved the onus is at once shifted to the respondent to bring himself within the saving clause R. S. O. (1877) c. 10, s. 162. The *Prescott Election*, 1 E. C. 88, followed. *Muskoka and Parry Sound Election (Ont.)*—*Paget v. Fauquier*, 1 E. C. 197.

See *North Wentworth Election (Ont.)*—*Christie v. Stock*, H. E. C. 343, p. 1489; *Centre Well-*

tion Election (Dom.)—*Ironsides v. Orton*, H. E. C. 576, p. 1462; *North Grey Election* (Ont.)—*Boardman v. Scott*, H. E. C. 362, p. 1488; *London Election* (Dom.)—*Pritchard v. Walker*, H. E. C. 560, p. 1465; *South Renfrew Election* (Ont.)—*Harvey v. Dowling*, 1 E. C. 359, p. 1522; *East Middlesex Election* (Ont.)—*Rhoder v. McKenzie*, 1 E. C. 250, p. 1485.

(b) Of Other Persons.

Quere, whether the judge presiding at the trial should not direct notice to be given to the parties who, from the evidence, were apparently guilty of corrupt practices, so that he might decide upon their liability to disqualification, and report them under the statute. *Prescott Election* (Ont.)—*McKenzie v. Hamilton*, H. E. C. 1.—Richards.

The election having been declared void on account of the corrupt practices of an agent of the respondent, the judges acting as a court for the trial of illegal acts committed at the election, after notice to such agent, granted an order for the punishment of such agent by fine and disqualification. *Stornont Election* (2) (Ont.)—*Empey v. Kerr*, H. E. C. 537.—Moss—Blake.

The right to vote is not to be taken away or the vote forfeited by the act of the voter unless under a plain and express enactment, for it is a matter in which others besides the voter are interested. *Brockville Election* (Ont.)—*Flint v. Fitzsimmons*, H. E. C. 139.—Q. B.

Held, the fact of persons having been reported by the judge as guilty of corrupt practices at a former election, had not the effect of disqualifying them from voting at a second election. The report of the judge is not as to them an adjudication, for voters are not, in a proper judicial sense, parties to the proceedings at an election trial. *Cornwall Election* (2) (Dom.)—*Bergin v. Macdonald*, H. E. C. 647.—Spragge.

See *North Simcoe Election* (Dom.)—*Edwards v. Cook*, H. E. C. 617, p. 1505.

VIII. IRREGULARITIES IN TAKING THE POLL.

At a polling subdivision, through a series of mischances, and without any wilful default of the officials the poll was not opened till between half-past one and two, whereby it was charged a number of electors were deprived of voting. The petitioner failed to prove the charge, while, if the onus of doing so were on the respondent, he shewed there was ample time to poll all the votes at that subdivision, and that all who desired to vote could have done so; the supply of ballot papers at a polling subdivision, through a blunder of the officials, ran out, and, while waiting for instructions the poll was closed for half an hour, whereby, it was charged, some seventeen voters were prevented from voting; but as a matter of fact none of these voters were prejudiced thereby; the deputy returning officer and subordinate officers at a polling subdivision, through improvidence, but not mala fide, did not make the declaration of secrecy required by section 147 of R. S. O. (1877), c. 10; but the result was not affected thereby.—Held, by the trial judges, Boyd, C., and Cameron, J., that as

these grounds of irregularity did not per se affect the result, they came within the protection of section 197, and did not avoid the election. *East Simcoe Election* (Ont.)—*Reid v. Drury*, 1 E. C. 291.

See *Bothwell Election* (Dom.)—*Hawkins v. Smith*, 8 S. C. R. 676, p. 1442; *Prescott Election* (Ont.)—*Cunningham v. Hagar*, 1 E. C. 88, p. 1444.

In use of voters' list. See Subhead II, 1 (a), p. 1425.

IX. ACCOUNTS OF EXPENDITURE.

When all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the case be stripped of all other circumstances, the strongest conclusion will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct. *South Grey Election* (Ont.)—*Hunter v. Lauder*, H. E. C. 52.—Mowat.

A candidate in good faith intended that his election should be conducted in accordance both with the letter and the spirit of the law; and he subscribed and paid no money, except for printing. Money, however, was given by friends of the candidate to different persons for election purposes, who kept no accounts or vouchers of what they paid.—Held, that bribery would not be inferred as against the candidate, who neither knew nor desired such a state of things, from the omission of the subordinate agents to keep an account of their expenditure, especially as the law was new, and contained no provision similar to the Imperial statute, which requires a detailed statement of expenditure to be furnished to the returning officer. But it is always more satisfactory to have the expenditure shown by proper vouchers; and if money is paid to voters for distributing cards, or for teams, or for refreshment, these will be open to attack, and judges will be less inclined, as the law becomes known, to take a favourable view of conduct that may bear two constructions, one favourable to the candidate and the other unfavourable. *East Toronto Election* (Ont.)—*Resnick v. Cameron*, H. E. C. 70.—Richards.

The Act 36 Vict. c. 2, ss. 7-12 (Ont.), requires all election expenses of candidates shall be paid through an election agent; and the Act 38 Vict. c. 3, s. 6, requires the member-elect to swear that he had not paid and will not pay election expenses except through an agent, and that he "has not been guilty of any other corrupt practice in respect of the said election." Certain payments were made by the respondent personally, and not through an election agent.—Held, that such payments were not corrupt practices.—Held, that the words "other corrupt practices" in the member's oath meant "any corrupt practice." *West Hastings Election* (Ont.)—*Wesley v. Wills*, H. E. C. 211.—Spragge.

Per Taschereau, J.—That the personal expenses of the candidate should be included in the statement of election expenses required to be furnished to the returning officer under 37 Vict. c. 9, s. 123. *Bellechasse Election* (Dom.)—*Larue v. Deslauriers*, 5 S. C. R. 91.

See *East Middlesex Election* (Ont.)—*Rhoder v. McKenzie*, 1 E. C. 250, p. 1495.



did not per se affect in the protection of the election. *See* *Drury*, 1 E.C. 291.

(Dom.)—*Hawkins v. 1842; Prescott Election*, 1 E.C. 88, p. 144.

*See* Subhead II. 1 (a).

#### EXPENDITURE.

and records of an employee by the respondent be stripped of all strongest conclusion against the legality of a conduct. *South Grey v. Lauder*, H. E. C.

with intended that his acted in accordance both spirit of the law; and he money, except for printing as given by friends of act persons for election accounts or vouchers of that bribery would not candidate, who neither state of things, from ordinate agents to keep expenditure, especially as contained no provision statute, which requires expenditure to be furnished. But it is always the expenditure shown if money is paid to cards, or for teams, or will be open to attack, inclined, as the law be favourable view of constructive constructions, one date and the other undate to Election (Ont.)—*Ren- C. 70.*—*Richards.*

ss. 7-12 (Ont.), requires candidates shall be paid at; and the Act 38 Vict. member-elect to swear and will not pay election as an agent, and that he any other corrupt practice election." Certain the respondent person election agent:—Held, not corrupt practices:—other corrupt practices" meant "any corrupt practice Election (Ont.)—*Wesley v. prapage.*

—That the personal expenses should be included in on expenses required to returning officer under 37 *chase Election (Dom.)*—S. C. R. 91.

*Election (Ont.)*—*Rhoder v. p. 1495.*

#### X. ACTIONS FOR PENALTIES.

##### 1. Against Persons Convicted of Bribery.

Held, that 18 Elizabeth chapter 5, which enacts that an informer shall sue either in person or by attorney, is in force in this province, and therefore the plaintiff, an infant suing by his next friend, could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below, this court in allowing the appeal on that ground, refused him his costs of appeal. *Garrett v. Roberts*, 10 A. R. 650.

A person who sues for a penalty given by the Election Act is a common informer. *Id.*

The acts of bribery complained of were committed between the 13th and 23rd of June, 1882. The writ was issued on the 12th June, 1883, and was served on the defendant on the 27th November thereafter. The defendant on the 30th November, moved to dismiss the action for wilful delay in prosecution under 39 Vict. c. 9 (Ont.). The plaintiff's solicitor swore that he was also solicitor for the petitioner in the Lennox election petition, at which election the acts of bribery complained of were alleged to have been committed, and in order not to endanger the success of that petition it was deemed advisable not to serve the writ until that petition was disposed of, which, on account of objections to the jurisdiction, was not tried till the 10th October, 1883. He also deposed that at the trial of the election petition an application was made for a summons against the defendant under 39 Vict. c. 9, to have the penalties for bribery imposed upon him; and that the application was not disposed of till the 23rd November, at which date the judge declined to interfere:—Held, that such delay as would not expose an order of suit to dismissal may be fatal to an action under this Act, under the special provision that such an action shall be carried on without wilful delay:—Held, also, there had been wilful delay not to be excused by the explanations given, and that the plaintiff was entitled as of right to have the action perpetually stayed or dismissed. The order was made, dismissing the action without costs, for the reason that a prima facie case of bribery was established against the defendant which he had not attempted to contradict. *Miles v. Roe*, 10 P. R. 218.—*Boyd.*

The jurisdiction of the Provincial Legislature over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Election Act, 1874, by section 108, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's Courts in the Province in which the cause of action arose, having competent jurisdiction:—Held, that the enactment was valid. *Doyle v. Bell*, 11 A. R. 326 32 C. P. 632.

##### 2. For Illegally Voting.

In an action under R. S. O. (1877) c. 10, s. 182, against an agent for the sale of crown lands

to recover a penalty alleged to have been incurred by voting at an election of a member to the legislative assembly, contrary to section 4 of the Act:—Held, overruling a demurrer to the statement of claim, that, though forfeitures and penalties belong to the crown unless otherwise disposed of, the sum declared to be forfeited by section 4 of the Act for a breach thereof is a penalty within the meaning of section 182, subsection 1, for which an action may be maintained by any person who will sue for the same. *Shringley v. Taylor*, 4 O. R. 396.—*Rose.* See also *S. C. sub nom. Shingley v. Taylor*, 6 O. R. 108, p. 1437.

##### 3. Against Returning Officers and Deputy Returning Officers.

###### (a) Refusing Votes.

At the election of a member of the legislative assembly for Algoma, six persons tendered their votes and offered to take the necessary oaths required by R. S. O. (1877) c. 14, to entitle them to vote. The deputy returning officer refused the vote of one because he could not produce his title deeds, and of the others because they had no houses on their lands. Four of those rejected offered to take the oath prescribed and described the property on which they claimed to vote. In an action for penalties for refusing the votes:—Held, that the duties of a deputy returning officer in taking the votes are ministerial, (save where he suspects personation want of qualification, etc.; in which case he should exercise his judgment as to administering the oath), and that having refused the tendered votes of those who had sufficiently shewn their right to vote, he had refused to perform an obligation or formality, required of him within section 180, and was liable to the penalties prescribed by the Act. *Walton v. Appjohn*, 5 O. R. 65—Q. B. D.

One Anderson, when tendering his vote, was not able to describe his land accurately, but stated that it was in one of three townships which he named. His vote was refused on the ground that he had no house on his land:—Held, *Hagarty, C. J.*, doubting, that the deputy returning officer was liable for the penalty for refusing this vote:—Held, also, that the point as to whether the polling division in question was within Ontario or not, could not be raised by the deputy returning officer acting under a writ for an election in Ontario:—Held, also, that notice of action was not necessary, nor was it necessary to aver or prove notice. *Id.*

###### (b) Returns.

An action to recover the penalty of \$200 imposed by 37 Vict. c. 9, s. 108 (Dom.). The sixth paragraph of the statement of claim alleged that the defendant as deputy returning officer neglected to make out the statement required by section 57, and enclose it in the ballot box. The seventh paragraph alleged that defendant pretended that he did make up the statement in question, but that he inclosed it by mistake in the envelope containing the ballot papers; and charged that the doing so was a neglect of duty, within the meaning of the statute. The defence denied the statement of claim, and alleged, (2) that the

nonperformance of any formality was unintentional on the part of the defendant, and was not the result of a guilty mind. On a motion to strike out the second paragraph of the defence, Cameron, J., gave leave to the plaintiff to take exception to that paragraph by demurrer. And:—Semble, that the paragraph shewed no valid ground of defence, and that if the defendant made the alleged mistake, no cause of action existed under section 57. *Cameron v. Lucas*, 9 P. R. 405.—Cameron.

Action by the plaintiff, a defeated candidate at an election for the local legislature, against the defendant, the returning officer for wilfully contravening the provisions of R. S. O. (1877) c. 10, s. 125, in not delaying the return after receiving notice from the county judge of a recount of the ballots. The county judge had mailed a notice to the defendant, which it was not controverted had reached him in time, and a duplicate of it was left at his residence with his wife:—Held, affirming the judgment of Wilson, C. J., at the trial, *Cameron, C. J.*, dubitante, that the evidence set out in the report, did not shew that the notice came to defendant's knowledge before he made his return, and therefore he did not contravene the section, so that there could be no recovery:—Cameron, C. J., doubting, on the ground that the defendant had not affirmed by his oath that the fact of a recount did not come to his knowledge before he made his return. Held, per Wilson, C. J., that the plaintiff was a "person aggrieved" within section 181 of the Act; and that the defendant could not question the power of the county judge to give the appointment or issue the notice on the material before him, because the process of the court or judge must be obeyed while it stands when, as here, there was jurisdiction. *Hays v. Armstrong*, 7 O. R. 621—C. P. D.

#### 4. Appeal.

See *Chagnon v. Normand*, 16 S. C. R. 661.

### XI. TRIAL OF CONTROVERTED ELECTIONS.

#### 1. Court for Trial.

The Court of Queen's Bench is an existing court for the presentation and trial of Dominion controverted election cases, notwithstanding the O. J. Act, 1881. The petition in this case was intitled, "In the Queen's Bench, High Court of Justice, Queen's Bench Division," and was delivered, without any special instructions to him, to an officer of, and in the office of the Queen's Bench Division, with whom and in which the business of the Court of Queen's Bench had formerly been transacted, and the officer entered it in the procedure book of the Queen's Bench Division:—Held, that the words "High Court of Justice, Queen's Bench Division," added in intitling the petition might be rejected as surplusage, and that the petition had been properly presented in the Queen's Bench:—Held, also, that the act of the officer in entering it in a wrong book should not prejudicially affect the petition. *In re Russell Election (Dom.)—Henderson v. Dickenson*, 1 O. R. 439. Cameron. But see the next two following cases.

A petition against the return of a member for the house of commons, was filed in the High Court of Justice, Common Pleas Division, constituted by the O. J. Act; and the required security was furnished by the deposit thereof being made in a bank under a direction obtained therefor from the accountant of the said High Court, appointed under the said Act:—Held, by Cameron, J., that the Common Pleas Division of the said High Court was not one and the same court as the Court of Common Pleas as constituted prior to the passing of the Judicature Act; that the said Court of Common Pleas still existed, and was capable of receiving and trying the said petitions, and therefore, the said Common Pleas Division had no jurisdiction to entertain the same:—Held, also, that the question was properly raised by way of preliminary objection, as was also the question as to the security furnished:—Held, also, that the onus of proving the preliminary objections rested on the respondent, who raised them. The question as to jurisdiction being important, and open to reasonable doubt, no costs were allowed. *Re North York Election (Dom.)—Paterson v. Mulock*, 32 C. P. 458. Overruled. See the next case.

The election petition against the election and return of the respondent, was entitled in the High Court of Justice, Queen's Bench Division, and was presented to the official in charge of the office of the Queen's Bench Division, and filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction:—Held, (Henry and Taschereau JJ., dissenting), reversing the judgment of Cameron, J., (1 O. R. 433) and *Re North York Election case, Patterson v. Mulock*, 32 C. P. 458, that the Ontario Judicature Act, 1881, makes the High Court of Justice and its divisions a continuation of the former courts merged in it, and that those courts still exist under new names; and that the petition had not been irregularly entitled and filed. *West Huron Election—Mitchell v. Cameron*, 88 C. R. 126.

See *Re Niagara Election (Dom.)—Plumb v. Hughes*, 29 C. P. 261; *South Ontario Election (Dom.)—McKay v. Glen*; *Re West Hastings Election (Ont.)—Wallbridge v. Bove*, 15, 270; *Montmorency Election (Dom.)—Valin v. Langlois*, 5 App. Cas. 115; 3 S. C. R. 1, p. 306.

#### 2. Petition.

##### (a) Petitioners.

The respondent attacked the qualification of one of the petitioners on the grounds that he was an alien, and that he had no property qualification, having made an assignment in insolvency before the election. The judge admitted the evidence, but:—Held, (1) That the evidence as to the petitioner having lived in the United States without shewing that his parents were American citizens, was not sufficient to establish the charge of alienage. (2) That the Ontario Election Act of 1881, by the term "owner," gives to the husband whose wife has an estate for life or a greater estate, the right to vote in respect of his wife's property; and that the petitioner having that qualification, and being in possession of his wife's estate, was

entitled to petition. *Prescott Election (Ont.)*.—*McKenzie v. Hamilton*, H. E. C. 1.—Richards.

The respondent, on the opening of the case, charged that the petitioner was a candidate at the election, and as such candidate was guilty of corrupt practices, and therefore disqualified to be a petitioner. The chief justice, without deciding whether the respondent had the right to attack the qualification of the petitioner, allowed the evidence to be given, but held the same to be insufficient. *Prince Edward Election (Ont.)*.—*Anderson v. Striker*, H. E. C. 45. See next case.

A petitioner in an election petition who has been guilty of corrupt practices at the election complained of, does not thereby lose his status as a petitioner. *Dufferin Election (Ont.)*.—*Slightholm v. Barr*, H. E. C. 529; 4 A. R. 420.

Except where there are recriminatory charges against the unsuccessful candidate, or for the purpose of declaring the petitioner's vote void on a scrutiny, the conduct of a petitioner at an election cannot be inquired into. And in this case there is no distinction between a candidate-petitioner, and a voter-petitioner. *Ib.*

Seemingly, that if the petitioner in this case was proved at the trial of the election petition to have been guilty of corrupt practices at the election complained of, the petition could not be dismissed. *Ib.*

A candidate may be a petitioner although his property qualification be defective, if it was not demanded of him at the time of his election. If he claims the seat, his want of qualification may be urged against his being seated, but he may still shew that the respondent was not duly elected, if he so charge in his petition. *North Victoria Election (Dom.)*.—*Cameron v. Maclean*, H. E. C. 584.—Richards.—Spragge.—Hagarty.

A duly qualified voter is not disqualified from being a petitioner on the ground that he has been guilty of bribery, treating or undue influence, during the election. *North Simcoe Election (Dom.)*.—*Edwards v. Cook*, H. E. C. 617.—Richards.—Spragge.—Hagarty.

Disqualifications from corrupt practices on the part of a voter or candidate arise after he has been found guilty, there is no relation back. *Ib.*

In order to disqualify the petitioner acting as such, the respondent offered to prove (1) that the petitioner had been reported by the judge trying a former election petition as guilty of corrupt practices. (2) That the petitioner had in fact been guilty of corrupt practices at such election; and (3) that he had been guilty of corrupt practices at the election in question.—Held, that, such evidence, if offered, would not disqualify the petitioner as such. *Cornwall Election (3) (Dom.)*.—*Mackman v. Beryin*, H. E. C. 803.—Armour.

Held, that as the petitioner did not on the petition claim the seat, evidence could not be gone into for the purpose of personally disqualifying him. *Ib.*

See *Peel Election (Ont.)*.—*Hurst v. Chisholm*, H. E. C. 485, p. 1517; *Megantic Election (Dom.)*.—

*Frechette v. Goulet*, 8 S. C. R. 169, p. 1509; *Megantic Election (Dom.)*.—*Côté v. Goulet*, 9 S. C. R. 279, p. 1516.

#### (b) Making Agent a Party.

The petition, besides charging the respondent with various corrupt acts, charged one of his agents with similar acts, and claimed that the agent was subject to the same disqualifications and penalties as a candidate. The prayer of the petition asked that this agent might be made a party to the petition, and that he might be subjected to such disqualifications and penalties.—Held, (1) That there is no authority in the Election Act or elsewhere, for making an agent of a candidate a respondent in a petition on a charge of personal misconduct on his part. (2) There is no authority given to the election court or the judge on the rota to subject a person "other than a candidate," to such disqualifications. *South Oxford Election (Ont.)*.—*Hopkins v. Oliver*, H. E. C. 238.—Draper.

#### (c) Form of.

An allegation in the petition "that the respondent was by himself, etc., guilty of corrupt practices as defined by the Controverted Elections Act of Ontario" sufficiently charges the commission of corrupt practices under sections 152 and 153 of the Election Act, R. S. O. (1877) c. 10. *North Ontario Election (Ont.)*.—*Trelacaven v. Gould*, 1 E. C. 1.—Burton.—Osler.

The petitioner, in his particulars delivered herein, charged the respondent with giving or causing to be given meat, drink, and refreshment to voters on polling day on account of their having voted or being about to vote, being a corrupt practice under R. S. O. (1877) c. 10, s. 153. The petition itself, however, merely charged that the respondent "before, during, at, and after the said election, was by his agents and by other persons on his behalf guilty of corrupt practices as defined by the Controverted Elections Act of Ontario, R. S. O. (1877) c. 11, s. 2:—Held, at the trial, that this form of petition was objectionable, being hardly reconcilable with the intention of the legislature in requiring petitioners to file an affidavit with the petition stating that they have reason to believe and do believe the statements contained in the petition to be true in substance and in fact, and, moreover, the charge being only by reference to a statute, the affidavit in such case could only be intelligently and honestly made by one who had informed himself of the provisions of the statute and applied to them some definite construction, and in any event the deponent would only be swearing to his own construction of the statute, without stating what that construction was:—Held, further, that inasmuch as "corrupt practices," so far as defined at all by R. S. O. (1877) c. 11, were declared to mean "bribery, treating and undue influence, or any of such offences, as defined by this or any other Act of the legislature, or recognized by the common law of the Parliament of England," and also the violation of certain specific sections of R. S. O. (1877) c. 10, among which section 153 was not included, and inasmuch as acts prohibited by section 153 were clearly not corrupt practices under the common

law of Parliament, nor is there any definition of "treating" in any of the Acts of our legislature, and therefore nothing to show that it covers offences under section 153, and therefore inasmuch as there might be extended upon the face of the petition every offence covered by the description or definition of corrupt practices contained in the Controverted Elections' Act of Ontario, and yet there would not be amongst them any charge under section 153; therefore, the petitioner could not succeed in avoiding the election upon any charge under section 153, as he sought to do here, unless allowed to add it by way of amendment to his petition. On the cross-appeal of the petitioner on this point no judgment was given, the disposition of the respondent's appeal rendering it unnecessary to do so:—Held, further at the trial, that such amendment could not be allowed, for R. S. O. (1877) c. 11, s. 9, sufficiently shews that the court has no jurisdiction to allow such an amendment notwithstanding section 2, sub-section 1, and section 43, of that Act, as does also the requirement of an affidavit under section 11. *Mande v. Lowley*, L. R. 9 C. P. 165, followed; *Re Monck Election*, H. E. C. 154, 32 Q. B. 147, distinguished. *West Simcoe Election (Ont.)—Bedford v. Phelps*, 1 E. C. 128.—*Patterson—Ferguson*.—C. of A.

The 6th general rule in election cases does not preclude the statement of evidence in the petition, it renders it unnecessary, and is intended to discourage such pleading. *South Oxford Election (Ont.)—Hopkins v. Oliver*, H. E. C. 238.—*Draper*.

An election petition need not shew the time at which the return of the respondent was published in the Gazette. *In re Russell Election (Dom.)—Henderson v. Dickenson*, 1 O. R. 4:9.—*Cameron*.

See *Lincoln Election* (21) (Ont.)—*Pauling v. Rykert*, H. E. C. 489, p. 1511.

#### (d) Filing.

Held, that under 37 Vict. c. 10 (Dom.) the filing of an election petition in the local registrar's office at L. Original was not a presentation of the petition within the requirements of the statute, which requires the filing to be at the head office, and that no amendment could be made to validate such petition. *In re Prescott Election (Ont.)*, 9 P. R. 481.—*Hagarty*.

Time for filing cross petition. See *Montmorency Election (Dom.)—Vulin v. Lanfrais*, 3 S. C. R. 90, p. 1513.

#### (e) Service.

An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that the respondent was at Ottawa, is a proper order for the judge to make in the exercise of his discretion under section 10 of R. S. C. cap. 94.—*Semble*, per Ritchie, C. J., and Henry, J., that the court below had power to make rules for the service of an election petition out of the jurisdiction. *Shelburne Election (Dom.)—Robertson v. Lawrie*, 14 S. C. R. 258.

The service of an election petition made in the Province of Quebec, at the defendant's law office, situated on the ground floor of his residence and having a separate entrance, by delivering a copy thereof to the defendant's law partner who was not a member of, nor resident with, the defendant's family is not a service within section 11, chapter 9 R. S. C., and article 57 C. C. P. and a preliminary objection setting up such defective service was maintained and the election petition dismissed. (*Gwynne, J.*, dissenting.) *Montmagny Election Case (Dom.)*, *Choquette v. Laberge*, 15 S. C. R. 1.

There is no power in the court or a judge under section 10 of the Dominion Controverted Elections' Act (R. S. C. chapter 9), to make an order within the first five days after an election petition is filed allowing service of such petition in any manner other than that intended by the final part of the section. But where under an order made within the five days a petition was directed to be served, among other modes, upon the wife of the respondent at his domicile at the village of D. :—Held, that as service on the respondent "either personally, or at his domicile," was good service, within the meaning of the section no order was necessary, and the fact that the service in this case was made under an order did not make it any the less a good service. *Haldimand Election (Dom.)—Walsh v. Montague*, 1 E. C. 480.—*Armour—Street*.

#### (f) Amendment of.

The judge trying an election petition has power to amend the petition by allowing the insertion of any objection to the voters' list used at the election. *Monck Election (Ont.)—Collins v. McArthur*, H. E. C. 154.—*Galt*.

On a preliminary objection to a petition claiming the seat on a scrutiny, the court declined to strike out a clause in the petition which claimed that the votes of persons guilty of bribery, treating and undue influence, should be struck off the poll. *North Victoria Election (Dom.)—Cameron v. MacLennan*, H. E. C. 584.—*Richards—Spragge—Hagarty*.

See *West Simcoe Election (Ont.)—Bedford v. Phelps*, 1 E. C. 128, p. 1507; *Hamilton Election (Ont.)—Patterson v. Stinson*, 1 E. C. 499, p. 1493.

#### (g) Preliminary Objections.

As the Ontario Act, R. S. O. (1877), c. 11, makes no provision similar to that in the Dominion Controverted Elections' Act, 1874, (37 Vict. c. 10), limiting the time within which preliminary objections to an election petition should be taken, the special circumstances of each case must determine whether the preliminary objections have been taken with sufficient promptitude. *Dufferin Election (Ont.)—Sleightholm v. Barr*, H. E. C. 529; 4 A. R. 420.—*Moss*.

An objection to the status of a petitioner cannot be taken by preliminary objection. *Dufferin Election (Ont.)—Sleightholm v. Barr*, H. E. C. 529; 4 A. R. 420.

A charge that the petition was not signed by the petitioner *bonâ fide*, but that his name was

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nary objection. *North Simcoe Election (Dom.)*—  
*Edwards v. Cook, H. E. C. 617.*—Richards—  
Spragge—Hagarty.

Preliminary objections to an election petition  
under 37 Vict. c. 10, Dom., though presented  
after the expiration of five days from the service  
of the petition, are not void but at most irregu-  
lar, and while they remain on the files of the  
court the petition is not at issue, and there can  
be no examination of the parties. *Re Bothwell*  
*Election Petition (Dom.)*—9 P. R. 485.—Osler.

The election petition in this case complained  
of the return of the respondent as member elect  
for the county of Algantic, (P. Q.) for the  
House of Commons. The petition was met by  
preliminary objections, in which the sitting  
member alleged, inter alia, that the petitioners  
were :—electors, nor qualified to vote at the  
election in question, etc. A day having been  
fixed for the hearing of these preliminary objec-  
tions, no evidence was given upon them, and  
they were dismissed by Plunkton, J., who  
held, following the practice adopted by the  
Superior Court of Quebec, sitting as an election  
court in the *Mistake* case, Duval v. Casgrain, 10  
L. C. Jur. 16, that the onus probandi was on  
the respondent to support such objections. On  
appeal to the Supreme Court of Canada, Four-  
mar, Henry and Gwynne, JJ., were of opinion  
that the onus probandi was on the appellant,  
who by his preliminary objections had affirmed  
the disqualification of the petitioner. Contra,  
Richie, C. J., and Strong and Taschereau, JJ.  
The court being equally divided, the judgment  
of the court below stood affirmed with costs.  
*Megantic Election (Dom.)*—Fréchette v. Goulet,  
88 C. R. 169.

Per Strong, J.—An extremely strong case should  
be shown to induce the court to allow an appeal  
from the judgment of the court below on preli-  
minary objections. *Shelburne Election (Dom.)*  
—Robertson v. Laurie, 14 S. C. R. 258.

See *Re North York Election (Dom.)*—8 P. R.  
528, p. 1511; *Re North York Election (Dom.)*—  
*Peterson v. Mulock*, 32 C. P. 458, p. 1504; *In re*  
*West Huron Election (Dom.)*—*Mitchell v. Cam-  
eron*, 1 O. R. 433; 8 S. C. R. 125, p. 1504.

### 3. Security.

A Dominion note for \$1,000 was offered as  
security in this case to the registrar of the Court  
of Chancery, who stated to the petitioner's solici-  
tors that he could not receive it, but directed  
them to make payment of it through the ac-  
countant of the court in the same manner as  
moneys were usually paid into court. The  
solicitors then paid the money into the bank to  
the credit of the matter of the petition accord-  
ing to the usual practice of the Court of Chan-  
cery;—Held, that the deposit of the security,  
as required by the Act, 37 Vict. c. 10 (Dom.),  
was properly given. *North York Election (Dom.)*  
—*Ther v. Strange*, H. E. C. 749.—Blake.

The deposit of \$1,000 was given to the clerk  
at the time of the presenting the petition, but it  
was afterwards paid into a bank under the direc-  
tion of the accountant of the Supreme Court:—

Held, that having been properly paid to the  
clerk, the subsequent disposition of it could not  
affect the petitioner. *In re Russell Election*  
(Dom.)—*Henderson v. Dickenson*, 1 O. R. 439.—  
Cameron.

### 4. Particulars.

#### (a) Generally.

When the petition claimed the seat for the  
unsuccessful candidate on the grounds that (1)  
illegal votes and (2) improperly marked ballots  
were received in favour of the successful candi-  
date; that (3) good votes and (4) properly mark-  
ed ballots for the unsuccessful candidate were  
improperly refused; and that (5) the successful  
candidate and his agents were guilty of corrupt  
practices, and particulars of all such votes and  
ballots and corrupt practices were asked from  
the petitioner:—Held, (1) As to the illegal votes,  
that the 7th general rule prescribed the particu-  
lars of objected votes to be given, and the time  
of filing and delivering the same, and a special  
order was not therefore necessary. (2) As to the  
improperly marked ballots and improperly re-  
jected ballots, the petitioner not having informa-  
tion respecting them, could not be ordered to  
deliver particulars of the same. (3) Particulars  
were ordered of the names, addresses, abode and  
addition of persons having good votes, whose  
votes were improperly rejected at the polls; and  
particulars of the corrupt practices charged by  
the petitioner against the respondent, and his  
agents. *Beal v. Smith*, L. R. 4 C. P. 145 (West-  
minster case), followed. *West Elgin Election*  
(Ont.)—*Casaden v. Munroe*, H. E. C. 223.—  
Draper.

Where particulars were delivered after the  
time limited by the order for particulars, and  
not returned, an application made at the trial to  
set them aside was refused, such application  
should have been made in chambers before the  
trial. *North Victoria Election (Ont.)*—*McRae*  
*v. Smith*, H. E. C. 252.—Draper.

Particulars of recriminatory charges. See *S.*  
*C. Ib.*, p. 1512.

The particulars not having been properly pre-  
pared, the petitioner, while obtaining the costs of  
the proceedings, was disallowed the costs of the  
particulars. *East Northumberland Election (Dom.)*  
—*Gibson v. Biggar*, H. E. C. 577.—Hagarty.

See *South Ontario Election (Ont.)*—*Farwell v.*  
*Brown*, H. E. C. 420, p. 1524; *South Wentworth*  
*Election (Ont.)*—*Olmstead v. Carpenter*, H. E. C.  
531, p. 1427; *West Simcoe Election (Ont.)*—*Bed-  
ford v. Phelps*, 1 E. C. 128, p. 1507.

#### (b) Amendment of.

Where a question is raised as to the sufficiency  
of the notice of objection to voters, the judge  
may amend the particulars; giving time to the  
party affected by the amendment to make in-  
quiries. *Stormont Election (Ont.)*—*Bethune v.*  
*Colquhoun*, H. E. C. 21.—Richards.

At the trial of the petition, an amendment of  
the particulars as to corrupt practices will be  
allowed; and if the respondent is prejudiced by  
the surprise, terms may be imposed. *Welland*  
*Election (Ont.)*—*Beatty v. Currie*, H. E. C. 47.—  
Strong.



The respondent was elected by a majority of twenty-three, and on the trial of an election petition, filed to set aside his election for corrupt practices and illegal votes, evidence was given by both sides on a charge not properly set out in the petitioners' particulars of corrupt practices. At the close of the evidence the respondent objected that the charge was not in the particulars, and that it was not verified by the affidavit of the petitioners:—Held, (1) That the petitioners might amend their particulars, and that the charges in the petition were wide enough to cover the charge. (2) That as to this charge, the parties had in fact gone into evidence without particulars, and that the petitioners' affidavit verifying the particulars was not necessary. *Lincoln Election (2) (Ont.)—Pauling v. Rykert, H. E. C. 489.—Blake.*

On an application by the petitioner to amend the particulars by adding charges of bribery against the respondent personally, and his agents, his attorney made affidavit that different persons had been employed to collect information; that the new particulars only came to his knowledge three days before the application; and that he believed they were material to the issues joined:—Held, that as it was not shewn that the petitioner or the persons employed could not have given the attorney the information long prior to the application, and as it was not sworn that the charges were believed to be true, nor were they otherwise confirmed, and as the amendment might have been moved for earlier, the application should be refused. *South Norfolk Election (Dom.)—Decow v. Wallace, H. E. C. 660.—Draper.*

The evidence in support of the offer of a present, or something nice, to the wife of a voter to induce the voter to refrain from voting shewing that it had reference to a different election than the one in question, an amendment of the particulars was refused and the charge dismissed. *Halton Election (Dom.)—Cross v. McCraney, H. E. C. 736.—C. of A.*

See *North Victoria Election (Ont.)—McRae v. Smith, H. E. C. 252, p. 1488; South Victoria Election (Ont.)—Rodden v. McIntyre, 1 E. C. at p. 195.*

#### 5. Respondent's Answer.

Where a respondent had filed certain preliminary objections to the petition, which were overruled, he was not allowed to insert similar objections in his answer, and the clause containing them was struck out. *Re North Oxford Election (Dom.) 8 P. R. 526.—Hagarty.*

The respondent cannot, in his answer, set up that the petitioner was by himself and his agent, guilty of corrupt practices, whereby he became disqualified to be a candidate. *Ib.*

The court or a judge has power on a summary application to strike out any allegations in an answer which are not an answer in law, and might be embarrassing at the trial to the petitioner. *Ib.*

#### 6. Recriminatory Charges.

Where a charge of corrupt practices by way of a recriminatory case is alleged by a respon-

dent against a petitioner, it may be reserved until the conclusion of the petitioner's case. *North Simcoe Election (Ont.)—Simmons v. Ardagh, H. E. C. 50.—Strong.*

Recriminatory charges are permitted in the interest of electors, in order to prevent a successful petitioner obtaining the vacated seat if he has violated any provision of the election law. *North Victoria Election (Ont.)—Mellae v. Smith, H. E. C. 252.—Draper.*

Particulars of recriminatory charges delivered were allowed, but the petitioner was allowed to apply for time to answer the charges therein and was given such costs as had been occasioned by the granting of the application. *Ib.*

J., the appellant, claimed under 37 Vict. c. 10, s. 66 (Dom.), that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, and filed no counter petition, and did not otherwise comply with the provisions of 37 Vict. c. 10:—Held, that section 66 only applies to cases of recriminatory charges and not to a case where neither of the parties or their agents are charged with doing any wrongful act. *Queen's County Election (Dom.)—Jenkins v. Brecken, 7 S. C. R. 247.*

In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against the defeated candidate, and the trial judge, after having found that the election of the sitting member should be set aside for corrupt practices, fixed a day for the evidence upon the recriminatory charges. Thereupon the petitioners withdrew the claim to the seat and the judge gave judgment avoiding the election:—Held, that section 42 of chapter 9 R. S. C. no longer applied and the judge was right in refusing to proceed upon the recriminatory charges. *Per Gwynne, J.*—That it would have been competent for the trial judge to have received evidence on the recriminatory charges but his refusal to do so was not a sufficient ground for reversing the judgment avoiding the election. *Joliette Election Case (Dom.)—Gulbault v. Dessert, 15 S. C. R. 458.*

#### 7. Cross Petition.

In a Dominion Controverted Election case, a sitting member can file a cross petition only against a candidate who is not a petitioner. *Re North Oxford Election (Dom.), 8 P. R. 526.—Hagarty.*

V. (the appellant), the sitting member, against whom an election petition had been filed by L. (the respondent) an unsuccessful candidate, presented a cross-petition under the eighth section sub-section 2 of the Dominion Controverted Elections' Act, 1874, alleging that L. was guilty, as well by himself as by his agents, with his knowledge and consent, of corrupt practices at the said election. This cross-petition was not filed within thirty days after the publication in the Canada Gazette of the return to the writ of election by the Clerk of the Crown in Chancery, but within the delay mentioned in the last part of said sub-section 2 section 8, viz.: fifteen days after the service of the petition upon V. com-

it may be reserved  
the petitioner's case.  
(*Sissons v. Ardayh*,

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neither of the parties or  
with doing any wrong.  
*Election (Dom.)—Jen-*  
*r. 247.*

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J.—That it would have  
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Petition.

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section 8, viz.: fifteen days  
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plaining of his election and return. The cross-  
petition was met by a preliminary objection,  
maintained by Meredith, C. J., alleging that it  
was filed too late:—Held, on appeal, that the  
sitting member cannot file a cross-petition, with-  
in the delay of fifteen days mentioned in the last  
part of said sub-section 2 of section 8, against a  
person who was a candidate and is a petitioner.  
Per Fournier, Taschereau, and Gwynne, JJ., that  
the said extra delay of fifteen days is given only  
when a petition has been filed against the sitting  
member, alleging corrupt practices after the re-  
turn. (Henry J., dissenting). *Montmorency Elec-*  
*tion (Dom.)—Valin v. Langlois*, 3 S. C. R. 90.

#### 8. Time for Trial.

An order may be made extending the time for  
the trial of an election petition under 38 Vict.  
c. 10, s. 2 (*Dom.*), notwithstanding that six  
months have elapsed since the presentation of  
the petition, and though the application for such  
extension is not made within the six months.  
*Re West Middlesex Election (Ont.)—Walker v.*  
*Ross*, 10 P. R. 27.—*Armour.*

Semble, if the trial be not commenced within  
the six months the respondent should move to  
dismiss the petition. *Ib.*

Held, that the decision of a judge at the  
trial of an election petition overruling an  
objection taken by respondent to the jurisdic-  
tion of the judge to go on with the trial on the  
ground that more than six months had elapsed  
since the date of the presentation of the peti-  
tion, is appealable to the Supreme Court of  
Canada under section 50 (b), R. S. C., c. 9,  
Gwynne, J., dissenting. *Glenarry Election*  
(*Dom.*)—*Parcell v. Kennedy*, 14 S. C. R. 453.

In computing the time within which the trial  
of an election petition shall be commenced the  
time of a session of parliament shall not be ex-  
cluded unless the court or judge has ordered that  
the respondent's presence at the trial is neces-  
sary. (Gwynne, J., dissenting.) *Ib.*

The time within which the trial of an election  
petition must be commenced cannot be enlarged  
beyond the six months from the presentation of  
the petition, unless an order has been obtained on  
application made within said six months. An  
order granted on an application made after ex-  
piration of the said six months is an invalid order  
and can give no jurisdiction to try the merits of  
the petition which is then out of court. (Ritchie,  
C. J., and Gwynne, J., dissenting.) *Ib.*

The time for the commencement of the trial  
may be enlarged under section 33, R. S. C. c. 9,  
notwithstanding the expiration of the six months;  
but it had not been established in this case that  
the requirements of justice rendered such enlarge-  
ment necessary; and the court refused to appoint  
a time and place for trial or to enlarge the time.  
*Algoma Election (Dom.)—Burk v. Dawson*, 1 E.  
C. 448.—C. of A.

An order in a controverted election case made  
by the court below or a judge thereof not sitting  
at the time for the trial of the petition, and  
granting or rejecting an application to dismiss  
the petition on the ground that the trial had not  
been commenced within six months from the

time of its presentation, is not an order from  
which an appeal will lie to the Supreme Court  
of Canada under section 50 of R. S. C. c. 9.  
Fournier and Henry, JJ., dissenting. *L'As-*  
*somption Election (Dom.)*, *Gauthier v. Norman-*  
*deau*; *Quebec County Election—O'Brien v. Caron*,  
14 S. C. R. 429.

Where the proceedings for the commence-  
ment of the trial have been stayed during a  
session of parliament by an order of a judge,  
and a day has been fixed for the trial within the  
statutory period of six months as so extended,  
on which day the petitioners proceeded with  
their enquête and examined two witnesses after  
which the hearing was adjourned to a day be-  
yond the statutory period as so extended to  
allow the petitioners to file another bill of par-  
ticulars, those already filed being declared insuffi-  
cient:—Held, there was a sufficient commence-  
ment of the trial within the proper time and  
the future proceedings were valid under sec-  
tion 32 R. S. C. c. 9. *Joliette Election Case*  
(*Dom.*)—*Guilbault v. Dessert*, 15 S. C. R. 458.

The petition was presented on the 6th May,  
1887, during a session of parliament which ended  
on 23rd June, and issue was joined on 3rd  
June; no application was made or steps taken  
after that until the 6th December, 1887, when  
the petitioner applied to have a time and place  
appointed for trial and to have the time for the  
commencement of the trial enlarged. The first  
part of section 32 of the Controverted Elections'  
Act, R. S. C. c. 9, is as follows: "The trial of  
each election petition shall be commenced within  
six months from the time when such petition has  
been presented and shall be proceeded with from  
day to day until such trial is over; but if at any  
time it appears to the court or judge that the  
respondent's presence at the trial is necessary,  
such trial shall not be commenced during any  
session of parliament; and in computation  
of any time or delay allowed for any steps or  
proceeding in respect of any such trial, or for  
commencement thereof as aforesaid, the time  
occupied by such session of parliament shall not  
be included":—Held, Patterson, J. A., dis-  
senting, that the exception in the last clause is  
confined to a case in which the court is satisfied  
that the respondent's presence is necessary;  
"such trial" refers to a trial at which the re-  
spondent's presence has been declared to be  
necessary; and no such declaration having been  
made in this case, the time of the session of par-  
liament was not to be excluded from the six  
months within which the trial was to be com-  
menced. It was not incumbent upon the respon-  
dent to move to dismiss the petition for default.  
The court could not nunc pro tunc declare that  
the respondent's presence at the trial was nec-  
essary. *Algoma Election (Dom.)—Burk v. Daw-*  
*son*, 1 E. C. 448.—C. of A.

Held, that an order fixing the time for the trial  
of the petition in this case might be made by the  
three judges of a Divisional Court, sitting to-  
gether, or by any one of them sitting alone, and  
that it was in their discretion to dispense with  
notice of the application under the circumstances  
in this case. Semble, a judge making such an  
order need not necessarily be sitting formally in  
single court. *Haldimand Election (Dom.)—*  
*Walsh v. Montague*, 1 E. C. 480.—*Armour-*  
*Street.*

## 9. Evidence.

## (a) Admissions.

*Of Counsel.*—The admission of counsel in open court—that the giving of \$2 to a voter by an agent of the respondent, after such voter had voted, such voter admitting that he did not know why the \$2 was given to him, was bribery—acted upon, and the election avoided. *Carlton Election (Ont.)*—*Lyon v. Monk*, H. E. C. 6.—*Mowat*.

A voter who had been frequently fined for drunkenness was canvassed by C. to vote for the respondent, and was asked by him "how much of that money" (paid in fines) "he would take back and leave town until the election was over." Counsel for the respondent admitted that C. was an agent of the respondent, and that the evidence was sufficient to avoid the election:—Held, that the election was void on account of corrupt practices by an agent of the respondent. *Cornwall Election (Ont.)*—*Suetzinger v. McIntyre*, H. E. C. 203.—*Spragge*.

On the admission of the respondent's counsel the election was avoided, on the ground that agents of the respondent had, during the election hired and paid for teams to convey voters to the polls. *Prince Edward Election (Ont.)*—*Anderson v. Striker*, H. E. C. 45.—*Richards*.

The respondent was elected by a majority of 261, and at the trial counsel for the respondent admitted that there was evidence capable of being produced which would have the effect of avoiding the election under R. S. O. (1877) c. 10, s. 159; and the court on such admission declared the election void. *Dufferin Election (Ont.)*—*Sleightholm v. Barr*, H. E. C. 530.—*Moss*.—*Armour*.

See *Russell Election (Ont.)*—*Ogilvie v. Baker*, H. E. C. 199, p. 1487.

*Other Admission.*—Evidence of admissions made by an agent after his agency has expired, is inadmissible. *West Peterborough Election (Ont.)*—*Scott v. Cox*, H. E. C. 274.

The respondent, a week before the trial, served a notice on the petitioner admitting bribery by one of his agents, and notifying the petitioner not to incur further costs. At the trial the respondent, pursuant to the notice, gave evidence of bribery by an agent, which the court held sufficient to avoid the election. The petitioner then contended that he had a right to shew that corrupt practices had extensively prevailed, and that the respondent had been personally guilty of corrupt practices:—Held, that the functions of the court were judicial and not inquisitorial, and that no further evidence should be received on the issue as to the avoidance of the election on account of bribery by agents. But if incidentally it should appear, in the inquiry as to the personal charges against the respondent, that corrupt practices extensively prevailed, the same would be certified in the report to the speaker. *West Northumberland Election (Ont.)*—*Burnham v. Kerr*, H. E. C. 562.—*Spragge*.

Before the trial the respondent served a notice upon the petitioner, admitting that the election must be avoided on the ground of bribery

by an agent without his knowledge or consent, such admission was acted upon at the trial, and the election avoided accordingly. *North Simcoe Election (Dom.)*—*Edwards v. Cook*, H. E. C. 624.—*Gwynne*.

See *South Renfrew Election (Dom.)*—*Bannerman v. McDougall*, H. E. C. 556, p. 1520.

## (b) Other Cases.

The court ordered the agent of a telegraph company to produce all telegrams sent by the respondent and his alleged agent during the election reserving to the respondent the right to move the Court of Appeal on the point; the responsibility as to consequences, if it were wrong so to order, to rest on the petitioner. *South Oxford Election (Ont.)*—*Hopkins v. Oliver*, H. E. C. 243.—*Draper*.

A witness called on a charge in the particulars of giving spirituous liquors in a certain tavern on polling day, during polling hours, cannot be asked if he got liquor during polling hours in other taverns. *Id.*

The attorney for the respondent may be ordered out of court when a witness is being examined on a charge of a corrupt bargain for his withdrawal from the election contest, when the evidence of such witness may refer to the sayings and doings of such attorney in respect of such withdrawal. *Id.*

Held, that the writ of election and return need not be produced or proved before any evidence of the election is given. *Stormont Election (Ont.)*—*Bethune v. Colquhoun*, H. E. C. 21.—*Richards*.

Where in ordinary cases there is evidence to go to a jury, but on which the judge, if sitting as a juror, would find for the defendant; in similar cases in election trials he ought to find against the charge of bribery. *West Toronto Election (Ont.)*—*Armstrong v. Crooks*, H. E. C. 97.—*Richards*.

At the trial of the petition, the returning officer, who was also the registrar of the county of Megantic, and secretary of the municipality of Inverness, was called as a witness, and produced in court in his official capacity the original list of electors for the township of Inverness, and proved that the name L. McM., one of the petitioners whom he personally knew, was on the list. The original document was retained by the witness, and as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way:—Held, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 37 Vict. c. 10, s. 7 (Dom.) *Megantic Election (Dom.)*—*Côté v. Goulet*, 9 S. C. R. 279.

The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him:—Held, that the notes of evidence could not be objected to. *Id.*

A candidate when examined as a witness at an election trial, may be asked his expenditure at former provincial and dominion elections at which he was a candidate. *North Simcoe Elec-*

knowledge or consent, upon at the trial, and duly. *North Simcoe* v. Cook, H. E. C.

on (Dom.).—*Banner*. 556, p. 1520.

*Danes*.

agent of a telegraph, telegrams sent by the agent during the respondent the right to on the point; the referees, if it were wrong petitioner. *South Ontario* v. Oliver, H. E.

large in the particulars in a certain tavern during hours, cannot be during polling hours in

respondent may be on a witness is being a corrupt bargain for election contest, when mess may refer to the attorney in respect

election and return need before any evidence *Stormont Election* (Ont.) H. E. C. 21.—Richards.

es there is evidence to the judge, if sitting for the defendant; in trials he ought to find bribery. *West Toronto* v. Crooks, H. E. C.

petition, the returning-registrar of the county as a witness, and provincial capacity the original township of Inverness, E. Le McM., one of the personally knew, was on document was retained either of the parties could be filed, the judge defect. The status of the moved in the same way: sufficient evidence that persons who had a right to which the petition related s. 7 (Dom.) *Megantic* Goulet, 9 S. C. R. 279.

of the shorthand writer to take down the evidence in his handwriting, Held, that the notes objected to. *Ib*.

examined as a witness at asked his expenditure and dominion elections at ate. *North Simcoe Elec-*

tion (Dom.).—*Edwards v. Cook*, H. E. C. 624.—Gwynne.

A commission to examine witnesses in a foreign country may be issued in the case of the trial of an election petition. *Cornwall Election* (3) (Dom.).—*MacLennan v. Bergin*, H. E. C. 803; 8 P. R. 64.—Armour.

Allegation, that forty persons whose names were not on the voters' list and who were not entitled by law to vote, did vote and voted for the respondent. Objection, that the matters alleged were not available, because the seat was not claimed for the defeated candidate, and because it could be shown that the forty votes were cast for the respondent:—Held, though this objection came within the *East Elgin* Case, 4 A. R. 412, there appeared to be too much doubt about the question to strike out the allegation; for, semble, that a person who has voted without a right to do so is not entitled to the protection of the statute as to secret voting, and that an elector should not be prevented from shewing that the elected member obtained his majority through bad votes. *In re West Huron Election* (Dom.).—*Mitchell v. Cameron*, 1 O. R. 433.—Cameron.

Evidence to establish preliminary objections. See *Megantic Election* (Dom.).—*Frchette v. Goulet*, 8 S. C. R. 169.

Of bribery and corrupt practices. See Sub-head VII. 2, p. 1450.

See *West Northumberland Election* (Dom.).—*Burham v. Kerr*, H. E. C. 562, p. 1515; *East Middlesex Election* (Ont.).—*Rhoder v. McKenzie*, 1 E. C. 250, p. 1485.

#### 10. Withdrawal of Charge or Petition.

The court recommended the petitioner to withdraw his petition in this case; and on an application for that purpose, another elector having applied to be substituted as a petitioner:—Held, per Burton, J. A., that as the Court of Appeal had been placed in possession of all the charges against the respondent, and of the evidence in support of them, and had recommended the withdrawal of the petition, and no sufficient additional grounds having been shewn for such substitution of petitioner, the order for the withdrawal of the petition should be granted. *Peel Election* (Ont.).—*Hurst v. Chisholm*, H. E. C. 485.

Seemble, if evidence shewed that corrupt practices had been committed by a respondent, it would be the duty of the court so to adjudicate whether the petitioner was willing to withdraw the charge or not. *South Renfrew Election* (Dom.).—*Bannerman v. McDougall*, H. E. C. 556.—Spragge.

#### 11. Reserving Special Case.

A special case may be reserved for the opinion of the Court of Queen's Bench only when the judge presiding at the election trial has a serious doubt as to what the law is; or believes that the court might entertain a different opinion from that of the election judge. *North York Election* (Ont.).—*Gorham v. Boulbee*, H. E. C. 62.—Galt.

Quare, whether, under 34 Vict. c. 3, s. 20, the rota judge has power, before the close of the case to reserve questions for the court. *Brookville Election* (Ont.).—*Flint v. Fitzsimmons*, 1 H. E. C. 139.—Q. B.

Where a class of persons affected by the decision of a case is numerous, and the question involved is one of general importance, the judge may reserve a special case for the opinion of the Court of Queen's Bench and the judge here decided to take that course. The petitioner, after such special case had been reserved, appeared before the judge trying the election petition, and consented to abandonment of the special case and the dismissal of the petition, with costs, and it was so ordered. *West York Election* (Ont.).—*Grahame v. Patterson*, H. E. C. 156.—Hagarty.

See *Monck Election* (Ont.).—*Colliar v. McCullum*, H. E. C. 154, p. 1519.

#### 12. Costs.

The petition was dismissed, but owing to the unwise and imprudent acts of the respondent, he was allowed only one half of the taxable costs. *Glenarry Election* (Ont.).—*McLennan v. Craig*, H. E. C. 8.—Hagarty.

Where bribery by an agent is proved, costs follow the event, even though personal charges made against the respondent have not been proved, there having been no additional expense occasioned to the respondent by such personal charges. *South Grey Election* (Dom.).—*Hunter v. Lauder*, H. E. C. 52.—Mowat.

The petitioner having been warranted in continuing the enquiry as to the personal complicity of the respondent with the illegal acts of his agents, was held entitled to the full costs of the trial. *Kingston Election* (Dom.).—*Stewart v. Macdonald*, H. E. C. 625.—Richards.

There being no grounds for charging the respondent personally with corrupt practices, and the scrutiny having been abandoned, the costs of those parts of the case were ordered to be paid by the petitioner. But with respect to the other costs, though the respondent was successful, the matters were proper to be inquired into in the public interest, and each party was left to pay his own costs. *East Toronto Election* (Ont.).—*Renwick v. Cameron*, H. E. C. 70.—Richards.

The election was sustained, but it being in the public interest that the matters brought forward should have been inquired into, and as the respondent had not exercised supervision over the expenditure in connection with the election, the petition was dismissed without costs. *West Toronto Election* (Ont.).—*Armstrong v. Crooks*, H. E. C. 97.—Richards.

When the judge reserved a special case for the Queen's Bench as to his power to amend the petition at the trial by allowing the insertion of an objection to a voters' list used at the election and the Court of Queen's Bench held that the judge had power so to amend the petition and on the reassembling of the Election Court the petitioners abandoned the scrutiny. The petitioners were ordered to pay the costs of the respondent up to the meeting of the Election.

Court, and the costs of the special case; but as to the costs of the trial, each party was ordered to pay his own costs. *Monck Election (Out.)—Collier v. McCallum*, H. E. C. 154.—Galt.

The costs of investigating charges of bribery against the respondent's election agent, though not established, were awarded against the respondent, owing to the equivocal conduct of his agent in the matters which led to the charges; also the cost of other charges of bribery which were not established, and the costs of proving that several tavern-keepers, for their own profit, had violated section 66 of the Election Law of 1868, as the witnesses who gave evidence of these matters also gave evidence of other matters, as to which it was reasonable they should be subpoenaed. *West Wellington Election (Out.)—Moore v. McIlwain*, H. E. C. 231.

The petitioner was declared entitled to the general costs of the inquiry, and the costs of the evidence incurred in proof of the facts upon which the election was avoided; but the costs incurred in respect of charges which the petitioner failed to prove were disallowed. *South Essex Election (Out.)—McGee v. Wyle*, H. E. C. 235.—Spragge.

During the progress of a scrutiny of votes, certain ballot papers, counterfoils, and a voters' list were stolen from the court, which had the effect of rendering the proceedings in the scrutiny useless. And in disposing of the costs the court ordered the respondent to pay the costs up to the date the election was avoided, but that, under the circumstances, each party must bear his own costs of the scrutiny. *Lincoln Election (2) (Out.)—Pawling v. Rykert*, H. E. C. 480.—Patterson.—Blake.

When the petition has been rendered necessary by the mistakes of the deputy returning officers, for which neither the petitioner nor respondent was responsible.—Held, each party should bear his own costs. *Russell Election (2) (Out.)—Baker v. Morgan*, H. E. C. 519.—Moss.—Blake.

The returning officer having acted honestly and fairly in rejecting the nomination paper, each party to the petition was left to bear his own costs. *South Renfrew Election (2) (Dom.)—McKay v. McDougall*, H. E. C. 705.—Wilson.

Various acts of bribery and of colourable charity having been proved against the agents and subagents of the respondent, the election was set aside, with costs, including the costs of the evidence on the personal charges against the respondent. *Cornwall Election (Dom.)—Bergin v. Macdonald*, H. E. C. 547.—Spragge.

The respondent sought to establish, on an inquiry under a preliminary objection, that the petitioner (the opposing candidate) had been guilty of bribery, and was therefore disqualified as such. The inquiry was not concluded, as during its pendency the English Election Courts held that bribery would not disqualify a petitioner; but so far as the evidence went, while it disclosed such a large expenditure of money by the petitioner and his agents as to lead to the suspicion it was not all expended for the legitimate purposes of the election, it did not shew bribery by the petitioner. The respondent then

consented to his election being avoided on the ground of bribery by one of his agents without his knowledge or consent.—Held, that the general rule as to costs should prevail, and that the respondent should pay the costs of the inquiry as well as the general costs of the cause. *South Renfrew Election (Dom.)—Bannerman v. McDougall*, H. E. C. 556.—Spragge.

The election was set aside with costs, except as to the costs of certain charges which were unwarranted. A party, though successful, is not entitled to the costs of the witnesses he may subpoena, nor is the fact of them being called or not called the test of such costs being taxable. *Niagara Election (Dom.)—Black v. Plumb*, H. E. C. 568.—Hagarty.

The petitioners, after a notice from the respondent admitting bribery by one of his agents, examined witnesses on the personal charges, which were not proved, and in determining the question of costs, it was held, that as the petitioners might have come to the court on the notice served by the respondent, and have asked to have the election set aside, and as they had attempted, but had failed to establish the personal charges, the respondent should only pay such costs as he would have had to pay had the petitioners accepted the notice served upon them before the trial. *West Northumberland Election (Dom.)—Burnham v. Kerr*, H. E. C. 562.—Spragge.

From the judgment on the personal charges the petitioner appealed; but the court, on a review of the evidence, declined to set aside the finding of the election judge. The appeal was dismissed without costs, as the petitioner had strong grounds for presenting it. *South Huron Election (Dom.)—Ritchie v. Cameron*, H. E. C. 576.—Galt.

Costs of particulars. See *East Northumberland Election (Dom.)—Gibson v. Biggar*, H. E. C. 577.—Hagarty.

The petitioner was held entitled to the general costs of the petition, except as to the cases of the voters whose names were not on the voters' lists, and as to the scrutiny of ballots. *North Victoria Election (2) (Dom.)—Cameron v. MacLennan*, H. E. C. 671.—Wilson.—Q. B. D.

It is not a champertous transaction that an association of persons, with which the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition. *North Simcoe Election (Dom.)—Edwards v. Cook*, H. E. C. 617.—Richards.—Spragge.—Hagarty.

The petitioner was held entitled to costs of the charges on which he succeeded, and the respondent to the costs of the charges on which the petitioner failed. *North Renfrew Election (Dom.)—White v. Murray*, H. E. C. 710.—Wilson.—Q. B. D.

Where there had been excessive treating by an agent but not used as a means of corruptly influencing the voters, the petition was dismissed without costs, following the rule laid down in the Carrickfergus Case (1 O'M. & H. 264.) *East Elgin Election (Dom.)—Blue v. Arkell*, H. E. C. 769.—Blake.



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The petitioner was allowed his costs, but not the costs of the charges which he failed to establish. *Cornwall Election (Dom.)—MacLennan v. Bergin, H. E. C. 803.—Armour.*

Held, that although the respondent was duly elected, the costs did not follow the event, but, under section 160 of R. S. O. (1877) c. 10, as if the event had been the setting aside of the election; the respondent paying the general costs, including full costs, which would have been taxable, if the only charges had been those on which the petitioner had succeeded, the latter being deprived of costs in respect to the charges on which he failed, the respondent bearing his own costs of those charges. *Welland Election (Ont.)—Hobson v. Morin, 1 E. C. 383.—Patterson.—Ferguson.*

A petition under the Ontario Controverted Elections' Act, R. S. O. (1877), c. 11, was dismissed, with costs:—Held, on appeal, reversing the decision of one of the taxing officers, that under sections 97 and 100, R. S. O. (1877), c. 11, the respondent was not entitled to tax against the petitioners the costs of interviewing before the trial, persons named in the petitioner's bill of particulars as bribers and bribees. *Re West Middlesex Election—Johnson v. Ross, 10 P. R. 509.—Rose.*

See *North York Election (Ont.)—Gorham v. Bonthe, H. E. C. 62, p. 1450; West Peterborough Election (Ont.)—Scott v. Cox, H. E. C. 274, p. 1492; Welland Election (2) (Ont.)—Buchner v. Currie, H. E. C. 187, p. 1477; Prescott Election, 32 Q. B. 303; North Victoria Election—Cameron v. MacLennan, 39 Q. B. 147; Garrett v. Roberts, 10 A. R. 650, p. 1501.*

### 13. Judge's Report.

The judge's report to the speaker as to those persons "other than the candidate," who have been proved guilty of corrupt practices, is not conclusive, so as to bring them within 34 Vict., c. 3, s. 49 (Ont.) and so render them liable to penal consequences. *South Oxford Election (Ont.)—Hopkins v. Oliver, H. E. C. 238.—Draper.*

The definition of "corrupt practices" in section 3, and the effect of section 20 of the Controverted Elections' Act, 1873, as to the report of election judges to the speaker, considered. *North Victoria Election (Dom.)—Cameron v. MacLennan, 1 H. E. C. 584.—Richards.—Spragge.—Hagarty.*

A provincial election trial was held in 1883, before Cameron, J., and Boyd, C., who made separate reports agreeing in avoiding the election under R. S. O. (1877), c. 10, s. 161, by reason of respondent paying or consenting to the payment of the travelling expenses of certain voters to convey them to the poll; but differing in their judgments as to whether the respondent was guilty thereby of a corrupt practice under said section 161. Cameron, J., reported that respondent was proved guilty of said corrupt practice; and Boyd, C., reported that the said respondent committed an illegal act under section 154 in sanctioning such payment, but without any corrupt intent, and in ignorance, which was involuntary and excusable, under a belief

that as long as he did not personally bear or pay the said expenses it was not illegal, and under the fullest belief that the said voters were bound or were willing to repay the said expenses or allow them to be deducted from their wages. A subsequent election took place on 18th January, 1884, when respondent was elected. A petition was filed attacking his election on the ground of the prior disqualification of the respondent:—Held (Patterson, J. A., dissenting), affirming the judgment of the trial judges, Burton, J. A., and Galt, J., that the finding that the respondent was guilty of a corrupt practice was correct; and that he was therefore personally disqualified; and as there was not a concurrent finding that he came within the relieving clause of section 162 the disqualification was not removed; and that the amending Act 47 Vict. c. 4, s. 48 (Ont.), which was passed on 25th March, 1884, did not apply to this case. *South Renfrew Election (Ont.)—Harvey v. Dowling, 1 E. C. 359. See 48 Vict. c. 2, s. 18.*

On appeal from the decision of the trial judges in this case (1 E. C. 70.). Per Osler, J. A. One joint report of the trial judges under the hands of both is not essential; but there may be two separate reports each under the hand of one of the judges; but:—Quere, whether the certificate under R. S. O. (1877) c. 11 s. 55 of the result of the trial should be joint; but that this was not now open to the respondent, for by his becoming a candidate at the subsequent election he must be taken to admit that the former election was on some ground or other regularly set aside. *South Renfrew Election (Ont.)—Harvey v. Dowling, 1 E. C. 359.—C. of A.*

### 14. Claiming Seat by Respondent.

Candidate claiming seat precluded from objecting to irregularity at nomination. *East Simcoe Election (Ont.)—Reid v. Drury, 1 E. C. 291, p. 1439.*

See also Subhead III. 2 (c) p. 1438.

### 15. Appeals.

#### (a) When Appeal Lies.

The original petition in this case was tried by the judge on the merits, subject to an objection to his jurisdiction. The judge having taken the case en délibéré, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed." This judgment was appealed from, and the now respondent, under section 48 of the Supreme Court Act, limited his appeal to the question of jurisdiction, and the Supreme Court held that the judge had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court, to have the cause proceeded with according to law. The record was accordingly sent to the prothonotary of the Superior Court at Montmagny. The judge after having offered the counsel of each of the parties a rehearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the Supreme Court, and contended that the

judge had no jurisdiction to proceed with the case:—Held, that the Supreme Court on the first appeal could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court a quo to be proceeded with according to law, gave jurisdiction to the judge to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under section 48 of the Supreme Court Act (Fournier and Henry, J.J., dissenting). *Bellechasse Election (Dom.)—Larus v. Desauturiers*, 5 S. C. R. 91.

A petition was duly filed and presented by appellant on the 5th of August, 1883, under the "Dominion Controverted Elections' Act, 1874," against the return of respondent. Preliminary objections were filed by respondent, and before the same came on for hearing the attorney and agent of respondent obtained, on the 13th October from the judge, an order authorizing the withdrawal of the deposit money and removal of the petition off the files. The money was withdrawn, but shortly afterwards, in January, 1883, the appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained, upon summons, a second order from the judge rescinding his prior order of 13th October, 1882, and directing that upon the appellant repaying to the clerk of the court the amount of the security, the petition be restored, and that the appellant be at liberty to proceed. Against this order of January, 1883, the respondent appealed to the Supreme Court of New Brunswick, and the court gave judgment, rescinding it. Thereupon petitioner appealed to the Supreme Court of Canada:—Held, that the judgment appealed from was not a judgment on a preliminary objection within the meaning of 42 Vict. c. 39, s. 10 (the Supreme Court Amendment Act, 1879), and therefore not appealable. *King's County Election (Dom.)—Dickie v. Woodsworth*, 8 S. C. R. 192, followed. *County of Gloucester Election (Dom.)—Commeau v. Burns*, 8 S. C. R. 204.

The right of appeal given under section 63 and following sections of the Controverted Elections' Act, R. S. O. (1877), c. 11, does not extend to decisions either of the judge or judges for the trial of the petitions or other judges sitting as a court for the trial of corrupt practices under sections 174 and 175 of the Election Act, R. S. O. (1877), c. 10 and amendment. Observations upon anomalies and difficulties in the procedure. *Lennox Election (Ont.)—Re Hamilton v. Thompson*, 1 E. C. 422.—C. of A.

An appeal was allowed by the Supreme Court of Canada by consent of parties. The following is a note of the proceedings in that court on the hearing:—October 25th, 1887, McCarthy, Q. C., for the appellant. (No counsel appears for the respondent.) This is an appeal from a judgment of Mr. Justice Osler overruling preliminary objections to an election petition. I have a consent from the petitioner's agents and solicitors that the appeal should be allowed, and the petition be dismissed, but without costs, and the result will be that the preliminary objections are to stand. (Consent read.) Taschereau, J.—In this court we have done so before, but in the

Province of Quebec we have always refused to allow appeals upon consent. McCarthy.—In the North York case the appeal was allowed in the court by consent, and the judgment of the court below upon preliminary objections was reversed. Strong, J.—All we can do is to allow the appeal, but without costs; and that only disposes of the preliminary objections. Ritchie, C. J.—The order must be made that upon reading the written consent of the attorney and agent of the petitioner, the preliminary objections are sustained, and the appeal is allowed, but without costs. *Lincoln and Niagara Election (Ont.)—Pattison v. Rykert*, 1 E. C. 428, 432.

Appeal on preliminary objections. See *Shelburne Election (Dom.)—Robertson v. Laurie*, 14 S. C. R. 258, p. 1509; *L'Assomption Election (Dom.)—Gauthier v. Normandeau*; *Quebec County Election (Dom.)—O'Brien v. Caron*, 14 S. C. R. 420, p. 1514; *Glenagarry Election (Dom.)—Purcell v. Kennedy*, 14 S. C. R. 453, p. 1513.

See *North Ontario Election (Dom.)—Wheeler v. Gibbs*, 3 S. C. R. 374; *Montcalm Election—Mugnan v. Dugas*, 9 S. C. R. 93, p. 1525; *Berthier Election—Genereux v. Cuthbert*, 9 S. C. R. 102, p. 1525.

#### (b) Practice in Appeal.

The petitioner was not allowed to urge before the Court of Appeal a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial. *South Ontario Election (Ont.)—Farwell v. Brown*, H. E. C. 420.

In penal statutes, questions of doubt are to be construed favourably to the accused, and where the court of first instance in a quasi-criminal trial has acquitted the respondent, the appellate court will not reverse his finding. *North Ontario Election (Ont.)—McCaskill v. Paxton*, H. E. C. 304.—Wilson.—C. of A.

Charges of corrupt practices, consisting of promises of money and of employment, were made against the respondent and one M., his agent. Both the respondent and his agent denied making any promises of money, but left the promises of employment unanswered; and the judge trying the petition (Draper, C. J. A.) so found, and avoided the election. Thereupon the respondent appealed to the Court of Appeal, and under 38 Vict. c. 3, s. 4, offered further evidence by affidavit, specifically denying any offer or promise, directly or indirectly, of employment. Draper, C. J. A., who tried the petition, having intimated to the court that had the respondent and his agent made the explicit denial as to offers of money or employment which it appeared they had intended making, he would have found for the respondent:—Held, under these circumstances, that the finding of the election court should be set aside, and that a new trial should be held before another judge on the rota. Observations on the difference between an election trial and a trial *à nisi prius*. *Peel Election (Ont.)—Hurst v. Chisholm*, H. E. C. 485.

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band from voting, three witnesses testified to the offer; the respondent denied, and another witness who was present heard nothing of the offer. On this evidence, and there being no proof that the witnesses in support of the charge were acting from malicious motives or corrupt expectation, nor any evidence impeaching their veracity, the charge was held proved. The respondent appealed to the Court of Appeal on the finding of the chief justice on the above charge of personal bribery. Held, 1. That an appellate court will not, except under special circumstances, interfere with the finding of the court of first instance on questions of fact depending on the veracity of witnesses and conflicting evidence. 2. That as the judge trying the petition had found that the respondent had made the offer to the wife of the voter in the manner above stated, such an offer was a promise of a "valuable consideration," within the meaning of the bribery clauses of 32 Vict. c. 21. *Halton Election (Ont.)*.—*Russell v. Barber*, H. E. C. 283.

The charge upon which this appeal was principally decided was that of the respondent's bribery of one David Asselin. The judge who tried the case found, as a matter of fact, that the appellant had underhandedly slipped into Asselin's pocket the \$5 for a pretended purpose, that was not even mentioned to the recipient; that this amount was not included in the published return of his expense as required by the Election Act, and this payment was bribery:—Held, that an appellate court in election cases ought not to reverse on mere matters of fact, the findings of the judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below, that appellant had been guilty of personal bribery. *Bellechasse Election (Dom.)*.—*Lorue v. Deslauriers*, 5 S. C. R. 91.

Held, that the Supreme Court, on appeal, will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing one M., as well as of the other charges of bribery and treating, was not such as would justify an appellate Court in drawing the inference that the respondent intended to corrupt the voters. *Montreal Election (Dom.)*.—*Magnum v. Dugas*, 9 S. C. R. 93.

The judgment of the court below will not be reversed unless clearly wrong. *Berthier Election (Dom.)*.—*Generoux v. Cuthbert*, 9 S. C. R. 102.

At the trial it was found on a review of the evidence that an offer to bribe, which had not been carried out, was not proved:—Held, on appeal, that the finding of the trial judges should not be disturbed unless the court above was convinced that it was wrong, and that if no more could be said than that the evidence might have warranted a different conclusion, it should not be interfered with. *Prescott Election (Ont.)*.—*Gunningham v. Hagar*, 1 E. C. 88.—C. of A.

Per Osler, J. A.—Where the trial judges have certified that they disagree, the whole case is before the Court of Appeal on the evidence, and ought to be disposed of in all respects as on an

appeal from the trial judges. *East Simcoe Election (Ont.)*.—*Reid v. Drury*, 1 E. C. 291.

See *Peel Election (Ont.)*.—*Hurst v. Chisholm*, H. E. C. 485, p. 1517; *North Ontario Election (Dom.)*.—*Wheeler v. Gibbs*, 3 S. C. R. 374; *Kennedy v. Braithwaite*, 1 E. C. 195; *Haldimand Election (Dom.)*.—*Walsh v. Montague*, 15 S. C. R. 495, p. 1441.

#### 16. New Trial.

See *Peel Election (Ont.)*.—*Hurst v. Chisholm*, H. E. C. 485, p. 1524.

#### 17. Other Cases.

When a Rule of court has been issued under the Controverted Elections' Act, appointing a place for the trial not within the constituency the election for which is in question, the judge by whom the petition is being tried, has no power to adjourn, for the further hearing of the cause, from the place named in the Rule of court to a place within such constituency. *South Grey Election (Ont.)*.—*Hunter v. Lauder*, H. E. C. 52.—Mowat.

The effect of s. 30 of 34 Vict. c. 3 (Ont.), is that the judge is to act on the principles upon which election committees in England have acted where he has no light from the rules which his own professional experience supplies him with; and he is in addition to be bound by the decisions of the rota judges in England trying elections under Acts similar to our own, in the same way as the courts feel bound by their judicial decisions in other legal matters. *West Toronto Election (Ont.)*.—*Armstrong v. Crooks*, H. E. C. 97.—Richards.

The day appointed for the trial of an election petition may be altered to an earlier day by consent of the parties, and by an order of the judge. *West Elgin Election (Ont.)*.—*Cascaden v. Munro*, H. E. C. 227.—Spragge.

After the trial of an election petition has been commenced the trial judge may adjourn the case from time to time, as to him seems convenient. *Joliette Election Case (Dom.)*.—*Guilbault v. Desrobert*, 15 S. C. R. 458.

Where the right of the petitioner to claim the seat is decided adversely in one case, it is no prejudice to the respondent's case that other charges against the petitioner are not pronounced upon. *North Victoria Election (Ont.)*.—*McRae v. Smith*, H. E. C. 252.—Draper.

The court cannot grant an interim certificate declaring an election void, as the statute contemplates only one certificate to the speaker, certifying the result of the election trial. *Lincoln (2) (Ont.)*.—*Pauling v. Rykert*, H. E. C. 489.—Patterson.—Blake.

After an election petition had been filed, two clerks of the Toronto agents of the solicitor for the petitioner were allowed to compare it with an engrossed copy, and finding that the two were different, they altered the filed petition so as to correspond with the copy, adding in one place the word "treating," which had the effect of introducing a charge of a corrupt practice not in the original. The copy served upon the respondent after this alteration corresponded

with the petition as altered. It was not shewn and it was denied that the petitioner knew of the alteration.—Held, that the addition of the word "treating" was an alteration in a material part; but that the clerks in doing what they did were not the agents of the respondent or his solicitor. As the document was in the possession of the court, such an alteration, made by persons who were mere strangers or spoliators had not the effect of destroying it. The service of the petition in its altered condition could not, in the absence of knowledge of the alteration, be treated as a ratification by the respondent. It was ordered that the petition should be restored to its original state, and that the copy served should be amended to conform with the petition as it was when filed. *Lincoln and Niagara Election (Dom.)*.—*Pattison v. Rykert*, 1 E. C. 428.—Osler.

Semble, that R. S. C. c. 9, s. 33, sub-s. 2 does not prevent a judge proceeding with the trial of an election petition pending the sitting of the Divisional Court of which he is a member. *West Middlesex Election (Dom.)*.—*McNeil v. Roome*, 1 E. C. 465.—Falconbridge.

## XII. APPEAL IN SUMMARY TRIAL FOR ILLEGAL ACTS.

The right of appeal given under section 63 and following sections of the Controverted Elections' Act, R. S. O. (1877) c. 11, does not extend to decisions either of the judge or judges for the trial of the petitions or the other judges sitting as a court for the trial of corrupt practices under sections 174 and 175 of the Election Act R. S. O. (1877), c. 10 and amendment. Observations upon anomalies and difficulties in the procedure. *Lemox Election (Ont.)*.—*Hamilton v. Thompson*, 1 E. C. 422.—C. of A.

## XIII. ACTIONS FOR COSTS AGAINST PRIVATE PROSECUTOR.

The plaintiffs were tried for bribery at an election at the Haldimand assizes in the spring of 1887 and acquitted. The information upon which the indictment was supposed to have been founded was laid against them by the defendant and he was examined as a witness before the grand jury. At the conclusion of the trial the presiding judge, at the request of the counsel for the accused, indorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution and brought this action to recover payment of these costs from the defendant. The information and indictment (there being no evidence connecting the latter with the former) with the endorsement and the fact that the defendant was examined as a witness before the grand jury were the only evidence that the defendant was the private prosecutor.—Held, that the endorsement on the indictment had no force as a judgment or finding of fact and could not be accepted as proof of the defendant's position.—Held, also, that the facts that the information was laid by the defendant, and that he was examined as a witness before the grand jury were not sufficient evidence that he was the private prosecutor.

Decision of the County Court of the county of Lincoln reversed. *May v. Reid*, 16 A. R. 180.

## PAROL CONTRACT.

See CONTRACT.

## PAROL EVIDENCE.

See EVIDENCE.

## PARTICULARLY.

IN PLEADING—See PLEADING.

## PARTICULARS.

### I. ACTIONS GENERALLY, 0000.

### II. IN PARTICULAR ACTIONS.

1. *Alimony*.—See HUSBAND AND WIFE.
2. *Libel and Slander*.—See DEFAMATION.
3. *Patents for Invention*.—See PATENTS FOR INVENTION.

### III. IN ELECTION TRIALS.—See PARLIAMENTARY ELECTIONS.

### 1. ACTIONS GENERALLY.

Particulars are not part of the record. See *Davidson v. Bellville* and *North Hastings R. W. Co.*, 5 A. R. 315, p. 168.

The particulars of claim upon a writ of summons specially endorsed to which the defendant appears, do not bind the plaintiff as particulars under a declaration on the common counts, and, in such a case, he must comply with a demand for particulars made by the defendant. *Huggins v. Guelph Barrel Co.*, 8 P. R. 170.—Dalton, Q. C.

Where the plaintiff was not aware of the defence intended, qualified particulars of a defence of not guilty by statute were ordered. *Jennings v. Grand Trunk R. W. Co.*, 11 P. R. 300.—Dalton.

The defendant contested the validity of a will propounded by the plaintiffs, and also propounded two earlier wills, under which, in the event of the last in date being invalidated he claimed.—Held, that a general defence of fraud was admissible in such a case; but under that defence the defendant was required to give particulars immediately after the examination of the plaintiff. *Appleman v. Appleman*, 12 P. R. 138.—Boyd.

The practice in ordering particulars depends in this province on the inherent jurisdiction of the court to prevent injustice being done; the rules in force in England not having been adopted here. *Queen Victoria Niagara Falls Park Commissioners v. Howard*, 13 P. R. 14.—Boyd.

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*Reid*, 16 A. R. 150.

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P. R. 170.—Dalton,

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*Jara Falls Park Com-*  
P. R. 14.—Boyd.

In an action of trespass to land the defen-  
dants pleaded a lease from the Dominion Gov-  
ernment, and that the lands had been vested  
in the government as ordnance lands. This was  
pleaded in an unexceptionable manner, and no  
affidavit was filed by the plaintiffs to shew that  
they were unable to reply without further dis-  
closure. An order was made by the master in  
chambers for particulars of the facts and means  
by which and the time at which the lands became  
ordnance lands. It did not appear that the de-  
fendants had any special means of information  
as to the matter of title, not open to the plain-  
tiffs:—Held, that the order was wrong in form,  
and should not have been made in this case; for  
a party is not obliged to disclose upon what evi-  
dence he relies, or by what means he is going to  
prove his contention. *Ib.*

## PARTIES.

See PLEADING.

## PARTITION.

### I. WHEN AWARDED.

1. Generally, 1529.
2. To Dowress, 1530.

### II. PRACTICE, 1531.

### III. COSTS AND COMMISSION, 1532.

### IV. EFFECT OF JUDGMENT IN PARTITION, 1533.

#### I. WHEN AWARDED.

##### 1. Generally.

The plaintiff, being a trustee for sale, was held  
not to be in a position to ask for partition.  
*Keefer v. McKay*, 29 Chy. 162.—Ferguson.

An application for partition or sale of land by  
the plaintiff as one of several heirs was dismissed  
with costs where the plaintiff before making it  
knew that a defendant was in possession claim-  
ing title to the exclusion of the plaintiff and his  
co-heirs. *Hopkins v. Hopkins*, 9 P. R. 71.—  
Boyd.

A tenant for life is entitled to a partition, and  
where there is a right to a partition there may  
be a right to a sale as the Court may determine.  
*Lalor v. Lalor*, 9 P. R. 455.—Proudfoot.

The crown, by letters patent, granted land to  
F. B. for life, with remainder to her children,  
the petitioners, as tenants in common in fee  
simple. On a petition presented to the judge of  
the County Court, under R. S. O. (1877) c. 101,  
for partition or sale, a sale was ordered. A mo-  
tion for a prohibition was made on behalf of F.  
B., the tenant for life:—Held, Armour, J., dis-  
senting, that the case did not come within the  
Partition Acts, and that there was no power to  
compel a sale of the lands as against the tenant  
for life. A prohibition was therefore ordered.  
*Murcar v. Bolton*, 5 O. R. 164.—Q. B. D.

Quere whether the appellant in this case,  
whose only interest was that of mortgagee of  
the interest of one S. the owner of an undivided

one-sixth interest in the lands, had any locus  
standi to bring a suit for partition or to appeal  
without his co-plaintiff. *Laplanche v. Scamen*, 8  
A. R. 557.

J. C. died in 1867, having by his will pro-  
vided as follows: "And whereas trouble \* \*  
may arise among my family with regard to the  
property \* \* on account of its being put out  
of the power of my trustees to sell or dispose of  
the property, I hereby order, direct, and fully  
authorize at and after twenty years after my  
death, my trustees \* \* to absolutely sell and  
dispose of my said property in T. to the best  
advantage, provided only that it be the wish of  
a majority of my heirs who may then be living,  
to do so and not otherwise, etc." In 1897, a  
meeting of a large majority of those interested  
was held, and it was decided to sell by public  
auction. On an application by the plaintiffs  
who were trustees for one of the heirs and  
represented only a one-sixth share of the pro-  
perty for the usual order for partition and sale,  
which was resisted by a majority of the heirs.  
It was:—Held, that the land in question was  
vested in the trustees on the express trust to  
sell at the end of twenty years from the testator's  
death, provided a majority of the heirs were in  
favour of a sale, which was proved, and that the  
jurisdiction to partition was ousted. *Re Dennis*  
—*Downey v. Dennis*, 14 O. R. 267.—Boyd.

See *Grant v. Grant*, 9 P. R. 211, p. 1532.

##### 2. To Dowress.

A person entitled only to dower, unassigned,  
out of land is entitled to apply for partition.  
*Rody v. Rody*, 1 C. L. T. 146, overruled. But  
where one only of several is desirous of parti-  
tion, all that that one is entitled to is to have  
his or her portion set aside, leaving the others  
to hold jointly or in common, as before. *Hob-  
son v. Sherwood*, 4 Beav. 184, followed. *Dere-  
renx v. Kearns*, 11 P. R. 452.—Ferguson.

Where the dowress applied for partition or  
sale, confessedly with the object of obtaining  
the latter, and all the other parties opposed it,  
and it appeared that the applicant had by an-  
other proceeding obtained the right to have her  
dower assigned out of the lands, the application  
was refused, with costs. *Ib.*

Although some expressions in the Partition  
Act, R. S. O. (1877), c. 101, authorize a person  
entitled to dower not assigned to apply for par-  
tition or sale of the lands in which she is inter-  
ested, yet the court may, in its discretion, re-  
fuse the application and leave the dowress to  
proceed under the Dower Procedure Act, R. S.  
O. (1877), c. 53, or otherwise, to have her dower  
assigned. The provisions of the two Acts must  
be harmonized. *Fram v. Fram*, 12 P. R. 185.—  
Robertson—Chy. D.

The application of a dowress for partition or  
sale of two parcels of land owned by the defen-  
dants in severalty, subject to the right of dower,  
was refused where the defendants opposed the  
application and the proposed proceedings were  
for the benefit of the applicant only. *Devereux*  
*v. Kearns*, 11 P. R. 452, discussed. *Ib.*

Effect of partition on inchoate right of  
dower. See *Re Hewish*, 17 O. R. 454, p. 571.



## II. PRACTICE.

Under G. O. 640 (Con. Rule 989), where special circumstances are shewn on an application for partition or sale of lands, a reference to a master other than the master in the county town of the county where the lands are situate will be directed. The application under the order should be made to a judge in chambers. *Re Arnott—Chatterton v. Chatterton*, 8 P. R. 39.—Proudfoot.

After an order for partition of lands in the county of Peel had been granted by a master under G. O. 641 (Con. Rule 990), an order was made by a judge in chambers to include in said order lands in another county, though such lands were known of at the time the partition order was made. The costs of the application were allowed, exclusive of the usual commission under G. O. 643 (Con. Rule 1187). *Clark v. Clark*, 8 P. R. 156.—Spragge.

A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young v. Wright*, 8 P. R. 198.—Blake.

The jurisdiction created by G. O. 640 (Con. Rule 989) is intended to be exercised in simple cases only where there is no dispute. Where questions are raised of title, or the like, a bill must be filed. *Mardonell v. McGillis*, 8 P. R. 339.—Blake.

The fact that an intestate whose estate is being partitioned, has been dead for forty-five years, does not warrant the master in dispensing with the usual advertisement for creditors. *Bygar v. Bygar*, 8 P. R. 488.—Blake.

The defendant who occupied the property in question, in a partition suit, claimed an absolute title by possession under the statute of limitations. The master, notwithstanding, continued the inquiry, and proceed to take evidence. Spragge, C., directed the plaintiff to file a bill within two weeks, and the parties to go to a hearing at the then next ensuing sittings at Cornwall, costs to be costs in the cause. *Re McMillan—Patterson v. McMillan*, 8 P. R. 546.

A decree for partition issued by a local master at the instance of a purchaser at sheriff's sale under an order made by a County Court judge where the interest which had been sold, was that of one of four tenants in common in an equity of redemption in land, which was subject to two mortgages in different hands, was on appeal reversed with costs. *Wood v. Hurl*, 28 Chy. 146.—Proudfoot.

In a partition suit, an order allowing substitutional service of the bill, on the official guardian of an infant defendant, resident without the jurisdiction of the court, was granted on the ground that the share of the infant in the lands in question amounted to only \$40, and substitutional service would be inexpensive. *Weatherhead v. Weatherhead*, 9 P. R. 96.—Stephens, Referee.

An order for partition of the realty was refused, when the application was made within

six months of the death of the person whose estate was sought to be partitioned. The rule laid down by the Partition Act, R. S. O. (1877), c. 101, s. 6, held applicable. *Grant v. Grant*, 9 P. R. 211.—Boyd.

Where in a partition suit commenced by summary application under G. O. Chy. 640 (Con. Rule 989), the infants interested in the estate had been joined as plaintiffs, and a sale of the land had taken place by public auction:—Held, that the infants were improperly joined as plaintiffs; that they should have been defendants and represented by the official guardian; and a reference was directed to the master to fix the guardian's commission as if he had been engaged in the suit from the beginning. On consent of the guardian, it was ordered that the proceedings taken for sale, if they proved to be regular, should stand; but this was not to be a precedent. *Brown v. Brown*, 9 P. R. 245.—Proudfoot.

On an application for the sale of infants' estate worth about \$400, under R. S. O. (1877), c. 40, an order was made dispensing with the examination of two of the infants who were out of the jurisdiction. *Re Lane*, 9 P. R. 251.—Boyd.

An application to consolidate two motions for administration and partition pending before a local master, should be made to him and not to a judge in chambers. *Lambier v. Lambier*, 9 P. R. 422.—Boyd.

Sales by the court of real estate held in co-tenancy are governed by the provisions of the Partition Act, R. S. O. (1877) c. 101; and masters should not, without any specific or sufficient reasons, dispense with enquiries and advertisements for creditors holding specific or general liens upon the whole or any undivided share of the estate, down to the time of sale, and not merely at the time when the order under G. O. Chy. 640 is made. *Robson v. Robson*, 10 P. R. 324.—Boyd.

Power of master on a reference for partition or sale of lands to try the validity of a lease, or a fraudulent alteration in a sealed instrument. See *Re Rogers—Rogers v. Rogers*, 11 P. R. 90.

In the course of a reference to make a partition of lands, a master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared:—Held, that the course adopted by the master was a reasonable one; that he had the power under G. O. Chy. 240 (Con. Rule 73) to take such course, and that the fees paid to the skilled persons by the defendant should be taxed to him. *McKay v. Keefer*, 12 P. R. 256.—Ferguson.

Where lands are situate in different counties, a local master has no jurisdiction to make an order for the partition or sale thereof, and such an order and the proceedings thereunder, even as to lands within the county in which he is master, are wholly void. *Regina v. Smith*, 7 P. R. 429 followed. *Nichol v. Aidenby*, 17 O. R. 275.—Robertson.

## III. COSTS AND COMMISSION.

An order for partition or sale was made under G. O. 640, (Con. Rule 989) by the master at

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v. Attenby, 17 O. R.

COMMISSION.

or sale was made under  
50) by the master at

London, of the estate of one M., deceased. In  
proceeding under that order the master adver-  
tised for creditors, and M. & M. sent in a claim  
for obtaining letters of administration, and for  
defending an action in the Court of Common  
Pleas, brought by W. M., a defendant in this  
suit, and entitled to a share of the estate against  
the administratrix. The master allowed the  
claim, and W. M. appealed, on the ground that  
neither the deceased nor his estate were in-  
debted to M. & M., and that they were not enti-  
tled to prove as creditors in this cause:—Held,  
that the administratrix was justified in de-  
fending the suit, and the appeal was dismissed.  
McKay v. McKay, 5 P. R. 334.—Proudfoot.

The sum allotted to the guardian of infants  
for commission in partition suits should not be  
measured only by the work done in the master's  
office. Cameron v. Leroux, 9 P. R. 304.—  
Proudfoot.

Solitor's costs. See EXECUTORS AND AD-  
MINISTRATORS VI. 5 (a), p. 732.

See Brown v. Brown, 9 P. R. 245, p. 1532.

#### IV. EFFECT OF JUDGMENT IN PARTITION.

When proceedings for a partition in a County  
Court have been terminated by an order confirm-  
ing such partition, and nothing remains to be  
done by way of enforcing the judgment, such  
judgment cannot afterwards be impeached on the  
ground of fraud or deception on the court other-  
wise than in bringing an action in which it is re-  
lied on, or by bringing an action for the express  
purpose of setting it aside. Jenking v. Jenking,  
11 A. R. 92.

See Van Velsor v. Hughson, 9 A. R. 390, p.  
1182.

### PARTNERSHIP.

#### I. PARTNERSHIP CONTRACTS, 1534.

#### II. PROOF OF PARTNERSHIP, 1538.

#### III. RIGHTS AND LIABILITIES OF PARTNERS BEFORE THEMSELVES.

##### 1. Disposal of Individual Interest in Partnership Property, 1538.

##### 2. Actions and Proceedings to Take Partnership Accounts.

###### (a) Generally, 1539.

###### (b) Costs, 1539.

##### 3. Other Cases, 1540.

#### IV. LIABILITY OF PARTNERS TO THIRD PAR- TIES.

##### 1. As to Bills, Notes and Cheques, 1541.

##### 2. Other Cases, 1543.

#### V. DISSOLUTION, 1545.

#### VI. DEATH OF PARTNER, 1546.

#### VII. ACTIONS AND PROCEEDINGS BY AND AGAINST.

##### 1. Generally, 1546.

##### 2. For Non-Registration of Partnership, 1547.

##### 3. In Insolvency Proceedings—See BANK- RUPTCY AND INSOLVENCY.

##### 4. Parties to Actions—See PLEADING.

##### 3. Executions Against Partnership Pro- perty—See EXECUTION.

#### VIII. MISCELLANEOUS CASES, 1547.

#### IX. RIGHT OF DOWER IN PARTNERSHIP LANDS—See DOWER.

#### X. QUALIFICATION AS VOTERS IN RIGHT OF PARTNERSHIP PROPERTY—See PAR- LIAMENTARY ELECTIONS.

#### I. PARTNERSHIP CONTRACTS.

Eight persons, who had previously been en-  
gaged in the cattle trade, held a meeting in the  
month of October, 1880, and passed a series of  
resolutions, prefaced by the declaration that they  
and four others, whose names were mentioned,  
proposed to form a cattle dealers' syndicate for  
the purpose of exporting cattle, to commence  
with the opening of navigation, from Portland.  
The resolutions provided that each member of  
the syndicate should make a deposit of \$5,000 to  
the credit of the representative of each com-  
pany: That no member of "this firm" should  
do any business outside of the syndicate in ex-  
port cattle except for the benefit "of the com-  
pany." That no member of the syndicate should  
appoint any person to buy cattle except approved  
of by the majority of the members: That each  
member should take the position assigned him  
by the majority of the syndicate: That the  
syndicate should be divided into two companies,  
each to consist of six members (whose names  
were mentioned): That no member should be  
admitted to the syndicate without the approval  
of all the members: That none of the cattle  
space which was then taken should be sublet  
without the approval of the syndicate: That  
the profit and loss should be equally divided,  
share and share alike, between all the members  
of the syndicate. All the contemplated mem-  
bers of the proposed syndicate except one signed  
the resolutions. One of the firms was already  
in existence, the other was to be thereafter  
formed. The one already existing comprised six  
members of the proposed syndicate, and was  
called Thompson & Co., the other subsequently  
formed was composed of five members of the pro-  
posed syndicate, and was called Craig & Co.  
These two firms proceeded to buy and export  
cattle; each opened separate bank accounts. The  
firm of Craig & Co., dealt with the plaintiffs and  
obtained advances. From the evidence it ap-  
peared that the plaintiffs had knowledge of the  
resolutions above referred to, but opened the  
account solely with the firm of Craig & Co., and  
the members of that firm, from whom alone they  
took security; and it appeared by the evidence  
that notwithstanding the form of the resolu-  
tions, the arrangement contemplated thereby was  
treated by the parties as still open and as a mat-  
ter of negotiation to be completed by some future  
agreement between the parties, and to perfect  
which meetings were from time to time held;  
and afterwards, at a subsequent meeting of some  
of the members of the firm of Craig & Co., and  
Thompson & Co., on 20th April, 1881, a formal  
agreement was drawn up, purporting to be  
made between the individuals composing the

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firm of Thompson & Co., of the first part, and the individuals composing the firm of Craig & Co., of the second part, which provided for the two firms carrying on their business of cattle exporters in co-operation with each other, and for dividing between the two firms the net profits and losses of the two firms respectively, from 8th December, 1880, and containing a declaration that neither company should be liable for any debts or liabilities of the other company, and that nothing therein contained should create a partnership between the two companies. This agreement was signed by all the parties except two of the members of Thompson & Co., who refused to sign it. The two firms continued to carry on business as cattle exporters, each on its own account. A paper purporting to be a copy of the agreement was furnished to the plaintiffs by Craig & Co., whereby it appeared to be signed by all the parties to it. But the plaintiffs were subsequently informed of the refusal of the two to sign it, and thereafter made further advances to the firm of Craig & Co.—Held, (1) that the refusal of two of the members of the firm of Thompson & Co. to sign the agreement of 20th April, 1881, rendered it inoperative not only as to those refusing to sign it, but also as to those who had signed it, and that until all had signed it was not a completed agreement:—(2) that those who actually signed the agreement could not thereby bind their co-partners who did not sign it:—(3) that even if the agreement had been completed it did not constitute a partnership between the two firms, so as to enable one firm to pledge the other firm's credit, for advances in carrying on the trade:—(4) that the provision for sharing profits and losses, which in an ordinary trading association where there is a community of capital and stock-in-trade, and a common undertaking, is conclusive evidence of a partnership, is nevertheless not a conclusive test of partnership where there is an extraordinary adventure between two partnerships presenting a well defined and well known separation of interests and ownerships:—(5) that the way in which the profits are to be participated in is the essence of the matter, and that when the right to call for a proportion of the profits arises by virtue of an express contract to that effect, which would not otherwise flow from the relations of the parties, the right exists qua debt, and not by virtue of partnership:—(6) that even assuming that the agreement of 20th April, constituted a partnership between the two firms, yet that the plaintiffs with knowledge of all the facts, by electing to give credit to Craig & Co. alone, were precluded from thereafter resorting to Thompson & Co. *Merchants' Bank v. Thompson—Mallon v. Craig*, 3 O. R., 541.—Boyd.

Where one M. was induced to become a member of a firm, on the faith of representations made to him that the previous losses of the firm only amounted to \$18,000, but it subsequently turned out that such losses amounted to about \$22,000 or \$24,000:—Held, that M. by reason of such misrepresentation was entitled to be relieved from such agreement, and to be indemnified by the other members of the firm against all liabilities incurred by him as such partner prior to the discovery of the untruth of the representation made as to the losses of the firm. *Id.*

Held, also, that M. having become a partner also on the faith that the firm in question intended to form a syndicate arrangement with another firm, which arrangement failed to be carried out for want of the concurrence of some of the members of such other firm, he was on that account also entitled to be relieved from his agreement to become a partner. *Id.*

The respondents having on hand large contracts to fulfil, entered into partnership with the appellant under the style of J. W. & Co. The respondent A. P. M. subsequently filed a bill in chancery against W., the appellant and his two sons co-partners, asking for a decree declaring him and his two sons entitled to receive credit to the amount of \$40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the province of Quebec, under which the respondent claimed to be entitled to credit of \$40,000, was as follows: "The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works by the said parties of the first part, A. P. M. & Sons; also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by the said parties of the first part, or any of them, the whole of which is valued at the sum of \$40,000, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses, appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of M. & W., of the city of Montreal, hardware merchants, to secure them certain claims which they had against the said A. P. M. & Co., for moneys used in the construction of the works referred to, to the extent and sum of about \$24,000 and interest; and whereas the said J. W. has paid said amount of \$24,000, and redeemed said plant, tools, horses, and appliances, and quarries, steam tugs, and scows, etc., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses, and appliances that are or may be put on the said work, shall be and continue to be the entire property of the said J. W. until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of \$24,000 and interest so advanced by him as aforesaid, as also any other sum of advances and interest which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm of J. W. & Co., that is to say: That one-half thereof shall revert to and belong to the parties of the first part, and the other half to the said party of the second part, as the said J. W. has a full half interest in this contract and all its profits, losses and liabilities, and the said A. P. M., W. E. M., and R. M., parties of the first part, jointly and severally, the other half interest in the same." There was evidence that the plant had cost originally \$57,000, and that it was valued in the inventory at \$40,000 at the request of the appellant; it was also

become a partner in question intended agreement with another to be carried out by some of the he was on that agreed from his agreement.

on hand large consent to partnership with style of J. W. & Co. subsequently filed a bill the appellant and his for a decree declared to receive credit the estimated value in the construction partnership. The partnership executed be- province of Quebec, not claimed to be en- as follows: "The ship consists of the horses and appliances of said works by first part, A. P. M. & Co. tugs, scows; and quarries that are held first part, or any of is valued at the sum of in an inventory and for reference after identification by the said whereas the said plant, steam tugs, scows, had been heretofore of the first part to the city of Montreal, hard- to them certain claims the said A. P. M. & Co., destruction of the works at and sum of about and whereas the said J. of \$24,000, and re- horses, and appliances, and scows, etc., and of the same under a is hereby well agreed said plant, tools, horses, or may be put on and continue to be the said J. W. until realized and received profits of the present end to reimburse him of and interest so advanced also any other sum of which shall or may be present firm or partner- and event the whole of me the property of the that is to say: That to and belong to the and the other half to second part, as the said interest in this contract and liabilities, and the, and R. M., parties of and severally, the other." There was evidence originally \$57,000, and the inventory at \$40,000 appellant; it was also

shown and admitted that the profits of the business were sufficient to reimburse the appellant the sum of \$24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership:—Held, varying the judgment of the court below, (7 A. R. 531) Henry and Gwynne, J.J., dissenting, that the plant, etc. furnished by the respondents having been inventoried and valued in the articles of partnership at \$40,000, the respondents had thereby become creditors of the partnership for the said sum of \$40,000, but as it appeared by the said articles of partnership that the said plant was subject at the time to a lien of \$24,000, and that said lien had been paid off with the partnership moneys, the respondents were only entitled to be credited as creditors of the partnership, with the sum of \$16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership. *Worthington v. Macdonald*, 9 S. C. R. 327.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that in a suit for a share of the profits of a gold mine where the plaintiff relied on an agreement by the defendant for a transfer of a portion of the latter's interest in such mine for valuable consideration, the evidence was not sufficient to establish a partnership between the parties in the working of the mine and the suit was dismissed. *Stuart v. Mott*, 14 S. C. R. 734.

The defendants (other than C.) and others signed a certificate of their intention to become incorporated as a co-operative association under R. S. O. (1877), c. 158. They failed, however, to fulfil the requirements of the Act, and never actually became a corporation under it. In the meanwhile the plaintiff supplied the defendants and other intended members of the association with certain goods, and now sued the former for the balance due in respect thereof:—Held (affirming the decision of Boyd, C.), that he was entitled to judgment against the defendants as partners; but as to C. who came into the arrangement at a later date than the others, only as to goods supplied after such later date. *Seiffert v. Irving*, 15 O. R. 173.—Chy. D.

The plaintiffs sued G. and W. for the price of goods sold to the firm of P. W. G. & Co., and the principal question in the action was, whether W. was an actual partner in the firm, the evidence failing to show that he was an ostensible partner, and as such, liable to third persons:—Held, that the true test to be applied to ascertain whether a partnership existed, was to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other. G. and W. did not intend to create a partnership between them. G. was carrying on business in the name of P. W. G. & Co., as a dealer in pianos and organs, and, being in want of money, applied to W. for a loan; he did not ask W. to become his partner, nor did W. suggest it, but G. proposed to give W. half the profits of his business if W. would lend him \$500. The money was advanced and the following receipt was given by G.:—Toronto, 13th February, 1888. Received from W. the sum of \$500 to be used for carrying on the business of dealers in pianos and organs, in return for which I hereby

agree to give the said W. one-half of the profits of the said business, after all expenses have been paid, including the sum of \$10 a week, which is to be charged as wages to G., this arrangement to continue until the 1st day of January, 1889, and to be continued thereafter if desired by Mr. W. The said W. reserving a claim upon instruments in the store to the value of \$500, and he can also at any time demand the said sum upon giving one month's notice, in which case this agreement would be at an end." W. made a subsequent advance of \$500 to G., and on the 14th April, 1888, a receipt was given for such advance containing an agreement to pay "over and above the agreement of the 13th of February, interest at the rate of eight per cent. per annum." This receipt was at the request of W., signed "P. W. G. & Co., p. P. W. G., sole partner of said firm":—Held, that these documents did not establish that the business was the joint business of G. and W., or that they were carrying it on as principals or agents for each other; but that they did establish that the true relation was that of debtor and creditor; and W. was therefore not liable to the plaintiffs. *Meulebsohn Piano Co. v. Graham* 19 O. R. 83—Q. B. D.; 17 A. R. 378.

## II. PROOF OF PARTNERSHIP.

The representation of an agent that his principals are a firm in a distant province, and that such firm is composed of A. and B., coupled with evidence of receipt by the person to whom the representation is made of letters from one of the alleged members of the firm, written on paper on which the names of such members are printed, in answer to letters from such person, is *prima facie* evidence that A. and B. constitute the said firm. *McDonald v. Gilbert*, 16 S. C. R. 700.

## III. RIGHTS AND LIABILITIES OF PARTNERS BETWEEN THEMSELVES.

### 1. Disposal of Individual Interest in Partnership Property.

M. and G. met and agreed to jointly purchase 150 acres of land and to sell it in lots, or perhaps en bloc, to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had one-third interest and G. had two-thirds. No syndicate was got up to take the whole, and G. telegraphed M. that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds' interest, and obtained a large profit thereon. This arrangement was made in writing, and recited that G. was seised in fee of the lands, and had executed a declaration of trust of one-third in favour of M., and "executes this declaration as to the remaining two-thirds." A quit claim deed was afterwards executed by M. in favour of G., and a declaration of trust as to one-third in favour of M., was signed by G. In an action by M. for a share of G.'s profit, it was:—Held, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so as to pass out of the partnership, though as to them there might be a sub-partnership; there

had been no dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share and no injury had resulted to his partner, and even if any had it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed, with costs. *Mitchell v. Gornley*, 9 O. R. 139.—Boyd; 14 A. R. 55.

## 2. Actions and Proceedings to Take Partnership Accounts.

### (a) Generally.

Action against executor and surviving partner seeking to set aside a release and for an account. See *Burn v. Burn*, 8 O. R. 237, p. 1422.

In June 1874, the plaintiff and defendant by writing entered into an agreement for supplying together the iron for the Grand Junction Railway, and providing for the division of the surplus or profits. No division of the profits was made and the defendant went on investing the receipts from that enterprise in other contracts, and the plaintiff claimed a like interest in them also, which the defendant denied his right to:—Held, that the onus of negating such right of the plaintiff rested on the defendant, and having failed to negative his right to such share, the court declared him entitled thereto, and directed a reference to take the accounts between the parties. *Cameron v. Bickford*, 11 A. R. 52. This case was reversed by Privy Council. Not reported.

The fact that the plaintiff who had for some years acted as legal adviser of the defendant, was appointed one of the directors of the railway company at the same time that he claimed to be interested with the defendant in the contract for the construction of the road formed no ground for the defendant refusing to account to the plaintiff for his share of the profits of the enterprise. *Ib.*

Barred by the Statute of Limitations. See *Cotton v. Mitchell*, 3 O. R. 421, p. 1202.

See *Neil v. Park*, 10 P. R. 476.

### (b) Costs.

Where, on the dissolution of a partnership between the plaintiff and defendant, it was agreed that the defendant should wind up the concern, and the plaintiff having demanded a statement of account, the defendant rendered an untrue and imperfect one, whereupon the plaintiff brought this action for a winding-up, claiming that the defendant was indebted to him on account of partnership assets received, which the defendant denied, and the plaintiff succeeded:—Held, that the defendant must pay the costs of the suit. *Carmichael v. Sharp*, 1 O. R. 381.—Ferguson.

On a reference to take an account of partnership dealings the report found that the plaintiff had contributed to the partnership capital \$87.39, and the defendant \$233.89, and that there was due from the defendant to the plain-

tiff \$43.74. The taxing officer taxed the plaintiff's costs under the lower scale, on the ground that the case came within C. S. U. C. c. 15, s. 34, sub-s. 1. On appeal, Cameron, J., reversed the taxing officer's ruling. *Blaney v. McGrath*, 9 P. R. 417.

### 3. Other Cases.

Fraud or misrepresentation in formation of partnership. See *Merchants' Bank v. Thompson*; *Malton v. Craig*, 3 O. R. 541, p. 1535; *Morrison v. Earls*, 5 O. R. 434, p. 773.

A firm consisting of two persons dissolved partnership, the retiring partner receiving a number of promissory notes in payment of his share in the business, which notes he endorsed to the plaintiff. The continuing partner of the firm afterwards entered into a partnership with O. the defendant, and transferred to the new firm all the assets of his business, his liabilities, including the above mentioned promissory notes, being assumed by the co-partnership and charged against him. The new firm paid two of the notes and interest on others, and made a proposal for an extension of time to pay the whole, which was not entertained:—Held, Fournier, J., dissenting, that the agreement between the continuing partner and the defendant did not make the defendant a trustee of the former's property for the payment of his liabilities, and the act of the defendant in paying some of the notes did not amount to a novation, as it was proved the plaintiff had obtained and still held a judgment against the maker and endorser of the notes in an action thereon, and there was no consideration for such novation. *Osborne v. Henderson*, 18 S. C. R. 698; reversing *S. C. sub nom. Henderson v. Kiley*, 17 A. R. 456; 14 O. R. 137.

A certain firm was indebted to the plaintiffs. Another firm bearing the same name, but composed of different individuals, assumed its liabilities, as between itself and the former firm, and continued the business, and made certain payments to the plaintiffs, and also asked for time to pay the balance. There was no evidence of any assets of the first firm being taken over by the second:—Held, that the above was not sufficient to create a new obligation as between the plaintiffs and the new firm. *Osborne v. Henderson*, 18 S. C. R. 699, cited and relied on. *Canadian Bank of Commerce v. Marks*, 19 O. R. 450.—Boyd.

Right of partner paying a judgment against the firm to enforce it for his own benefit. See *London and Canadian Loan Co. v. Morphy*, 14 A. R. 577, p. 701.

The plaintiff and defendant were partners, and judgment was recovered against them in 1876 by a bank upon certain promissory notes, of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant. The partnership accounts were taken by a referee, whose finding, approved by the Court, was, that the defendant should have paid one-half of the judgment:—Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and



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scale, on the ground  
C. S. U. C. c. 15, a.  
Cameron, J., reversed  
*Blaney v. McGrath*,

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Bank v. Thompson;  
C. S. U. C. c. 1535; Mor-  
p, p. 773.

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that the agreement  
partner and the defen-  
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S. C. R. 698; revers-  
Anderson v. Killey, 17 A.

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There was no evidence  
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new firm. Osborne v.  
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*Loan Co. v. Morphy*, 14

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enforce the judgment against the defendant.  
Per Armour, C. J.—The Mercantile Amend-  
ment Act, R. S. O. (1887), c. 122, ss. 2, 3, 4,  
applies to the case of partners. *Small v. Riddell*,  
31 C. P. 373; *Potts v. Leask*, 36 Q. B. 476;  
and *Scripture v. Gordon*, 7 P. R. 164, not fol-  
lowed, in view of the opinions expressed in  
London and Canadian L. & A. Co. v. Morphy,  
14 A. R. 577. *Housinger v. Love*, 16 O. R.  
170.—Q. B. D.

Arbitrators upon a reference to settle disputes  
between parties, found the balance due from the  
firm to one of the partners, and declared in the  
award that the balance was a lien upon the assets  
to be paid out of them specifically:—Held, that  
they had the power to give this direction, and  
the partner in question had power to sell to  
satisfy the lien out of the specific property  
applicable of which he was joint owner. *Redick*  
v. *Skellton*, 18 O. R. 100.—Boyd.

See *Tupper v. Annand*, 16 S. C. R. 718, p.  
324; *Manitoba Mortgage Co. v. Bank of Mon-*  
*tréal*, 17 S. C. R. 692, p. 1543; *O'Keefe v. Cur-*  
*ran*, 17 S. C. R. 596, p. 1546.

#### IV. LIABILITY OF PARTNERS TO THIRD PARTIES.

##### 1. As to Bills, Notes and Cheques.

A promissory note for \$6,200, made by the  
president and secretary of a syndicate formed  
for completing the Hamilton and Dundas Street  
railway, in favour of O., S. and the defendants,  
was endorsed by them to the Bank of Commerce  
or order. On the day the note fell due O. and  
S. respectively paid the same, O. paying \$2,000,  
and S. \$4,200, the remaining sum due thereon,  
S. at the time directing the bank agent to en-  
dorse it to the plaintiff, who it appeared gave  
no value for it. The agent endorsed it as fol-  
lows: "Pay to J. S." the plaintiff "or order."  
D. Hughes Charles, Manager." The plaintiff  
thereupon sued the defendants as endorsers:—  
Held, that the plaintiff could not recover, for  
the evidence shewed that S. by his payment in-  
tended to satisfy the note, which being made  
for a purpose directly relating to and not col-  
lateral to the partnership of which S. and defen-  
dants were partners, S. could not recover  
against defendants thereon, and as the plaintiff  
was found to have only the same right as S.,  
neither could he recover. *Small v. Riddell*, 31  
C. P. 373.—C. P. D. But see *Housinger v. Love*,  
16 O. R. 170, *supra*.

Held, that a third person holding a note for the  
benefit of one joint endorser, cannot maintain a  
joint action against the co-endorsers under R. S.  
O. (1877), c. 116 ss. 2, 3, as endorsers for the  
full amount of the note, but must sue each sepa-  
rately in a special action for his share of the  
contribution:—Held, also, that the Act does  
not refer to partnership transactions. Quære,  
whether the endorsement as made by the man-  
ager, was sufficient. *Id.*

The plaintiff, knowing that the defendants  
were a firm of solicitors, advanced to one A.  
money upon a joint note signed by him and by  
one of the defendants in the firm's name, with-  
out the knowledge or consent of his partner.  
No usage or general mutual authority to sign  
notes in the name of the firm was proved, and it  
was admitted that the plaintiff had no know-

ledge of the transactions relied upon to shew  
such authority. A verdict was given for defen-  
dants in the County Court, and a rule nisi to  
set it aside refused:—Held, that the plaintiff  
could not recover against both defendants, but  
that the defendant who signed the note was  
liable; and the court, having no power on an  
appeal from the County Court to amend the re-  
cord, allowed the appeal on payment of costs by  
the appellant, so far as to direct the issue of a  
rule nisi, upon the return of which in the court  
below, the necessary amendment could be made.  
Semble, per Burton, J. A., that even in the  
case of a trading partnership, a partner has no  
implied power to give the partnership name to  
secure the debt of a third person. *Wilson v.*  
*Brown*, 6 A. R. 411.

The plaintiffs discounted a note for J. N., the  
maker, payable to and endorsed by a firm in the  
partnership name by one of the partners, the  
plaintiffs knowing that it was so endorsed as  
security for J. N., and having no reason to sup-  
pose that it was in connection with the partner-  
ship business:—Held, that the other partners  
were not liable. *Federal Bank v. Northwood*, 7  
O. R. 389.—Q. B. D.

The defendant W. acted as agent for his co-  
defendants under a written agreement that no  
partnership should be created between them, or  
"the parties held to be partners." To all ap-  
pearance, however, W. acted as a partner and  
as such effected a sale to the plaintiff of a quan-  
tity of wine, etc., at ninety days' credit. Sub-  
sequently he applied to plaintiff for a loan of  
money for the purpose, as he stated, of retiring  
notes of customers of the firm, but which he  
told the plaintiff he was desirous of concealing  
from the other defendants, his so-called part-  
ners, and for the amount so borrowed he gave  
the promissory note of the firm:—Held, affirm-  
ing the judgment of the court below, that what  
transpired between W. and the plaintiff when  
lending the money, was sufficient to shew that  
the advances had not been for partnership pur-  
poses, and therefore that the other defendants  
were not liable. *McConnell v. Wilkins*, 13 A.  
R. 438.

J. E. Dunham carried on business at Montreal  
from February, 1886, to 1st September, 1886,  
under the style of J. E. Dunham & Co. The  
same J. E. Dunham, with W. W. Park carried  
on business at Toronto from 1st May, 1886, to  
1st August, 1886, under the same style, J. E.  
Dunham & Co. By the articles of partnership  
between Dunham and Park it was agreed that  
Dunham should not sign the firm name to bills  
or notes. The dissolution of the partnership  
between Dunham and Park was not advertised  
until the 20th August, 1886. Dunham, for  
purposes of his own, and without the knowledge  
of Park, upon the 11th of August, 1886, signed  
a series of notes amounting to \$21,000 with the  
firm name of J. E. Dunham & Co., and gave  
them to one Isaacs. The note in question in  
this action was one of that series, but antedated  
upon the 30th July. The plaintiffs who had no  
knowledge of Park being a member of J. E.  
Dunham & Co., took this note without notice  
of any infirmity, and to secure a pre-existing  
debt which was overdue. The judge at the  
trial charged the jury that the plaintiffs had a  
right to resort to either firm for payment:—

Held, a misdirection, and that there was no such right of election; that it was for the creditor to prove who his debtor was and not for the defendants to prove that they were not the debtors:—Held, also, that if this note had been given before the 1st of August, the judge at the trial should have left it to the jury to say which firm Dunham intended to bind; but that as the note was not given during the partnership, and as the plaintiffs had no knowledge of the firm, or of Park being a member of it, the question was not material:—Held, also, that as the plaintiffs knew nothing of the firm of J. E. Dunham & Co., or the members of it, and had had no dealings with it, the defendant Park was not liable upon the note signed after the 1st of August, when the dissolution actually took place, although before the 20th of August, when publication of the same was made. As the facts were all before the court, instead of ordering a new trial, judgment was given for the defendant Park, with costs. *Standard Bank v. Dunham*, 14 O. R. 67.—Q. B. D.

When a partnership is entered into for the purpose of buying and selling lands, the lands acquired in the business of such partnership are, in equity, considered as personality, and may be dealt with by one partner as freely as if they constituted the stock-in-trade of a commercial partnership. The active partner in such business has an implied authority to borrow money on the security of mortgages acquired by the sale of partnership lands. An amount so borrowed was paid by a cheque made payable to the order of all the partners by name. The active partner had authority, by power of attorney, to sign his partners' names to all deeds and conveyances necessary for carrying on the business, but had no express authority to endorse cheques:—Held, that having authority to effect the loan and receive the amount in cash he could endorse his partners' names on the cheque, and the drawees had a right to assume that he did it for partnership purposes and were justified in paying it on such endorsement:—Held, also, that if the payment by the drawees was not warranted, the drawers having, for two years after, received monthly statements of their account with the drawees, and given receipts acknowledging the correctness of the same, they must be held to have acquiesced in the payment. *Manitoba Mortgage Co. v. Bank of Montreal*, 17 S. C. R. 692.

Where a non-negotiable promissory note, given for money lent to a firm, is made by one member thereof and endorsed by the other, the character in which the endorsement is made, will be implied from the purposes for which the note is given, the endorsement obtained, and the particular circumstances of the case, which were here held to make such indorser liable as guarantor. *McPhee v. McPhee*, 19 O. R. 603.—MacMahon.

See *Osborne v. Henderson*, 18 S. C. R. 698, p. 1540; *Purdum v. Nichol*, 16 O. R. 699; 15 A. R. 244; 15 S. C. R. 610, p. 1262.

## 2. Other Cases.

H. & M. were carrying on business in co-partnership, and H. becoming dissatisfied with the manner in which the business was conducted,

a dissolution was agreed upon, in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it, H. retiring and assigning to M. his interest in the partnership assets, in consideration of \$1,332, for which M. gave his promissory notes at three, six, nine, and twelve months, and bound himself to pay all the debts of the co-partnership. M. continued to carry on the business, and in doing so had several transactions with the plaintiffs, from whom he continued to receive goods on credit, giving promissory notes for the price as well as to cover the firm's indebtedness, during which time the plaintiffs rendered periodical statements to M., ignoring apparently the existence of H., in which the liabilities of the firm and M. were embraced; although expressed "M. and H. Liability," giving the items, and "J. M. Liability," also detailing the items. M., by means of contra accounts against H., had reduced the latter's claim to about \$400. In November or December, 1876, the plaintiffs applied to H. to renew the partnership notes, but this he declined to do on the ground that he was not liable, notwithstanding which the plaintiffs continued to deal with M. until he became insolvent in January, 1880, when they instituted proceedings against both partners to recover their claim:—Held, Patterson, J. A., dissenting, reversing the finding of Cameron, J. (31 C. P. 430), that the effect of the dealings between H. and M. was not to constitute H. a surety for M., and that he and M. remained liable to the plaintiffs for the partnership debts. *Birkett v. McGuire*, 7 A. R. 53.

Where S. a partner, had contracted in writing in the partnership name, to sell certain timber limits, property of the partnership, but standing in his name only, and M., his co-partner, when informed thereof, had not dissented, but had shortly afterwards furnished information to the purchaser, which he was only entitled to ask for as such purchaser:—Held, having regard to all these circumstances, S. had assented to the said contract, and was bound thereby. It appeared also, that S., who was the managing partner, and the purchaser subsequently put an end to the terms of credit, and agreed to a cash payment of \$15,500, part of the purchase money:—Held, it was competent for them so to do, and within the power of S., so far as his co-partner was concerned. *Reid v. Smith*, 2 O. R. 69.—Boyd.

Liability of solicitor for fraudulent conduct of partner. See *Re McCaughey and Walsh, Solicitors* 3 O. R. 425.

Liability of solicitor for negligence of partner in making investments. See *Thompson v. Robinson*, 16 A. R. 175.

Where one member of a partnership borrows money upon his own credit by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business of his own free will without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for said loan, under Art. 1867 C.C. *Maguire v. Scott*, 7 L. C. R. 451, distinguished. *Shaw v. Cadwell*, 17 S. C. R. 357.

The plaintiffs received from their traveller an order for goods from the firm of C. Bros., hotel-keepers. Before they delivered the goods they

in, in October, 1876, approval of the plaintiff in arranging it, M. his interest in consideration of \$1,332, promissory notes at three, and bound himself to partnership. M. business, and in doing with the plaintiffs, to receive goods on notes for the price as indebtedness, during rendered periodical apparently the existences of the firm though expressed "M. items, and "J. M. the items. M., by against H., had re to about \$400. In 1876, the plaintiffs partnership notes, he ground that he was which the plaintiffs until he became insolvent when they instituted partners to recover son, J. A., dissenting, Cameron, J. (31 C. P. dealings between H. a surety for M., liable to the plaintiffs debts. *Birkett v.*

contracted in writing to sell certain timber partnership, but standing his co-partner, when not dissented, but had no information to the only entitled to ask for, having regard to all and assented to the said thereby. It appeared managing partner, and only put an end to the d to a cash payment of case money:—Held, it to do, and within the co-partner was con- O. R. 69.—Boyd.

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a partnership borrows dit by giving his own m so borrowed, and he eds of the note in the is own free will with- igation to, or contract the partnership is not r Art. 1867 C.C. Ma- R. 451, distinguished. R. 357.

from their traveller an firm of C. Bros., hotel- delivered the goods they

became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros., and that S. L. C. was one of the members of it, and they were at the same time informed that the partnership still existed. They shipped and charged the goods, and also goods subsequently ordered, to C. Bros. As a matter of fact, however, the partnership did not exist at the time the first order was given, S. L. C. having retired from the business, and the plaintiffs had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. L. C. continued to live at the hotel except when he was absent on his own business; the lamp with the name of C. Bros. continued at the door; the liquor license in the name of C. Bros. continued to hang in the bar room; and letter-paper with the heading "C. Bros., proprietors" continued to be handed to customers:—Held, that where a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, and has not become aware of his retirement, the retiring member of the firm is liable unless he shows that he has given reasonable public notice of his retirement; and, as such notice was not given here, S. L. C. was liable, not only for the goods first, but for those subsequently, ordered, no notice of the retirement having ever been given. *C. P. Reid & Co. v. Coleman Brothers*, 19 O. R. 93.—Q. B. D.

See *Merchants' Bank v. Thompson*, 3 O. R. 541, p. 1535; *Seifert v. Irving*, 15 O. R. 137, p. 1537.

#### V. DISSOLUTION.

Partnership articles for a firm of three persons provided that if any partner should violate certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken such conditions of partnership the others verbally notified him that he must leave the firm and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business and the assignee brought an action against the remaining partners for the value of the same:—Held, reversing the judgment of the C. P. D. Mead v. O'Keefe, 15 O. R. 84, and the Court of Appeal, 15 A. R. 103, Fournier, J., dissenting, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from showing that it took place in consequence of the misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice of intention to expel required by the articles could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited:—Held, also, that if it was a dissolution by one partner voluntarily retiring

no claim could be made by the retiring partner in respect to goodwill, as the account to be taken under the partnership articles in such cases does not provide therefor:—Semble, that the goodwill consisted wholly of the trade name of the firm. *O'Keefe v. Curran*, 17 S. C. R. 596.

Agreement by new firm to pay debts of old firm. Right of creditors to enforce. See *Osborne v. Henderson*, 18 S. C. R. 698, p. 1540.

The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract. In an action brought in the individual names of the three partners, for damages for non-delivery:—Held, that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract. *McCraney v. McCool*, 19 O. R. 470—Q. B. D.; 18 A. R. 217.

See *Re Walker an Insolvent*, 6 A. R. 169, p. 120; *Birkett v. McGuire*, 31 C. P. 430; 7 A. R. 53, p. 1544; *Wilson v. Roger, McLay & Co.*, 10 P. R. 355, *infra*; *Melbourne v. City of Toronto*, 13 P. R. 346, p. 388; *C. P. Reid & Co. v. Coleman Bros.*, 19 O. R. 93, p. 1545.

#### VI. DEATH OF PARTNER.

Upon the death of one member of the firm and the subsequent insolvency of the surviving partners the joint estate passes to their assignee in insolvency. See *Davidson v. Papps*, 28 Chy. 91, p. 118.

Held, that a contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners. *Burnet v. Hope*, 9 O. R. 10.—C. P. D.

#### VII. ACTIONS AND PROCEEDINGS BY AND AGAINST.

##### 1. Generally.

Blakeslee, Brown & Co. carried on business in partnership, under the name of Blakeslee & Co. Blakeslee absconded on the 19th September, and the business continued. O. assigned his interest to Brown, and after such assignment, but before it had been made public, the plaintiff served his writ of summons against the firm on O.:—Held, that the service was good. *Bank of Hamilton v. Blakeslee*, 9 P. R. 130.—Dalton, Master.

The cause of action arose before, and the writ of summons was issued after the dissolution of defendant's firm:—Held, that the defendants were properly sued in their firm's name. *Wilson v. Roger, McLay & Co.*, 10 P. R. 355.—Dalton.—Master.—Osler.

The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership, binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to. *Taylor v. Cook*, 11 P. R. 60.—Dalton, Master.

Examination as judgment debtors of parties under Division Court Act, R. S. O. (1887), c. 51, s. 108, sub-s. 4, 5, 6. See *Re Young v. Parker & Co.*, 12 P. R. 646, p. 549.

See *Morrison v. Earls*, 5 O. R. 434, p. 773; *London and Canadian Loan and Agency Company v. Morphy*, 14 A. R. 577, p. 701; *Miller v. White*, 16 S. C. R. 445, p. 668; *Mail Printing Co. v. Berlin*, 17 O. R. 15, p. 324.

## 2. For Non-Registration of Partnership.

In an action by several plaintiffs qui tam against two defendants for penalties for not registering their partnership under R. S. O. (1877), c. 123, of which section 11 gives the right of action to "any person" who may sue:—Held, reversing the judgment of the court below: (1) That under the above section and the Interpretation Act, any objection to the action being brought in the name of more than one person, could not prevail; (2) That the circumstance that the plaintiffs, resided out of the jurisdiction could not defeat their action; (3) That the joinder of two defendants for several penalties was not a ground of demurrer; and per Osler, J.A.—There was no inconvenience or impropriety in joining these two defendants in one action. *Chaput v. Robert*, 14 A. R. 354.

## VIII. MISCELLANEOUS CASES.

The assignment for the benefit of creditors was executed by one partner, at the request of his co-partner, in the partnership name, and was made at the request of several creditors:—Held, that the assignment was properly executed, and that there was sufficient assent of the creditors. *Nolan v. Donnelly*, 4 O. R. 440. —C. P. D.

Execution of chattel mortgage and assignment for creditors by infant partner. See *Powell v. Calder*, 8 O. R. 505, p. 805.

Chattel mortgage taken in the individual name of a partner, the moneys advanced by the firm.—Validity as against creditors. See *Hobbs' Hardware Co. v. Kitchen*, 17 O. R. 363, p. 179; *Ross v. Dunn*, 16 A. R. 552, p. 192.

Sale of goodwill of business. See *O'Keefe v. Curran*, 17 S. C. R. 596, p. 1546.

## PARTY WALLS.

See BUILDINGS.

## PASSENGERS.

See CARRIERS—RAILWAYS AND RAILWAY COMPANIES—SHIP.

Soliciting Passengers. See *Regina v. Verrall*, 18 O. R. 117, p. 1375.

## PATENT FOR INVENTION.

### I. FIRST INVENTOR, 1548.

### II. DELIVERY OF MODEL, 1548.

### III. COMBINATION AND NOVELTY, 1548.

### IV. PRIOR USE, 1552.

### V. RE-ISSUE OF PATENT, 1552.

### VI. ASSIGNMENT AND ROYALTY, 1553.

### VII. NOTES GIVEN FOR PURCHASE OF PATENT RIGHTS, 1556.

### VIII. JURISDICTION OF MINISTER OF AGRICULTURE, 1556.

### IX. ACTIONS FOR INFRINGEMENT.

#### 1. Venue, 1557.

#### 2. Particulars, 1558.

#### 3. Evidence, 1558.

#### 4. Damages, 1558.

#### 5. Other Cases, 1559.

### X. TRADE MARKS—See TRADE MARKS.

#### I. FIRST INVENTOR.

To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by scire facias, whether it is vested in the defendant or in a person not a party to the suit. *Smith v. Goldie*, 9 S. C. R. 46.

#### II. DELIVERY OF MODEL.

Held, that 35 Vict. c. 26 (Dom.), does not require delivery of a model prior to the issue of a patent of invention. In this case, after the granting of the patent the commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of the model, which was sent, and the patent was then forwarded:—Semble, that delivery of the model prior to the grant of the patent was dispensed with, merely requiring it to be sent before the patent would be forwarded. *Regina v. Smith*, 7 O. R. 440.—Rose.

### III. COMBINATION AND NOVELTY.

In November, 1879, the plaintiff obtained a patent for a new and useful improvement in bakers' ovens, which was expressed to be "In combination with a baker's oven, a furnace, 'D,' set within the oven but below the sole, 'A.'" This patent he surrendered, and a new one issued in August, 1880, on the ground that the first was inoperative by reason of the insufficiency of the description. The new patent was for the unexpired portion of the five years covered by the first patent. The claim of invention, as set forth in the specification, was: "(1) In a firepot or furnace placed within a baker's oven below the sole thereof, and provided with a door situated above the grate; (2) In a firepot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide. (3) In a flue, 'H,' leading from below the grate, 'B,' to the flue, 'E.' (4) In a baker's oven provided with a circular

tilting grate situated below the sole of the oven, and provided with a door. (5) In a cinder grate, 'F.' placed beneath the fire grate, 'B.' in combinations with a flue, 'H.' The plaintiff, in his specifications, claimed all these as his inventions; in his evidence he claimed each of the combination to be the subject of his patent:—Held (1), if the plaintiff was correct in the latter view, that the last four combinations being new, the first patent could not have been inoperative as to them; and the second patent in respect of these must be construed as an independent one, issuing for the first time on its date, and as all other than the first combination had been used for upwards of a year prior to the patent, he was not entitled to a patent therefor; (2) that the 5th combination of previously known articles, as applied to a baker's oven, which was productive of results which were new and useful to the trade, was a subject of a patent. *Hunter v. Corrick*, 28 Chy. 489.—Proudfoot. Reversed, 10 A. R. 449; 11 S. C. R. 300.

Some of the devices were in use before the patent, but numerous witnesses engaged in baking testified that they never knew of the combination before the plaintiff's invention:—Held, that the defence for want of novelty failed. *Id.*

Held, also, that the first combination in the patent of 1880 was such an amendment as is contemplated by the Act, 35 Vict. c. 26, s. 19. *Id.*

The defendant's oven was completed early in July, 1880, and before the re-issue of the plaintiff's patent; she had in use the first and fourth combinations, and continued to use them after such re-issue:—Held, that there was not any remedy for the intermediate user, as the patent was then inoperative; but as to any subsequent infringement, the user under the defective patent could not operate as a defence. *Id.*

The plaintiff claimed as his invention, for the purpose of purifying flour during its manufacture, a bolting cloth or sieve, through which a current of air was forced upwards by means of an air chamber and a fan, or substitute therefor, and, in order to keep such sieve from becoming clogged, a brush, or a number of brushes, arranged in such a manner as to traverse the under service. The air chamber and the fan combined with the bolt or sieve were admittedly old; and it appeared that one B. had patented a machine which was in use in the manufacture of semolina, in which a similar brush arrangement was in use for the purpose of keeping open the meshes of the sieve when used:—Held (affirming the judgment of Spragge, C.), that the plaintiff's invention was not patentable. *Smith v. Goldie*, 7 A. R. 628. Affirmed in the Supreme Court, 9 S. C. R. 46. Strong J. diss. Special leave to appeal to Her Majesty in Council in this case was refused.

C. obtained a patent for an alleged invention styled "The Paragon Black Leaf Cheque Book," and in his specification claimed as his invention. "In a black leaf cheque book of double leaves (one-half which are bound together while the other half fold in as fly-leaves, both being perforated across so that they can be readily torn out, the combination of the black leaf bound into the book next the cover and provided with

tape across its ends, the said black leaf having the transferring composition on one of its sides only." A half interest in this patent was assigned to the defendant, with whom C. was in partnership, and on the dissolution of such partnership said half interest was reassigned to C., who afterwards assigned the whole interest to the plaintiffs. Prior to the said dissolution the defendant obtained a patent for what he called "Butterfield's Improved Paragon Cheque Book," claiming as his invention the following improvements on cheque books previously in use: (1) A kind of type. (2) The membrane hinge for a black leaf, the whole bound by an elastic band to the ends or sides of the lower cover. (3) A totalling sheet. After the dissolution he proceeded to manufacture cheque books under his patent. The plaintiffs instituted proceedings to restrain such manufacture, claiming that their patent was thereby infringed, and on the hearing before the Chancellor, obtained the relief prayed for. The Court of Appeal, (11 A. R. 145) reversed this judgment, holding that although the plaintiffs' patent was infringed by the act of the defendant, yet, that the patent itself was void for want of novelty, and could not be protected. On appeal to the Supreme Court of Canada:—Held, that the patent of the plaintiff under which they claimed was a valid patent, and, as there was no doubt that it was infringed by the manufacture and sale of the defendant's books, the judgment of the Court of Appeal should be reversed and that of the Chancellor restored. *Grip Printing and Publishing Co. of Toronto v. Butterfield*, 11 S. C. R. 291.

In a suit for the infringement of a patent the alleged invention was the substitution in the manufacture of corsets of coiled wire springs, arranged in groups and in continuous lengths, for india-rubber springs previously so used. The advantage claimed by the substitution was that the metal was more durable, and was free from the inconvenience arising from the use of india-rubber caused by the heat from the wearer's body:—Held, affirming the judgment of Proudfoot, J., (9 O. R. 228) and the Court of Appeal (12 A. R. 738) Fournier and Henry, J.J., dissenting, that this was merely the substitution of one well known material, metal, for another equally well known material, india-rubber, to produce the same result on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of india-rubber, and it was, consequently, void of invention and not the subject of a patent. *Ball v. Crompton Corset Co.*, 13 S. C. R. 469.

Where in an action to restrain infringement of a patent, brought against C. and H. who had been employed as a workman by C., it appeared that the only portion of the defendants' combination, which was not identical with the plaintiff's patented machine was a mere variation in arrangement, or a mechanical equivalent of a corresponding portion of the plaintiff's machine—a device containing no element of invention, but effecting the same purpose by a slightly different method:—Held, that the plaintiff was entitled to judgment for an injunction against both defendants, but to a reference as to damages only as against C.:—Quære, whether it is correct to say that there can be no infringement of a combination unless the whole be pirated.



*Woodward v. Clement*, 10 O. R. 348.—Prov foot.

A patent for a horse-rake, the specification of which described as part of the invention "the construction and novel arrangement of a divided axle, with wheels firmly fastened thereon, a friction gripe for engaging with the divided axle," etc.; the description of the construction and operation stating that "the axle being divided into two parts, permits the wheels to turn in opposite directions; a piece of iron or steel wire, or cord, or chain, is coiled round each half of the axle, one end of each coil being secured firmly to the rake head, while the other ends of the coil are secured to a foot treadle," etc.;—Held, not to be infringed by a rake worked by a strap passed twice or oftener round the inner part of the hub of the wheel elongated for the purpose of receiving it, one end of the strap being attached to the axle, and the other connected with the treadle:—Held, also, that the mode of using the cord was a novel, being essentially the same described in an earlier patent as consisting of "five metallic straps which encircle the inner portion of the hubs, one end of each strap being attached to a fixed bearing secured to the axle, and the other to the short end of a lever," etc.:—Sensible, that neither the circle nor the coil was the subject of either invention, but only modes of using a friction band in connection with another device which was the patented improvement. Per Hagarty, C. J. O.—It was not patentable. *Sylvester v. Masson*, 12 A. R. 335.

In 1877 L., a candle manufacturer, obtained a patent for new and useful improvements in candle making apparatus. In 1879 C., who was also engaged in the same trade, obtained a patent for a machine to make candles. L. claimed that C.'s patent was a fraudulent imitation of his patent and prayed that C. be condemned to pay him \$13,200 as being the amount of profits alleged to have been realized by C. in making and selling candles with his patented machine, and also \$10,000 exemplary damages. C. contended his patent was valid as a combination patent of old elements; that there could be no action for infringement of L.'s patent until C.'s patent was repealed by *scire facias*; and also that L.'s patent was not a new invention. At the trial there was evidence that there were other machines known and in use for making candles, but there was no evidence as to the cost of making candles with such machines, or what would have been a fair royalty to pay L. for the use of his patent. And it was proved also that L.'s trade had been increasing. The Superior Court on the evidence found that C.'s patent was a fraudulent imitation of L.'s patent, and granted an injunction and condemned C. to pay L. \$600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal to the Supreme Court of Canada it was:—Held, affirming the judgment of the courts below, Henry, J., dissenting, that C.'s machine was a mere colourable imitation of L.'s, based upon the same principles, composed of the same elements, and differing from it only in the arrangement of those elements, and producing no results materially different; therefore L.'s patent had been in-

fringed, and there was no necessity in order to aver damages for infringement that C.'s patent should first be set aside by *scire facias*:—Held, also, reversing the judgment of the court below, that in this case the profits made by the defendants was not a proper measure of damages; that the evidence furnished no means of accurately estimating the damages, but substantial justice would be done by awarding \$100. *Collette v. Lamiere*, 13 S. C. R. 563.

P. D. obtained a patent for an improvement in the construction of carriages by the combination of a folding sectional roof joined to the carriage posts, in such a way and by such an arrangement of sections of the roof and of the carriage posts that the whole carriage top could be made entirely in sections of wood or other rigid material with glass sashes all round, and the carriage be opened in the centre into two principal parts and at once converted into an open uncovered carriage. In an action for infringement of this patent:—Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), and restoring the judgment of the Superior Court, Ritchie, C. J., and Gwynne J. dissenting, that the combination was not previously in use and was a patentable invention. *Dawson v. Bellemare*, 16 S. C. R. 180.

See *Owens v. Taylor*, 20 Chy. 210, p. 1554.

#### IV. PRIOR USE.

It is not illegal to manufacture and sell an article in this country which has been patented in the United States, and put upon it a statement that it is so patented, as a recommendation of it, so long as there is no infringement of a valid existing patent in this country. *Kilder v. Smart*; *Kilder v. Smart Manufacturing Co., Brockville (Limited)*, 8 O. R. 362.—Ferguson.

The plaintiffs were the patentees of a certain invention in the United States, and being desirous of having the article with some improvement patented in Canada, one of them employed one of the defendants, a mechanic, to make a model, and under the pledge of secrecy placed the United States patent in his hands and imparted to him his ideas as to the improvements. It was afterwards discovered that the defendant so employed had, during his employment, taken out a patent for a similar article, under which he and the other defendants were manufacturing. In an action brought to set aside this patent and for an injunction restraining the manufacture by the defendants of the article, it was contended on the latter's behalf, that the article was not protected in Canada by the United States patent, and in fact that the idea was public property:—Held, following *Morrison v. Moat*, 9 Ha. 241, that the plaintiffs had the right to succeed as to the injunction, and that their title was good as against the defendants, even though they might not have a good title against the public. *Lean v. Huston*, 8 O. R. 521.—Ferguson.

See *Smith v. Goldie*, 9 S. C. R. 46, p. 1549.

#### V. RE-ISSUE OF PATENT.

Where to an action to restrain certain alleged infringements of a re-issued patent, it was

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objected by way of defence that the re-issued patent contained a combination not in the original patent or the application therefor, and was therefore invalid; and it appeared that the combination in question was manifested in the drawings and specifications of the original patent, but by mistake and inadvertence was not separated from the other parts of the description, and made the subject of a distinct claim, so as to be protected by the original patent :—*Held*, per Boyd, C. (affirming the decision of Ferguson, J.), that the reissued patent was nevertheless valid. *Proudfoot, J.*, dissentiente. Per Boyd, C.—What could have been claimed as part of the invention under the specifications and descriptions accompanying the original patent, but was not by reason of error, mistake or inadvertence, may be claimed on a re-issue if there has been no laches. Not what the patentee claims as his invention, but what is for the first time disclosed to the public on his application, is the measure of his rights on a re-issue. *Withrow v. Malcolm*, 6 O. R. 12.—Chy. D.

Per Proudfoot, J.—A re-issued patent must be for the same invention as that embraced and secured in the original patent. It is a misconstruction of the Patent Act of 1872 to say it authorizes a re-issue "with broader and more comprehensive claims," if by that be meant that it authorizes a re-issue with a claim not in the original patent at all; neither is it enough to justify a re-issue that all the elements of the new claim may be found in the specifications of the original patent; but if the claim is so imperfectly described, through error or mistake, as not to cover the invention, then a re-issue may be had. *Ib.*

Per Proudfoot, J.—The earlier decisions in the United States are more in conformity with the language and intention of our Patent Acts than the later decisions, which seem to recognize the right in the re-issue to broaden the claims in a manner which the law does not appear to justify. *Ib.*

Held, that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a re-issue there), before the application for a re-issue in this country, is fatal to the validity of the re-issue here. *Kidder v. Smart; Kidder v. Smart Manufacturing Co., Brockville (Limited)*, 8 O. R. 362.—*Ferguson.*

#### VI. ASSIGNMENT AND ROYALTY.

The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent; but P. having obtained a patent therefor, which he assigned to the plaintiff, who again assigned to the defendant subject to certain royalties :—Held, that notwithstanding the invalidity of the patent he was entitled to recover the amounts payable to him under the agreement

during the currency thereof. *O'Brien v. Taylor*, 29 Chy. 210.—*Proudfoot.*

In 1875 J. R. obtained letters patent for improvements in "harvesters," and sold and assigned to the plaintiffs the exclusive right to manufacture and sell the same, and to sell such right to other persons. In the same year the plaintiffs executed a deed to the defendant, assigning to the defendant the exclusive right to manufacture and sell such "harvesters" in certain counties, he paying \$10 royalty on each one to be manufactured by him. It was then covenanted by and on the part of the plaintiffs that the original patentee, J. R., would warrant and defend the defendant in the possession of the said patent within the territory thereby granted, and further agreed that if J. R. neglected or refused to protect and defend him in his peaceable possession of the said patent, then the royalty agreed to be paid by him should cease. Per Hagarty, C. J. O., and Morrison, J. A., the plaintiffs under this covenant were liable only to the defendant in case J. R. neglected to defend him against all persons having a right to manufacture and sell the machines, not as against mere wrongdoers. Per Burton and Patterson, JJ. A., the terms of the covenant bound J. R. to protect the defendant against all infringers, the rule of construction of covenants to "warrant and defend," as applied to lands, not having any application in cases like the present. *Green v. Watson*, 10 A. R. 113; 2 O. R. 627.

Seemingly, if there had been a breach of the covenant by J. R., the defendant would not have been liable to pay the royalty under the above agreement, though he had continued to manufacture the patented article. *S. C.*, 2 O. R. 627. Chy. D.

On 1st June, 1877, C. P., the owner of a patent for an improved pump which had only about a month to run, but was renewable for two further terms of five years each, agreed to sell to P. et al., his pump patent for five counties, and by deed of same date he granted, sold and set over to P. et al., "all the right, title, interest which I have in the said invention as secured by me by said letters patent for, to and in the said limits of the counties of," etc. The habendum in the deed was "to the full end of the term for which the letters patent are granted." The consideration was \$4,500, of which \$1,500 was paid down, and mortgages given on the land on which the business was carried on, and on the chattels for the residue. The patent expired on the 19th July, 1877, and C. P. renewed it in his own name for the further term of five years, and P. et al. having made default in June, 1878, C. P. filed his bill asking for payment of the balance of purchase money, or in default for sale of the land. Almost at the same time P. et al., brought a suit against C. P. to enforce specific performance of the agreement for sale of the patent right for the full period to which C. P. was entitled to renew the same under the patent laws :—Held, in the suit *Peck v. Powell*, reversing the judgment of the Court of Appeal, that under the agreement and assignment plaintiffs were entitled to the extension as well as the current term. And in the suit *Powell v. Peck*, 8 A. R. 498, affirming the judgment of the Court of Appeal, that C. P. was entitled to a decree for the

redemption or foreclosure of the mortgaged premises with costs. Per Henry and Gwynne, J.J., that the decrees in the Court of Chancery should be consolidated and the decree for sale in default of payment in the suit of Powell v. Peck delayed until P. had assigned the renewal term. *Peck v. Powell*, 11 S. C. R. 494. See *S. C.*, 26 Chy. 325; 8 A. R. 495.

The plaintiffs being the patentees of a certain article, by memorandum in writing, under seal, reciting that they were the inventors of the article in question, assigned all their interest in the patent to the defendant for a certain district or territory in consideration of certain royalties and sums of money therein agreed to be paid by him. In an action to recover the consideration in which the evidence of the defendant went to shew that he knew before the first year after the making of the contract had expired that others were manufacturing the patented article, but he did not complain or repudiate the transaction, or refuse to pay, or offer to reassign, or require the alleged infringers to desist, or call upon the patentees to vindicate their patent, and that he had a profitable user of the invention to a substantial extent:—Held, that in the absence of fraud, or warranty, or representation which induced the bargain and was falsified in the result such a contract was simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible. The plaintiffs were therefore held entitled to judgment. *Smith v. Neale*, 2 C. B. N. S. 67, and *Hall v. Conder*, 2 C. B. N. S. 22, commented on; *Hayne v. Maltby*, 3 T. R. 438, and *Saxton v. Dodge*, 37 Barb. (N.Y.) 84, distinguished. *Vermilgea v. Cammiff*, 12 O. R. 164.—Boyd.

Action to recover royalties alleged to be payable on threshing machines manufactured by defendant, under an indenture made between plaintiff B. and defendant, whereby the plaintiff B. sold and transferred to the defendant the right to manufacture and use a certain invention known as 'Beam's Thresher'; and in consideration thereof the defendant agreed to pay a named royalty on all machines manufactured "upon or after" the principle of the invention. The plaintiff B. subsequently assigned to his co-plaintiff F. one-half share or interest in the invention, and also one-half of the moneys then, and to grow, due under the indenture. The plaintiff's patent was for a combination, part only of which was used by defendant. The machines in question were manufactured after the assignment to F. The defendant objected that the patent was invalid on the ground of want of novelty in the invention, and that it was not the subject of a patent; and also that the machine was not manufactured on the principle of the plaintiff's patent. Parol evidence was admitted, subject to objection, that the plaintiff agreed to prevent any infringement of the patent, and, if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation:—Held, (1) that the defendant having used the plaintiff's invention, could not raise the objection to the validity of the patent. (2) That whether the machines were or not manufactured "upon or after" the principle of the plaintiff's patent, was a question for the jury on the evidence, and they having found, as they were warranted by the

evidence in doing, that they were so manufactured, the finding could not be interfered with, (3) That the parol evidence was not admissible to vary the deed, following *McNeely v. McWilliams*, 13 A. R. 324; and also that by a prior judgment of the Q. B. D., the matter was res judicata, and the fact that the judgment was between B. alone and defendant, could make no difference. *Beam v. Merner*, 14 O. R. 412.—C. P. D.

In an action under a similar agreement, the defendant partially manufactured a number of machines, and then sold out his establishment to a firm M. D. & Co., who completed the machines, and labelled them as required by the contract. Afterwards the defendant took M.'s place in the firm, and the firm manufactured a number of machines upon and after the principle of the plaintiff's patent which they labelled with another name from that required by the contract. The plaintiffs sued for the royalties, and for not labelling as required:—Held, that the plaintiffs were entitled to recover as for a manufacture and sale by defendant, for they might assume that the defendant was making the machines under the contract, and that the firm were but agents working for him. *Id.*

#### VII. NOTES GIVEN FOR PURCHASE OF PATENT RIGHTS.

The statute R. S. C. c. 123, ss. 12-14, which requires notes given for the purchase of a patent right, before being issued to have the words "given for a patent right," written or printed thereon, provides that the endorsee or transferee of a note with such words thereon shall have the same defence as would have existed between the original parties, and subjects to indictment, any one issuing, selling or transferring such notes without such words written thereon. One of the plaintiffs gave two notes to the defendant for the purchase money on the assignment of a patent right on which the required words were written. These notes were subsequently cancelled, and in lieu thereof the notes in question were given, made by both plaintiffs without having the said words thereon:—Held, that the notes were enforceable by defendant, these words not being required as between maker and payee, and, even if they were, the makers had the right to and did waive having the same thereon. *Girvin v. Burke*, 19 O. R. 204.—C. P. D.

#### VIII. JURISDICTION OF MINISTER OF AGRICULTURE.

Held, that the minister of agriculture or his deputy has exclusive jurisdiction over questions of forfeiture under the 28th section of the Patent Act, 1872, and a defence on the ground that a patent has become forfeited for breach of the conditions in the said 28th section cannot be supported after a decision of the minister of agriculture or his deputy declaring it not void by reason of such breach:—Per Henry J.—The jurisdiction of the minister is administrative rather than judicial, and he may look at the motive and effect of an act of importation, and a single act, such as the importation of a sample tending to introduce the invention, is not necessarily a breach of the spirit of the conditions of

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Section 28 of the Patent Act of 1872, after specifying certain cases in which patents are to be null and void, provided that in case disputes shall arise under this section as to whether a patent has or has not become void, such disputes shall be settled by the minister of agriculture or his deputy, whose decision shall be final:—Held, that a court or judicial tribunal for the determination of the matters referred to in the section was constituted by the Act; that the constitution of such a court was not ultra vires the Dominion Parliament as infringing Provincial legislation; and that it was competent for the minister to decide as to the existence of disputes arising for his decision. Prohibition therefore was refused. *In re the Bell Telephone Co. and the Telephone Manufacturing Co. and the Minister of Agriculture*, 7 O. R. 605.—Osler.

On a motion for a writ of certiorari to bring up into this court all the proceedings, etc., before the minister of agriculture, including his decision therein, on an application made before him to have a patent declared void for non-compliance with the provisions of section 28 of the Patent Act of 1872:—Held, that the minister of agriculture, or his deputy, had jurisdiction under section 28 to decide any dispute as to whether a patent had become void for non-observance or violation of the provisions of that section. *In re Bell Telephone Co.*, 9 O. R. 339.—C. P. D.

Seemle, that the minister's duties are ministerial, and therefore cannot be reversed or reviewed in a court of law; but, even if judicial, this court cannot interfere on the ground of a total want of jurisdiction on the minister's part to make the inquiry, for, so far at least as this court was concerned, this must be considered res judicata by the decisions of *Smith v. Goldie*, 9 S. C. R. 46, and *Re Bell Telephone Co. and Minister of Agriculture*, 7 O. R. 605; nor was there a partial want of jurisdiction, by reason of the neglect of the minister to examine witnesses on oath or his refusal to issue summonses for witnesses to attend before him, because under section 28 this was not required. Quere, whether also, if judicial, the Provincial Courts have jurisdiction to interfere with such a tribunal, it being, on this assumption, a Dominion court. A writ of certiorari was therefore refused. *Id.*

Seemle, that on an application to question a patent under the statute the intervention of the Attorney-General is not essential. *Id.*

## IX. ACTIONS FOR INFRINGEMENT.

### 1. Venue.

In an action for the infringement of a patent, plaintiff laid the venue in Hamilton, while the defendant was a resident of Toronto:—Held, that regarding the language of section 24 of the Patent Act, 1872, the venue should be laid in the county where the defendant resided; and an order was made under Rule 254 (Con. Rule 653) to change the place of trial to Toronto. *Goldsmith v. Walton*, 9 P. R. 10.—Osler.

Held, that the word "may" in 35 Vict. c. 26, s. 24 (Dom.), was obligatory and not merely permissive, and that the venue in an action to restrain the infringement of a patent, must be laid at the place of sittings of the court in which the action is brought, nearest to the place of residence or business of the defendant:—Held, also that section 24 was not ultra vires the Dominion parliament. *Aitchison v. Mann*, 9 P. R. 473.—Q. B. D. Affirming *S. C.*, *Id.* 253.—Boyd.

### 2. Particulars.

In an action for infringement of a patent the defendants denied (4) the novelty of the invention, and (6) that the plaintiff was the first and true inventor:—Held, Boyd, C., dissenting, that the defendants should deliver particulars under these defences, shewing in what respects the defendants deny that the plaintiffs' patent was for any new machine, etc., and the dates and occasions when, and also the names of the persons by whom the prior user was had. Per Boyd, C.—In the absence of any legislation or rules of court upon the subject, the judge has no power or right to prescribe so minutely what shall be disclosed in the particulars. The statute 35 Vict. c. 26, s. 24 (Dom.), goes no further than to justify such general order for particulars as is usual in other cases. *Mills v. Scott*, 5 Q. B. 360, discussed. *Smith v. Greey*, 11 P. R. 169.—Chy. D.

### 3. Evidence.

In an action to restrain the infringement of a patent in which the defence set up that the supposed invention had been previously patented in the United States and England, copies of American patents material to the defendant's case were procured by his solicitors of their own motion for the purposes of the action:—Held, that such documents were privileged from production. *Guelph C. Co. v. Whitehead*, 9 P. R. 509.—Dalton, Master.

The general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the ground of his attacking a plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses. *Smith v. Greey*, 10 P. R. 482.—Boyd.

See *Beam v. Verner*, 14 O. R. 412, p. 1556.

### 4. Damages.

In a patent action the judgment of the Supreme Court of Canada declared that the plaintiffs were entitled to an inquiry and to be paid the amount found due upon such inquiry for damages sustained from the making, constructing, using, selling, or vending to others to be used, by the defendants, and by the persons to whom they have sold, given, or let the same of any of the machines, etc. The judgment gave relief beyond what the plaintiffs asked by their bill of complaint:—Held, that where the language of the decree is unambiguous, the allega-

tions in the pleadings should not be taken into account in the inquiry as to damages, and therefore the master was wrong in excluding evidence of damages to the plaintiffs by the use of machines by persons who had bought them from the defendants. *Smith v. Goldie*, 11 P. R. 24.—*Proudfoot, Master*.—Dalton.

See *Leslie v. Calvin*, 9 O. R. 207, *infra*; *Collette v. Lasnier*, 13 S. C. R. 563, p. 1552.

#### 5. Other Cases.

An action for the infringement of a patent should not ordinarily be tried by a jury. *Vermylue v. Guthrie*, 9 P. R. 267.—Boyd.

The plaintiff sued the executors of D. D. C. for an account of all profit accrued to the estate of D. D. C., by reason of the user by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to D. D. C.:—Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of D. D. C. in respect of such profit accrued to him prior to his death. *Phillips v. Homfray*, 24 Ch. D. 439, discussed, and regarded as decisive in the present case:—Semble, that if the statement of claim could be read to mean that by reason of the wrongful act complained of, property of a tangible character, passed from the plaintiff's estate to that of D. D. C., as distinct from the saving of expense, the conclusion might be different. *Leslie v. Calvin*, 9 O. R. 207.—Ferguson.

See *Beam v. Merner*, 14 O. R. 412, p. 1556.

### PATENT FOR LAND.

See CROWN LANDS.

### PATHMASTER.

See *Stalker v. Township of Dunwich*, 15 O. R. 342, p. 1417.

### PAWNBROKER.

Remarks upon the law relating to pawnbrokers. *Regina v. Adams*, 8 P. R. 462.—Cameron.

A pawnbroker under C. S. C., c. 61, may legally charge any rate of interest that may be agreed upon between him and the pledgor. *Ib.*

### PAYMENT.

#### I. TO CREDITORS.

1. *What Amounts to*, 1560.
2. *Tender*—See TENDER.
3. *Appropriation of Payments*, 1561.
4. *By and to Whom*.

(a) *Agents*—See MORTGAGE—PRINCIPAL AND AGENT.

(b) *Garnishees*—See ATTACHMENT OF DEBTS.

(c) *Trustees*—See TRUSTS AND TRUSTEES.

(d) *Solicitors*—See SOLICITOR.

5. *By Cheque*, 1562.

6. *Plea of Payment*, 1563.

7. *Accord and Satisfaction*—See ACCORD AND SATISFACTION.

8. *Of Bills and Notes*—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

9. *Of Guarantees*—See GUARANTEE AND INDEMNITY.

10. *Of Rent*—See LANDLORD AND TENANT.

11. *Of Mortgages*—See MORTGAGE.

12. *Of Insurance Premiums and Losses*—See INSURANCE.

13. *On Contracts for Sale of Goods*—See SALE OF GOODS.

14. *To Save the Statute*—See LIMITATION OF ACTIONS.

II. ACTIONS TO RECOVER BACK MONEY PAID—See MONEY PAID.

III. TIME GIVEN FOR PAYMENT—See BILLS OF EXCHANGE AND PROMISSORY NOTES—PRINCIPAL AND SURETY.

IV. POWER OF ARBITRATORS TO DIRECT MANNER OF PAYMENT—See ARBITRATION AND AWARD.

V. PAYMENT BY INSOLVENT COMPANIES—See COMPANY.

#### VI. PAYMENT OF MONEY INTO COURT.

1. *Voluntary Payments*, 1563.

2. *In Actions*.

(a) *Generally*, 1563.

(b) *Effect of*—As an Admission, 1564.

(c) *Effect of*—As to Costs, 1565.

(d) *In Division Court Suits*—See DIVISION COURTS.

3. *On Sale of Land by Order of the Court*—See SALE OF LAND BY ORDER OF THE COURT.

4. *In Other Cases*, 1566.

5. *Interest Allowed*, 1566.

6. *Attachment of Money in Court*, 1567.

7. *By Executors*—See EXECUTORS AND ADMINISTRATORS.

#### VII. PAYMENT OF MONEY OUT OF COURT.

1. *In Actions Pending Appeal*.

(a) *Generally*, 1567.

(b) *As Security for Costs*—See COSTS.

2. *In Other Cases*, 1568.

3. *Stop Order*, 1569.

#### I. TO CREDITORS.

1. *What Amounts to*.

In a mechanic's lien action the owner of the property had an old account against the con-



tractor for bread supplied, which account, with interest, he charged against the sums due to the contractor under the contract:—Held, upon the evidence, that the account and interest should be treated, not as a matter of set-off, but as a payment of so much of the contract price. *Truax v. Dixon*, 17 O. R. 366.—Q. B. D.

See *Blackley v. Kenney*, 19 O. R. 169, p. 1281.

### 3. Appropriation of Payments.

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between St. J., the plaintiff, and R., the defendant. The master found that \$453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note for \$510, and interest thereon as barred by the Statute of Limitations; and reduced the interest on a sum of \$3,000 advanced from twenty-four per cent. to six per cent. after judgment had been recovered. The note of \$510 was dated 18th November, 1861, and was payable with interest at the rate of \$10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into agreement with him in order to relieve him from the pressure of execution debts, paid him \$2,000 on account of his indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870:—Held, that the evidence showed an appropriation by respondent of the \$2,000 on account of the debts for which he was being pressed, and as the note for \$510 was not included in such debts, the master was right in treating it as barred by the Statute of Limitations. *St. John v. Rykert*, 10 S. C. R. 278.

B. was a defaulter to the plaintiffs. Soon after his defalcations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs to realize and apply the money therefrom towards satisfying B.'s defalcations, but without indicating to what part of such defalcations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants, a guarantee company, were not liable, since by a condition of their policy they were not to be liable except for losses occurring within a year before notice of claim made to them:—Held, that the case was similar to payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it, and the defendants had no right to complain of the appropriation made in this case. *City of London v. Citizens' Ins. Co.*, 13 O. R. 713.—Ferguson.

Appropriation of payments are to be made (1) as the debtor directs at the time of payment. (2) When there is no direction by the debtor, as the creditor directs. (3) When neither makes any direction, then the law will apply it to the older debt, or as may be just. The defendant was indebted to the plaintiff and gave him several promissory notes in payment, which fell due in 1871. The interest was paid up to

August, 1878. The defendant thereafter paid in 1882, \$50, \$40 and \$100, and in 1883, \$100. The first two payments were specially appropriated by the defendant to the interest, and the others were unappropriated:—Held, that the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations. *Wilson v. Rykert*, 14 O. R. 188.—C. P. D.

At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque:—Held, by Street, J., that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn. *Lowden v. Martin*, 12 P. R. 496.

Payment of insurance moneys by mortgagor. See *Corham v. Kingston*, 17 O. R. 432, p. 1286; *Edmonds v. Hamilton Provident and Loan Society*, 18 A. R. 347.

See *Birkett v. McGuire*, 31 C. P. 430; 7 A. R. 53, p. 1544; *Bailey v. Jellott*, 9 A. R. 187, p. 134; *Taylor v. Mayrath*, 10 O. R. 669; *Spurr v. Albert Mining Co.*, 9 S. C. R. 35.

### 5. By Cheque.

A cheque of the plaintiffs when produced at the hearing, had written on it, "in full of all his (the defendant's) claims for notes or otherwise," and which words the plaintiff swore were on the cheque when sent to the defendant, which he denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of the clerk in the bank, whom he had requested to initial the words so introduced. The court (Spragge, C.) refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness. *Livingston v. Wood*, 27 Chy. 515.

Of premium on life policy. See *Neill v. Union Mutual Life Ins. Co.*, 7 A. R. 171, p. 995.

The payees of a cheque took it to the bank on which it was drawn on the afternoon of the day on which they received it from the drawer and got it marked "good," the amount being charged to the drawer's account. They then took it away without demanding payment. The bank, on the evening of the same day, suspended payment, and on the following day, on presentation of the cheque payment was refused:—Held, that the drawer of the cheque was discharged from all liability thereon. Affirming the judgment of Street, J. *Boyd v. Nasmith*, 17 O. R. 40.—C. P. D.

6. *Plea of Payment.*

See *Montreal City and District Savings Bank v. County of Perth*, 32 C. P. 18, p. 479.

## VI. PAYMENT OF MONEY INTO COURT.

1. *Voluntary Payments.*

Payment of money into court of amount awarded for compensation of land expropriated by a municipality for a court-house site. See *In re Beckett and the City of Toronto*, 10 O. R. 106, p. 1364.

A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after death the corpus to his son. The executors renounced probate, and after revocation of a prior grant to the son, who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act 47 Vict. c. 20 (Ont.), provides that such policy moneys to which infants are entitled shall be payable to a "trustee, executor, or guardian." P. claimed the moneys as administrator, whereupon the Insurance Company under section 15 of the Act, and G. O. 197, and Rule 541 (a) O. J. Act, applied to the master in ordinary in chambers for leave to pay the moneys into court. The master held (1) that voluntary applications to pay in money may be made in chambers. (2) That under rule 541 (a) O. J. Act, (Con. Rule 88) he had jurisdiction, by virtue of the administration proceedings before him, to make the order. (3) That the money was no part of the estate subject to the control of creditors, and when paid in should be "ear marked," and not mixed with the other funds of the estate. On appeal by the administrator, P., Proudfoot, J., made an order directing that the money in court be paid out to the Insurance Company. *Merchants' Bank v. Monticith—Ex parte Standard Life Assurance Co.*, 10 P. R. 588.

2. *In Actions.*(a) *Generally.*

Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited; and where in an alimony suit the statutory bond under a writ of ne exeat has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor, paid into court, and applied in discharging arrears of alimony. *Richardson v. Richardson*, 8 P. R. 274.—Proudfoot—Spragge.

Where there were cross-actions, in one of which a sum had been reported due and a claim of set-off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was held entitled to move for judgment under Rule 324 (Con. Rule 744). But the affidavits filed on the motion being conflicting:—Held, the action must be entered for trial at the

sittings for the examination of witnesses, but the amount found due in the first action was ordered to be paid into court, to abide the result of the second action. *Francis v. Francis*, 9 P. R. 209.—Proudfoot.

Payment into bank to credit of wrong cause. See *Johnston v. Johnston*, 9 P. R. 250, p. 1309.

Where the plaintiff in an alimony suit obtains a writ of arrest and the defendant gives bail and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked, paid into court, to be applied from time to time in payment of the alimony and costs:—Semble, upon such payment the sureties are entitled to be discharged from their bond. *Needham v. Needham*, 29 Chy. 117.—Boyd.

See *Gooderham v. Traders' Bank*, 16 O. R. 438, p. 1291.

(b) *Effect of—As an Admission.*

The defendant stated in his defence that in case the court should be of opinion that he was liable for the payment of the balance, etc., he, the defendant, brought into court the sum of \$4,300, saying that the same was sufficient to pay in full all claims of the plaintiff in respect of the balance, etc.; and paid into court under his defence the said sum of \$4,300, which was withdrawn by the plaintiff after issue and before trial. *Ferguson, J.*, although he held that the plaintiff was not entitled to recover, refused to order him to refund the \$4,300. An appeal from such refusal was dismissed with costs, as the result of a division of opinion. *Per Hagarty, C. J. O., and Osler, J. A.*—There was only one way in which this money could have been paid into court, unless under a special order, viz., under Order XXVI. O. J. Act; the money was not paid in conditionally, but absolutely in satisfaction and as an alternative defence; and, therefore, it was properly withdrawn by the plaintiff. *Per Burton and Patterson, JJ. A.*—The defence of payment into court set up, was not strictly pleadable, but was a notice to the plaintiff that the money was in court to answer his demand, if he established it. Money paid into court under a defence is not inevitably to be regarded as paid in under Order XXVI. O. J. Act. The inference that payment into court is made for immediate satisfaction, must yield to a direct notice, that it is not made for that purpose; and such notice sufficiently appearing from the pleading, the money was improperly withdrawn by the plaintiff:—Held, by the Supreme Court, *Strong, J.*, dissenting, that the payment was a payment into court in satisfaction which the plaintiff had a right to retain, notwithstanding his action was dismissed at the hearing:—Held, *per Strong, J.*, that this plea only recognized the plaintiff's right to the money in the event of the court deciding that the defendant was not discharged from his liability, but that on the facts presented the plaintiff was entitled to judgment for the same amount as the sum paid into court. *Bell v. Fraser*, 12 A. R. 1; S. C., *sub nom. Fraser v. Bell*, 13 S. C. R. 546.

The plaintiffs sued for work and labour as contractors, claiming a balance of \$511. The defendant by his statement of defence denied all

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the allegations in the statement of claim, and also said that \$300 was sufficient to satisfy the plaintiffs' whole claim, and he paid that sum into court in satisfaction of such claim. Con. Rule 632 provides that "the payment of money into court shall not be deemed an admission of the cause of action in respect of which it is so paid."—Held, that the plaintiffs were not entitled, before the determination of the suit, to take out the money paid into court, unless they took it in full satisfaction of their claim. *Kane v. Mitchell*, 13 P. R. 118.—Dalton, Master.

#### (c) Effect of—As to Costs.

The defendant brought into court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and the judge at the trial finding that it was sufficient, directed judgment to be entered for the defendant, with costs:—Held, that the judge at the trial had a discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into court. *Small v. Lyon*, 10 P. R. 223.—Cameron.

The statement of defence set up that the assault complained of was in self-defence, and, as an alternative defence, that, while the defendant did not admit his liability for damages, he brought into court \$150 and said that the same was sufficient, etc.:—Held, that the money paid into court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs. *Rogers v. Loos*, 11 P. R. 118.—Kingsmill, Local Judge.—Boyd.

Per Armour, J.—The rule as to costs before the Judicature Act was, that if money was paid into court in respect of the whole cause of action, and the plaintiff refused to accept it in satisfaction, and recovered no more at the trial, the defendant was entitled to judgment and his costs of the suit and there is nothing in the Judicature Act to alter this rule. *Tobin v. McGillis*, 12 P. R. 60.

The plaintiffs claimed in this action \$3,249.36, "amount of defalcation of J." and \$90.55 for certain expenses connected therewith, in all \$3,339.91. The defendants paid into court \$3,273, claiming by their notice of payment in, that it was sufficient to satisfy the plaintiffs' claim. There was no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and, upon notice of a motion under Rule 203 (Con. Rule 646) to dismiss the action being served by the defendants, the plaintiffs gave a notice under Rule 170 (Con. Rules 641, 642) of withdrawal of the balance of their claim:—Held, that the plaintiffs had no power under Rule 170 (Con. Rules 641, 642) to withdraw; the portion of that Rule relating to the withdrawal of part of the alleged cause of the complaint is applicable only where the part sought to be withdrawn can be severed from the rest of the claim; and an order dismissing the action was proper:—Sensible, that the plaintiffs, not having under Rule 218 (see Con. Rules 632 et seq.) accepted the money in full satisfaction of their

claim, were liable to pay the whole costs of the action; but the disposition of costs by the local judge who made the order was not interfered with on appeal. *Bank of London v. Guarantee Co. of North America*, 12 P. R. 499.—Rose.

#### 4. In Other Cases.

The referee in chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry—Wright v. Curry*; *Curry v. Curry*, 8 P. R. 340.

Payment into court by surety of amount of bond given for security for costs. See *Kelly v. Imperial Loan Co.*, 10 P. R. 499, p. 302.

Defence of tender without payment into court in an action to recover money as compensation for land expropriated. See *Demorest v. Midland R. W. Co.*, 10 P. R. 640.

The gross proceeds of a sale of goods in an interpleader matter should be paid by the sheriff into court without deducting anything for his expenses. *Ontario Bank v. Revell*, 11 P. R. 249.—Dalton, Master.

An application for an order sanctioning the payment of a bequest in favour of infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Surrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into court. *Re Andrews*, 11 P. R. 199 distinguished. *Re Parr*, 11 P. R. 301.—Boyd.

Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins v. Clarke*, 11 P. R. 350.—Proudfoot.

A solicitor in an action had obtained an order for the payment out to him of certain moneys in court, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal:—Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the court; and that Con. Rule 867 had no application. *Pritchard v. Pritchard*, 18 O. R. 173, 178.—MacMahon.

#### 5. Interest Allowed.

Under 31 Viet. c. 12, and 37 Viet. c. 13, the Minister of Public Works of the Dominion of Canada appropriated to the use of the Dominion certain lands in Yarmouth county, known as "Bunker Island." In accordance with said Acts, on the 2nd April, 1875, he paid into the hands of W., prothonotary at Halifax, the sum of \$3,180 as compensation and interest, as provided by those Acts, to be thereafter appropriated among the owners of the said island.

This sum was paid at several times, by order of the Supreme Court of Nova Scotia, to one A., as owner, to one G., as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of W., the prothonotary of the court, for some time, H., attorney for G., applied to the Supreme Court for an order of the court calling upon W., the prothonotary, to pay over the interest upon G.'s proportion of the moneys, which interest (H. was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. W. resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the court, for interest, but did not deny that interest had been received by him. A rule nisi was granted by the court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount.—Held, that the prothonotary was not entitled to any interest which the amount deposited earned while under the control of the court. That in ordering the prothonotary to pay over the interest received by him, the court was simply exercising the summary jurisdiction which each of the superior courts has over all its immediate officers. (Fournier and Henry, JJ., dissenting.) *Wilkins v. Geddes*, 3 S. C. R. 303.

During the progress of this action money had been paid into court by the defendants which remained there on deposit for upwards of seven years.—Held, affirming the judgment of Proudfoot, J. (12 O. R. 492) that on taking the account between the parties the defendants were liable to pay in respect of this sum the rate allowed upon the residue of the principal, and was not limited to the rate allowed by the court. *Powell v. Peck*, 15 A. R. 138.

See *Re George Taylor and The Ontario and Quebec R. W. Co.*, 11 P. R. 371; *Re Philbrick and The Ontario and Quebec R. W. Co.*, 11 P. R. 373.

#### 6. Attachment of Money in Court.

See *Macpherson v. Tisdale*, 11 P. R. 261, p. 89.

### VII. PAYMENT OF MONEY OUT OF COURT.

#### 1. In Actions Pending Appeal.

##### (a) Generally.

About \$40,000 was paid into court during the progress of the suit. The decree dismissed the bill, and ordered payment of the money in court to defendant. The plaintiff appealed, and paid \$400 into court as security for costs. Subsequently an order was made by the referee staying payment out to the defendant, pending the appeal, upon the plaintiff giving additional security to the amount of \$200 for the difference between the legal interest and that allowed by the court.—Held, on appeal, that such order was not ultra vires nor unreasonable. *McDonald v. Worthington*, 8 P. R. 554.—Ferguson.

The plaintiffs having moved for an injunction to restrain the sale of goods under execution, the motion was enlarged and the sale permitted to proceed, the money arising therefrom being directed to be paid into court to the credit of the

cause, there to abide the further order of the court. The injunction was afterwards refused.—Held, on appeal from the referee, ordering payment out, that the payment out of the fund was discretionary with the court, and that pending the appeal to the Court of Appeal the same should remain in court, but might be paid out on proper security being given.—Held, also, no objection that the order refusing the injunction, and the order for payment out had not been entered. *King v. Duncan*, 9 P. R. 61.—Ferguson.

On the 16th November, 1881, an order was made directing D. to pay a certain sum of money into court. D. appealed from this order to the Court of Appeal, and for the purpose of staying execution, instead of giving security, as required by R. S. O. (1877) c. 38, s. 4, he paid this sum into court, being authorized so to do by an order in chambers. On the 27th October, 1883, the Court of Appeal reversed the order of 16th November, 1881. The respondents then gave notice of appeal to the Supreme Court of Canada.—Held, that the money paid in by D. must be taken to have been so paid in lieu of the bond required by the statute; that when the decision in appeal was given in D.'s favour, the money had served the purpose for which it was paid; and that it ought to be repaid. *Re Donovan—Wilson v. Beatty*, 10 P. R. 71.—Proudfoot.

The defendants succeeded at the trial, in the Divisional Court, and in the Court of Appeal. Pending an appeal by the plaintiffs to the Supreme Court of Canada, the defendants applied for payment out of court to them of a sum paid in by the plaintiffs representing the whole subject matter of the litigation.—Held, that the application was in the discretion of the court; that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal; and that the application should therefore be refused, following *King v. Duncan*, 9 P. R. 61. *Canadian Land and Emigration Co. v. Township of Dysart*, 11 P. R. 51.—Ferguson.

See *Citizens' Ins. Co. v. Parsons*, 32 C. P. 492, p. 412; *McLaren v. Caldwell*, 9 P. R. 118, p. 412.

#### 2. In Other Cases.

Where money is paid into court under an order giving leave to "apply at Chambers" for its payment the referee has jurisdiction to make the order for payment out. *In re Selby*, 8 P. R. 342.—Stephens, Referee.

An order was made in this matter by the referee in chambers before the passing of the O. J. Act directing certain ascertained shares then in court to be paid out to certain infants as they respectively came of age.—Held, that the shares might be paid out without any further order, notwithstanding Rule 424, O. J. Act (see Con. Rule 41). *Re Cameron Infants*, 9 P. R. 77.—Proudfoot.

As to jurisdiction of master in chambers. See *Re Devitt*, 9 P. R. 110.

Money in court to the credit of a lunatic, though not so found, was directed to be paid out in annual sums for maintenance. *Re Hinds, Hinds v. Hinds*, 11 P. R. 5.—Ferguson.

order of the wards refused; fees, ordering out of the fund and that pend- appeal the same to be paid out on Held, also, no the injunction, had not been R. 61.—Fergus-

an order was in sum of money his order to the pose of staying rity, as required e paid this sum o do by an order otober, 1883, the order of 16th ents then gave e Court of Can- id in by D. must ien the decision our, the money h it was paid: Re Donovan—Proudfoot.

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Lien of solicitor on fund in court. See *Re Ryan*, 11 P. R. 127; *Yemen v. Johnston*, 11 P. R. 231.

A sum of money left by McD. in his will to his daughter, who predeceased him was paid into court by McD.'s executors. The daughter by her will had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid out to the executor:—Held, that the will of the testatrix should be respected, and the infants' money paid out to the executor. *Re McDougall Trusts*, 11 P. R. 494.—Ferguson.

On an application by a trustee company, and a party who was entitled for life to the income of a fund in court, which was the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the company as trustees (they having been appointed the trustees under the will which devised the settled estates), which application was opposed by the official guardian on behalf of the remainderman:—Held, that the practice and current of authority were against what was asked by the petitioners, and that they were not entitled to it as a matter of right, and that the application must be dismissed. *Re J. T. Smith's Trusts*, No. 2, 18 O. R. 227.—Boyd.

Held, per Ritchie, C. J., Strong and Taschereau J.J., affirming the judgment of the Court of Queen's Bench, Montreal, that where moneys have been voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition en sous ordre. Fournier and Gwynne J.J. dissenting, on the ground that as the moneys were still subject to the control of the court at the time the opposition en sous ordre was filed, such opposition was not too late. *Barnard v. Molson*, 15 S. C. R. 716.

Money in court will not be paid out to the next of kin of deceased parties without a personal representative having been appointed and made a party by revivor, except in simple cases, where the sum in court is small, and the circumstances are such that the court can see that it is safe to dispense with administration or revivor or both, in order to save costs. *Mulock v. Caethra*, 13 P. R. 453.—Macleanman.

See *Conseman v. City of London Fire Ins. Co.*, 13 P. R. 36, p. 390; *Kane v. Mitchell*, 13 P. R. 118, p. 1565.

### 3. Stop Order.

H. M. C. being entitled to certain moneys in court, obtained certain advances from A. H. and gave him a power of attorney to endorse any cheques issued to him by the court and repay himself. Subsequently H. M. C. obtained an-

other advance from W. H. and assigned all his interest in the funds in court to H., which assignment was duly filed in the accountant's office and entered in the accountant's books and acted on for three years. W. H. had no notice of A. H.'s power of attorney. A. H. recovered a judgment against H. M. C. for the amount due him in December, 1883, and obtained a stop order in October, 1885. On a motion for payment out to A. H., which was resisted by W. H., who claimed all the moneys under his assignment, it was:—Held, that the court is the custodian of the fund and not the accountant, and that notice to the accountant of an assignment of funds in court is not tantamount to notice of the assignment of a trust fund to a private trustee, and that a stop order is the proper way of perfecting such a security. Per Boyd, C.—It was not necessary for A. H. to recover a judgment in order to entitle him to a stop order. Payments already made to W. H. under the assignment should not be interfered with, as the lodging of the assignment with the accountant was sufficient under the practice to justify payments out in the absence of any claim by A. H. under the first assignment. Per Ferguson, J.—A. H. having the earlier assignment was first in point of time, and *prima facie* would be preferred in law, and having obtained a stop order, which has been held to be the proper way of giving notice to the court, he thereby perfected his assignment. *Cottingham v. Cottingham*, 11 O. R. 294.—Chy D.

Since the coming into force of the "Creditors' Relief Act of 1880," 25th March, 1884, execution creditors who obtain stop orders on funds in court do not obtain any priority thereby, but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors, they must have the same right with regard to funds in court as they would have with regard to funds in the sheriff's hands, and in any case where an execution creditor obtains a stop order there must be a reference to the master to ascertain if any other creditors desire to ask a share of the fund. *Dawson v. Moffatt*, 11 O. R. 484.—Chy. D.

## PEDIGREE.

See EVIDENCE.

## PENAL ACTIONS AND PENALTIES.

- I. LEGISLATIVE JURISDICTION—See CONSTITUTIONAL LAW.
- II. UNDER ELECTION ACTS—See PARLIAMENTARY ELECTIONS.
- III. UNDER BY-LAWS—See MUNICIPAL CORPORATIONS.
- IV. CONVICTIONS—See JUSTICES OF THE PEACE—INTOXICATING LIQUORS.

In penal statutes questions of doubt are to be construed favourably to the accused, and where



the court of first instance in a quasi criminal trial has acquitted the respondent, the appellate court will not reverse his finding. *North Ontario Election (Ont.)—McCaskill v. Paxton*, H. E. C. 324.—C. of A.

Actions for penalties against municipal clerk and returning officers under the Municipal Act, 1883, s. 167. See *Atkins v. Ptolemy*, 5 O. R. 360, p. 1331.

Held, that the 18 Eliz. c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this province, and therefore the plaintiff, an infant, suing by his next friend could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below this court on allowing the appeal on that ground, refused him his costs of appeal. A person who sues for a penalty given by the Election Act is a common informer. *Garrett v. Roberts*, 10 A. R. 650.

Security for costs in penal actions. See *Martin v. t. v. Consolidated Bank*, 45 Q. B. 163, p. 360; *Budworth v. Bell*, 10 P. R. 544, p. 360.

Action for penalty under 31 Car. II. c. 2, s. 6. See *Arscott v. Lilley*, 11 O. R. 153; 14 A. R. 297, p. 850.

In an action by several plaintiffs qui tam against two defendants for penalties for not registering their partnership under R. S. O. (1877) c. 123, of which section 11 gives the right of action to "any person" who may sue:—Held, reversing the judgment of the court below: (1) That under the above section and the Interpretation Act, any objection to the action being brought in the name of more than one person could not prevail: (2) That the circumstance that the plaintiffs resided out of the jurisdiction could not defeat their action: (3) That the joinder of two defendants for several penalties was not a ground of demurrer; and per Osler, J.A.—There was no inconvenience or impropriety in joining these two defendants in one action. *Chaput v. Robert*, 14 A. R. 354.

The courts of this province will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action. The Court of Appeal being divided in opinion, both as to the penal nature of the judgment sued on and as to whether the law applicable to such question was that of the foreign country or of this province, the appeal was dismissed. *Huntington v. Attrill*, 17 O. R. 245.—Street; 18 A. R. 136.

### PENALTY BY CONTRACT.

The defendant, who had trespassed on the plaintiff's land by placing stones and commencing to build a stone fence thereon, entered into an agreement to remove the same before the 15th of December, unless, upon a resurvey, which he had the privilege of having made before the 15th November, it was found that the line run by one S., a surveyor, was not the correct line, or unless defendant should fail to have such resurvey; and he agreed "to pay to the plaintiff the sum of \$200 as liquidated damages if the said

stones and stone fence are not removed, as herebefore agreed, at the times mentioned in this agreement:—Held, affirming the judgment of the County Court, that the sum mentioned was not a penalty, but liquidated damages for the omission to perform a specific act, viz., the removal of the stones and stone fence. *Craig v. Dillon*, 6 A. R. 116.

The plaintiffs under a by-law granted the defendant a bonus of \$20,000 to aid him in the manufacture of steam fire engines and agricultural implements, subject to a condition in the by-law that he should give a mortgage on the factory premises for \$10,000 and a bond for \$10,000, to be conditioned: (1) for the carrying on of such manufactures for twenty years; (2) during that period to keep \$30,000 invested in the factory; and (3) to insure the building and plant in plaintiffs favour for \$10,000. The defendant gave the bond and mortgage, the latter containing a covenant for insurance, and he invested the \$30,000 as stipulated for. He also made a further mortgage on the premises to the plaintiffs for \$3,000, not mentioned in the by-law. The factory was one in which eighteen to twenty-five men might have been employed, and which could have turned out 100 mowers in a year. In the course of two years only twenty mowers were constructed, and the number of persons employed dwindled down from eighteen or twenty to two or three:—Held, that the performance contemplated by the parties to the contract to carry on manufactures was one reasonably commensurate with the capabilities of the factory; and that, upon the evidence, the defendant had failed in the performance:—Held, also, that the \$10,000 mortgage was given as a security for any damages the plaintiffs might sustain by the defendant's default, to an extent not greater than \$10,000, and not as a charge for that specific sum:—Held, also, that, as the \$3,000 mortgage was not authorized by the by-law, as to it the plaintiffs were not entitled to any relief. Remarks upon elements to be considered by the master in assessing the damages. *Village of Brussels v. Ronald*, 11 A. R. 605.

To an action for the balance due under a building contract, the defendant set up as a defence that by the contract the plaintiff was to build the house and have the same completely finished and ready for the defendant's occupation by a named date, "under a penalty of \$5 per day," to be paid by the plaintiff to the defendant for each and every day the work on the said house remained unfinished after the said date; alleging that the work remained unfinished after the said date for a certain number of days, making an amount which the defendant claimed to deduct from the contract price:—Held, on demurrer, defence good: that the \$5, though called a penalty, was in fact liquidated damages:—Quere, whether a demurrer was the proper mode of raising the question as some damages would be recoverable. *Chatterton v. Crothers*, 9 O. R. 683.—Rose.

On 27th May, 1885, certain individuals forming a cigar manufacturers' association, amongst whom was the defendant, considering themselves aggrieved by the members of the cigar makers' union, who refused to lower the price of making a particular kind of cigar, entered into an agreement in writing between themselves of

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the first part and S. of the second part, as fol-  
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been agreed that the parties of the first part shall  
become severally bound to S. in the sum of \$500,  
liquidated damages in case any of them shall at  
any time during the continuance of this agree-  
ment, either directly or indirectly, buy or sell  
any cigars marked \* \* with the labels of the  
cigar makers' union, or shall use \* \* in  
connection with the manufacture of cigars by  
him any cigar makers' union label, \* \* or  
shall permit \* \* any cigar makers' union, or  
any union or set of men to compel him to hire  
or employ union men only, or to dismiss any  
employee. Now, therefore, \* \* the parties  
hereto of the first part severally covenant with  
S. each for himself that he will, in case he  
shall at any time hereafter violate any of the  
foregoing stipulations (setting them out) im-  
mediately pay to S. the sum of \$500: the in-  
tention being that in case of a violation of all or  
any of the stipulations \* \* aforesaid by any  
of the parties hereto of the first part, he, the  
said party so offending, shall immediately forfeit  
and pay to S. the full sum of \$500, \* \* be-  
cause of his so offending, as liquidated and ascer-  
tained damages (and not as a penalty) to be by  
S. applied, etc. \* \* The intention, also, being  
that the entire sum of \$500 shall be the amount  
of the ascertained and liquidated damages for any  
violation or breach whatever, of any of the stipu-  
lations \* \* aforesaid on the part of any one of  
the parties of the first part." The defendant hav-  
ing broken the above agreement in all respects,  
S. brought this action against him to recover \$500  
as liquidated damages:—Held, that the sum of  
\$500 was liquidated damages and not a penalty.  
*Schrader v. Lillis*, 10 O. R. 358.—Proudfoot.

Where a contract contains a condition for pay-  
ment of a sum of money as liquidated damages  
for the breach of stipulations of varied import-  
ance, none of which is for payment of an ascer-  
tained sum of money, the general rule is, that  
the sum named is not to be treated as a penalty,  
but as liquidated damages. The stipulations  
in this case resolved themselves into one—  
viz., that the defendant would not submit  
to the dictation of the cigar makers in carrying  
on his business. It was impossible to calculate  
the damage to the other members of the manu-  
facturers' association by non-compliance with the  
agreement. The case would therefore seem to  
come within the rule that when the agreement  
is for the performance of one act, and there is no  
adequate means of ascertaining the damages  
from a violation and the parties agree upon a  
sum as liquidated damages, it will not be treated  
as a penalty. *Id.*

A bond contained a stipulation that in the  
event of any sum being found due by M. to the  
bank, interest should be payable thereon from the  
time an account of the balance due was delivered  
to the parties to the bond by the bank, and  
judgment was given in the court below in excess  
of the penalty:—Held, however, as the law  
would not allow a verdict against the obligors  
for a greater sum than the penalty, interest  
could not be computed on that amount until  
after judgment. *Exchange Bank v. Springer*;  
*Exchange Bank v. Barnes*, 13 A. R. 390.

See *Jones v. The Queen*, 7 S. C. R. 570, p. 1576.

## PERJURY.

See CRIMINAL LAW.

Action on a judgment. Defence that the judg-  
ment was obtained by perjury, stating the per-  
jury:—Held, good. *Stewart v. Sullivan*, 8 O. R.  
341.—Rose.

## PERPETUITY.

See WILL.

## PETITION OF RIGHT.

- I. IN CASES OF CONTRACT, 1574.
- II. IN OTHER CASES, 1580.
- III. PLEADING, 1584.
- IV. COSTS, 1585.
- V. APPEALS, 1585.

### I. IN CASES OF CONTRACT.

The suppliant engaged by contract under seal,  
dated 4th December, 1872, with the Minister of  
Public Works, to construct, finish, and complete,  
for a lump sum of \$78,000, a deep sea wharf at  
Richmond station at Halifax, N. S., agreeably  
to the plans in the engineer's office and specifi-  
cations, and with such directions as should be  
given by the engineer in charge during the pro-  
gress of the work. By the 7th clause of the con-  
tract no extra work could be performed, unless  
"ordered in writing by the engineer in charge  
before the execution of the work." By letter,  
dated 26th August, 1873, the Minister of Public  
Works authorized the suppliant to make an ad-  
dition to the wharf by the erection of a super-  
structure to be used as a coal floor, for the addi-  
tional sum of \$18,400. Further extra work  
which amounted to \$2,781, was performed under  
another letter from the public works depart-  
ment. The work was completed, and on the  
final certificate of the government engineer in  
charge of the works, the sum of \$9,681, as the  
balance due, was paid to the suppliant, who  
gave the following receipt, dated 30th April,  
1875: "Received from the Intercolonial Rail-  
way, in full, for all amounts against the govern-  
ment for works under contract, as follows:—  
Richmond deep water wharf works for storage  
of coals, work for bracing wharf, rebuilding two  
stone cribs, the sum of \$9,681." The suppliant  
sued for extra work, which he alleged was not  
covered by the payment made on the 30th April,  
1875; and also for damages caused to him by  
deficiency in and irregularity of payments. The  
petition was dismissed with costs; and a rule  
nisi for a new trial was subsequently moved for  
and discharged:—Held, affirming the judgment  
of the court below, that all the work performed  
by the suppliant for the government, was either  
contract work within the plans or specifications,  
or extra work within the meaning of the 7th  
clause of the contract, and that he was paid in  
full the contract price, and also the price of all  
extra work for which he could produce written

authority, and that the written authority of the engineer and the estimate of the value of the work were conditions precedent to the right of the suppliant to recover payment for any other extra work. (Henry, J., dissenting.) *O'Brien v. The Queen*, 4 S. C. R. 529.

Per Ritchie, C. J., that neither the engineer, nor the clerk of the works nor any subordinate officer in charge of any of the works of the Dominion of Canada, have any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *Id.*

On the 25th May, 1870, J. and S., contractors, entered into a contract with the Intercolonial Railway Commissioners (authorized by 31 Vict. c. 13) to construct and complete section No. 7 of the said Intercolonial Railway for the Dominion of Canada, for a bulk sum of \$557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th November, 1872. The total amount paid on the 10th February, 1873, was \$557,750, the amount of the contract. The contractors thereupon presented a claim to the commissioners amounting to \$116,463.83 for extra work, etc., beyond what was included in their contract. The commissioners, after obtaining a report from the chief engineer, recommended that an additional sum of \$31,091.85 (less a sum of \$8,300 for timber bridging not executed, and \$10,354.24 for under drain taken off contractor's hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to suppliants and refused. The contractors thereupon, by petition of right, claimed \$124,663.33, as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that by orders of the chief engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and alleging, further that they were put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in plans and bill of works exhibited at the time of letting. On the profile plan it was stated that the best information in possession of the chief engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan "but contractors must understand that these quantities are not guaranteed;" and in the bill of works, which purported to be an abstract of all information in possession of the commissioners and chief engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate." The contract provided inter alia, that it should be distinctly understood, intended

and agreed that the said price or consideration of \$557,750 should be the price of, and be held to be full compensation for all the works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not upon any pretext whatever, be entitled by reason of any change, alteration or addition, made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor-in-Council by the said Act, intitled "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer, by the said contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alterations in the grade or line of locations, and that the said contract and the said specifications should be in all respects subject to the provisions of the Act first cited in the said contract, entitled "An Act respecting the construction of the Intercolonial Railway," 31 Vict. c. 13, and also, in as far as they might be applicable, to the provisions of "The Railway Act of 1868." The 18th section of 31 Vict. c. 13, enacts "that no money shall be paid to any contractor until the chief engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the commissioners." No certificate was given by the chief engineer of the execution of the work:—Held, that the contract requiring that any work done on the road must be certified to by the chief engineer, until he so certified and such certificate was approved of by the commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered dehors the contract, then there was no such contract with the commissioners as would give the contractors any legal claim against the Crown; the commissioners alone being able to bind the Crown, and they only as authorized by statute. That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown the fraudulent misconduct of its servants. *Jones v. The Queen*, 7 S. C. R. 570.

In the contract it was provided that if the contractors failed to perform the works within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors should forfeit all money then due and owing to them under the terms of the contract, and also the further sum of \$2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872:—Held, that if the Crown insisted on

requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of \$2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages. The Crown subsequently waiving the forfeiture, judgment was rendered in favour of the suppliants for the sum of \$12,430.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount. *Ib.*

In January, 1872, the commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection inter alia of certain engine-houses according to plans and specifications deposited at the office of the chief engineer at Ottawa. J. I. tendered for the erection of an engine-house at Metapedia, and in October following he was instructed by the commissioners to proceed in the execution of the work, according to his accepted tender, the price being \$21,080. The work was completed and delivered to the government in October, 1884. The specifications provided as follows: "The commissioners will provide and lay railway iron, and will also provide and fix cast iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, J. I. was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, etc., until March following, owing to which delay he suffered loss and damage. During the execution of the work, J. I. was instructed and directed by the commissioners or their engineers to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings and specifications. By his petition of right, J. I. claimed \$3,795.75 damages in consequence of the delay on the part of the commissioners to provide the cast iron columns, etc., and \$8,505.10 for extra works. The Crown demurred and also traversed the allegation of negligence and delay, and admitted extra work to the amount of \$5,056.60 and set up the 18th section of 31 Vict. c. 13, which required the certificate of the engineer-in-chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial Railway. By 37 Vict., c. 15, on the 1st June, 1874, the Intercolonial Railway was declared to be a public work vested in Her Majesty and under the control and management of the Minister of Public Works, and all the powers and duties of the commissioners were transferred to the Minister of Public Works, and section 3 of 31 Vict. c. 13, was repealed, with so much of any other part of the said Act as might be in any way inconsistent with 37 Vict. c. 15:—Held, that the tender and its acceptance by the commissioners constituted a valid contract between the Crown and J. I., and that the delay and neglect on the part of the commissioners acting for the Crown to provide and fix the cast iron columns, etc., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for the damages resulting from such breach. That the extra work claimed for, being for a sum less than \$10,000, the commissioners had power to order the same under the statute 31 Vict. c. 13, s. 16, and J. I. could recover by petition of right, for such

part of the extra work claimed as he had been directed to perform. That the 18th section of 31 Vict. c. 13, not having been embodied in the agreement with J. I., as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on that section of the statute for work done and accepted and received by the government. That the effect of 37 Vict. c. 15, was to abolish the office of chief engineer of the Intercolonial Railway, and for work performed and received on and after 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said engineer-in-chief, in accordance with section 18 of 31 Vict. c. 13. *Ischeater v. The Queen*, 7 S. C. R. 696.

Action against the Crown for counsel fees.—Retainer. See *Regina v. Doutré*, 6 S. C. R. 342; 9 App. Cas. 745, p. 148.

The suppliants agreed by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 Vict. c. 13) to build, construct and complete sections three and six of the railway for a lump sum for section three of \$162,444, and for section six of \$455,946.43. The contract provided, inter alia, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions or by-laws, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act intitled "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineers by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the contract relating to alteration in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vict. c. 13; that the works embraced in the contracts should be in all respects subject to the provisions of 31 Vict. c. 13, that the works embraced in the contracts should be fully and entirely complete in every particular and given up under final certificates and to the satisfaction of the engineers on the 1st of July, 1871 (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, etc., to money due or percentage agreed to be retained, and to pay as liquidated damages \$2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving seven clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case the contractors were to forfeit all right to

money due on the works and to the percentage retained. The work was taken out of the hands of the contractors for not having been satisfactorily proceeded with:—Held, affirming the judgment of the Exchequer Court, on a petition of right filed by contractors—Fournier and Henry, J.J., dissenting. 1st. That by their contracts the suppliants had waived all claim for payment of extra work. 2nd. That the contractors not having previously obtained, or been entitled to, a certificate from the chief engineer, as provided by 31 Vict. c. 13, s. 18, for or on account of the money which they claimed, the petition of the suppliants was properly dismissed. 3rd. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors and charge them with the extra cost of completing the same, but that in making up that amount the court below should have deducted the amount awarded for the value of the plant and materials taken over from the contractors by the commissioners. *Berlinguet v. The Queen*, 13 S. C. R. 20.

By his petition of right, W., a sculptor, alleged that he was employed by the Dominion Government to prepare plans, models, specifications and designs, for the laying out, improvement and establishment of the Parliament Square, at the city of Ottawa: that he had done so, and superintended the work and construction of said improvements for six months. He claimed \$50,000 for the value of his work. 31 Vict. c. 12, s. 7, provides that, when executory contracts are in writing they shall have certain requisites, such as signing, sealing and countersigning to be binding; and by section 15 provides that before any expenditure is incurred there shall have been a previous sanction of parliament, except for such repairs and alterations as the public service demands; and section 20 requires that tenders shall be invited for all works, except in cases of pressing emergency. It was held, from the nature of the work it could be done expeditiously and economically executed by the officers and servants of the department:—Held, 1, that the Crown in the Dominion cannot be held responsible under a petition of right on an executory contract entered into by the department of public works for the performance of certain works placed by law under the control of the department when the agreement therefor was not made in conformity with the above 7th section of 31 Vict. c. 12, s. 2. That under section 15 of said Act, if parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the department of public works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded. 3. That in this case, if parliament has made appropriations for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department under section 20 of said Act, then no written contract would be necessary to bind the department, and suppliant should recover for work so done. *Wood v. The Queen*, 7 S. C. R. 634.

H., in his capacity of "clerk of the joint committee of both houses on printing," advertised

for tenders for the printing, furnished the printing paper, and the binding required for the parliament of the Dominion of Canada. The tender of the suppliants was accepted by the joint committee and by both houses of parliament by adoption of the committee's report, and a contract was executed between the suppliants and H. in his said capacity. The suppliants, by their petition, contended that the tender and acceptance constituted a contract between them and Her Majesty, and that they were entitled to do the whole of the printing required for the parliament of Canada, but had not been given the same, and they claimed compensation by way of damages:—Held, reversing the judgment of Henry, J., in the Exchequer Court, that the parliamentary printing was a matter connected with the internal economy of the Senate and House of Commons over which the executive government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it. *Regina v. MacLean*, 8 S. C. R. 210.

It is settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown. *Thomas v. The Queen*, L. R. 10 Q. B. 31, and *Feather v. The Queen*, 6 B. & S. 293, approved. It is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. *Windsor and Annapolis R. W. Co. v. The Queen*, 11 App. Cas. 607.

See *Regina v. Smith*, 10 S. C. R. 1, p. 341; *Regina v. Starrs*, 17 S. C. R. 118, p. 462.

## II. IN OTHER CASES.

In order to establish a right to damages against the Crown for having, as alleged, obstructed the flow of water to the mills of the suppliants, it is incumbent on the suppliants to show that less than the natural volume of water forming the stream reaches the mill on account of such alleged obstruction; therefore, where it appeared upon the evidence that certain waters alleged to have been penned back by a dam, would never have reached the mills of the suppliants, and the extreme and unprecedented dryness of the season had had an appreciable effect upon the supply of water:—Held, that the evidence did not sustain the petition, which alleged that the suppliants sustained damage by the erection of a dam across the river, above their mill. *Muskoka Mill Co. v. The Queen*, 28 Chy. 563.—Spragge.

The maxim that the Crown can do no wrong, applies to alleged tortious acts of the officers of a public department of Ontario, and a petition of right will not lie for such alleged wrongful acts under 35 Vict. c. 13, (Ont.), which creates no new right in the subject against the Crown, but relates rather to procedure only. The redress of a subject suffering damage from such acts, if unauthorized by statute, would be against the subject who committed the wrong, and not against the Crown. *Ib.*

Held that a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work. *Regina v. McFarlane*, 7 S. C. R. 216.



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Held, that an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides. In such a case Her Majesty cannot be held liable as a common carrier. *Ib.*

N. C., the suppliant, by his petition of right, claimed, as respecting the heirs of P. W. Jr., certain parcels of land originally granted by letters patent from the Crown, dated 5th January, 1806, to P. W. Sr., together with a sum of \$200,000 for the rents, issues and profits derived therefrom by the government since the illegal detention thereof. As to the merits defendant pleaded:—1st. By pre-emptory exception, setting up title and possession in Her Majesty under divers deeds of sale and documents; 2nd. Prescription by thirty, twenty and ten years. An exception was also filed, setting up that these transfers to petitioner by the heirs of P. W. Jr. were made without valid consideration, and that the rights alleged to have been acquired were disputable (*droits litigieux*). The general issue and a supplementary plea claiming value of improvements were also filed. To the first of these exceptions the petitioner answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed *en faux* against a judgment of ratification of title to a part of the property rendered by the Superior Court for the district of Aylmer, P. Q. To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of the defendant. There were also general answers to all the pleas. On the issues thus raised, the parties went to proof by an *enquête* before a commissioner under authority of the court, granted on motion, in accordance with the law of the province of Quebec. The case was argued in the Exchequer Court before J. T. Taschereau, J., and he dismissed the suppliant's petition of right with costs. Whereupon the suppliant appealed to the Supreme Court of Canada:—Held (Fournier and Henry, J.J., dissenting). 1. That before the code, and also under the code (Art. 2211) the Crown had, under the laws in force in the province of Quebec, the right to invoke prescription against a subject, which the latter could have interrupted by petition of right. 2. That in this case the Crown had purchased in good faith with translatory titles and had, by ten years' peaceable, open and uninterrupted possession, acquired an unimpeachable title. 3. That in relation to the inscription *en faux*, the Art. 473 of the code of procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the register of the court. 4. That the petitioner was bound to have produced the minute, or draft of judgment attacked, but having only produced a certified copy of the judgment, the inscription against the judgment fell to the ground. 5. That even if S. O.'s title was *un titre précaire*, the heirs by their own acts ceded and abandoned to L. all their rights and pretensions to the land in dispute, and that the petitioner C. was bound by their acts:—Held, also, that the *impenses* claimed by the incidental *demande* of the Crown

were payable by the petitioner, even if he had succeeded in his action. *Chevier v. The Queen*, 4 S. C. R. 1.

McL., the suppliant, purchased, in 1880, a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf, and her promise, did not carry safely and securely suppliant on said railway and that he was greatly and permanently injured in body and health, and claimed \$50,000. The Attorney-General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants. The judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded \$36,000. On appeal to the Supreme Court of Canada:—Held (Fournier and Henry, J.J., dissenting), that the establishment of Government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the nonfeasance or misfeasance, wrongs, negligences, or omissions of duty of subordinate officers or agents employed in the public service on said railways. That the Crown is not liable as a common carrier for the safety and security of passengers using said railways. *Regina v. McLeod*, 8 S. C. R. 1.

Prior to confederation one T. was cutting timber on territory in dispute between the old Province of Canada and the Province of New Brunswick, the former having granted him a license for the purpose. In order to utilize the timber so cut, he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and only released upon payment of fines. T. continued the business for two or three years, paying fines to the Province of New Brunswick each year, until he was finally compelled to abandon it. The two provinces subsequently entered into negotiations in regard to the territory in dispute, which resulted in the establishment of a boundary line, and a commission was appointed to determine the state of accounts between them in respect to such territory. One member of the commission only reported finding New Brunswick to be indebted to Canada in the sum of \$20,000 and upwards, and in 1871 these figures were verified by the Dominion Auditor. Both before and after Confederation T. frequently urged the collection of this amount from New Brunswick with the ob-

ject of having it applied to indemnify the parties who had suffered by the said dispute while engaged in cutting timber, and finally by an Order in Council of the Dominion government (to whom it was claimed the indebtedness of New Brunswick was transferred by the B. N. A. Act), it was declared that a certain amount was due to T., which would be paid on his obtaining the consent of the governments of Ontario and Quebec therefor. Such consent was obtained and payments on account were made by the Dominion government first to T. and afterwards to the suppliant, to whom T. had assigned the claim. Finally the suppliant not being able to obtain payment of the balance due by the order in Council, proceeded to recover it by petition of right to which petition the defendant demurred on the ground that the claim was not founded upon a contract and was not properly a subject for petition of right. Fournier, J., sitting in the Court of Exchequer, overruled the demurrer and gave judgment for the suppliant. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of Fournier, J. (Fournier and Henry, JJ., dissenting), that there being no previous indebtedness shewn to T. either from the Province of New Brunswick, the Province of Canada, or the Dominion Government, the Order in Council did not create any debt between T. and the Dominion Government which could be enforced by petition of right. *Regina v. Dunn*, 11 S. C. R. 385.

By an agreement entered into between the Windsor & Annapolis R. W. Co. and the government approved and ratified by the Governor in Council, 22nd September, 1871, the Windsor Branch N. S., together with certain running powers over the trunk line of the Intercolonial was leased to the suppliants for a period of twenty-one years from 1st January, 1872. The suppliants under the agreement went into possession of the Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B. being and acting as superintendent of railways as authorized by the government (who claimed to have authority) under 37 Vict. c. 16 (Dom.), passed with reference to the Windsor Branch to transfer the same to the Western Counties R. W. Co., otherwise than subject to the rights of the Windsor & Annapolis R. W. Co., ejected suppliants from and prevented them from using said Windsor Branch, and from passing over the said trunk line; and four or five weeks afterwards said government gave over the possession of said Windsor Branch to said Western Counties R. W. Co., who took and retained possession thereof. In a suit brought by the Windsor & Annapolis R. W. Co. against the Western Counties R. W. Co. for recovery of possession, etc., the Judicial Committee of the Privy Council:—Held, that 37 Vict. c. 16 (Dom.), did not extinguish the right and interest which the Windsor & Annapolis R. W. Co. had in the Windsor Branch under the agreement of the 22nd September, 1872. On a petition of right being filed by suppliants claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of the 22nd September, 1871, the Exchequer Court (Gwynne, J., presiding):—Held, that the taking possession of the road by an officer of the Crown under

the assumed authority of an Act of Parliament was a tortious act for which a petition of right did not lie:—Held, on appeal to the Supreme Court of Canada (Strong and Gwynne, JJ., dissenting), the Crown, by the answer of the Attorney-General, did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious they were justified. But as the agreement, was still a continuous, valid and binding agreement to which they had no right to put an end this defence failed. Therefore the Crown by its officer having acted on a misconception of or misinformation as to the rights of the Crown and wrongfully because contrary to the express and implied stipulations of their agreement, but not tortiously in law evicted the suppliants, and so though unconscious of the wrong by such breach become possessed of the suppliants' property, the petition of right would lie for the restitution of such property and for damages. *Windsor & Annapolis R. W. Co. v. The Queen*, 10 S. C. R. 335; 11 App. Cas. 607.

Prior to the filing of the petition of right the suppliants sued the Western Counties Railway for the recovery of the possession of the Windsor Branch, and also by way of damages for moneys received by the Western Counties Railway for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same that were not paid. The judgment in question was not pleaded by the Crown but was proved on the hearing by the record in the Supreme Court of Canada, to which court an appeal in said cause had been taken, and which affirmed the judgment of the Supreme Court of Nova Scotia:—Held, per Ritchie C. J., and Taschereau J., that the suppliants could not recover against the Crown as damages for breach of contract what they claimed and had judgment for as damages for a tort committed by the Western Counties Railway and in this case there was no necessity to plead the judgment. Per Fournier and Henry JJ., that the suppliants were entitled to damages for the time they were by the advice of the Government deprived of the possession and use of the road to the date of their filing their petition of right. *Id.*

Per Strong, J., A petition of right is an appropriate remedy for the assertion of the suppliant of any title to relief under section 29, of 7 Vict. c. 11, and where it is in the power of a party having a claim against the Crown of such a nature as in this case to resort to a petition of right a mandamus will not lie, and a mandamus will never under any circumstances be granted where direct relief is sought against the Crown. *McQueen v. The Queen*, 16 S. C. R. 1.

See *Jones v. The Queen*, 7 S. C. R. 570, p. 1576; *Tylee v. The Queen*, 7 S. C. R. 651, p. 1209; *McQueen v. The Queen*, 16 S. C. R. 1.

### III. PLEADING.

N. C., the suppliant, by his petition of right claimed, as representing the heir of P. W., jr., certain parcels of land originally granted by let-

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R. 570, p. 1576;  
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ters patent from the Crown, dated 5th January, 1806, to P. W., senr., together with a sum of \$200,000 for the rents, issues and profits derived therefrom by the government since the illegal detention thereof. The Crown pleaded to this petition of right—1st, by demurrer, defense au fonds en droit, alleging that the description of the limits and position of the property claimed was insufficient in law; 2nd, that the conclusions of the petition were insufficient and vague; 3rd, that in so far as respects the rents, issues and profits, there had been no signification to the government of the gifts or transfers made by the heirs to the suppliants. These demurrers were dismissed by Strong, J., and it was—Held, that the objection taken should have been pleaded by exception à la forme, pursuant to Art. 116 C. C. P., and as the demurrer was to all the rents, issues and profits as well those before as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of P. W., jr. *Cherrier v. The Queen*, 4 S. C. R. 1.

#### IV. COSTS.

In dealing with the question of costs upon a petition of right, the same rule will be applied as if the question was one between subject and subject; therefore, where on a petition of right the Crown, instead of demurring, went to a hearing, the court (Spragge, C.), on dismissing the petition, allowed to the Crown such costs only as would have been taxed had the liability of the Crown been raised by demurrer. *Muskoka Mill Co. v. The Queen*, 28 Chy. 563.

Security for costs in Exchequer Court. See *Wood v. The Queen*, 7 S. C. R. 631, p. 689.

#### V. APPEALS.

The provisions of the Supreme and Exchequer Courts Acts relating to appeals from the Province of Quebec, apply to cases arising under the Petition of Right Act of that province, 46 Vict. c. 27. *McGregory v. The Queen*, 14 S. C. R. 735.

#### PETTY CHAPMEN.

See MUNICIPAL CORPORATIONS.

#### PHARMACY.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada that section 8 of 48 Vict., c. 36 (Que.) which says that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising, are entitled to be registered as licentiates of pharmacy, applies to respondent who had, during more than five years before the coming into force of the said Act, practised as chemist and druggist in partnership with his brother and in his brother's name, and therefore he (respondent) was en-

titled under section 8 to be registered as licentiate of a pharmacy. *L'Association Pharmaceutique de la Province de Quebec v. Brunet*, 14 S. C. R. 738.

#### PHYSICIANS.

See MEDICAL PRACTITIONERS.

#### PLANS.

I. IN EVIDENCE—See EVIDENCE.

II. SALE OF LAND ACCORDING TO PLANS—  
 See SALE OF LAND.

III. REGISTRATION—See REGISTRY LAWS.

Quere, whether a person who has hid out land into town or village lots for sale cannot afterwards, if he finds that he cannot dispose of them as such, or for any other reason, replace his land as it was before. *In re Allan*, 10 O. R. 110.—Wilson.

#### PLEADING.

I. ADMISSIONS BY PLEADING—See EVIDENCE.

II. ESTOPPEL BY PLEADING—See ESTOPPEL.

III. IN COUNTY COURT ACTIONS—See COUNTY COURT.

IV. IN PARTICULAR ACTIONS—See THE SEVERAL TITLES.

V. IN ACTIONS BY OR AGAINST PARTICULAR PERSONS—See THE SEVERAL TITLES.

(Since the Judicature Act, 1881.)

I. GENERALLY, 1588.

II. VENUE OR PLACE OF TRIAL.

1. Generally, 1589.

2. Changing.

(a) *Preponderance of Convenience*, 1589.

(b) *By Order of Judge and Master—Appeals*, 1592.

(c) *In County Court Cases*, 1593.

(d) *Other Cases*, 1594.

III. PARTIES.

1. *Generally*, 1594.

2. *Cestui que Trust*, 1596.

3. *Executors*—See EXECUTORS AND ADMINISTRATORS.

4. *Husband and Wife*, 1596.

5. *Mortgagees*, 1596.

6. *Partners*, 1597.

7. *Other Persons*, 1598.

8. *Third Parties*, 1599.

9. *Adding and Striking out Parties*,
    - (a) *Generally*, 1601.
    - (b) *In Master's Office*, 1606.
    - (c) *Ejectment*—See EJECTMENT.
    - (d) *Injunction*—See INJUNCTION.
    - (e) *Mortgage Suits*—See MORTGAGE.
  10. *Actions for Specific Performance*—See SPECIFIC PERFORMANCE.
  11. *Actions to Set Aside Fraudulent Conveyances*—See FRAUDULENT CONVEYANCES.
  12. *Waiver of Objections to Non-Joinder*, 1606.
- IV. STATEMENT OF CLAIM.
1. *Generally*, 1606.
  2. *Joinder of Causes of Action*, 1607.
  3. *Filing and Delivery*, 1607.
- V. STATEMENT OF DEFENCE.
1. *Generally*, 1608.
  2. *Filing and Delivery*, 1609.
- VI. SET-OFF AND COUNTER CLAIM.
1. *Generally*, 1609.
  2. *Striking Out or Excluding*, 1611.
  3. *Costs*—See COSTS.
  4. *In Ejectment*—See EJECTMENT.
- VII. REPLY, 1613.
- VIII. JOINDER OF ISSUE, 1613.
- IX. OTHER CASES OF PLEADING, 1614.
- X. PARTICULARS—See PARTICULARS.
- XI. SPECIALLY PLEADING A STATUTE, 1615.
- XII. NOT GUILTY BY STATUTE, 1615.
- XIII. DEMURRERS, 1616.
- XIV. WAIVER BY PLEADING, 1618.
- XV. NOTICE OF EXCEPTIONS, 1618.
- XVI. AMENDING AND STRIKING OUT PLEADINGS.
1. *In Chambers*, 1618.
  2. *At the Trial*, 1620.
  3. *In Master's Office*, 1622.
  4. *Other Cases*, 1622.
  5. *On Appeal*—See SUPREME COURT OF CANADA.
  6. *New Trial*—See NEW TRIAL.
- XVII. COSTS, 1622.
- XVIII. VENIRE DE NOVO, 1623.

(Before the Judicature Act, 1881.)

#### PLEADING AT LAW.

##### I. GENERALLY.

1. *Embarrassing Pleadings*, 1623.
2. *Departure*, 1623.
3. *Certainty and Particularity*, 1623.

##### II. DECLARATION.

1. *Venue*, 1624.
2. *Changing Venue*, 1624.

##### 3. Time for Declaring, 1625.

##### 4. Form of, 1625.

##### III. PLEAS IN ABATEMENT, 1625.

##### IV. TIME FOR PLEADING TO NEW ASSIGNMENT, 1625.

##### V. PLEAS IN BAR AND SUBSEQUENT PLEADINGS.

1. *Similiter*, 1625.
2. *Other Cases*, 1626.

##### VI. EQUITABLE PLEAS, 1626.

##### VII. COSTS, 1627.

##### VIII. AMENDMENT OF PLEADINGS.

1. *Parties*, 1627.
2. *Other Cases*, 1628.

##### IX. WAIVER OF OBJECTIONS, 1628.

(Before the Judicature Act, 1881.)

#### PLEADING IN EQUITY.

##### I. BILLS.

1. *Form of*.
  - (a) *Multifariousness*, 1628.
  - (b) *Certainty and Particularity*, 1628.
  - (c) *Prayer for General Relief*, 1629.
2. *Cross Bill*, 1630.

##### II. PARTIES.

1. *Misnomer of Parties*, 1630.
2. *Persons Suing on Behalf of a Class*, 1630.
3. *Husband and Wife*, 1631.
4. *Other Persons*, 1631.
5. *Attorney-General*—See ATTORNEY-GENERAL.
6. *Adding Parties in Master's Office*, 1632.
7. *In Partition Suits*—See PARTITION.

##### III. SUPPLEMENTAL ANSWER, 1633.

##### IV. DEMURRER.

1. *For Want of Equity*, 1634.
2. *Other Cases*, 1634.

##### V. EFFECT OF ADMISSIONS, 1635.

##### VI. AMENDMENT, 1636.

(Since the Judicature Act, 1881.)

#### PLEADING.

##### I. GENERALLY.

Under the system of pleading in the High Court of Justice and in County Courts under the Judicature Act, Rules 128, 146, 147, 148, 240 (Con. Rules 339 and 449, 401, 402, 403), where a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue. *Waterloo Mutual Fire Ins. Co. v. Robinson*, 4 O. R. 295, approved of. *Seabrook v. Young*, 14 A. R. 97.

When a pleading contains an answer to allegations in the opposite pleading, which is insensible if not read as admitting certain statements, those statements must be taken as admitted. *Richardson v. Jenkin*, 10 P. R. 292.—C. P. D.

When upon the argument of an appeal, the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the court refused to wade through the mass of pleading which had been filed in the court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of the court below upon such pleadings. The unnecessary and improper length of the pleadings remarked upon. *Quindan v. Union Fire Ins. Co.*, 8 A. R. 376.

## II. VENUE OR PLACE OF TRIAL.

### 1. Generally.

In actions for infringement of patent. See *Goldsmith v. Walton*, 9 P. R. 10, p. 1557; *Aitchison v. Mann*, 9 P. R. 253, p. 1558.

In an action wherein a sheriff is plaintiff or defendant, the opposite party, if he so desire, may have the action tried in the county adjoining that in which the sheriff resides. *Brannen v. Jarvis*, 8 P. R. 322.—Galt.

An action by a mortgagee for foreclosure, payment and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254, O. J. Act, (Con. Rule 653) and the venue need not therefore in such an action be laid in the county where the lands lie. *Seymour v. DeMarsh*, 11 P. R. 472.—Dalton, Master.

Per Armour, C. J.—An action should be tried in the county where the cause of action arose. *Greey v. Siddall*, 12 P. R. 557.

Held, that the effect of Rule 254 of the O. J. Act (Con. Rule 653) is to abolish all local venues as well those made so by statute as at the common law, except actions of ejectment. *Legacy v. Pitcher*, 10 O. R. 620.—Q. B. D. See also *Ireland v. Pitcher*, *ib.* 631.

In an action against magistrates for malicious and illegal arrest and imprisonment:—Held, following *Legacy v. Pitcher*, 10 O. R. 620, that the venue need not be laid where the offence was committed. *Boul v. Connee*, 15 O. R. 716.—C. P. D.

The venue in this action was laid in the city of Toronto, and subsequently an order was made striking out the jury notice and directing the trial to take place at Port Arthur:—Held that in view of this order the objection that the venue was improperly laid could not be sustained. *S. C.*, 16 A. R. 398.

### 2. Changing.

#### (a) Preponderance of Convenience.

Where the cause of action arose, and the defendant resided at Pembroke, and the writ in the action was issued at Pembroke, but the plaintiff advisedly proposed to have the action tried at Kingston, alleging that he could not obtain a

fair trial from a jury at Pembroke, owing to the influence of the defendant in that county:—Held, on appeal, reversing the decision of the local judge at Pembroke, that the defendant should not succeed in having the place of trial changed from Kingston to Pembroke, as upon the affidavits filed he did not shew such a preponderance of convenience in favour of Pembroke, as to warrant depriving plaintiff of his right to choose the venue. *Davis v. Murray*, 9 P. R. 222.—Cameron.

A formal verdict was entered at the Ottawa assizes, subject to a reference, which failed through the omission of the arbitrators to enlarge the time. A judge in single court set aside the verdict, and granted a new trial. The plaintiffs resided in Montreal, and defendant's officers at Picton, and plaintiffs had some witnesses resident in Toronto. It appeared that Toronto was as easily accessible as Ottawa, and that no inconvenience would be occasioned by a change of venue to Toronto. Under these circumstances the change was directed. *Cooper v. Central Ontario R. W. Co.*, 4 O. R., 280.—Rose.—C. P. D.

The plaintiff lived and carried on business in Toronto, the defendants in Parkhill, near London. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who solicited the order in Parkhill, where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Company in Toronto. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six witnesses: that the cause of action arose in Parkhill: and that the expense of a trial at Toronto would be greater by \$30 than at London. The plaintiff swore that he intended to call six witnesses and give evidence himself; that four of the six lived in Toronto, one east of Toronto and one in Parkhill: and that the extra expenses of a trial at London would be about \$25:—Held, that the cause of action arose in Toronto, and that there was no such preponderance of convenience in favour of London as would justify a change in the place of trial, following *Noad v. Noad*, 6 P. R. 48; *Davis v. Murray*, 9 P. R. 222, and *Robertson v. Daganeau*, 19 C. L. J. 19. Appeal allowed, and place of trial restored to Toronto. *Walton v. Wideman*, 10 P. R. 228.—Rose.

The plaintiff in a county court action laid his venue at Toronto. The master-in-chambers changed it. On appeal, Boyd, C., discharged the master's order on the undertaking of the plaintiff to pay the extra expense (\$25 to \$30) of a trial at Toronto. *Brigham v. McKenzie*, 10 P. R. 406.

A motion to change the place of trial in a county court action from London to Toronto was refused under the following circumstances: The action was on a promissory note made and payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was, that the defendant was discharged from liability under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the clerk of the county court at Toronto, and the assignee



of the defendant who also lived there. The plaintiff filed no affidavit on the motion. *Slater v. Purvis*, 10 P. R. 604.—Rose.

In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton, where also the parties and their respective solicitors and all the witnesses resided, but the plaintiff proposed to have the action tried at Toronto. The increase in expense of a trial at Toronto over one at Hamilton, was estimated by the defendant at between \$50 and \$75, and by the plaintiff at about \$30:—Held, that there was an exceeding preponderance of convenience in favour of Hamilton, and it was ordered that the place of trial should be changed, unless the plaintiff at once paid into court \$40 to meet the defendant's additional expense. *Serros v. Serros*, 11 P. R. 135.—Boyd.

Where cross-actions with different venues, are consolidated, the place of trial will be ordered as the balance of convenience requires. *Gouge v. Leitch*, 11 P. R. 255.—Dalton, Master.

Circumstances constituting a preponderance of convenience. *Shroder v. Myers*, 34 W. R. 261, followed, and distinguished. See *Ross v. Canadian Pacific R. W. Co.*, 12 P. R. 220. *Nicholson v. Linton*, 12 P. R. 223.—Rose.

It is too late when the assizes have begun to consider the question of the balance of convenience; and therefore, while the court did not see fit under the circumstances to restore the venue to Sarnia, they varied the order of Armour, J., by making the costs of the day at Sarnia, and of the several motions to change the venue costs to the plaintiff in any event. *Sarnia Agricultural Implement Manufacturing Co. v. Perlus*, 11 P. R. 224.—C. P. D.

The venue was changed from Whithy to Toronto in an action of alimony upon the application of the defendant, where there was not sufficient difference in expense to warrant the change in an ordinary case, because of the rule in alimony cases which imposes on the defendant the burden of advancing and paying all the disbursements on both sides in any event. The circumstances that two of the defendant's witnesses, who resided in Toronto, were public officers, and that their absence would be a public inconvenience, was also considered in determining the preponderance of convenience. *Fogg v. Fogg*, 12 P. R. 249.—Ferguson.

The plaintiff lived in Montreal and the defendant in Toronto; the plaintiff had twenty-six witnesses in Montreal, and the defendant twenty-eight in or near Toronto. On a motion to change the venue from Cornwall to Toronto, the master-in-chambers directed the parties to put in affidavits disclosing the names and the nature of the evidence of the witnesses, and upon these determined that the evidence of some of the Montreal witnesses would be irrelevant to the issues, while all the Toronto witnesses might be important, and changed the venue to Toronto. Upon appeal:—Held, that the conclusion of the master as to the evidence was correct, and his order for change of venue proper upon the affidavits before him; but:—Semble, the direction to disclose the names and evidence of witnesses was improper; not having been appealed against,

however, and having been complied with, it could not be disturbed. *Arpin v. Guinane*, 12 P. R. 364.—Boyd.

The question for decision on an application to change the place of trial is, where can the action most conveniently be tried? And where, in an action on a promissory note for the contract price of work done by the plaintiff in fitting a mill in the county of Middlesex, to which the defence was that the contract had never been carried out, the plaintiff had eight witnesses in Toronto or east of Toronto, and the defendant eight in Middlesex or west of Middlesex, upon the defendant's application to change the place of trial from Toronto to London, it was:—Held, that London was the most convenient place for trial, and the venue was changed accordingly. *Greey v. Subbalt*, 12 P. R. 557.—Q. B. D.

Upon motion to change the venue from Toronto to Napanee in a county court action, brought to recover \$100 damages for breach of a contract by the defendant to sell a horse to the plaintiff, it appeared that the defendant resided in the county of Lennox and Addington and the plaintiff in Toronto, and that all the witnesses on both sides resided in Lennox and Addington except the plaintiff himself and one other in Toronto. The defendant swore that he required eleven witnesses at the trial. It was not clear where the cause of action arose, but the breach was probably where the defendant resided. The master in chambers refused to change the venue:—Held, that there was a very great preponderance of convenience in favour of having the action tried at Napanee, and the venue was accordingly changed. *McIligan v. Sills*, 13 P. R. 350.—Rose.—Q. B. D.

See *Mahon v. Nicholls*, 31 C. P. 22, p. 1625.

#### (b) By Order of Judge and Master—Appeals.

The action came on for trial at the Toronto Assizes, but the trial was postponed, and Armour, J., endorsed on the record: "Upon my own motion, I order that the place of trial in this cause be changed to the town of Belleville, and that this cause be tried at the next assizes there by a jury." Rose, J., sitting in chambers, had previously refused to change the place of trial to Belleville:—Held, that the question of place of trial was res judicata:—Held, also, notwithstanding section 28, sub-sections 2 and 3, O. J. Act, that the Divisional Court had jurisdiction to hear an appeal from the order of Armour, J., having regard to the language of Rule 254, O. J. Act, (Con. Rule 653) and of the order itself. *Bull v. North British Canadian Loan and Investment Co., (Limited)*, 11 P. R. 83.—C. P. D. See Con. Rule 1260.

Sembla, Rule 254 (Con. Rule 653), does not give a judge a right to interfere with the procedure in the action except at the instance of a party. *Ib.*

Mr. Winchester, official referee, sitting for the master in chambers, refused an application by the defendant to change the place of trial from Sarnia to Stratford, but gave leave to bring on an appeal from his order, or a substantive

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Master—Appeals.

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ing to the leave given, and made the order  
changing the venue to Stratford. The order  
was drawn up as made by a judge at the assizes,  
and was signed by the local registrar at Sarnia:—  
Held, that, having regard to Rule 254, O. J. Act,  
(Con. Rule 653), and to the leave given and the  
character of the motion, the order of Armour,  
J., was to be regarded as that of a judge and  
not of the High Court, and could therefore be  
reviewed by the Divisional Court. *Sarnia Ag-  
ricultural Implement Manufacturing Co. v. Per-  
due*, 11 P. R. 224.—C. P. D.

There is nothing to prevent a judge sitting at  
the assizes hearing a chamber motion, if he is  
disposed for the purpose to treat the court-room  
as his chambers. Such an application as this,  
however, should not be made at the trial on  
account of the inconvenience and detriment to  
the public interest arising from the delay of  
other business appropriate to the assizes, and on  
account of the injustice to parties to the cause  
who have prepared for trial. *Ib.*

In an action of ejectment the place of trial  
may be changed by order of a judge. If the  
power to change is not given by Rule 254, O. J.  
Act, (Con. Rule 653), it is not taken away there-  
by, and it previously existed under R. S. O.  
(1877), c. 51, s. 23. (See Con. Rule 653 a.)  
*Canadian Pacific R. W. Co. v. Manion*, 11 P. R.  
247.—Proudfoot.—Chy. D.

#### (c) In County Court Cases.

Semble, the master in chambers has not juris-  
diction to change a venue under R. S. O. (1877),  
c. 50, s. 155, as the rule of court passed 1st Feb-  
ruary, 1879, under the authority of 33 Vict. c.  
11, delegates to the master only the jurisdiction  
the judges of the Superior Courts then posses-  
sed in certain matters, and it was not till the  
passing of 35 Vict. c. 10, (1872), that Superior  
Court Judges had jurisdiction in such matters in  
County Court actions. Nor has the master in  
chambers power under Rule 420, O. J. Act, (Con.  
Rule 30), as that is limited to “actions and mat-  
ters” in the High Court, and a motion of this  
kind is neither “matter” nor “proceeding” (s.  
91, O. J. Act) in the High Court. *Bingham v.*  
*McKenzie*, 10 P. R. 406, Boyd. But see now  
Con. Rule 1260.

Held, that the venue in any action of replevin  
in a county court, except for goods distrained,  
may be changed to any other county under sec-  
tion 155 of R. S. O. (1877) c. 50. *O'Donnell v.*  
*Duchenaault*, 14 O. R. 1.—O'Connor. See now  
Con. Rule 1260.

In an action pending in the High Court, an  
interpleader issue and all subsequent proceed-  
ings were transferred under the 44 Vict. c. 7,  
s. 1 (Ont.) to the county court of Middlesex.  
By a subsequent order made on consent, the  
trial of such issue was withdrawn from Middle-  
sex, and a special case was agreed on, and the  
venue changed from Middlesex to York, where  
the special case was argued:—Held (Per Pat-  
erson and Osler, J.J.A.), that in strictness the  
appeal should be quashed. The transfer to the

Middlesex county court was final, and there  
was no jurisdiction under the statute or other-  
wise to transfer the issue or any part of it, or  
to change the venue to any other county court.  
The proceedings in the county court of York  
could therefore only be regarded as a summary  
trial by consent from which no appeal lay.  
*Coyne v. Lee*, 14 A. R. 503.

Held, by Rose, J., that an appeal lay to a  
judge in chambers from an order of the master  
in chambers under Con. Rule 1260, and on  
appeal to the Q. B. D.:—Held, that the venue  
in this case was properly changed to Napanee;  
and that, even if an appeal did not lie from the  
master in chambers to a judge in chambers, the  
latter had the right as upon a substantive ap-  
plication to make the order which the master  
refused. As the appeal to the Divisional Court  
was dismissed upon the merits, no opinion was  
expressed as to whether such appeal lay. *Mil-  
ligan v. Sils*, 13 P. R. 350.

See *Mahon v. Nicholls*, 31 C. P. 22, p. 1625.

#### (d) Other Cases.

An order was made by the master in chambers  
changing the venue from the assizes at Simcoe,  
for which notice had been given, to the chan-  
cery sittings at London. The judge presiding  
at those sittings, having refused to take the case  
as it belonged to a common law division:—Held,  
without determining whether the master's order  
was a proper one, that the plaintiff was justified  
in acting on it, and his costs occasioned by the  
abortive attempt at trial, were allowed to him.  
*Schroeb v. McIloughlin*, 9 P. R. 475.—Cameron.

Leave to appeal to the Court of Appeal was  
asked by the plaintiff because it was of impor-  
tance to him in other litigation to have the ques-  
tion of venue decided, and was granted upon his  
undertaking to pay the costs of both parties of  
the appeal. *Greay v. Siddall*, 12 P. R. 557.—  
Q. B. D.

The plaintiff having in his statement of claim  
named Toronto as the place of trial, afterwards  
amended it on precise under Rule 179, O. J.  
Act (Con. Rule 424), naming Belleville as the  
place of trial:—Held, on appeal, affirming the  
decision of the master in chambers, and follow-  
ing *Frietsch v. Winkler*, 3 Chy. Chamb. 100  
(decided under Chy. G. O. 81, which is substan-  
tially the same as the said Rule), that no  
change of the place of trial could be made by  
amendment of the statement of claim. *Bull*  
*v. North British Canadian Investment Co. (Li-  
mited)*, 10 P. R. 622.—Rose.

The action was tried at Brantford and a new  
trial was moved for at a place other than Bran-  
tford, because the jury there were biased against  
the defendant:—Held, that this formed no  
ground for a new trial. *Wood v. McPherson*,  
17 O. R. 163.—C. P. D.

### III. PARTIES.

#### 1. Generally.

The plaintiff shipped goods from St. Johns,  
Quebec, to Dundas, Ontario, to be carried from  
St. Johns to Toronto by the Grand Trunk Ry.

Co., who delivered them to the Great Western Ry. Co., who carried the same to Dundas, where the goods arrived in a damaged state. The plaintiff being in doubt as to which company was liable, there having been a separate contract with each, joined both as defendants:—Held, affirming the order of Proudfoot, J., who had affirmed the order of the master in chambers (9 P. R. 80), that the case came within Rule 94 of the Judicature Act (Con. Rule 308), and that the plaintiff had a right to make both companies parties. *Harvey v. Grand Trunk R. W. Co.*, 7 A. R. 715.

Held, in this case that the company were properly made parties to an action to restrain a forfeiture of stock made under a resolution of the directors, it being alleged that the number of directors had been illegally reduced, as the reduction of the directorate was the act of the company. *Christopher v. Nowon*, 4 O. R. 672.—Proudfoot.

Plaintiff sued defendant for flooding his land by means of a mill dam, after the determination of a license to do so. The Great Western Railway had turned the waters of the stream into another channel, which was not deep enough to carry off all the water if the defendant's dam were removed, so that by the act of the railway company the plaintiff could not obtain complete relief by succeeding against defendants:—Held, that the plaintiff should have liberty under Rules 91, 103 (Con. Rules 301, 324), to add the railway company as defendants. *Head v. Boeman*, 9 P. R. 12.—Dalton, *Master*.

Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a party to an action claiming such way and where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing. *Saylor v. Cooper*, 2 O. R. 398.—Proudfoot.

The plaintiff, the owner of a water-lot and boathouse abutting on the Ottawa river, who carried on the business of letting boats for hire, brought an action against four sawmill owners, alleging that they being each the owner of a sawmill situated higher up on the river than the plaintiff's lot, had each been in the habit of throwing sawdust, slabs, etc., into the river, and that this waste matter floating down had lodged upon and in front of the plaintiff's water-lot, and had there formed into a solid mass:—Held, that the four sawmill owners were properly joined as defendants in one action. *Rattle v. Booth*, 10 P. R. 649.—Boyd.—Chy. D.

In an action of ejectment where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874, under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books:—Held, by the master in chambers, that the father might have been made a party under Rule 109, (Con. Rule 330) on the ground of his having been a party to a fraud in conveying land to the plaintiffs after he had made an agreement with his son. *McMaster v. Mason*, 12 P. R. 278.—Dalton, *Master*.—Galt.

## 2. *Cestui que Trust.*

The plaintiff was the surviving trustee under the will of one J. B., of certain land, on which was erected a two storey brick house, the westerly wall of which formed the boundary of one L.'s land, immediately adjoining the plaintiff's on the west. L. leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two storeys higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant:—Held, that the plaintiff under the O. J. Act, Rule 95, (Con. Rule 309), was entitled to maintain an action as representing the estate, without making the cestuis que trustent parties. *Brooke v. McLean*, 5 O. R. 209.—C. P. D.

## 4. *Husband and Wife.*

Under the practice in Nova Scotia, when the wife is improperly joined as co-plaintiff with the husband the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone. *Caldwell v. Stadacona Fire and Life Ins. Co.* 11 S. C. R. 212.

The inchoate right of dower at law obtained by a wife in land conveyed to her husband makes her a proper party defendant to a suit to set aside a conveyance made to her husband by fraud in which the wife is alleged to have assisted. *McFarland v. McFarland*, 9 P. R. 73.—Boyd.

Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife:—Held, Proudfoot, J., dissenting, that, although suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. *McKay v. Baker*, 12 P. R. 341.—Chy. D.

Held, under R. S. O. (1877) c. 125, that in an action for a tort committed by a wife during coverture the husband is not a proper party, but the wife must be sued alone. *Amer v. Rogers*, 31 C. P. 195.—Osler. See *Lee v. Hopkins*, 20 O. R. 666.

A married woman may bring an action of libel in her own name without joining her husband as plaintiff. The omission of the words "either in contract, or in tort or otherwise," found in section 2 (2) of the Married Woman's Property Act, 1884, from section 3 (2), R. S. O. (1887), c. 132, does not limit the legal effect and operation of that section. *Spahr v. Bean*, 18 O. R. 70.—Boyd.

See *Ferris v. Ferris*, 9 P. R. 443, p. 1602.

## 5. *Mortgagees.*

The land in respect of which the claim was made in this action was mortgaged:—Held, that

trustee under land, on which house, the west boundary of one of the plaintiff's erected thereon the plaintiff's westing joists thereon to raise it two of the plaintiff's ing society, who, ut:—Held, that Rule 95, (Con. tain an action as not making the *Brooke v. McLean*,

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Scotia, when the plaintiff with the e, but the wife's e record and the by the husband a *Fire and Life*

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from the title to married woman, embarrassed circum- and taken a con- plaintiff had no and was not a per- no trust between l, Proudfoot, J., g alone and with- woman is not res-. The only per- the title was the not be joined as a party. *McKay v.*

c. 125, that in an by a wife during proper party, but *Amor v. Rogers*, *Mc v. Hopkins*, 20

ing an action of joining her hus- on of the words t or otherwise," married Woman's tion 3 (2), R. S. t the legal effect *Spahr v. Bean*, 18

443, p. 1602.

the claim was ed:—Held, that

the mortgagee was not a necessary party, the proceedings not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but as the compensation was only some \$50, the court would not require him to be made a party. *In re Nickle and the Town of Walkerton*, 11 O. R. 433.—Wilson.

It was contended in this case on the part of the defendants that the mortgagees of the property should be made parties:—Held, that O. J. Act, s. 17, sub-s. 5, enables a mortgagor entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail. *Platt v. Grand Trunk R. W. Co. of Canada*, 12 O. R. 119.—Proudfoot.

In an action for arrears of an annuity and to declare the same a charge on land, mortgagees of the land whose mortgage was subsequent to the will creating the charge and subject to the terms of it were made defendants by the writ of summons; but on their own application immediately after delivery of statement of claim, their name was struck out with costs. *Nelson v. Cochrane*, 13 P. R. 76.—Galt.

See *Polson v. Dwyer*, 12 O. R. 275, p. 344; *Maddonalt v. Metcalf*, 12 A. R. 593, p. 822; *McMullen v. Free*, 13 O. R. 57, p. 1276; *McVean v. Tiffin*, 13 A. R. 1, p. 1171.

#### 6. Partners.

D. B. and W. D. B. were partners in a certain Joint Stock Savings Bank, under articles which provided that the partnership should last during their joint lives, and that they should share the profits and expenses. D. B. died in April, 1874, leaving a will, whereby he bequeathed to W. S. B., the son of W. D. B., the residue of his property, including his interest in the bank, and appointed L. his executor. In May, 1874, L. gave W. D. B. a general power of attorney to act for him. In July, 1879, W. S. B. came of age, and soon after demanded of W. D. B. an account of the assets of the partnership and a settlement with him; and in November, 1880, W. D. B. gave the plaintiff a cheque for \$8,000, handing him at the same time a document for signature, which purported to be a receipt of the said sum in full of all claims on the estate of D. B., and W. S. B. signed it. W. S. B. now brought this action against W. D. B. and L., alleging that after the death of D. B., W. D. B., with L.'s connivance, made certain arrangements for the winding up of the partnership, and that large portions of the assets of D. B. and of the bank had been realized, and profits made, and converted by W. D. B. to his own use, and claiming to have the said release declared void, and an account of the estate of D. B., and of the partnership, and to have the same wound up, and payment of the share to which he was entitled:—Held, that the suit in

its present shape was maintainable as brought, for though the general rule is, that persons who have possessed themselves of the property of the deceased, or are debtors to the estate generally, cannot be made parties to a suit against the executor, yet this rule is relaxed in the case of surviving partners of the deceased, whom it is allowed to make parties with the executor in order that the plaintiff may have an account of the personal estate entire. At all events, such an action may be supported in all cases where the relationship between the executors and the surviving partners is such as to present a substantial impediment in the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners, as seemed the case here, although it did not appear that there had been actual collusion between L. and W. B. D. *Burn v. Burn*, 8 O. R. 237.—Ferguson.

The cause of action arose before, and the writ of summons was issued after, the dissolution of the defendants' firm:—Held, that the defendants were properly sued in their firm name. *Wilson v. Roger McLay & Co.*, 10 P. R. 355.—Dalton, Master.—Osler.

See *Hopper v. Harrison*, 28 Chy. 22, p. 1633.

#### 7. Other Persons.

Misjoinder of parties since the Judicature Act, is no longer a ground of demurrer. *Young v. Robertson*, 2 O. R. 434.—Boyd.

Parties to an action for the removal of an instrument from the register where the registration of such instrument is not authorized by the Registry Act. See *Ontario Industrial Loan and Investment Co. v. Lindsey*, 3 O. R. 66.

Parties to action to enforce mechanics' lien. *Bank of Montreal v. Haffner*, 3 O. R. 183; 10 A. R. 592, p. 1170; *Oldfield v. Barbour*, 12 P. R. 554, p. 1173; *McVean v. Tiffin*, 13 A. R. 1, p. 1171.

In an action for the cancellation of a tax deed: Held, that the fact that the defendants might have a remedy over against the municipal corporation which had sold the land for taxes, did not make the corporation a necessary party to the action. *Charlton v. Watson*, 4 O. R. 489.—Ferguson.

Action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the municipal council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees"; that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper:—Sembler, the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers, except the defendants. *Morrow v. Connor*, 11 P. R. 423.—Proudfoot.

In an action to declare the seats of certain trustees of a school board vacant and for an injunction restraining them from further acting as members of the board. See *Chaplin v. Public School Board of Woodstock*, 16 O. R. 728, p. 923.

The plaintiffs brought this action as land owners injuriously affected by certain drainage works of the defendants and the assessments made under by-laws relating to the same, seeking damages and other relief:—Held, that there was no misjoinder of plaintiffs, nor was it incumbent on the plaintiffs to sue on behalf of any others, and the plaintiffs had the right thus to proceed by way of action and not of arbitration. *Alexander v. Township of Howard, Galbraith v. Township of Harwich*, 14 O. R. 22.—Ferguson.

In an action by several plaintiffs qui tam against two defendants for penalties for not registering their partnership under R. S. O. (1877), c. 123, of which section 11 gives the right of action to "any person" who may sue:—Held, reversing the judgment of the court below, (1) That under the above section and the Interpretation Act any objection to the action being brought in the name of more than one person could not prevail. (2) That the circumstance that the plaintiffs resided out of the jurisdiction could not defeat their action. (3) That the joinder of two defendants for several penalties was not a ground of demurrer, and per Osler, J.—There was no inconvenience or impropriety in joining these two defendants in one action. *Chaput v. Robert*, 14 A. R. 354.

Held, that since the Devolution of Estates Act, R. S. O. (1877), c. 108, s. 4, devisees are not necessary parties to an action for dower. *Malone v. Malone*, 17 O. R. 101.—Robertson.

See *Galbraith v. Irving*, 8 O. R. 751, p. 1148; *Mitchell v. City of London Fire Ins. Co.* 12 O. R. 706, p. 976; *Beatty v. Neelon*, 12 A. R. 50, p. 240; *McGuin v. Fretts*, 13 O. R. 699, p. 1605; *Servell v. British Columbia Towing and Transportation Co.*, 9 S. C. R. 527; *International Wrecking Co. v. Murphy*, 12 P. R. 423, p. 278; *Thompson v. Molson's Bank*, 16 S. C. R. 664, p. 145; *Blackley v. Dooley*, 18 O. R. 381, p. 345.

### 8. Third Parties.

Under Rule 112, (Con. Rule 333) where in an action the plaintiff is entitled to recover against the defendant, against whom the action is brought, the defendant is precluded from trying questions arising between himself and a third party added at his instigation under Rule 108, (Con. Rule 329) in the trial of which the plaintiff has no interest, and which has the effect of delaying the plaintiff in his recovery. *Town of Davidas v. Gilmour*, 2 O. R. 463.—C. P. D.

Defendants, sued by the plaintiffs for the amount due under a lease of a tollgate, brought in W. as a defendant, alleging that an agreement to commute tolls, payable by W., had been made by the plaintiffs, and claiming as a set-off the difference between such commutation and the tolls otherwise payable by W. This agreement having been disproved, the parties proceeded to try the question as to the liability of W. to the original defendants, in which the

plaintiffs had no interest, and judgment was given in favour of the original defendants:—Held, that such judgment must be set aside. *Ib.*

The action was upon promissory notes made by the defendants to the order of the B. C. L. Co., and by them endorsed to the plaintiff Co. The defendants claimed indemnity against the B. C. L. Co., and at the trial that company, against the protest of the plaintiffs, was made a third party defendant, and judgment was directed to be entered against them in favour of the defendants, to indemnify the defendants against the judgment recovered against them at the suit of the plaintiffs:—Held, reversing the order making the company a third party, and the judgment against them, that third parties should be joined only before trial: that in any case they can be joined only for the purpose of binding them by the judgment against the original defendant; and that in order that the original defendant may obtain indemnity against a third party he must bring a separate action. *Lockie v. Tennant*, 5 O. R. 52.—Q. B. D.

In an action for the non-delivery of coal, one of the defendants gave notice to S. & M., under the first part of Rule 107 (Con. Rule 328) and Rule 108, (Con. Rule 329) of the action, and that he claimed contribution from them to the extent of one-half of any sum recovered against him on the ground that they were co-partners in the transaction, etc. S. & M. appeared to this notice, and the master in chambers subsequently made an order giving them leave to appear, and directing that they should be bound by any judgment against the said defendant:—Held, on appeal from the order of Osler, J. A., setting aside the order of the master, that the latter order had been properly made. *McLaren v. Marks*, 10 P. R. 451.—Q. B. D.

The plaintiff and P. both claimed to be entitled by assignment to a mortgage made by the defendant. The defendant paid P. one gale of interest and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff then brought this action claiming the interest which had been paid to P., and also the principal for default in payment of interest. The defendant applied to have P. added as a co-defendant:—Held, not a proper case for adding P. as a party under Rule 163 (a), (Con. Rule 324 (a)) but rather one in which a notice might be served upon P. by the defendant under Rule 108, O. J. Act (Con. Rule 329). Quere, per the master in chambers, whether the defendant had not a remedy by interpleader. *Horitt v. Heise*, 11 P. R. 47.—Dalton, Master.—Osler.

In an action for the price of goods sold C., to whom the defendant had paid the price of the goods, believing him and not the plaintiff to have the title thereto, and J. C. F. and A. F., who were charged by C. with having fraudulently obtained possession of the goods and made a pretended sale of them to the plaintiff, were added as defendants under Rule 100, O. J. Act (Con. Rule 330), with a direction that C. should, in his pleading, state his case against J. C. F. and A. F., and that they should be at liberty to reply. *Brown v. Cousineau*, 11 P. R. 363.—Dalton, Master.—Proudfoot.



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No order is necessary to enable a defendant to plead a claim for indemnity against his co-defendant, but such a claim will not be tried without an order providing for the determination of the question so raised. P. borrowed money from the plaintiff and then went into partnership with N. ; P. and N. afterwards sold the business to B. The plaintiff having judgment against P., brought this action against P., N. and B. to set aside the sale to B. as fraudulent. P. alleged in his defence that N. agreed to pay half his debts, including that to the plaintiff and that B. agreed to pay the liabilities of P. and N. appearing on their books, which the liability to the plaintiff did, and he claimed indemnity against N. and B. :—Held, (reversing the decision of the master in chambers) that the trial of the question whether or not the sale to B. was fraudulent as against the plaintiff would involve an inquiry as to the terms upon which B. purchased from the other defendants, and that the whole matter was one that might be advantageously disposed of at one hearing. *Burke v. Pittman, 12 P. R. 662.*—Street.

The plaintiff sued a municipal corporation and a railway company for damages ; the corporation in their statement of defence claimed indemnity or relief over against the company, but the company did not answer the pleading, and no order was made or applied for before or at the trial to have the question determined ; judgment was given for the plaintiff against the corporation, but nothing was decided either in favour of or against the company. After the judgment had been affirmed by a Divisional Court the corporation applied to the trial judge for an order under Con. Rule 328 to have the question between them and the company determined. Quære, whether there was power under the Rules to make the order ; and :—Held, that, if there was power, it would not be a wise exercise of discretion to make it ; for new pleadings and a new trial would be necessary, and it would be better that a fresh action should be brought than that the plaintiff should be kept before the court while the defendants settled their dispute. *Mead v. Township of Etobicoke, 13 P. R. 341.*—Rose.

See *Torrance v. Livingston, 10 P. R. 29, p. 1610; Tomlinson v. Northern R. W. Co. of Canada, 11 P. R. 419, p. 1622.*

## 9. Adding and Striking out Parties.

### (a) Generally.

The defendant and his brother partitioned their lands, defendant taking the west-half of a lot, on which was an hotel, and the brother the east-half, on which a store was erected, each supposing that the division line ran between the two buildings. The defendant sold his portion to the plaintiff, who had lived opposite for many years, the land being described as the west-half according to a plan. The hotel encroached upon the east-half at the rear end of the building about thirty-four inches, the value of the land encroached upon being very trifling. It appeared that the hotel could be moved for about \$40 ; and that defendant had offered to procure a lease of the portion encroached upon at a

nominal rent, which was refused. The plaintiff charged that the defendant had falsely and fraudulently represented that the division line between the two lots ran between the two buildings, and brought an action therefor, praying for a rescission of the sale, for an account of improvements, and for damages. The deed was drawn after the alleged misrepresentation, and after the plaintiff knew of the encroachment, and nothing was then said about the line. The judge at the trial found that there was no false representation, but he added defendant's brother as a party, and directed him to convey to the plaintiff the land encroached upon :—Held, that under the circumstances, more fully stated in the report, the brother should not have been added ; and the plaintiff, having based her action on the ground of fraud, should not be allowed to rely upon an entirely different ground. *Dunbar v. Meek, 32 C. P. 195.*—C. P. D.

Action by plaintiffs for \$160, as assignees under an assignment from the assignee in insolvency of the estate of W. & A. At the trial the judge held that, under the circumstances set out in the report, the amount did not pass to the plaintiffs under the assignment to them, but he refused to add the insolvents as co-plaintiffs, because the defendant was not in a position to know whether he had a defence as against them. During the following sittings of the court, the defendant having had sufficient time to ascertain his rights, and shewing no defence, the court under the O. J. Act, Rule 90 (Con. Rule 445), directed the insolvents to be added, and judgment to be entered for the plaintiffs for the amount claimed, but, under the circumstances, without costs. *Woodward v. Shields, 32 C. P. 282.*—C. P. D.

One C., a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by C., and brought an action thereon against H., the assignee in insolvency of C., and D. and others, the owners of parts of the mortgaged lands. It was objected by D. that C. should have been made a party :—Held, that C. was not a trader within the meaning of the Insolvent Act and that nothing passed to the assignee in the insolvency proceedings. C. was therefore declared to be a necessary party, and leave was given to add him as a defendant. *Joseph v. Haffner, 29 Chy. 421.*—Boyd.

The action was brought by one F. and his wife, against Archibald F., to recover nine years' arrears, under an annuity deed made by the defendant to secure \$120 a year to the plaintiffs during their lives. Janet F., the defendant's wife, had joined in the annuity deed to bar her dower. Subsequently the defendant Archibald F., abandoned his wife and absconded. Janet F., then brought an action for alimony, and now applied to be let in to defend this action, on the ground that it was collusively brought for the purpose of defeating her suit for alimony, and to deprive her of her dower in the lands :—Held, upholding the order of the master in chambers, that Janet F., was entitled to be admitted to defend. *Ferris v. Ferris, 9 P. R. 443.*—Dalton, Master.—Ferguson.

The defendant Clarkson, as assignee of the defendant Hicks for the benefit of creditors, had taken possession of the goods in question, on which the plaintiff claimed a lien under an unregistered agreement in the nature of a chattel mortgage. On motion of certain creditors they were made parties to the action, under Rule 103 O. J. Act, (Con. Rule 324) on the ground that they had a substantial interest in the subject matter of the action. *Kitching v. Hicks*, 9 P. R. 518.—Winchester, Registrar.

The plaintiff consigned goods to parties in England, and shipped them by the defendant companies on bills of lading, describing them as shipped by the plaintiff, to be delivered to — order or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading to various parties in England, to whom he had sold the goods. The consignees paid the drafts drawn upon them for the price, and the goods having been seriously damaged in transit, they made claim upon the plaintiff for the loss. The plaintiff now sued for the damage, and was nonsuited on the ground that he had not sufficient interest, or was not the proper person to sue. The court without deciding as to the plaintiff having no right of action, or the effect of R. S. O. (1877), c. 116, s. 5, set aside the nonsuit, and directed a new trial with leave to the plaintiff to add as co-plaintiffs any or all of the consignees or endorsees of the bills of lading, the evidence already given to stand with any additions the parties might desire, reserving all costs. *Hately v. Merchants' Despatch Co.*, 2 O. R. 385.—Q. B. D.

The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor, and before any creditor had been informed of the assignment of the plaintiffs, who had omitted to register their mortgage, demanded of the defendants the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the master in chambers ordered M. to be added as a party defendant, in order to test the validity of the plaintiff's mortgage:—Held, affirming the order of Galt, J., who rescinded the master's order, that the defendant was not entitled to the order, for when the plaintiff demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment. *Hymon v. Bourne*, 5 O. R. 430.—C. P. D.

A cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Company, and upon an endorsement, purporting to be that of the Tool Company, the defendants cashed the cheque, and upon presentation by them to the plaintiffs, were repaid the amount. The Tool Company repudiated the endorsement. The defendant's solicitor swore that he had good reason to believe, and did believe, that a third party was the beneficial plaintiff, and that there were equities which would attach as against the present plaintiffs. Leave to add such third party was refused, but leave was given to the defendants to amend by alleging that the third party was the beneficial plaintiff, and to set up any defence that might be open to them on that ground. *Bank of Commerce v. Bank of British North America*, 10 P. R. 158.—Dalton, Master.

An objection was taken in the Divisional Court, that the action should have been brought by the consignee, James, because, as was alleged, the evidence showed that the property had passed to him. The objection was not taken at the trial or in the pleadings, otherwise it would have been shewn that the property was still in the plaintiff; and in any event the consignee James consented to be added as a co-plaintiff:—Held, that the objection could not now be raised; and, even if there were anything in it, the court would allow James to be added as a co-plaintiff. *Dymont v. Northern and North-Western R. W. Co.*, 11 O. R. 343.—C. P. D.

Adding Attorney-General. See *Re Trent Valley Canal*; *Re "Water Street" and the Road to the Wharf*, 11 O. R. 687.

This action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof. The defendant applied to add as a co-defendant one W., on whose behalf, as well as his own the defendant had made the contract in question, and who with knowledge of it had ratified and adopted it, but who was not formally a party to it:—Held, following *Kendall v. Hamilton*, 4 App. Cas. at p. 513 et seq., that the defendant had no right to force W. upon the plaintiff as a defendant, in the character of a joint contractor. Quære, whether W. would have a right to be brought in as a defendant on his own motion. *Toronto and Hamilton Navigation Co. v. Silcox*, 12 P. R. 622.—Dalton, Master.—Galt.

Under an incomplete agreement with the plaintiff, the defendant and one R. went into possession of the plaintiff's shop, intending to carry on business as partners. The agreement never was completed, the defendant and R. were put out of the shop, and the plaintiff brought this action to recover the amount received by the defendant from sales of goods while in possession of the shop. The defendant asserted that the contract was a joint one on the part of himself and R., but the plaintiff and R. denied this:—Held, that an order under Con. Rule 324 (a) compelling the plaintiff to add R. as a party defendant, in the character of a joint contractor, was under the circumstances a proper order. *Robb v. Murray*, 13 O. R. 397.—Dalton.

A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where by an ex parte order made in the action in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts due to a certain Grange, and brought this action pursuant thereto, it was:—Held, that an amendment should be made adding the Grange as co-plaintiffs without security being given for their costs, they being insolvent. If there were no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the

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The firm of R. & Co., consisting of three members, supplied goods to the defendants, and subsequently one of the members retired, and transferred his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and afterwards made an assignment to E., under 48 Vict. c. 26 (Ont.), for the benefit of their creditors. E., as assignee, sold to the plaintiff the debt supposed to be due from the defendants to R. & Co. for the price of the goods supplied, and also the interest of R. & Co. in any goods supplied and charged to anyone, remaining unsold, and the plaintiff brought this action to recover the same. The goods in question, however, were not purchased by defendants, but were consigned to them for sale by R. & Co., by whose instructions the proceeds of the goods actually sold were remitted to H. & Co., to whom they had been assigned by R. & Co. At the trial it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The Judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action refusing to add H. & Co. as parties. The plaintiff moved by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue, remaining unsold, of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co., if the transfer to them should be upheld, or absolutely if that transfer should be set aside as a fraudulent preference:—Held, 1. That these questions were "questions involved in the action" within the meaning of Rule 103 (Con. Rule 324), having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that Rule, but the amendment must be confined to the plaintiff's possible rights. 2. That by section 7 of 48 Vict. c. 26, E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co., but that transfer was not made by the same firm of R. & Co. who assigned to E.; that the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those only against whom a fraudulent preference by the original firm could be declared void: that the plaintiff could have no higher right than E. through whom he claimed, and could not therefore attack the assignment to H. & Co. The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt and of payments on account thereof, and, as against the original defendants, to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendants' whole costs to be a condition precedent. Falconbridge, J., dubitante, as to disposition of costs. *Adams v. Watson Manufacturing Co., (Limited)*, 15 O. R. 218.—Q. B. D.; 16 A. R. 2.

See *Foulds v. Harper*, 2 O. R. 405, p. 1633;  
*Saylor v. Cooper*, 2 O. R. 398 p. 1595; *Clarkson v.*

*White*, 4 O. R. 663 p. 119; *Head v. Bowman*, 9 P. R. 12, p. 1505; *O'Sullivan v. Lake*, 12 P. R. 550, p. 1404; *McMaster v. Mason*, 12 P. R. 278, p. 632; *Wildress v. Crawford*, 12 P. R. 658, p. 1308; *St. Louis v. O'Callaghan*, 13 P. R. 322, *infra*; *Reinhart v. Shutt*, 15 O. R. 325, p. 1171; *Hamilton Provident Loan and Investment Co. v. Smith*, 17 O. R. 1, p. 1277.

#### (b) In Master's Office.

See *Reinhart v. Shutt*, 15 O. R. 325, p. 1171;  
*Lally v. Loughard*, 12 P. R. 510, p. 1308; *Wildress v. Crawford*, 12 P. R. 658, p. 1308.

#### 12. Waiver of Objections to Non-joinder.

It is too late to raise an objection for the first time in the argument before the Supreme Court that the legal representatives of the assured were not made parties to the cause. *Venuer v. Sun Life Assurance Co.*, 17 S. C. R. 394.

#### IV. STATEMENT OF CLAIM.

##### 1. Generally.

The plaintiff in his statement of claim claimed damages from the defendants for "unlawfully, negligently and wrongfully," depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to approach the plaintiff's store for business: also for in like manner, blocking them up, and rendering them almost impassable in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully, and wrongfully," preventing customers or others coming thereto, and almost entirely destroying the plaintiff's business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to plaintiff: or that it be referred to the proper officer to ascertain and state such compensation:—Held, on demurrer, that the statement of claim was sufficient; for it alleged that the work was negligently done, and this gave a cause of action, even though the work itself might be lawful. *Quillman v. Canada Southern R. W. Co.*, 6 O. R. 567.—Rose.

Held, that the mention of the date of issue of a writ in a statement of claim was essential, but leave was given to amend on payment of costs. *Scott v. Creighton*, 9 P. R. 253.—Dalton, Master.

In an action for malicious prosecution, a part of the statement of claim setting out the observations of the judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from publication of such charge in newspapers and otherwise by defendants, was allowed to stand. *Morrow v. Cheyne*, 12 P. R. 487.—Dalton, Master.

Where a new defendant was added in 1889 to an action begun in 1886:—Held, that the statement of claim should shew on its face the date at which such defendant was made a party, and an amendment was ordered. *St. Louis v. O'Callaghan*, 13 P. R. 322.—Street.

Held, upon demurrer to a statement of claim in an action to enforce a mechanic's lien brought by a sub-contractor against the owner of the lands, and the contractor, that it was necessary for the plaintiff to aver that there was something due from the owner to the contractor. *Townsend v. Baldwin*, 18 O. R. 403.—Boyd.

## 2. Joinder of Causes of Action.

Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent should be joined in one action. *Snider v. Snider*—*Snider v. Orr*, 11 P. R. 140.—Boyd.

Action by the plaintiff on behalf of himself and all other creditors of the defendant L. asking for judgment against L. upon two overdue promissory notes and seeking to obtain execution for such claim, and also a previously recovered judgment, against two several parcels of land, alleged to have been fraudulently conveyed to the other two defendants respectively. A motion was made to strike out the name of one or other of the alleged fraudulent grantees as improperly joined in the same action:—Held, that it was possible under the present practice to combine two such causes of action, which, if well founded, had a common root in the fraudulent transfer, and that here there would be no practical inconvenience in trying both on the same record. The motion was, therefore, refused. *Chaput v. Robert*, 14 A. R. 354, remarks of Osler, J. A., at pp. 361, 362, specially referred to. *Heaton v. McKellar*, 13 P. R. 81.—Boyd.

As to joining other causes of action with actions for the recovery of land. See *Goring v. Cameron*, 10 P. R. 496, p. 580; *Campbell v. James*, 11 P. R. 347, p. 1619; *White v. Ramsay*, 12 P. R. 626, p. 580; *Pritchard v. Pritchard*, 17 O. R. 50, p. 580.

## 3. Filing and Delivery.

An order allowing further time to file a statement of claim should not be made ex parte. *Wigle v. Harris*, 9 P. R. 276.—Proudfoot.

If a statement of claim is filed after the time limited by Rule 158 (a) (Con. Rule 369a) (three months from appearance entered), the action will not be dismissed for its non-delivery, but the statement is irregular and may be struck out. In this case, under the circumstances, the time for delivery was extended upon payment of costs of the motion. *Clarke v. McKewin*, 9 P. R. 281.—Dalton, Master.

An order of the 4th October, 1886, extended the time for the delivery of the statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed, with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action:—Held, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462, (Con. Rule 485) vacating the judgment, and further extending the time for delivering the statement, and the master in chambers had jurisdiction to make such an order. *Newcomb v. McLuhan*, 11 P. R. 461.—Wilson.

Upon the defendant's application to dismiss the action for want of prosecution, an order was made on the 6th May, that upon payment by the plaintiff of \$20 costs within eighteen days, and upon his delivering his statement of claim, within the same time the defendant's application was dismissed. On the 20th May, after the expiry of the eighteen days, the plaintiff filed his statement of claim and delivered a copy to the defendant's solicitors, and tendered them \$20, which they refused to accept. They also declined to admit service of the statement of claim, but retained it in their possession. On the 3rd June an order was made extending for one week the time for filing and delivering the statement of claim and paying the \$20. This order did not provide that the statement of claim already delivered should stand. Within the week the plaintiff paid the \$20, and nine days afterwards signed judgment against the defendant for default of defence, upon the statement of claim delivered on the 20th May:—Held, affirming the decision of the master in chambers, that although the plaintiff was wrong in filing and serving his statement of claim before paying the costs, this irregularity was waived and the service became effective when the costs were afterwards received, they being paid under the order of the 3rd June. *Pierre v. Palmer*, 12 P. R. 275.—Dalton, Master.—Boyd.

See *Laidlaw v. Ashbaugh*, 9 P. R. 6, p. 579.

## V. STATEMENT OF DEFENCE.

### 1. Generally.

Though each paragraph of a statement of the defence should, under Rule 128, (see Con. Rule 449) as nearly as may be, contain a separate allegation, it need not contain a separate defence. *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 453.—Wilson.

Statement of claim claiming damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, etc., through defendants' negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statement of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect:—Held, on demurrer to the second paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence or was immaterial; that it could not embarrass the plaintiff, for if he proved actionable negligence he must prove either actual or presumptive notice. *Beasley v. City of Hamilton*, 9 O. R. 112.—Rose.

In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour; that the plaintiff was avoiding arrest; that the defendants therefore watched him and when he endeavoured to escape detained him until the arrival of the constable, and then gave him into custody; and that the defendants did this in the bona fide belief that they were justified in thus aiding the arrest:—Held, that although these facts did not constitute an answer to the action,

tion to dismissal, an order was made by the court on the fifth day, and of claim, within application was made after the expiry of the time set by the defendant, which was also declined to be made, but on the 3rd June another week the time of claim did not provide ready delivery the plaintiff paid his signed judgment of defence, delivered on the 3rd June, and the plaintiff's statement of this irregularity became effective received, they on the 3rd June. *Dalton, Master.*

P. R. 6, p. 579.

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statement of the bill, (see Con. Rule 17) in a separate allegation of defence. 46 Q. B. 453.

damages for an action on a promissory note, one member of a syndicate cannot ask to have a contract set aside by reason of misrepresentation, the other members not asking for a rescission; his remedy must be by cross-action or counter-claim for deceit. See *Morrison v. Earls*, 5 O. R. 434.

at the statement as a warrant in apprehension of a defendant; that the defendant and when he gave him into custody this in the justified in these although these as to the action,

yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record. *Pursey v. Bennett*, 11 P. R. 64.—*Rose.*

## 2. Filing and Delivery.

A statement of defence, delivered after the proper time and on the same day on which the plaintiff set the action down, to be heard on motion for judgment, was—Held irregular, and the court ordered that it should be struck out, and judgment granted for the plaintiff as prayed by the statement of claim, unless the defendant paid the costs of setting down the action and of the motion for judgment within a limited time. *Snider v. Snider*, 11 P. R. 34.—*Boyd.*

The last of the eight days within which the defendants should have delivered their statement of defence, as required by Con. Rule 371, was a Saturday, and on that day at twenty-five minutes past two in the afternoon, no statements of defence having then been filed, or served on the plaintiff's solicitor, the officer entered a note that the pleadings were closed.—Held, that the officer had no power to close the pleadings until the end of the day, which would be three o'clock; and therefore the note was irregular and should be set aside. Con. Rules 7, 393, 398, 480, considered. *Lloyd v. Ward*, 13 P. R. 238.—*Galt.*

## VI. SET-OFF AND COUNTER-CLAIM.

### 1. Generally.

In an action on a promissory note, one member of a syndicate cannot ask to have a contract set aside by reason of misrepresentation, the other members not asking for a rescission; his remedy must be by cross-action or counter-claim for deceit. See *Morrison v. Earls*, 5 O. R. 434.

The plaintiff sued defendant on an account assigned to him by one F. Defendant, by his counter-claim, alleged a set-off against F., and adding F. as a defendant claimed judgment against him for a balance due.—Held, that the counter-claim as against F. must be disallowed, the defendant having no right in this suit to raise an issue between himself and a third party, with which the plaintiff was not concerned. *Romann v. Brodrecht—Brodrecht v. Fick*, 9 P. R. 2.—*Dalton, Master.*

Held, that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant, under R. S. O. (1877) c. 116, ss. 7, 10, and the Judicature Act, ss. 11, 16, and Rule 127, can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Osler, J., his right to do so depended wholly upon R. S. O. (1877) c. 116, s. 10. In this case the judge, at the trial, having refused to entertain the former defence, a new trial was ordered. *Exchange Bank v. Stinson*, 32 C. P. 158.—*C. P. D.*

A promissory note made by the defendant had been held by the Consolidated Bank, and after

its maturity the defendant transferred certain timber limits to the bank as collateral security for the payment of the note, which limits the bank sold. The plaintiffs became holders of the note for value after dishonour and after the timber limits transaction and brought this action upon the note. A counter-claim against the plaintiffs and the bank by the defendant setting up that the bank had sold the timber limits without authority and for an insufficient price, and were thereby guilty of a breach of trust, and claiming that the defendant should be permitted to set off so much of his claim therefor against the bank as would satisfy the balance claimed upon the note was held bad and struck out as not being properly a counter-claim. Per Cameron, J. Unless required by the clear legal rights of the defendant for his protection against the plaintiff's action, counter-claims are not to be favoured. *Canadian Securities Co. v. Prentice*, 9 P. R. 324.—*Dalton, Master—Cameron.*

Held, per Ferguson, J., that the O. J. Act, Rule 17 (Con. Rule 248) and G. O. Chy. 647, (effete) do not apply to counter-claims. *Klein v. Union Fire Ins. Co.*, 3 O. R. 234.

In an action by the plaintiffs as endorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counter-claim against the plaintiffs, and H. & G., as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming \$10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation of the bill, and other bills in the same transaction. Upon the application of H. & G. the master in chambers struck out the counter claim, and the names of H. & G. as defendants.—Semble, that as against the plaintiffs, the defence should have been pleaded as a defence to the claim on the bill. *Torrance v. Livingstone*, 10 P. R. 29.—*Dalton, Master.*

An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiffs by H. & McT. on their banking account with the plaintiffs. Counter-claim by the defendant against the plaintiffs and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiffs ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount, and indemnify the defendant. As the counter-claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor, and surety, it was held bad, and ordered to be struck out. *Federal Bank v. Harrison*, 10 P. R. 271.—*Dalton, Master.—Rose.*

The Judicature Act has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off although it may be made the subject of counter-claim. Therefore, where a defence of money due to defendants by the plaintiffs, part of which accrued before and part after action brought, was pleaded as a set-off, the order of a local judge directing the defendants to amend by confining their plea of set-off, to those debts



which accrued before the commencement of the action, was affirmed. *Chamberlain v. Chamberlain*, 11 P. R. 501.—Ferguson

The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills under which in the event of the last in date being invalidated he claimed:—Held, that this was a proper subject of counter-claim. *Appelman v. Appelman*, 12 P. R. 138.—Boyd.

The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over \$1,000, and claimed a balance of \$169.72 and interest from the 1st January, 1888. The defendant by his statement of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of \$1,325.74, for which he counter-claimed:—Held, that the matter of the counter-claim was really a set-off, and even if it were not improper to call it a counter-claim, having regard to Con. Rule 373, this could not change its real character. *Cutler v. Morse*, 12 P. R. 594, referred to. *Bennett v. White*, 13 P. R. 149.—Ferguson.

A counter-claim must be a defence in the action in which it is pleaded, and it is as much a part of the defence as any of the other pleas. And therefore where the plaintiff took issue on the defence, not mentioning the counter-claim:—Held, that the pleadings were closed, and a notice of trial served thereafter was regular. *Macara v. Shore*, 12 P. R. 616.—Dalton, Master.

A counter-claiming defendant is not a plaintiff in an action; nor is a counter-claim an action. *Irwin v. Brown*, 12 P. R. 689.—Dalton, Master.

The defendant having distrained for rent in arrear, the plaintiff claimed that the defendant was indebted to him in damages for breach of the covenant in the lease to repair, and to lease to plaintiff an adjoining piece of land, and obtained ex parte an interim injunction restraining proceedings under the distress which was dissolved on the ground of concealment of facts:—Held, that the damages claimed by the plaintiff were not a "debt" within section 3 of 50 Vict. c. 23 (Ont.), so as to constitute a set-off against the rent; and although under the O. J. Act they might be the subject of counter-claim they would not justify an injunction as against a distress levied as here. *Walton v. Hurry*, 18 O. R. 620.—MacMahon.

## 2. Striking Out or Excluding.

A defendant asking relief against his co-defendant will not be ordered to give security for costs on the ground of residence out of the jurisdiction:—Sembles, such relief should not be asked by way of counter-claim. *Walsley v. Griffith*, 11 P. R. 139.—Dalton, Master.

In an action for damages for negligence, a counter-claim for libel was excluded, on the ground of the inconvenience which would arise in trying the two causes of action together, but leave to bring an independent action was given. *McLean v. Hamilton Street R. W. Co.*, 11 P. R. 193.—O'Connor.

To an action on a promissory note the defendant L., the endorser, pleaded that by an arrangement made with the plaintiffs, who had discounted the note, it was to be renewed from time to time, and paid out of the proceeds of a certain agency business, in which the defendant O., the maker of the note, and the defendant L. were engaged as partners; that the defendant O. had absconded, and that afterwards the plaintiffs had, by libel and slander of the defendant L., prevented him from securing the continuance of the agency business for himself, whereby he was unable to carry out the arrangement; and he also pleaded a counter-claim against the plaintiffs for the alleged libel and slander. The court (Rose, J., dissenting) struck out the counter-claim, upon an application under Rule 127 (b), O. J. Act (Con. Rule 373). Per Cameron, C. J.—There is a wide range of discretion under Rules 127 (b), 168, and 178 (Con. Rules 373, 374, 423). In actions where malice is an essential element and the damages are sentimental without any legal rule to guide in their measurement, there is much more injury likely to arise to the cause of justice by allowing such a counter-claim than can possibly spring from the defendants being forced to bring an independent action. Per Rose, J.—

The charge of libel arises out of the circumstances giving rise to the claim and defence. If the facts set up by L. do not constitute a valid answer in law to the claim, the plaintiffs may recover judgment against him, when peradventure he is in law and justice entitled to damages against them, exceeding the amount of such claim; but if the facts constitute a defence to the claim, they must be allowed to be shown in evidence, and no good will be achieved by not allowing the counter-claim to stand. *Central Bank of Canada v. Osborne*, 12 P. R. 160.—C. P. D.

Where, in an action by the assignee of C. for the benefit of his creditors, under 48 Vict. c. 26 (Ont.), stated to be brought for the benefit of one of such creditors, the F. Bank, to set aside a mortgage made to the defendants, as fraudulent and preferential, a judgment for foreclosure of the mortgage obtained against the plaintiff was pleaded as a bar to the action, and a counter-claim was asserted for payment by the F. Bank of certain moneys alleged to be due to the defendants, a motion to strike out such defence and counter-claim was refused, and the plaintiff was left to demur:—Sembles, that the counter-claim was not inadmissible. *Glass v. Grant*, 12 P. R. 480.—Boyd.

A counter-claim for damages by reason of false and depreciatory statements with regard to the value of the mortgaged premises having been set up by the defendants in an ordinary mortgage action, an order striking it out under Con. Rule 374 was affirmed, as well on the ground of inconvenience in trying the action and counter-claim together, as on the ground that the counter-claim was filed for delay. *McLean v. Hamilton Street R. W. Co.*, 11 P. R. 193; and *Central Bank v. Osborne*, 12 P. R. 160, followed. *Odell v. Bennett*, 13 P. R. 10.—Robertson.

See *Field v. Gallonay*, 5 O. R. 502, p. 261; *Ambrose v. Fraser*, 14 O. R. 551, p. 1143; *Garner v. Tume*, 12 P. R. 280, p. 1613; *Irwin v. Brown*, 12 P. R. 639, p. 1613.

## VII. REPLY.

The defendants by counter-claim delivered a reply, which contained more than a mere joinder of issue, to the statement of defence and counter-claim of the original defendants. No subsequent pleading having been delivered, the defendants by counter-claim, after the lapse of four days, served notice of trial:—Held, that the pleadings were not closed, and the notice of trial was therefore irregular. The plaintiffs by counter-claim, were entitled under Rule 180 (Con. Rule 425), to twenty-eight days from the delivery of the defence and counter-claim in which to amend. *Garner v. Tume*, 12 P. R. 280. —Dalton, Master.—Galt.

The defence of the plaintiff to a counter-claim is technically the plaintiff's reply, notwithstanding Con. Rule 379, and there can, without leave, be no further pleading by the defendant, but a joinder of issue. *Irwin v. Brown*, 12 P. R. 639. —Dalton, Master.

To a counter-claim against the plaintiff, who lived out of Ontario, seeking the recovery of a debt contracted out of Ontario, the plaintiff pleaded that the court had no jurisdiction, and the defendant replied, without obtaining leave, that the plaintiff had assets in Ontario to the value of \$200:—Held, that this reply, even if leave were obtained, was bad, because sub-sec. (e) of Rule 45, O. J. A., has not been incorporated in the Consolidated Rules. (See Con. Rule 271.) *Ib.*

Con. Rule 381 provides that "A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the court or a judge;" and Con. Rule 392 provides that "at the expiry of the three weeks the pleadings shall be closed:—Held, that where, upon a motion to set aside a reply delivered after the three weeks, nothing else appears than the fact that the time has expired, the pleading should not be set aside; and even if there is the right to move, the proper order to make upon such a motion would be one extending the time for delivery of the reply, and the moving party should have no costs:—Held, also, that upon such a motion no grounds of irregularity except those taken in the notice can be considered; referring to Con. Rule 534. *Wright v. Wright*, 13 P. R. 268.—Rose.

See *Sanger v. Short*, 9 P. R. 83.

## VIII. JOINDER OF ISSUE.

A cause is at issue where a joinder of issue has been delivered, or where three weeks have elapsed after statement of defence has been delivered. *Schneider v. Proctor*, 9 P. R. 11.—Dalton, Master.

Seemingly, the joinder of issue referred to in Rule 176 O. J. Act (Con. Rule 392), is not a simple denial of a previous pleading. *Weller v. Proctor*, 10 P. R. 323.—Dalton, Master.

The plaintiff delivered a reply which was a simple joinder of issue upon the statement of defence and counter claim:—Held, that this closed the pleadings. *Hare v. Canthrope*, 11 P. R. 353.—C. P. D.

See *Garner v. Tume*, 12 P. R. 280, p. 1613; *Macara v. Snow*, 12 P. R. 616, p. 1611; *Irwin v. Brown*, 12 P. R. 639, p. 1613.

## IX. OTHER CASES OF PLEADING.

In an action for calls defendants pleaded that plaintiffs' license had been suspended:—Held, on demurrer, that the defence should have alleged notice in the *Gazette* of the suspension of the license, pursuant to R. S. O. (1877) c. 160, s. 34, and 42 Vict. c. 25, s. 3, sub-s. 7, but an amendment was allowed, this point not having been taken. *Union Fire Ins. Co. v. Lyman*, 46 Q. B. 471.—Wilson.

Per Strong and Gwynne, J.J.—It is doubtful whether the strict rules applied in England to equitable defences pleaded under the C. L. Procedure Act should be adopted with reference to such pleas in Nova Scotia, where both legal and equitable remedies are administered by the same court and in the same forms of procedure. *Smith v. Bank of Nova Scotia*, 8 S. C. R. 558.

The fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same cause in this Province. *Hughes v. Rees*, 5 O. R. 654.—Ferguson.

Pleading foreign judgment. See *Hughes v. Rees*, 10 P. R. 301; 9 O. R. 198, p. 1090.

This action was to recover money as compensation for land expropriated, and for other relief. Defendants pleaded a defence in denial, and also a tender of \$400 and interest, but did not pay the amount into court:—Held, that the defence of tender without payment into court was a good defence under the O. J. Act, and a motion to strike out the defence, or to compel payment into court, or for judgment for the amount, with leave to proceed for a further amount was refused. *Demorest v. Midland R. W. Co.*, 10 P. R. 640.—Dalton, Master.

D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that therefore the sum of \$400 offered by the railway company before proceedings taken had become the amount of the compensation. The judge found on the evidence that no time had been fixed by the arbitrators for making the award:—Held, that as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff the sum of \$400 offered had not become the compensation to be paid, and a reference back was ordered. *Demorest v. Grand Junction R. W. Co.*, 10 O. R. 515.—Ferguson.

Pleas of fraud to actions on former judgments. See *Stewart v. Sutton*, 8 O. R. 341, p. 1090; *Harvey v. Harvey*, 9 A. R. 91, p. 831.

Quære, per Ferguson, J., whether it is not necessary, under the present system of pleading, to set up specially a defence arising from the maxim, "Volenti non fit injuria." See *Le May v. Canadian Pacific R. W. Co.*, 18 O. R. 314.

Effect of plea of payment into court. See *Fraser v. Bell*, 13 S. C. R. 546, p. 1564.

Embarrassing plea. See *Switzer v. Laidman*, 18 O. R. 420, p. 515; *Snider v. Snider—Snider v. Orr*, 11 P. R. 140, p. 1619.

Quære, whether hypothetical defences can be pleaded. *Smith v. Fair*, 14 O. R. 729.—Proudfoot.

See *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, p. 176.

#### XI. SPECIALLY PLEADING A STATUTE.

The statement of claim alleged a partnership between the plaintiff and defendant, but did not aver whether the agreement was in writing or not. The defence set up a special agreement by which the defendant was to be remunerated by a share of the profits in lieu of wages or salary, but did not expressly refer to the R. S. O. (1877), c. 133. It was admitted that something was due to defendant, and a reference was ordered. The Master in Ordinary held, following the remarks of Proudfoot, J., in *Rogers v. Ullman*, 21 Chy. 139, that as the defendant had not pleaded R. S. O. (1877), c. 133, so as to negative the plaintiff's allegation of a partnership, he could not claim the benefit of that statute to support his account, but to enable him to properly raise the question on appeal, permitted an affidavit to be filed shewing that there was an agreement under the statute:—Held, on appeal, that the case did not come within the terms of Rule 141, O. J. Act, (Con. Rule 413), and that it was not necessary, more specifically to plead the statute. *Neil v. Park*, 10 P. R. 476.—Boyd.

The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of the goods either at the trial or in the order nisi, the court without deciding that there had been a sufficient delivery held that the objection was not open to the defendant and refused to permit an amendment. *Greenizen v. Burns*, 13 A. R. 481.

See *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511, p. 1616; *Keefer v. Roaf*, 8 O. R. 69; *McKay v. Cummings*, 6 O. R. 400, p. 1215; *Bond v. Connor*, 15 O. R. 716; 16 A. R. 398, p. 1122.

#### XII. NOT GUILTY BY STATUTE.

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract; and the defence of "not guilty irrespective of statutory authority is not admissible under the Judicature Act. *Town of Peterborough v. Midland R. W. Co.*, 12 P. R. 127.—Dalton, Master.

Semble, the omission to give notice of action, must be pleaded or the section which requires it referred to in the plea of "not guilty by statute." *Bond v. Connor*, 16 A. R. 398.

Held, reversing the C. P. D. (18 O. R. 482) that evidence of contributory negligence is properly admissible under a defence of "not guilty by statute" without any special plea of contributory negligence, and at any rate in this case, even if strictly speaking the evidence were not admissible as the pleadings stood, still, it having been given without objection, the plaintiff could not afterwards complain. *Doan v. Michigan Central R. W. Co.*, 18 O. R. 482; 17 A. R. 481.

#### XIII. DEMURRERS.

In an action to set aside a conveyance of land as a fraudulent preference, the non-avertment that the plaintiff sued on behalf of all other creditors, is no ground for demurrer, but a mere informality to be dealt with under O. J. Act, Rules 103, 104, (Con. Rules 324, 325). *Seane v. Duckett*, 3 O. R. 370.—Boyd.

In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not in his statement of claim, allege that the bill was delivered a month before action brought is not now, any more than before the O. J. Act, ground for demurrer, but only for defence. *Ib.*

In an action by the Attorney-General, upon the relation of the bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the university, the defendants pleaded that the said lands had been with the assent of the university and bursar, taken possession of by them for the purposes of their railway under their statutory powers, and that they had since retained, and then were in possession thereof, and they also pleaded the statute of limitations:—Held, on demurrer, that it was not necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements:—Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under Rule 144 (Con. Rule 416.) *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511.—Boyd.

In case of a partial demurrer to a pleading under Rules 180 (Con. Rule 384), if any one or more paragraphs be demurred to, the court will look at any other paragraph or paragraphs bearing on the same matter of defence, and if the whole taken together, disclose a sufficient defence, the demurrer must be overruled. *Ib.*

When a pleading is ambiguous or uncertain, the proper remedy is to apply in chambers to strike out or amend the defective matter, and a demurrer on that ground will not lie. *Ib.*

The defendant having filed his statement of defence, the plaintiff replied thereto by amending his claim, adding to the statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up, when separated from the rest of the statement, did not disclose any distinct cause of action. Thereupon the defendant served an

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amended statement of defence, and demurred to the two paragraphs which had been so added. In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the court (Boyd, C.) overruled the demurrer without costs, as it was the first occasion the point had arisen under the Judicature Act. *Rumohr v. Marx*, 29 Chy. 179.

The propriety of partial demurrers which do not bring up the whole or even a substantial question between the litigants, thus tending to increase costs, considered and remarked upon. *Ib.*

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Where the allegations in a bill of complaint were of an ambiguous character, hovering between two inconsistent alternatives, neither of which supported the conclusion suggested by the pleader, a demurrer for want of equity was upheld. The court will regard the intuits with which the allegations in a bill of complaint are made, and will not allow the prayer for general relief to control the obvious frame of the record. The primary object of the bill was to enforce a contract of sale of land between N. an insolvent, of whom the plaintiff was assignee, and one C. N. was made a party because, as the bill alleged, said C. N. pretended that one L. who had advanced money to N. on the security of the property, had conveyed his interest to C., while the plaintiff charged the contrary, and alleged that if such conveyance was made yet it was without value, and made to defeat N.'s and L.'s creditors. A demurrer by C. N. was allowed, on the grounds above mentioned, and because the bill was multifarious. *Gunn v. Trust and Loan Co.*, 2 O. R. 393.—Boyd.

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Where a demurrer is raised to a statement of claim for specific performance on the ground of no sufficient agreement, it is enough if in any aspect of the case, the plaintiff may be entitled to some relief. In this case it was held, on the statement of claim set out in the report, that a concluded contract was shewn, and that defendant was liable. *Young v. Robertson*, 2 O. R. 434.—Boyd.

Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer. *Ib.*

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A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence enter it for argument and give notice, nor serve an order for leave to amend, as required by Rule 195 (a) O. J. Act (Con. Rule 539):—Held, on an ex parte motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a judge in court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading. *Livingston v. Trout*, 10 P. R. 493.—Rose.

A demurrer to a statement of claim raised the question whether in an action against a shareholder living in Ontario, in a Quebec Joint Stock Company incorporated under the Dominion Joint Stock Companies' Act, 1877, it is sufficient to show a judgment and execution thereon returned unsatisfied in Quebec, or whether this must be

shown in Ontario:—Held, that the demurrer was not frivolous. *Brice v. Munro*, 10 P. R. 548.—Dalton, Master.—Rose.

Semble, the jurisdiction as to setting aside demurrers as frivolous, should rarely be exercised where the point is a new one, and is apparently raised in good faith to obtain the opinion of the court. *Ib.*

Held, that where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury. *Bingham v. Warner*, 10 P. R. 621, commented on. *Fraser v. Johnston*, 12 P. R. 113.—Boyd.

A party whose pleading is demurred to may still serve a notice of exception to the pleading of the opposite party. *O'Donnell v. Ducheneault*, 14 O. R. 1.—O'Connor.

Held, per Strong, J., that a plea setting up non-compliance with a condition in a contract having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer the question as to the sufficiency in law of the defence was res judicata. *Grand Trunk R. W. Co. v. McMillan*, 16 S. C. R. 543.

No other or greater costs were allowed to defendants in this case than if they had successfully demurred instead of defending and going down to trial. *Hepburn v. Township of Orford*, 19 O. R. 585.—Q. B. D.

See *Shields v. Peak*, 8 S. C. R. 579, p. 1626; *Chatterton v. Crothers*, 9 O. R. 683, p. 1572; *Glass v. Grant*, 12 P. R. 480, pp. 1612, 1620; *Chaput v. Robert*, 14 A. R. 351, p. 1599.

#### XIV. WAIVER BY PLEADING.

Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the master, he waives it, and leaves the whole matter at large to be enquired into on the evidence. *Hughes v. Rees*, 10 P. R. 301.—*Hodgins, Master-in-Ordinary*. But see *S. C. 2 O. R.*, 198, p. 1099.

Held, in this case, that a clause in the answer of W. S. expressing his willingness that the will should be construed by the court and the rights of the parties thereunder determined had not the effect of waiving any right that might have accrued to him during the progress of the suit. *Archer v. Scerim*, 12 O. R. 615.—Proudfoot.

See *Lock v. Todd*, 8 P. R. 60, p. 1628; *Regina v. Stewart*, 8 P. R. 297, p. 1628.

#### XV. NOTICE OF EXCEPTIONS.

See *O'Donnell v. Ducheneault*, 14 O. R. 1, *supra*.

#### XVI. AMENDING AND STRIKING OUT PLEADINGS.

##### 1. In Chambers.

Adding plea of promissory notes being insufficiently stamped.—See *Coughill v. Clarke*, 3 O. R. 269, p. 156; *S. C. 9 P. R.* 471, p. 155, 156.

In an action for damages for detention of dower, defendants pleaded (1) that the lands in

question were wild, and plaintiff was not entitled to the sum claimed for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set-off for moneys expended in respect of said lands; (4) that they did not detain, but were always willing, etc. On a motion in chambers, after issue joined, for an order directing a reference as to the damages under s. 47 O. J. Act, and upon evidence by affidavit both for and against the truth of the pleas, the master made an order striking out the 2nd and 3rd pleas, and directing a reference:—Held, that the master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing. *Ryan v. Fish*, 10 P. R. 187.—Dalton, Master.—Proudfoot.

The plaintiff indorsed his writ of summons and filed his statement of claim to recover possession of the land in dispute, as being the assignee of a lease made by him to the defendants, who assigned to a third party, who assigned and surrendered to the plaintiff. The defence was that the lease was in effect a mortgage, and fraud and want of consideration were alleged:—Held, that the plaintiff could not amend his statement of claim, and ask a foreclosure of the land as mortgagee. *McIlhargy v. McGinnis*, 9 P. R. 157.—Wilson.

Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent should be joined in one action. Separate actions were brought for such claims, the five defendants appearing by the same solicitors, and filing separate statements of defence. A paragraph of each of the defences submitted that "the plaintiff had made out no case entitling her to relief." This was struck out by a local master, by five separate orders to the same effect:—Held, that the paragraph was neither scandalous, nor prejudicial, nor embarrassing under Rule 178, (Con. Rule 423) but was a mere reference to section 44 of the Judicature Act, and should not have been struck out and the costs of only one order were allowed. *Snider v. Snider*, *Snider v. Orr*, 11 P. R. 140.—Boyd.

Where the writ of summons was indorsed with a claim for the recovery of land and for mesne profits, but the statement of claim asked specific performance of the contract by the defendant to buy the land from the plaintiff, and in the event of specific performance not being decreed, possession, etc., and no order had been obtained for leave to join another cause of action with a claim for the recovery of land, as required by Rule 116, O. J. Act (Con. Rule 341), and a motion was made to set aside the writ of summons and statement of claim, or one of them. Held, that the causes of action were improperly joined in the statement of claim without leave, but inasmuch as the two causes of action could not conveniently be prosecuted separately, leave was given to amend the writ by adding a claim for specific performance, or the statement of claim by striking out such claim, at the plaintiff's option. *Campbell v. James*, 11 P. R. 347.—Dalton, Master.

A defence which is wholly inapplicable may be struck out, unless amended, although it is neither scandalous nor tending to prejudice, embarrass, or delay. *Chamberlain v. Chamberlain*, 11 P. R. 501.—Ferguson.

As a general rule pleadings should not be set aside on summary applications unless so plainly frivolous or indefensible as to invite excision. Where a matter is doubtful or difficult it is better to leave the objecting party to demur; and even if the pleading appears to be demurrable, that is not a sufficient reason for expunging it from the record. *Gloss v. Grant*, 12 P. R. 480.—Boyd.

See *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511, p. 1616; *Torrance v. Livingstone*, 10 P. R. 29, p. 1610; *Bank of Commerce v. Bank of British North America*, 10 P. R. 158, p. 1603; *Lauder v. Carrier*, 10 P. R. 612, p. 568.

## 2. At the Trial.

Action on a life policy. The application contained a number of questions and answers, and at the foot was a declaration, signed by the assured, that to the best of his knowledge and belief the foregoing statements and other particulars were true: that the declaration should form the basis of the contract: and that if any untrue averment had been intentionally made therein or in the replies to the company's medical adviser in connection therewith the policy should be void. By the policy the declaration and "relative papers" were made the basis of the contract, with a proviso that if any fraudulent or wilfully untrue material allegation was contained in said declaration; or if it should thereafter appear that any material information had been withheld, and any of the matters set forth had not been truly and fairly stated, then the policy should be void. To the questions in the application as to the name and residence of usual medical attendant, and for what serious illness had he attended, the assured answered "none"; and to the questions by the medical adviser as to what other disease or personal injury and from whom had he received professional assistance, etc., the assured answered "none." It was found that these answers were wilfully untrue, and that the information was wilfully withheld from and was material to be stated to the company:—Held, that these answers constituted a breach of the express contract between the parties and therefore the policy was void. The pleas setting up these defences were added at the trial, and after the case had been in progress for some time. The action was commenced before the Judicature Act came in force, but the trial took place thereafter:—Held, that, whether under section 8 of the A. J. Act, or under Rule 128 of the O. J. Act (Con. Rule 399), the pleas were properly added. A replication to these pleas set up that certain correspondence between the company's general manager and their local agent, but of which the assured had no notice, directing the agent to make enquiries as to the habits, etc., of the assured, upon the result of which the agent was to issue the policy, constituted an agreement that the company would rely on the judgment of the agent alone founded on such enquiries:—Held, that the replication could not be supported, either at law or on the facts. *Russell v. Canada Life Assurance Co.*, 32 C. P. 256.—C. P. D.: 8 A. R. 716.

The judgment of the court below (32 C. P. 131) overruled the demurrer on the assumption that the plea had been amended according to



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leave given, but the appeal book did not shew the amendment to have been made, and the defence as set out in the printed case was held bad on demurrer, and the appeal by the plaintiff allowed with costs. *Cameron, J., diss.* who thought that under the circumstances the plea should be treated as amended pursuant to leave granted by the court below, and that the judgment of the court below, which was in the opinion of this court right as it was given, should not be reversed. *Boswell v. Sutherland, 8 A. R. 233.*

O. was a member of Court Maple of the defendants' order, and was insured under the endowment provisions thereof for \$1,000. This court left the order in a body and joined another order of Foresters, and it was in consequence suspended. On joining the new order it was arranged that O., who was in ill-health, and had gone to California for change, should be taken and insured with the others. By the rules of defendants' order members of suspended courts in good standing at suspension were, on application within thirty days, to the supreme secretary, and payment of a fee of \$1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days they must pass a medical examination. On his return from California, O. on ascertaining that the Court Maple had been suspended, within the thirty days, being then in good standing, applied to the defendants' supreme secretary for his card of membership, tendering \$1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having the card, was prevented from affiliating, though he endeavoured to do so, with another court. By the endowment certificate the \$1,000 was payable to the widow, orphans, or legal heirs of O., and by endorsement thereon O. directed the amount to be paid to the plaintiff, the widow. At the trial an amendment was asked, to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the judge:—Held, under the circumstances the refusal was proper. Quere, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another order might not, if properly pleaded, have required some consideration. The frame and effect of the pleading in this case considered. *Outs v. Supreme Court of the Independent Order of Foresters, 4 O. R. 335.—C. P. D.*

Per Hagarty, C. J. O.—This court is allowed and required by law to give judgment "according to the very right and justice of the case," and up to the last moment has the right to make any amendment proper for the attainment of that end. Therefore where the defendants had by their answers admitted the truth of certain paragraphs of the bill which charged that they had severally purchased with notice of the claim of the plaintiff; but subsequently they swore that they did not intend to make such admission; that in fact they had not had such notice, and the admission was made in ignorance of its effect; the defendants up to the last stage of the proceedings should be at liberty to set up the facts as a means of defence. *Peterkin v. McFarlane, 9 A. R. 420.*

*See Caughill v. Clarke, 3 O. R. 269, p. 156; Todd v. Dui Wiman & Co., 15 A. R. 85, p. 514; McPherson v. Wilson, 15 A. R. 294, p. 657.*

### 3. In Master's Office.

The master has no jurisdiction to make amendments to the pleadings after judgment; nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings. *Hughes v. Rees, 10 P. R. 301.—Hodgins, Master in Ordinary.*

*See Court v. Holland, 4 O. R. 688, p. 1663.*

### 4. Other Cases.

New trial granted in action for malicious prosecution with leave to plaintiff to amend the statement of claim. *See Macdonald v. Henwood, 32 C. P. 433, p. 1218.*

In this case which was an action for the rescission of a contract for the sale of land:—Held, that inasmuch as all the evidence that could throw light upon the case had admittedly been given, the fact that the issue of improvidence was not raised on the pleadings was immaterial. In such a case it is a mere matter of form to adapt the pleadings to the matters proved. *Gough v. Bench, 6 O. R. 699.—Chy. J.*

Amendment of pleadings by changing a breach of contract not proved into an action for breach of warranty. *See Ellis v. Abell, 10 A. R. 226.*

*See Greenizen v. Burns, 13 A. R. 481, p. 395.*

### XVII. COSTS.

Where the original plaintiffs in an action were not entitled to any relief but by amendment, and a party was added to whom relief was granted:—Held, that the defendants were entitled to costs of the action up to the date of the amendment. *Clarkson v. White, 4 O. R. 663.—Chy. D.*

The defendants, being sued as carriers for the loss of goods in transit under a contract between the plaintiffs and defendants, gave notice under Rules 107 and 108 (Con. Rules 328, 329), to the third parties that they claimed indemnity from them under a contract to which the plaintiffs were strangers; the third parties appeared, and an order was made that they should be at liberty to assist in defending the action and should be bound by the result as regards the liability of the defendants to the plaintiffs. The plaintiffs were nonsuited at the trial:—Held, that the plaintiffs were not liable for the costs of the third parties, or for the costs occasioned by joining them; nor were the defendants liable for such costs. *Tomlinson v. Northern R. W. Co. of Canada, 11 P. R. 419.—Armour.*

Where the demurrer is partly successful and partly unsuccessful neither party should get costs. *Attorney-General v. Midland R. W. Co., 3 O. R. 511.—Boyd.*

Costs of counter-claim. *See COSTS.*

Where party succeeds only in part. *See COSTS.*

*See Rumohr v. Marx, 29 Chy. 179, p. 1617; Woodward v. Shields, 32 C. P. 282, p. 1602; Scott v. Crevington, 9 P. R. 253, p. 1606; Clarke v. McEwing, 9 P. R. 281, p. 1607; Schwob v. McLaughlin, 9 P. R. 475, p. 1594.*

## XVIII. VENIRE DE NOVO.

See *Wills v. Carman*, 14 A. R. 656, p. 378.

(Before the Judicature Act. 1881.)

## PLEADING AT LAW.

## I. GENERALLY.

1. *Embarrassing Pleadings.*

The plaintiff alleged in one count in trover that the defendant converted to his own use, or wrongfully deprived the plaintiff, etc.:—Held, overruling *Bain v. McKay*, 5 P. R. 471, that the count was not embarrassing. *Taylor v. Adam*, 8 P. R. 66.—Dalton, Q. C.

The C. L. P. Act, (R. S. O. 1877, c. 50), s. 120, empowers the court or a judge to strike out pleas not merely where they are embarrassing, because confused in terms and so difficult to understand, but where they combine several defences in one plea, or are repetitions of a defence already pleaded, and may thus be embarrassing, or prejudice a fair trial. In this case, being an action on promissory notes, the defendant having pleaded total failure of consideration, added other pleas repeating that defence, and setting up besides another agreement, not necessarily connected with the notes, and so stated as to leave it uncertain whether it was intended as a separate defence or as supporting the other defence:—Held, affirming the judgment of Cameron, J., that such pleas were properly struck out. *Abell v. McLaren*, 31 C. P. 517.—C. P. D.

2. *Departure.*

To the plea of "non est factum," the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but that the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it:—Held, a good replication and not a departure from the declaration. *Wright v. London Life Ins. Co.*, 5 A. R. 218.

Action on a debenture, by which the defendant agreed to pay to the bearer £200 stg. at the office of a named bank, and on a named day, upon presentation and surrender there of the debenture. Averment of performance of all conditions precedent. Breach non-payment of the principal sum:—Held, by Osler, J., and affirmed by the C. P. D., that the presentation and surrender of the debenture at such place and date were conditions precedent, and the performance of such conditions having been averred in the declaration, a replication alleging presentation on a later day was a departure. *Montreal City and District Savings Bank v. County of Perth*, 32 C. P. 18.

3. *Certainty and Particularity.*

Declaration, that D., by writing, for valuable consideration, duly assigned to plaintiff the sum of \$500, money due and to become due to D. by

defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, etc.:—Held, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied by law. *Mitchell v. Goodall*, 44 Q. B. 398, and *Brice v. Bannister*, 3 Q. B. D. 569, distinguished. *Smith v. Ancaster Township*, 45 Q. B. 86.—Osler.

To an action for maliciously making demand for an assignment under the Insolvent Act the defendant's third plea after setting up a variety of dealings between the parties, shewing that the plaintiff had from time to time failed to meet his engagements with defendants, concluded that the plaintiff being indebted to the defendants in the sum of \$1,400, and being unable to pay the same or to meet his engagements, and the plaintiff being also to the knowledge of the defendants indebted in large sums to divers other persons, creditors of the plaintiff, the defendants bona fide believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice made a demand on the plaintiff, etc.:—Held, a good plea, although it was not expressly averred in the words of sec. 4 that the plaintiff had ceased to meet his liabilities generally as they became due. Quære, whether that expression means his liabilities to the particular creditor or to his creditors generally. *Nagle v. Timmins*, 31 C. P. 221.—Galt.

See *Town of Peterborough v. Edwards*, 31 C. P. 231, p. 27, p. 1333.

## II. DECLARATION.

1. *Venue.*

In an action for damages caused by the non-repair of a highway in the county of York the venue was laid in Peel, but the declaration did not state in what county the highway was situated. The venue being admitted to be wrong, plaintiff was allowed to amend his declaration. *Brown v. County of York*, 8 P. R. 139.—Dalton, Q. C.

In an action wherein the sheriff is plaintiff or defendant, the opposite party, if he so desires, may have the action tried in the county adjoining that in which the sheriff resides. *Brannan v. Jarvis*, 8 P. R. 322.—Galt.

2. *Changing Venue.*

Held, that there is no appeal to the full court in term from an order of the clerk of the Crown and Pleas, made on an application to change the venue in County Court cases under R. S. O. (1877), c. 30, s. 155, but the only appeal in such cases is to a judge in chambers under section 31 of the Act:—Held, however, that if an appeal did lie to the full court, it might be made direct thereto without first going before a judge in chambers. Semble, in such cases the proper course is to follow, as laid down in the Act, the practice in force in the Superior Courts, and that the mere fact of the cause of action having arisen in the

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## 2. Other Cases.

Per Gwynne, J., that as the plea demurred to in this case confessed the debt for which the action was brought, and that such debt was incurred under circumstances of fraud, and offered no matter whatever of avoidance or in bar of the action it was bad. *Shields v. Peak*, 8 S. C. R. 579.

Held, that it was no objection to a replication that it shewed for the first time that interest only was claimed, for that being merely an accessory to the principal, need not be claimed as damages. *Montreal City and District Savings Bank v. County of Perth*, 32 C. P. 18.—C. P. D.

Held, that a plea which, after traversing the presentation of the debenture modo et forma, alleged it was afterwards paid and was then duly surrendered to the defendants, was a good plea, as the plaintiffs, by excepting to it, admitted payment of the principal sum, which would include the nominal damages, if any, alone recoverable for its detention, while the surrender of the debenture would shew that the payment was in satisfaction and discharge of the debt, if not of the damages also; that it was no answer to the plea to say that the surrender before the damages were paid was by mere oversight and inadvertence so long as it appeared to be intentional; but that it would be a good answer to say that such delivery was on the express agreement that the right to damages was reserved:—Held, also, that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants. *Osborne v. Preston & Berlin R. W. Co.*, 9 C. P. 241 and *Fellows v. Ottawa Gas Co.*, 19 C. P. 174, commented upon. *Id.*

The declaration alleged that the defendant laid an information that certain harness had been stolen by the plaintiff, whereas the information proved was qualified by the addition of the words "as he supposed":—Held, no variance. *Colbert v. Hicks*, 5 A. R. 571.

The plaintiff lent P. a sum of money, for securing the repayment of which P. gave a chattel mortgage on goods which P. was to retain possession of, and the defendant executed a bond, conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and an action having been commenced against the defendant on his bond, he pleaded the fact of such destruction without any default on his part:—Held, bad on demurrer, for not negating any default on the part of P. (*Cameron, J.*, dissenting.) *Boswell v. Sutherland*, 8 A. R. 233.

See *Creighton v. Chittick*, 7 S. C. R. 348, p. 117; *Brown v. County of York*, 8 P. R. 139, p. 1625.

## VI. EQUITABLE PLEA.

Declaration upon a promissory note. Third plea, "that the defendant made the said note

## 3. Time for Declaring.

A plaintiff must declare within one year after the writ of summons, inclusive of the day of service. *Murchison v. Canada Farmers' Ins. Co.*, 8 P. R. 451.—Dalton, Q. C.

## 4. Form of.

Remarks as to the proper form of declaration in an action for negligence in investing money where the defendant was not paid by the lender but by the borrower. *Carter v. Hatch*, 31 C. P. 293.—C. P. D.

## III. PLEAS IN ABATEMENT.

The plaintiff brought his action for damages caused by the non-repair of a highway in the county of York, and laid the venue in Peel, but the declaration did not state in what county the highway was situate. Defendant pleaded not guilty; and (2) that the court ought not to have further cognizance of the action, because the cause of action was local, and arose in the county of York and not in the county of Peel:—Held, that this was properly a defence in bar, and not in abatement:—Held, that whether a plea in abatement or to the jurisdiction, it could not be pleaded with a plea in bar. *Brown v. County of York*, 8 P. R. 139.—Dalton, Q. C.

The defendant pleaded to an action in a Superior Court, on a writ specially endorsed for \$410, that there was a suit pending in a County Court, brought by the plaintiffs against the defendant, for the same cause of action:—Held, that the plea should aver that the cause of action in the first suit was within the jurisdiction of the County Court. *Morgan v. Ault*, 8 P. R. 429.—Dalton, Q. C.

## IV. TIME FOR PLEADING TO NEW ASSIGNMENT.

A defendant had four days only to plead to a new assignment. *McDonald v. McKinnon*, 8 P. R. 13.—Dalton, Q. C.

## V. PLEAS IN BAR AND SUBSEQUENT PLEADINGS.

### 1. Similiter.

With his joinder of issue, the plaintiff served notice of trial for the chancery sittings. Defendant afterwards served a similiter and jury notice:—Held, that the similiter and jury notice were good, and that the notice of trial must be set aside. *McLaren v. McQuay*, 8 P. R. 54.—Dalton, Q. C.

The plaintiff joined issue upon defendant's pleas, and at the same time filed a similiter, without a jury notice, for the defendant. Afterwards the defendant filed a second similiter, and with it a jury notice:—Held, that defendant should have filed a jury notice with his pleas; that the first similiter was good, that the second

with and for the accommodation of one W. C., at the request of the plaintiffs, in respect of a pre existing debt, then due to the plaintiffs, by the said W. C. alone, and the said note was drawn payable on demand, with interest at ten per cent., and except as aforesaid there was never any value or consideration for the making or payment of the said note by the defendant. Fourth plea, on equitable grounds, that the defendant made the note jointly and severally with W. C. for his accommodation, and as his surety only, to secure a debt due to the plaintiffs, and that after the note became due the plaintiffs gave W. C. an extension of time for the payment of the note:—Held, that the third plea was good, for it shewed that no extension of time had been given, and therefore that there was no consideration, and that the fourth was not an equitable plea, and must be amended by striking out the words "upon equitable grounds," and the jury notice served with it allowed to stand. *Merchants' Bank v. Robinson*, 8 P. R. 117.—Dalton, Q. C.

#### VII. COSTS.

A count having been drawn so as to invite a demurrer the demurrer was overruled without costs. *Smith v. Ancaster Township*, 45 Q. B. 86.—Osler.

#### VIII. AMENDMENT OF PLEADINGS.

##### 1. Parties.

In ejectment the plaintiff obtained a verdict, but as the defendant had made improvements on the land under a bona fide belief that the land was his own he was held entitled to the relief given by R. S. O. (1877) c. 95, s. 4, and the master in chancery at Ottawa was directed to ascertain the value of such improvements and report thereon which he did. A rule nisi having been obtained to refer back the report for the reasons stated, it appeared that after the report the defendant died intestate, and that no personal representative had been appointed, leaving a widow who was residing on the land in question and a son by a former wife but no children by the second wife, and also that defendant had assigned all his interest in the sum to be found due for improvements to a loan society. The court permitted the plaintiff to amend his rule nisi by calling on the widow or son of the deceased, and on the loan society to shew cause why they should not be made parties to the suit and why the former should not be appointed under A. J. Act, s. 9, to represent the estate of the defendant for the purposes of this motion and all subsequent proceedings in the reference, and why in that event the relief asked by the rule should not be granted. The rule to be returnable on fourteen days' notice before a single judge. *McCarthy v. Arbuckle*, 31 C. P. 48.—Osler.

Leave was granted to amend a declaration where "the Commissioners of the Cobourg Town Trust" were sued as a corporation, by substituting the names of the commissioners. *McSherry v. Commissioners of the Cobourg Town Trust*, 45 Q. B. 240.—Q. B. D.

After issue joined one of two plaintiffs gave to the defendant a release under seal of all ac-

tions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine v. Carling*, 8 P. R. 171.—Osler.

##### 2. Other Cases.

The plaintiffs applied at the trial to amend their declaration by striking out a term of the bargain therein alleged, but not proved, that the plaintiffs would sell as much of the tea as they could:—Held, an amendment which was imperative under R. S. O. (1877), c. 50, s. 270. *Lumsden v. Davis*, 46 Q. B. 1.—Q. B. D.

Adding plea of fraud, in action against surety, at second trial. See *Village of Gananoque v. Stenden*, 1 O. R. 1, p. 779.

Power of Supreme Court to allow amendment. See *South West Boom Co. v. McMillan*, 3 S. C. R. 700; *Moore v. Connecticut Mutual Life Ins. Co. of Hartford*, 6 S. C. R. 634.

#### IX. WAIVER OF OBJECTIONS.

The obtaining of an order for time to reply waives an objection that no notice to reply was served, and takes the place of such notice. *Lock v. Todd*, 8 P. R. 60.—Dalton, Q. C.

Held, that in this case the defendant was precluded by having accepted service of the writ with knowledge of certain irregularities, and delayed moving after the time for pleading had expired. *Regina v. Stewart*, 8 P. R. 297.—Osler.

(Before the Judicature Act, 1881.)

#### PLEADING IN EQUITY.

##### I. BILLS.

###### 1. Form of.

###### (a) Multifariousness.

The owner of real estate died intestate, and A., the husband of one of his sisters, took possession of the property and appropriated to his own use the rents and profits thereof, whereupon some of the surviving brothers and sisters of the intestate filed a bill against A., to which they made all the next of kin of the intestate parties, calling upon A. for an account of rents received, and seeking to restrain him from further intermeddling therewith. The court Spragge, C., on demurrer by A. held the bill was not multifarious. *Young v. Wright*, 27 Chy. 324.

See *Campbell v. Campbell*, 29 Chy. 252, p. 1631; *Gunn v. Trust and Loan Co.*, 2 O. R. 393, p. 1617.

###### (b) Certainty and Particularity.

In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that

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the defendant E. B. (the widow) is not entitled to dower":—Held, a sufficient allegation that the defendant's right to dower was barred by the statute, though it omitted to state that this was the legal result of any particular statute. *Banks v. Bellamy*, 27 Chy. 342.—Spragge.

In a bill filed by a mortgagor against his son, a bidder at the sale by another of the defendants, a loan company, to which bill the company and one B. were also defendants, it was alleged that it had been agreed between the son and B. that in consideration of the son securing to B. a debt of the plaintiff, B. would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land which he accordingly did; that in consequence of B.'s refusal to make the promised advance the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding, and that B. afterwards privately bought the land at a great under value to the loss of the plaintiff:—Held, on demurrer that the bill sufficiently, though inartificially alleged that by reason of B.'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale and profited thereby to the loss and damage of the plaintiff. *Campion v. Brucknidge*, 28 Chy. 201.—Spragge.

The bill stated that the plaintiff was grandson of L., who had died intestate:—Held, that this did not sufficiently state the title of the plaintiff. *Lario v. Walker*, 28 Chy. 216.—Spragge.

A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the ceasing of the life-estate the parties entitled in remainder filed a bill stating that the railway company assumed to purchase the lands for the right of way; that the company alleged that they had paid the full consideration for the land to the tenants for life; submitting that if the company did make such payment they did so in their own wrong, and asking for payment of the plaintiff's share of the purchase money:—Held, (1) that the word "assumed" was a sufficient allegation of the fact of sale and conveyance. But (2), that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground. *Orston v. Grand Trunk R. W. Co.*, 28 Chy. 428.—Spragge.

#### (c) Prayer for General Relief.

If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill alio intuitu, a relief entirely foreign to the scope of the bill. The bill, which was filed against the executors of C.S., his widow and children, prayed that the proceeds of an insurance policy which had been effected by the deceased for his wife and children should be subjected in the hands of the executors, to the payment of moneys lent by

the plaintiff to the deceased, and applied by him to the support of his children, and that the executors might be restrained from paying over the money. *Blake, V. C.*, overruled a demurrer thereto, and under the prayer for general relief granted administration:—Held, reversing this decision, that under the circumstances the plaintiff was not entitled to the administration decree. *Gaughan v. Sharpe*, 6 A. R. 417.

See *Gunn v. Trust and Loan Co.*, 2 O. R. 393, p. 1617; *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 128.

#### 2. Cross Bill.

The object of a cross bill ordinarily was to obtain discovery on the part of the plaintiff in the cross cause to be used in the original cause; or in order to obtain full relief in respect of the subject matter of litigation in the original cause. Therefore, where a bill was filed to restrain arbitrators, on the ground of irregularity in their appointment, from acting in respect of matters in dispute between the plaintiff and defendant companies, and the defendant company by their answer asked that if the court entertained the case it should afford them relief in respect of the matters in dispute between the companies:—Held, that this was not the proper office of a cross bill, and therefore could not be set up as a subject of cross relief by the answer. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.—Blake.

#### II. PARTIES.

##### 1. Misnomer of Parties.

See *Grand Junction R. W. Co. v. Midland R. W. Co.*, 7 A. R. 681, p. 1257.

##### 2. Persons Suing on Behalf of a Class.

Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of the defendant, and the fact that the deed was made by a third party in consideration of money paid by the debtor does not alter the rule of pleading in this respect. *Morphy v. Wilson*, 27 Chy. 1.—Spragge.

Where a right of suit exists in a body of persons too numerous to be all made parties, the court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the water-works branch, the plaintiff insured, giving his promissory note or undertaking to pay \$163, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy-holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy-holders in said branch, that large losses had occurred in the company prior



to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the Division Courts had not the machinery for that purpose.—Held, that according to the statements of the bill, the policy-holders in the water-works branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs. *Thomson v. Victoria Mutual Fire Ins. Co.*, 29 Chy. 56.—Ferguson.

The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached conveyance demurred for multifariousness, for want of equity, and want of parties. The court (Boyd, C.) overruled the demurrer on the first two grounds, but allowed the demurrer for want of parties: the plaintiff not having recovered judgment and execution, could only sue in a representative capacity—that is on behalf of herself and all other creditors. *Longway v. Mitchell*, 17 Chy. 190; *Turner v. Smith*, 26 Chy. 198; *Culver v. Swayze*, 26 Chy. 395, and *Morphy v. Wilson*, 27 Chy. 1, considered and followed. *Campbell v. Campbell*, 29 Chy. 252.

See *City Light and Heating Co. v. Macfie*, 28 Chy. 363, p. 1632.

### 3. Husband and Wife.

In a bill the style of cause named several females as being severally wives of their respective husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs. *Webster v. Leys*, 28 Chy. 471.—Proudfoot.

In application for injunction in respect of wife's property. See *Hathaway v. Doig*, 6 A. R. 264, p. 924.

### 4. Other Persons.

To an information alleging that the bridge erected by the International Bridge Company constituted a nuisance, a railway company who had become lessees of the bridge were held to be proper parties. *Attorney-General v. International Bridge Co.*, 27 Chy. 37.—Blake.

The lessees of a railway having been made parties to the bill, the court under the facts stated in the report of this case refused relief against them with costs to be paid by the lessor company. *Cameron v. Wellington Grey and Bruce R. W. Co.*, 27 Chy. 95.—Proudfoot.

The rule of equity is that if any person not made a party to the suit be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer. Where, therefore, a bill was filed against the Dominion Tele-

graph Co., seeking to restrain that company from carrying out an agreement for the transfer of telegraphic messages to the American Union Telegraph Company, on the ground that such agreement was in contravention of an agreement previously entered into between the plaintiff and defendant companies for mutual exclusive connections and exchange of telegraphic business, without making the American Union Company a party, a demurrer for want of parties on that account was allowed, with costs. *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.*, 27 Chy. 392.—Spragge.

A demurrer to a bill filed by shareholders of an incorporated company on behalf of themselves and all other shareholders except the defendants, in which the company were joined as co-plaintiffs, attacking a transaction whereby all the shareholders, including some of those whom the plaintiffs assumed to represent, received shares in the transaction sought to be impeached, was allowed. *City Light and Heating Co. v. London v. Macfie*, 28 Chy. 363.—Blake.

To a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation, the treasurer of the municipality is not a proper party. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.—Proudfoot.

In a suit to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs for irregularity in such nomination:—Held, that the arbitrators being necessary parties and the defendants resident in this country, the arbitrators, though resident out of the jurisdiction, were properly made defendants to the bill. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Chy. 648.—Blake.

Where proceedings were taken against sureties without joining their principal:—Held, that the plaintiffs could not proceed against the sureties alone if they required the joinder of the principal in order that they might have their remedy over against him. *Exchange Bank v. Springer*; *Same Plaintiffs v. Barnes*, 29 Chy. 270.—Chy. D.

Where a bill was filed by a creditor to vacate a deed of composition and discharge, where the discharge had been obtained by a fraudulent concealment of assets:—Held, that the assignee in insolvency was not a necessary party. *McGee v. Campbell*, 2 O. R. 130.—Chy. D.

See *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 428, p. 1629; *McLean v. Bruce*, 29 Chy. 507, p. 1634.

### 6. Adding Parties in Master's Office.

Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor, the defendant, had no interest in any of the machinery at the date of the mortgage to the plaintiff, having previously sold out to one Abel, but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under the decree obtained by the plaintiffs

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the master made the lumber company parties as subsequent encumbrancers:—Held (assuming the machinery or some portions of it to be trade fixtures removable as between landlord and tenant), that the machinery or such portions aforesaid when acquired by the mortgagor, would go to increase the plaintiff's security and that therefore the master was right in making the lumber company parties as subsequent encumbrancers. *London and Canadian Loan &c. Co. v. Pulford*, 8 P. R. 150.—Proudfoot.

In proceeding upon a reference under a decree, the master cannot under the General Orders 244, 245, (Con. Rules 46, 47) order a person to be made a party to the suit against whom any relief is sought; and where in proceeding under a decree for the administration of a testator's estate, the master directed one D., who had been in partnership with the testator up to the time of his death, to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which D. appealed, the court (Proudfoot, V. C.):—Held, the object of making D. a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness. *Hopper v. Harrison*, 28 Chy. 22.

Before a redemption suit one of the mortgagor's surviving children died an infant and intestate:—Held, that this suit enured to the benefit of those entitled to her share, including her mother as tenant for life, under R. S. O. (1877), c. 105, s. 27, and Held, also, that the mother should be directed to be made a party in the master's office under G. O. 438 (Con. Rule 306), since the present case did not fall under the Judicature Act. Semble, if under that Act the same might have been directed under Rule 89 (Con. Rule 300). *Paulds v. Harper*, 2 O. R. 405.—Chy. D.

See *Hill v. Merchants' and Manufacturers' Ins. Co.*, 28 Chy. 560, p. 977; *Duff v. Canadian Mutual Ins. Co.*, 6 A. R. 238, p. 977.

### III. SUPPLEMENTAL ANSWER.

The bill alleged that defendant had given the plaintiff certain notes on account of the purchase money of a vessel, and a mortgage on the vessel as collateral security. Defendant's answer filed in November, admitted this allegation, which was denied by his co-defendant. In March he applied for leave to file a supplemental answer, withdrawing his admission, and setting up that the notes were given for plaintiff's accommodation, and denying the allegation as to the mortgage. His affidavit stated that he had forgotten the facts, which occurred some years since, when he swore to his answer, and he only remembered them on having a conversation with his co-defendant. The application was refused. *Right v. Way*, 8 P. R. 326.—Stephens, *Referer*.—Blake.

A decree which had been made against several defendants, one of them, A., being administrator ad litem of a defendant who had died before answer was vacated as to defendant B. and leave given him to file a supplemental answer and

have a new hearing of the cause. Subsequently C. who had since the decree and before the appeal been appointed administrator in place of A. who died after decree, applied for leave to file an answer setting up defences which his predecessor had omitted. It was shewn that he had been appointed pro forma to represent the estate; that no proceedings in appeal had been served upon him, and that no further relief was sought against the estate. The referee granted the leave asked:—Held, affirming the order of Proudfoot, V. C., that the vacation of the decree against B. did not, under the circumstances, open up the decree as against the deceased defendant's estate, and that the referee had, therefore, no power to allow C. to file a supplemental answer. *Peterkin v. McFarlane*, 6 A. R. 254.

### IV. DEMURRER.

#### 1. For Want of Equity.

Where certain shareholders in a company joined with the company as plaintiffs in a precautionary measure merely in case it should transpire that their co-plaintiffs, the company, were not entitled or were unwilling to sue, the court (Blake, V.C.), refused to allow a demurrer for want of equity, as the objection was purely of a formal nature. *City Light and Heating Co. of London v. Macfie*, 28 Chy. 363.—Boyd.

The plaintiffs A. and J. filed a bill for the purpose of having a deed made to the defendant by J. declared void, as having been obtained by fraud and misrepresentation. The bill alleged that J. had subsequently made a deed of the same property to A., for the purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant, the bill alleging that such deed to A. was made to him "as trustee for the heirs of A. M.," who had died seized. The bill in no place alleged that A. was trustee, but in the following paragraph it was stated that "before the execution of such last mentioned deed the heirs of the said A. M., who are the rightful owners of the said land," etc.:—Held, that notwithstanding the absence of any express allegation of A. being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was overruled with costs. A demurrer *ore tenus* for misjoinder of plaintiffs, it appearing by the bill that J. had no interest in the question raised, was allowed, without costs. *Reche v. Jordan*, 20 Chy. 573, followed. *McLean v. Bruce*, 29 Chy. 507.—Blake.

See *Attorney-General v. International Bridge Co.*, 27 Chy. 37, p. 1010.

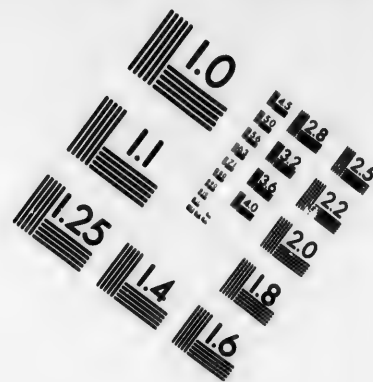
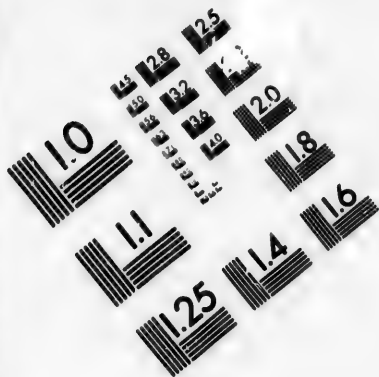
#### 2. Other Cases.

On the argument of a demurrer any document referred to must be taken to be truly stated, and cannot be looked at to contradict or alter the averments in the pleading, even though there is a reference to the instrument for greater certainty as to its contents. *Loughhead v. Stubbs*, 27 Chy. 387.—Proudfoot.

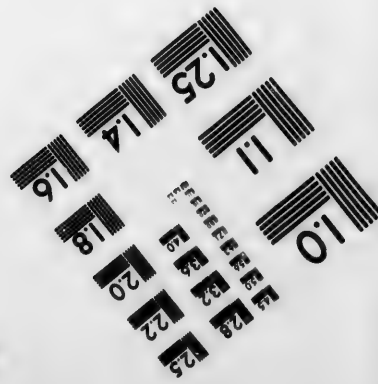
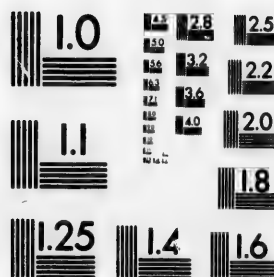
The bill alleged that the municipal councils of the respective corporations had adopted and

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sanctioned certain terms and conditions for dividing and settling the several liabilities and assets of the corporation, upon their separating, and that both parties accepted such settlement as a final settlement between them, and acted thereupon:—Held, on demurrer, that it was not necessary to allege that such acceptance was by by-law; although:—Sembie, that at the hearing it might be necessary to establish that such was the fact. *The Village of Gravenhurst v. The Township of Muskoka*, 29 Chy. 429.—Boyd.

A bill alleged that a mortgage was executed by W. to the defendant in consideration of \$450; that the defendant advanced to W. \$30 thereon, and W. being entitled to receive the balance, assigned such right and conveyed his equity of redemption to the plaintiffs, that the defendant refused to pay the balance, and claimed to hold the mortgage as security for \$450. The plaintiff was for specific performance or in the alternative a declaration of the above facts and for general relief. At the hearing the judge allowed a demurrer on the ground that an agreement to lend money could not be specifically performed:—Held, reversing this judgment that upon the facts alleged in the bill, namely, that the mortgage was being held for more than had been advanced thereon, and therefore to that extent formed a cloud on the title, the plaintiff would be entitled to a declaration to that effect and appropriate relief, and as the demurrer admitted the truth of the allegation, it should have been overruled. *Calvert v. Burnham*, 6 A. R. 620.

The defendants set up by way of defence and as a ground of demurrer to the plaintiffs' bill, to restrain proceedings by the alleged arbitrators, the pendency of another action in New York for the same purpose; but:—Held, that this could only form a ground for application to stay proceedings, or to compel the plaintiffs to elect between the two tribunals; and, Sembie, that under the circumstances set out in the report of the case, it could not be taken advantage of in any way. *Direct United States Cable Co. (Limited) v. Dominion Telegraph Co. of Canada*, 8 A. R. 416; 28 Chy. 648.

See *Sirewright v. Leys*, 28 Chy. 498, p. 729; *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.*, 27 Chy. 592, p. 1632; *City Light and Heating Co. of London v. Marfio*, 28 Chy. 363, p. 1332.

#### V. EFFECT OF ADMISSIONS.

E. carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to W., and by the agreement covenanted "not to open or start a retail and photographic business of a similar character" in the city of Toronto for five years. By a subsequent agreement the first was modified, so as to allow E. to sell in any manner to persons residing out of Toronto, and to sell retail in Toronto, on allowing W. a percentage on the prices realized. W. filed a bill alleging that E. had, prior to such second agreement, sold goods in contravention of the first agreement, and had subsequently sold to a large amount, and prayed an account and payment of his percentage. The court (Spragge, C.) being of opinion that such

second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the master, although the answer professed to state the actual amount of sales, and on the motion for decree had been read as evidence for the plaintiff. *Williamson v. Ewing*, 27 Chy. 596.—Spragge.

#### VI. AMENDMENT.

Although according to the ruling in *Adamson v. Adamson*, 25 Chy. 552, a plaintiff will not be allowed to amend so as to set up a title acquired after the filing of the bill, yet where by error in the conveyance the west instead of the east half of the lot was conveyed, it would seem (per Proudfoot, V. C.) that it would not be any infringement of that rule to allow an amendment setting up the fact that since the filing of the bill the error had been corrected by a new conveyance, and making the necessary amendments in the bill in accordance therewith. *Dumble v. Larush*, 27 Chy. 187.

The proposed amendments of the bill were set out substantially in the order for the injunction, which was served:—Held, that, as the defendant had thereby notice of the proposed amendments, the objection that the amended bill had not been served was not entitled to prevail. *Taylor v. Hall*, 29 Chy. 101.—Ferguson.

#### PLEDGE.

##### I. OF STOCK.—See BROKER.

##### II. COLLATERAL SECURITY.—See COLLATERAL SECURITY.

The plaintiff transferred a covenant for the payment of \$4,000, executed by four persons in his favour to the defendant by an absolute assignment, as security for \$2,000; the defendant giving to the plaintiff a separate agreement, to "reassign" on payment of the loan and interest. On a bill to obtain a reassignment alleging that such loan had been repaid, the court (Spragge, C.) made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof. *Livingston v. Wood*, 27 Chy. 515.—Spragge.

B., who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company with his own. He bought locomotives which were delivered to, and used openly and publicly by, the railway company as their own property for several years. In January and May, 1883, B., by documents *sous seing privé*, sold with the condition to deliver on demand, ten of these locomotive engines to F. et al., the appellants, to guarantee them against an endorsement of his notes for \$50,000, but reserved the right on payment of said notes or any renewals thereof to have said locomotives redelivered to him. B. having become insolvent, F. et al., by their action directed against B., the South Eastern R. W. Co. and B. et al., trustees of the com-

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pany under 43-44 Vict., chap. 49 (Que.), asked for the delivery of the locomotives which were at the time in the open possession of the South Eastern Railway Company, unless the defendants paid the amount of their debt. B. did not plead. The South Eastern Railway Company and R. et al., as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging he was a judgment creditor of B., notoriously insolvent at the time of making the alleged sale to F.:—Held, affirming the judgment of the court below, that the transaction with B. only amounted to a pledge not accompanied by delivery, and, therefore, F. et al. were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent. *Fairbanks v. Barlow*, 14 S. C. R. 217.

See *Bush v. Fry*, 15 O. R. 122, p. 745.

## POLICE.

### I. COMMISSIONERS OF POLICE, 1637.

#### II. CONSTABLE—See CONSTABLE.

### I. COMMISSIONERS OF POLICE.

Powers of commissioners of police of a town to appoint chief of police with a stipulation that he should act as county constable and a further stipulation as to fees. See *Town of Stratford*, v. *Wilson*, 8 O. R. 104, p. 298.

Power of commissioners as to regulating and licensing owners of cabs. See *Regina v. Reeves*, 1 O. R. 490, p. 211.

## POLICE MAGISTRATE.

### I. APPOINTMENT, 1637.

#### II. JURISDICTION AND TRIALS BEFORE.

##### 1. Generally, 1638.

##### 2. Under the *Canada Temperance Act*.—See INTOXICATING LIQUORS.

#### III. JUSTICE OF THE PEACE—See JUSTICE OF THE PEACE.

### I. APPOINTMENT.

The court declined to hear discussed the question whether the police magistrate in this case, if appointed only by the Ontario government, was legally or validly appointed, as his appointment should have been by the Dominion, the patent by the Ontario government only being produced, and it not appearing that no commission by the Dominion had issued to him, nor that any search or enquiry had been made at the proper office as to the fact, the only other evidence as to the appointment, besides the mere production of the Ontario patent, being the defendant's affidavit stating that the magistrate had no authority or appointment from the Crown or Governor-General of the Dominion,

## POLICE MAGISTRATE.

and that he knew this "of common and notorious report." *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

Per *Wilson, C. J.*, the power to appoint police magistrates rests with the Ontario government. *Richardson v. Ransom*, 10 O. R. 387.

Held, that the appointment of police magistrates is not ultra vires the legislature of Ontario. *Regina v. Bennett*, 1 O. R. 445, followed. *Regina v. Lee*, 15 O. R. 353.—C. P. D. See also *Regina v. Bush*, 15 O. R. 398, p. 315.

See also, INTOXICATING LIQUORS, II. 5 (a) p. 1030.

### II. JURISDICTION AND TRIALS BEFORE.

#### 1. Generally.

The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half-interest to C. The horse-power had been hired from one M., and at the time of the sale the term of hiring had not expired. At its expiry, M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32-33 Vict. c. 21, s. 110 (Dom.):—Held, that the conviction was bad, there being no offence against that section, and no jurisdiction in the police magistrate to try summarily. *Regina v. Young*, 5 O. R. 400.—Rose.

Held, that 38 Vict. c. 47 (Dom.), giving power to police and stipendiary magistrates to try in a summary manner felonies and misdemeanours was intra vires the Dominion Parliament. *In re Boucher*, Cassels' Dig. 180.

Held, that a police magistrate cannot reserve a case for the opinion of a superior court under *Con. Stat. U. C. c. 112*, as he is not within the terms of that Act. *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

The defendant was tried at Belleville before the police magistrate of the county of Hastings and convicted, for, amongst other things, supplying milk from which the cream or strippings had been taken or kept back. The factory was in Hastings, but the defendant resided and the milk was supplied in the county of Lennox and Addington:—Held, that the police magistrate of Hastings had no jurisdiction to try the offence and the conviction must be quashed:—Held, also, that certiorari has not been taken away in such cases; but, even if it had, the court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction. *Regina v. Dowling*, 17 O. R. 698.—C. P. D.

Jurisdiction of justices of the peace in absence of police magistrate. See *Regina v. Gordon*, 16 O. R. 64, p. 1054; *Regina v. Lynch*, 19 O. R. 604, p. 1113.

See *Regina v. Boucher*, 8 P. R. 20, p. 1110; *Regina v. Riley*, 12 P. R. 98, p. 1098; *Regina v. Lee*, 15 O. R. 353, 449, p. 1032.

**POLICY.***See* INSURANCE.**POST NUPTIAL SETTLEMENTS.***See* FRAUDULENT CONVEYANCES.**POST OFFICE.**

The condition of a bond given by the defendants, as sureties for a postmaster, to the Postmaster-General, was, that the postmaster "do not and shall not commit any theft, larceny, robbery or embezzlement of, or loss or destroy, or commit any malfeasance, misfeasance, or neglect of duty, from which may arise any theft, larceny, robbery, or embezzlement, loss or destruction of, any money, goods, chattels, valuables, or effects, or of any letter or parcel containing the same which may come into his custody or possession, as such postmaster," etc. The postmaster opened several letters which came into his possession as such postmaster, and having taken therefrom certain cheques, forged the payees' names as endorers thereof, and got them cashed by a bank upon guaranteeing the genuineness of such endorsements. The drawers refused to recognize these cheques, but issued duplicates to the payees and paid them, so that the bank lost the money. In an action by the Postmaster-General on the bond, on behalf of the bank, to recover from defendants, as such sureties, the loss so incurred:—Held, referring to sections 37 and 78 of the Post Office Act 1875, that defendants were not liable, for that the forgery and the postmaster's guarantee, and not the larceny, were the proximate causes of the loss, and the contents of the letters did not belong to the bank. Remarks as to form of the condition. *Postmaster-General v. McColl*, 31 C. P. 364.—C. P. D.

**POUNDAGE.***See* SHERIFF.**POUNDS AND POUND-KEEPERS.***See* DISTRESS—MUNICIPAL CORPORATIONS.**POWER OF APPOINTMENT.***See* WILL.**POWER OF ATTORNEY.***See* PRINCIPAL AND AGENT.**POWER OF SALE.***See* MORTGAGES—*See* MORTGAGE.**PRACTICE.**

- I. IN COUNTY COURTS—*See* COUNTY COURTS.
- II. IN DIVISION COURTS—*See* DIVISION COURTS.
- III. IN PARTICULAR ACTIONS OR PROCEEDINGS—*See* THE SEVERAL TITLES.

(Since the Judicature Act, 1881.)

- I. GENERALLY, 1643.
- II. WRITS,
  - 1. *Endorsement*,
    - (a) *Generally*, 1643.
    - (b) *Signing Judgment*—*See* JUDGMENT.
  - 2. *Renewal*, 1644.
  - 3. *Service*,
    - (a) *Substitutional Service*, 1644.
    - (b) *Service Abroad Under Repeated Rule 46*, 1644.
    - (c) *Other Cases*, 1646.
    - (d) *Of Subpoena*—*See* EVIDENCE.
- III. APPEARANCE, 1646.
- IV. PARTICULARS—*See* PARTICULARS.
- V. MULTIPLICITY OF ACTIONS—*See* MORTGAGE.
- VI. CROSS ACTIONS—*See* ACTION.
- VII. CONSOLIDATION OF ACTIONS, 1646.
- VIII. CIRCUITY OF ACTION—*See* ACTION.
- IX. ABATEMENT OF ACTIONS—*See* ACTION.
  - X. COMPROMISING AND SETTLING ACTIONS—*See* ACTION.
- XI. SUSPENSION OF ACTION IN CASES OF FELONY—*See* ACTION.
- XII. DISCONTINUANCE OR WITHDRAWAL, 1648.
- XIII. DISMISSING ACTIONS,
  - 1. *When Brought Without Authority*, 1649.
  - 2. *For Want of Prosecution*, 1650.
  - 3. *For Noncompliance with Order for Discovery or Interrogatories*—*See* EVIDENCE.
- XIV. TRANSFERRING CAUSES FROM ONE DIVISION OF THE HIGH COURT TO ANOTHER, 1652.
- XV. JURISDICTION OF HIGH COURT—DIVISIONS AND DIVISIONAL COURTS AND SINGLE JUDGE—*See* HIGH COURT OF JUSTICE.
- XVI. JUDGE IN CHAMBERS—LOCAL JUDGE—MASTER OR REFEREE IN CHAMBERS—LOCAL MASTER.
  - 1. *Jurisdiction*,
    - (a) *Judge*, 1652.
    - (b) *Local Judge*, 1654.
    - (c) *Master in Chambers*, 1655.

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1654.

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(d) *Local Master*, 1656.

(e) *Proceedings Against Absconding Debtor*—See ABSCONDING DEBTOR.

(f) *In Quo Warranto Proceedings*—See MUNICIPAL CORPORATIONS.

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2. *Appeals From*.

(a) *Judge*, 1657.

(b) *Local Judge or Local Master*, 1657.

(c) *Master or Referee in Chambers*, 1658.

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1. *Jurisdiction to Order Reference*, 1659.

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3. *Changing Reference*, 1661.

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8. *Proceedings on Reference*.

(a) *Taking Accounts*, 1663.

(b) *Other Cases*, 1663.

(c) *Examination of Parties and Witnesses*—See EVIDENCE.

9. *Confirming Report*, 1664.

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2. *Pending Appeal*—See APPEAL.

3. *Other Cases*, 1671.

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(Before the Judicature Act, 1881.)

## PRACTICE AT LAW.

### I. WRIT OF SUMMONS.

#### 1. Service.

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(b) *Absconding Defendants*, 1674.

(c) *Service Abroad*, 1674.

2. *Special Endorsement*, 1674.

3. *Substitutional Service*, 1674.

### II. CLERK OF THE CROWN AND PLEAS.

1. *Jurisdiction*, 1674.

2. *Appeal from*, 1674.

### III. REFEREES—APPEALS FROM, 1675.

### IV. RULES AND ORDERS, 1675.

### V. SERVICE OF PAPERS, 1675.

### VI. TERM'S NOTICE, 1676.

### VII. STAYING AND SETTING ASIDE PROCEEDINGS.

1. *Delay in Moving*, 1676.

2. *Staying Proceedings on Equitable Grounds*, 1676.

3. *Other Cases*, 1676.

(Before the Judicature Act, 1881.)

## PRACTICE IN EQUITY.

### I. BILLS.

#### 1. Service of.

(a) *Absconding Defendants*, 1677.

(b) *Service Abroad*, 1677.

(c) *By Publication*, 1677.

(d) *On Infants*, 1677.

2. *Dismissing for Want of Prosecution*, 1677.

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### II. NEW HEARING, 1678.

### III. DECREE.

1. *Amendment of*, 1678.

2. *Review of, on New Evidence*, 1679.

3. *Other Cases*, 1679.

### IV. MASTER.

1. *References To, and When Ordered*, 1680.

2. *Proceedings in Master's Office*, 1680.

3. *Report*.

(a) *Confirming*, 1680.

(b) *Other Cases*, 1681.

4. *Appeal from*, 1681.

V. JURISDICTION OF JUDGE OR REFEREE IN CHAMBERS, 1682.

VI. ACCEPTANCE OF SERVICE, 1682.

VII. STAYING PROCEEDINGS, 1683.

VIII. ABATEMENT OF SUIT—See ACTION.

(Since the Judicature Act, 1881.)

## PRACTICE.

### I. GENERALLY.

Although the decree was pronounced before the Judicature Act, and might have been reheard under the former practice, yet the cause not having been set down to be reheard before the coming into force of the Act, it could not under the provisions of the Act respecting pending business, be reheard. *Trade v. Phoenix Ins. Co.*, 20 Chy. 426.—Boyd.—Chy. D.

Where in matters of practice there was a conflict between common law and equity as to matters not provided for by the Judicature Act, the practice which is most convenient is to be followed. Section 19, sub-section 10 relates to matters of substantive law, not of mere practice. *Friendly v. Carter*, 9 P. R. 41.—Dalton, *Master*.—Osler.

The policy of the Ontario Judicature Act is to decentralize business, and send local matters to local masters. *Aitken v. Wilson*, 9 P. R. 75.—Boyd.

### II. WRITS.

#### 1. Endorsement.

##### (a) Generally.

When a plaintiff seeks to register a lis pendens he should be more precise in respect to the endorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands. *Sheppard v. Kennedy*, 10 P. R. 242.—Boyd.

A writ of summons not endorsed with a statement of the plaintiff's residence as set out in Form 1 O. J. Act (Con. Rules, Form 1), is irregular. *Sherwood v. Goldman*, 11 P. R. 433.—Dalton, *Master*.

The writ of summons was issued against three defendants, O., A. and R. The endorsement claimed to have set aside a deed from A. to O., and a deed from O. to A. No claim whatever was made against R. and he was not mentioned in the endorsement.—Held, that the endorsement was sufficient, and a motion by R. to set aside the service upon him was refused. *Gilmore v. Township of Orford*, 11 P. R. 437.—Dalton, *Master*.

The writ of summons was specially endorsed with a money demand, besides which the endorsement claimed damages for waste, etc. The plaintiff obtained an ex parte order amending the endorsement by striking out the claim for damages.—Held, that judgment by default could not be entered after the amendment without reserving the writ on the defendant. *Guess v. Perry*, 12 P. R. 460.—MacMahon.

### 2. Renewal.

A writ of summons, dated the 17th April, 1879, was, after several renewals, finally renewed on the 6th April, 1881, and served on the 27th December, 1881.—Held, that no declaration having been delivered, the case was governed by Rule 493, O. J. Act, and that by Rule 31, (Con. Rule 238), the writ continued in force for one year from the date of the last renewal, and service on the 27th December, 1881, was good. *Mackelcan v. Becket*, 9 P. R. 289.—Dalton, *Master*.

Held, that a local judge has jurisdiction by the combined effect of Con. Rules 238 and 485 to make an order for the renewal of a writ of summons, even at a time when such a writ has actually expired. *Re Jones*, *Eyre v. Cox*, 46 L. J. N. S. Ch. 316, followed. *St. P. v. O'Callaghan*, 13 P. R. 322.—Street.

Where a local judge in 1887 and again in 1889 made orders renewing a writ of summons issued in 1886, and such orders were not appealed against.—Held, that the writ must be treated as having been properly renewed by such orders. *Id.*

### 3. Service.

#### (a) Substitutional Service.

The plaintiff had some years previously in an action of ejectment against these defendants served them personally, and they had defended by the same solicitor. It was shewn that one defendant, the father of the other two who resided in the U. S. A. corresponded with them. An application under Rule 4, O. J. Act, for an order permitting substitutional service on the father for the other two defendants, was refused, it not being shewn that prompt personal service could not be effected. *Robertson v. Mero*, 9 P. R. 510.—Dalton, *Master*.—Boyd.

See *Dobson v. Marshall*, 9 P. R. 1, p. 1670; *Weatherhead v. Weatherhead*, 9 P. R. 96, p. 907; *Locomotive Engine Co. v. Copeland*, 10 P. R. 572, p. 1654.

#### (b) Service Abroad under Repeated Rule 45.

[See now Con. Rule 271 et seq.]

Where a defendant has been served out of the jurisdiction, and the service is allowed, but the defendant does not appear, no order to proceed is necessary. Division (e), Rule 45 is not to be extended to all the cases under the rule. *Martin v. Lafferty*, 9 P. R. 300.—Dalton, *Master*.—Proudfoot.

Service of process on infant out of jurisdiction. See *Rev v. Anthony*, 9 P. R. 545, p. 906.

In an action for damages for breach of contract by the defendants, a corporation in Liverpool, England, in not delivering certain machinery at the railway station nearest to Ottawa, the writ and statement of claim were served on the defendants' agent in Montreal, and under Rule 48, O. J. Act (Con. Rule 274), the plaintiffs now applied for an order allowing the service, on the ground that the case was one within Rule 45. The affidavit made and filed by the plaintiff's solicitor set out. "2. The paper writing shewn to



the 17th April, 1881, finally renewed served on the 27th at no declaration was governed by Rule 31, (Con. 1881), was good. R. 289.—Dalton,

jurisdiction by ss 238 and 485 to of a writ of sum-  
*cyre v. Cox*, 46 L.  
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s previously in an these defendants hey had defended s shewn that one other two who re- mended with them.  
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P. R. 1, p. 1670;  
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peated Rule 45.

1 et seq.]

served out of the allowed, but the order to proceed le 45 is not to be the rule. *Martin Dalton, Master.*—

ut of jurisdiction. 45, p. 906.

breach of contract ion in Liverpool, ain machinery at Ottawa, the writ served on the d- and under Rule 48, he plaintiffs now he service, on the within Rule 45, the plaintiff's soli- writing shown to

me, marked Exhibit A. is a true copy of the state- ment of claim delivered in this action. 3. This action is brought to recover damages for breach of contract on the part of the defendants in not delivering the machinery, in the statement of claim mentioned, at the railway station nearest to Ottawa under the terms of the contract." But the affidavit did not state that the deponent knew the fact, either of his own knowledge or on information and belief, nor that the defendants ever entered into a contract with the plaintiff, and undertook to deliver the machinery at the railway station nearest to Ottawa. The bill of lading containing the contract in question provided inter alia, "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order \* \* freight \* \* to be paid by the consignees." "That the goods are to be delivered from the ship's deck, when the shipowner's responsibility shall cease. Through goods sent forward by mail are deliverable at the railway station nearest to the place named hereinafter." "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred"—Held (1), that the affidavit did not afford the proof required under Rule 48; (2), that the bill of lading shewed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa; nor any contract, the breach of which was made in Ontario, because if there was such a contract in the bill, force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, etc., and hence, though leave would be given to file further affidavits; such leave was therefore unnecessary. And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, etc., arising beyond their line, no damage for a breach in this province would result to the plaintiff, and though technically within Rule 45, sub-s. (c) discretion should (if any exist), be exercised in refusing to allow the service. In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, etc., within the jurisdiction as it shifts the onus of proof to the plaintiff and requires him to conduct possibly a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action. *Perkins v. Mississippi and Dominion Steamship Co. (Limited)*, 10 P. R. 198.—Rose.

Debts owing to the defendant from persons living in Ontario are assets in Ontario which may be rendered liable to the judgment within the meaning of Rule 45 (e) O. J. Act. *Purves v. Slater*, 11 P. R. 507.—Rose.

Waiver of objections as to sufficiency of service. See *Dart v. Citizens' Insurance Co.*, 11 P. R. 513, p. 1672.

See *Wanzer Lamp Co. v. Woods*. 13 P. R. 511, p. 557.

### (c) Other Cases.

Blakeslee, Brown & O. carried on business in partnership under the name of Blakeslee & Co., Blakeslee absconded on the 19th September, and the business continued. O. assigned his interest to Brown, and after such assignment, but before it had been made public, the plaintiff served his writ of summons against the firm on O.—Held, that the service was good. *Bank of Hamilton v. Blakeslee*, 9 P. R. 130.—Dalton, Master.

Service requisite to make judgment recovered in Quebec conclusive under R. S. O. (1877), c. 50, s. 145. See *Court v. Scott*, 32 C. P. 148, p. 1088.

A person of the same name as the defendant served by mistake with the writ was:—Held, entitled to his costs of opposing a motion for judgment under Rule 324, O. J. Act, (Con. Rule 744). *Lucas v. Fraser*, 9 P. R. 319.—Dalton, Master.

### III. APPEARANCE.

The plaintiff issued a writ of summons, and registered a certificate of his lis pendens upon the land of the defendant Toothe. The defendant not having been promptly served with the writ, and being anxious to get rid of the suit entered an appearance gratis. The master at London made an order in chambers upon the application of the plaintiff striking out the appearance:—Held, upon appeal, that there is nothing in the Judicature Act or rules which intereferes with the well recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear gratis be preserved in a case where his property is directly and prejudicially affected by the commencement of the action and the registration of its pendency. Appeal allowed, with costs in the cause to the defendant in any event. *McTaggart v. Toothe*, 10 P. R. 261.—Boyd.

In an action of ejectment. See *Goring v. Cameron*, 10 P. R. 496, p. 578.

In an action for foreclosure the defendant entered an appearance under Rule 68, O. J. Act, (Con. Rule 299), limiting his defence to one item in the particulars indorsed on the writ of summons. The appearance did not state that the defendant did not require the delivery of a statement of claim:—Held, that after such appearance a statement of claim was unnecessary, and a judgment signed upon it, for default of a statement of defence, was set aside, with costs. *Peel v. White*, 11 P. R. 177.—Dalton, Master.

### VII. CONSOLIDATION OF ACTIONS.

The defendant applied to have this action consolidated with an action brought by the defendant in the Chancery Division against these plaintiffs, on the ground that the plaintiffs' counter claim in the Chancery Division action disclosed the same cause of action as shewn in the statement of claim in this action. The action in the Chancery Division was commenced on the 17th May, 1882, and this action on the 10th June, 1882:—Held, that though the case presented was not technically within the terms of Rule 395, O. J. Act, (Con. Rule 652) there is an inherent right

in the course to prevent an undue use of its process, and this action was stayed until that in the Chancery Division was determined, no special reason to the contrary being shown by the plaintiffs. *Taylor v. Bradford*, 9 P. R. 350.—Cameron.

An application to consolidate two motions for administration and partition pending before a local master should be made to him and not to a judge in chambers. *Lambier v. Lambier*, 9 P. R. 422.—Boyd.

The plaintiffs in their first action claimed from the defendants a sum of \$200,000 as the balance due upon a construction contract, and in this action, begun some time after the first, they claimed from the same defendants a sum of \$3,000, the amount of an account for goods sold and delivered. The cause of action herein arose before the commencement of the previous action. The first action was practically consolidated with an action of the defendants against the plaintiffs in the Chancery Division:—Held, that the two claims should have been made in the one action, and that it was a proper exercise of discretion to leave the claim in this action to be tried with the claim to which it should originally have been joined. *Comtee v. Canadian Pacific R. W. Co.* (No. 2), 11 P. R. 222.—C. P. D.

The master in ordinary has no jurisdiction to consolidate actions in which judgments have been entered, and in which references are pending in his office. *Boswell v. Grant*, 11 P. R. 376.—O'Connor.

The plaintiffs brought four actions, each against a different person, alleging that the defendant in each case entered into a separate agreement with the plaintiffs to purchase and pay for certain grape vines and to allow the plaintiffs certain future benefits to be derived from the possession and cultivation of the vines, and claiming payment, an account, and damages. The statements of defence were practically the same in all the actions, the defendants setting up among their defences that by the fraud of the plaintiffs certain promises and warranties on their part were omitted from the written agreement, and that the defendants were induced to enter into the agreement by fraud and misrepresentation on the part of the plaintiffs, and claiming rectification and damages. The sales to the several defendants were entirely separate and distinct transactions made at different times and under different circumstances, but the form of agreement made use of with each defendant was the same. An order was made in chambers under Con. Rule 652, on the application of the defendants in all the actions, staying proceedings in all but one, which was to be treated as a test action, the defendants agreeing to be bound by the result of it, but the plaintiffs being allowed to proceed to trial in the other actions after the trial of the test action, if they deemed proper:—Held, that actions will only be stayed where the questions in dispute are substantially the same; and in this instance they were not the same, because the questions raised by the defendants upon their defences of fraud and misrepresentation would necessarily be different in each case, the negotiations for each agreement being distinct; and the order was set aside. *Niagara Grape Co. v. Nellie*, 13 P. R. 179.—Q. B. D.

An order to consolidate, strictly so called, is a matter of discretion, and is made as a favour to and for the benefit of the defendants, the object being that a single trial may decide that which is in fact only a single question, and thus save costs and expense. No such order ought to be made unless the questions in each case are substantially the same, and the evidence would be substantially the same if they were all tried. Leave to appeal from the order of the Q. B. D., 13 P. R. 179, was refused. *S. C., lb.* 258.—C. of A.

In determining which party is to have the conduct of a consolidation of two cross-actions the main indicia to be regarded are: Which action was first begun? Upon whom does the chief burden of proof lie? Which action is the more comprehensive in its scope? And where G. first sued B. for cancellation and delivery up of four promissory notes made by G. and S. jointly to B., and also for cancellation of an agreement in relation to which the notes were given; and B. afterwards sued G. and S. upon three of the four notes in question; and substantially the same issues were raised in both actions, the making of the notes being admitted by G. and S. in the pleadings, the actions were consolidated and G. was allowed to proceed with his action, S. being added as a party to it. *Girrin v. Burke—Burke v. Girrin*, 13 P. R. 216.—Boyd.

Twelve actions brought by a municipality against the different sureties of the municipal treasurer, to recover amounts alleged to have been received by the treasurer and not accounted for, were consolidated and proceedings in them were stayed pending the determination of an action against the treasurer himself to recover the same amounts. *County of Essex v. Wright*, 13 P. R. 474.—Galt.—C. P. D.

See *Miller v. Confederation Life Association—Confederation Life Association v. Miller*, 11 P. R. 241, p. 1671.

## XII. DISCONTINUANCE OR WITHDRAWAL.

The plaintiffs claimed in this action \$3,249.36, "amount of defalcation of J.," and \$90.55 for certain expenses connected therewith, in all \$3,339.91. The defendant paid into court \$3,273, claiming by their notice of payment in, that it was sufficient to satisfy the plaintiff's claim. There was no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and, upon notice of a motion under Rule 203 (Con. Rule 646), to dismiss the action being served by the defendants, the plaintiffs gave notice under Rule 170 (Con. Rules 641, 642), of withdrawal of the balance of their claim:—Held, that the plaintiffs had no power under Rule 170 (Con. Rules 641, 642), to withdraw: the portion of Rule 170 (Con. Rules 641, 642), relating to the withdrawal of part of the alleged cause of complaint is applicable only where the part sought to be withdrawn can be severed from the rest of the claim; and an order dismissing the action was proper:—Semble, that the plaintiffs not having under Rule 218 O. J. Act accepted the money in full satisfaction of their claim, were liable to pay the whole costs of the action; but the disposition of costs by the local judge who made the order was not interfered with on appeal. *Bank*



with costs. *Napanee, Tamworth and Quebec R. W. Co. v. McDonell*, 10 P. R. 525.—Rose.

In action to recover penalties under the Controverted Elections' Act. See *Miles v. Roe*, 10 P. R. 218, p. 1501.

If the plaintiff without good excuse neglect to proceed with the action, the Court will not, as of course, on his mere undertaking to speed the action and paying the costs, refuse to dismiss but where defendant's solicitor had refused to accept notice of trial a few hours late, an order refusing to dismiss and permitting the plaintiff to proceed, was affirmed. *Carter v. Barker*, 11 P. R. 1.—Rose.

An order made at chambers under Rule 255, O. J. Act, (Con. Rules 647, 654) dismissing the action for want of prosecution where issue had been joined, but the case had not been set down for trial nor notice of trial given, was:—Held, not a dismissal on the merits, and not a bar to a subsequent action for the same cause. *Roberts v. Lucas*, 11 P. R. 3.—Rose.

On the 5th November, 1885, an order was made requiring the plaintiff to give security for costs within four weeks, and in default that the action should be dismissed with costs, unless the court or judge on special application for that purpose should otherwise order. Within the four weeks the plaintiff obtained a summons with a stay of proceedings, for "further time to perfect security for costs," and on the 10th December, 1885, an order was made extending the time till the 23rd December, 1885, but not providing that the dismissal of the action should be the result of non compliance with its terms. Security was not furnished within the time so extended, and it was contended that after that the action was dead, and there was no jurisdiction to make an order in it:—Held, that the action never became dismissed under either of these orders, and that a motion to dismiss was regular and necessary. *Whistler v. Hancock*, 3 Q. B. D. 83; *King v. Davenport*, 4 Q. B. D. 402, distinguished. *Bank of Minnesota v. Page*, 14 A. R. 347.

A motion by two of the defendants to dismiss the action as against them for the plaintiff's default in not proceeding to trial was refused, where it appeared that one of the defendants, a necessary party, had for apparently sufficient reasons not been served with a writ of summons, while the action had proceeded against the other defendants, and as against them was ripe for trial:—Sembles, that it is the duty of an applicant to apply to the plaintiff's solicitor for information as to the state of the cause in regard to the other defendants before making such a motion. *Foley v. Lee*, 12 P. R. 371.—Dalton, Master.

The plaintiff sued for damages for false testimony, alleging that he had failed in a prior action by reason of such testimony given therein by the present defendant:—Held, that the action would not lie, and the plaintiff being in default by reason of not having given notice of trial the action was dismissed. *Clarke v. Creighton*, 13 P. R. 113.—Dalton, Master.—Galt.

Where the plaintiff fails to enter the action for trial at a sittings for which he has given notice of trial, the action cannot be dismissed for want of prosecution under Con. Rule 647; the defend-

ant's remedy is to enter the action himself under Con. Rule 663. *Crick v. Hewlett*, 27 Ch. D. 355, distinguished. *McDougald v. Thomson*, 13 P. R. 256.—Street.

Where the plaintiff was in default for not giving notice of trial for the autumn assizes, but the defendant did not move to dismiss the action, and the plaintiff gave notice of trial for the winter assizes, but neither party entered the action for trial:—Held, that the action could not be dismissed for want of prosecution under Con. Rule 647. *McDougald v. Thomson*, 13 P. R. 256, followed. *Simpson v. Murray*, 13 P. R. 418.—Dalton, Master.—MacMahon.

#### XIV. TRANSFERRING CAUSES FROM ONE DIVISION OF THE HIGH COURT TO ANOTHER.

Where a plaintiff brings an action in the Chancery Division which is proper to be brought there, he will not be allowed to transfer either on the ground that he wishes it tried by a jury, or that a transfer would expedite the trial. *Vermilyea v. Guthrie*, 9 P. R. 267.—Boyd.

The action was transferred from the Chancery Division to the Common Pleas Division of the High Court by an order of the judges, but the plaintiff not having notice of the transfer signed judgment in the Chancery Division. An order was made retraversing the case to the Chancery Division, and allowing the judgment entered to stand and be in force from its entry, without costs. *Patterson v. Murphy*, 9 P. R. 306.—Dalton, Master.

Since Rule 545, O. J. Act (See Con. Rule 226), an action is not to be transferred from one division of the High Court of Justice to another, except on very strong grounds. *Mase v. Mase*, 10 P. R. 574.—Boyd. But see next case.

Held, that Rule 545, O. J. Act (See Con. Rule 226), was not intended to and does not interfere with the power of transferring actions from one division of the High Court to another. *Pearson v. Merchants' Bank of Canada*, 11 P. R. 72.—C. of A.; *Herring v. Brooks*, *Id.* 15.—Ferguson.

#### XVI. JUDGE IN CHAMBERS—LOCAL JUDGE—MASTER OR REFEREE IN CHAMBERS—LOCAL MASTER.

##### 1. Jurisdiction.

###### (a) Judge.

A judge sitting in chambers has no jurisdiction to order judgment to be signed under Rule 324 (a) (Con. Rule 744), but a motion for judgment thereunder must be made to the court. *Morrison v. Taylor*, 26 Q. B. 492.—Wilson.

In an action brought to set aside a conveyance it was:—Held that while under the Act respecting the Court of Chancery (R. S. O. 1877, c. 40, s. 99) the court might direct an action to be tried by a jury upon notice and for good cause, yet this could only be done by the court, and not by a judge or master in chambers. *Thurlow v. Beck*, 9 P. R. 268.—Patterson.

Quære, when a judgment, as in this case has been framed without directing a set-off, whether

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LOCAL JUDGE—  
CHAMBERS—

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the prejudice of the solicitor, so as to vary the  
decree of the court. *Brown v. Nelson*, 11 P. R.  
121.—Dalton, *Master*.—Osler.

Powers of judge in chambers with reference  
to writs of habeas corpus. See *Regina v. Ar-*  
*cott*, 9 O. R. 541; *In re Sproute*, 12 S. C. R. 140,  
p. 847.

Jurisdiction to grant administration orders.  
See *In re Munie*, 10 P. R. 98, p. 728.

A judge in chambers has no power to rescind  
his own order for a writ of ca. sa. or to discharge  
the defendant from custody after the order has  
been acted upon. *McNabb v. Oppenheimer*, 11  
P. R. 214.—Rose.

An official referee, sitting for the master in  
chambers, refused an application by the defend-  
ant to change the place of trial from Sarnia to  
Stratford, but gave leave to bring on an  
appeal from his order, or a substantive motion  
to change the place of trial before Armour,  
J., at the Sarnia assizes. Armour, J., en-  
tained the motion, which was made according  
to the leave given, and made the order chang-  
ing the venue to Stratford. The order was  
drawn up as made by a judge at the assizes, and  
was signed by the local registrar at Sarnia :—  
Held, that, having regard to Rule 254, O. J. Act,  
(Con. Rule 653), and to the leave given and the  
character of the motion, the order of Armour,  
J., was to be regarded as that of a judge and  
not of the High Court, and could therefore be  
reviewed by the Divisional Court. *Sarnia Agri-*  
*cultural Implement Manufacturing Co. v. Perdue*,  
11 P. R. 224.—C. P. D.

There is nothing to prevent a judge sitting at  
the assizes hearing a chamber motion, if he is  
disposed for the purpose to treat the court-room  
as his chambers. Such an application as this,  
however, should not be made at the trial on  
account of the inconvenience and detriment to  
the public interest arising from the delay of  
other business appropriate to the assizes, and on  
account of the injustice to parties to the cause  
who have prepared for trial; and it is too late  
when the assizes have begun to consider the  
question of the balance of convenience; and  
therefore, while the court did not see fit under  
the circumstances to restore the venue to Sarnia,  
they varied the order of Armour, J., by making  
the costs of the day at Sarnia, and of the several  
motions to change the venue costs to the plain-  
tiff in any event. *Ib.*

A motion made to the master in chambers on  
the 27th October, 1886, to rescind his own ex  
parte order of 13th October, 1886, allowing the  
executrix of the plaintiff to issue execution for the  
costs of a motion for prohibition, was referred to  
a judge in chambers. The motion was made  
after execution had been issued and placed in the  
sheriff's hands :—Held, that neither the master  
nor the judge in chambers had the power to  
rescind the order; and the motion was too late  
to be treated as an appeal. *McNabb v. Oppen-*  
*heimer*, 11 P. R. 214, followed; *Stanier v. Evans*,  
W. N. December 26, 1885 p. 210, considered.  
*Re Doyle v. Henderson*, 12 P. R. 38.—Rose.

A motion to extend the time for moving be-  
fore a Divisional Court against the judgment of  
the trial judge should not be made to a judge in

chambers, but to the Divisional Court itself.  
*Imperial Loan Co. v. Baby*, 13 P. R. 59.—Fer-  
guson.

To give leave to appeal from report of referee.  
See *Re Dingman and Hall*, 13 P. R. 232, p.  
1607.

See *Grant v. Grant*, 10 P. R. 40.; *Hilliard*  
*v. Arthur*, 10 P. R. 281; S. C., *Ib.* 426, p. 1656;  
*Platt v. Grand Trunk R. W. Co.*, 12 P. R. 380,  
p. 411; *Ryan v. Canada Southern R. W. Co.*, 10  
P. R. 535, *infra*.

#### (b) Local Judge.

The plaintiff's solicitors lived at Sandwich,  
and the defendant's solicitors at Toronto. The  
local judge at Sandwich in November, 1884,  
made an ex parte order for leave to the plaintiff  
to amend the writ of summons before service,  
and subsequently set aside his own order on the  
defendant's application, on notice to the plaintiff  
and after argument by counsel on behalf of both  
parties. The plaintiff appealed from the second  
order to a judge in chambers at Toronto :—Held,  
that the local judge had no power to make the  
rescinding order under Rule 422, O. J. Act, (see  
Con. Rules 41, 138). Subsequently the defend-  
ants made a substantive motion before the same  
judge in chambers at Toronto, to set aside the  
original order of the local judge :—Held, that  
save as excepted, a local judge of the High  
Court in proceedings in the High Court having  
the same power in chambers as a judge of the  
High Court in chambers as to the matters re-  
ferred to in the Judicature Act Rules, he is a  
judge of co-ordinate jurisdiction with a judge of  
the High Court in chambers. A judge of the  
High Court has, therefore, no power to review  
the decision of a local judge, save by way of  
appeal in the manner provided by the Judicature  
Act Rules; and that this motion could not be  
treated as an appeal as it was too late under  
Rule 427, O. J. Act, (Con. Rule 346). *Ryan v.*  
*Canada Southern R. W. Co.*, 10 P. R. 535.—  
Rose.—C. P. D. But see *Jamieson v. Prince*  
*Albert Colonization Co.*, 11 P. R. 115, p. 1657.

Two of the defendants lived in Chicago, Ill.,  
and had no solicitor in the county where the  
action was begun :—Held, that the local judge  
of the county in which the action was begun had  
no jurisdiction under Rule 422, O. J. Act, (see  
Con. Rules 41, 138) to make an order for substi-  
tutional service of process on these defendants.  
*Locomotive Engine Co. v. Copeland*, 10 P. R. 572.  
—Rose.

Held, following the former chancery practice,  
that a local judge may make an ex parte order  
for the examination of a witness de bene esse,  
on the ground that he is dangerously ill, and  
not likely to recover. *Baker v. Jackson*, 10 P.  
R. 624.—Rose.

A local judge of the High Court has no power  
to order the discharge of a defendant held in  
custody under a ca. sa. issued out of the High  
Court of Justice. *Cochrane Manufacturing Co.,*  
*v. Lamon*, 11 P. R. 351.—Galt.

The judge of a county court has no power  
either as such judge or as a local judge of the  
High Court to order the issue of a ca. sa. in an  
action in the High Court. *Cochrane Manufac-*



turing Co. v. Lamon, 11 P. R. 351, followed. A judge of the High Court sitting in "Single Court," has power to set aside such an order. *Waterhouse v. McVeigh*, 12 P. R. 676. — *Armour*.

To order a reference. See *White v. Beemer*, 10 P. R. 531, p. 1659; *Union Loan and Savings Co. v. Boomer*, 10 P. R. 630, p. 1659.

To renew writ of summons. See *St. Louis v. O'Callaghan*, 13 P. R. 322, p. 1644.

See *Freel v. Macdonald*, 10 P. R. 170, p. 1656.

#### (c) Master in Chambers.

On a motion by petition for the sale of an infant's estate under the Chancery Act and for the application and distribution of the proceeds the referee in chambers granted the order and directed the application and distribution of the moneys to be realized by the sale, subject to the order being confirmed by a judge in chambers so far as it exceeded his jurisdiction. Proudfoot, J., held that the master in chambers or the referee sitting for him should continue to exercise the jurisdiction formerly vested in the referee in chancery chambers in such matters, subject only, to the confirmation of so much of the order as directed the distribution and payment out of court of the moneys to be realized, and made the confirming order. *Re Devitt*, 9 P. R. 110. See Con. Rule 30.

On motion for an order for the committal of a defendant for non-production of documents under Rule 420, O. J. Act, (Con. Rule 30) which vests in the master in chambers the powers of the referee in chambers, of the Court of Chancery:—Held that matters relating to the liberty of the subject having been excepted from the jurisdiction of the clerk of the crown and pleas under the former practice, are still beyond his jurisdiction by Rule 420 O. J. Act (Con. Rule 30). *Keefe v. Ward*, 9 P. R. 220.—*Dalton, Master*.

The master in chambers has no jurisdiction to entertain an application for costs under Rule 264, O. J. Act (Con. Rule 665). *Hopkins v. Smith*, 9 P. R. 285.—*Dalton, Master*.

The master's discretion exercised under R. S. O. (1877), c. 39, s. 29 and Rule 420, O. J. Act, (Con. Rule 30) is open to review by an appeal to a judge in chambers under Rule 427, O. J. Act, (Con. Rule 846). See *Christie v. Conway*, 9 P. R. 529, p. 1025.

Jurisdiction to grant administration orders. See *In re Munie*, 10 P. R. 98, p. 728.

After judgment has been entered against an absconding debtor pursuant to the finding of a County Court judge on a reference under R. S. O. (1877), c. 68, s. 9, the master in chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend. *Wills v. Carroll*, 10 P. R. 142.—*Chy. D.*

The plaintiff not appearing at the trial, which took place at the Picton Assizes, before Patterson, J. A., judgment was directed to be entered

for the defendant, with costs. Application was subsequently made to the judge at the same assizes to set aside the judgment and restate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the master in chambers under Rule 270, O. J. Act, (Con. Rule 795) to set aside the judgment entered at the trial. This motion was enlarged before Rose, J., in chambers, who:—Held, that Rule 270 O. J. Act (Con. Rule 795) does not give jurisdiction to the master or a judge in chambers in such cases. *Hilliard v. Arthur*, 10 P. R. 281; *S. C.*, *Id.*, 420.—*Q. B. D.*

As to changing venue. See *Brigham v. McKenzie*, 10 P. R. 406, p. 1594. *Milligan v. Silb.*, 13 P. R. 350, p. 1594.

The master in chambers has jurisdiction to entertain a motion under R. S. O. c. 120, s. 23, to annul the registry of a mechanic's lien when the amount in question is over \$200. *Re Cornish*, 6 O. R. 259, followed. *Re Moorehouse and Leak*, 13 O. R. 290.—*Chy. D.*

Amending and striking out pleadings. See PLEADING.

See *Grand Trunk R. W. Co. v. Ontario and Quebec R. W. Co.*, 9 P. R. 420, p. 1658; *Thurlow v. Beck*, 9 P. R. 288, p. 1652; *Newcombe v. McLuhan*, 11 P. R. 461, p. 1607; *Bank of Hamilton v. Baine*, 12 P. R. 418, *infra*.

#### (d) Local Master.

Rule 422, O. J. Act and its subsection (a) (See Con. Rules 41, 138) must be read together, and hence the limitation in the subsection of the jurisdiction of the county judge in certain cases curtails that of local masters in similar cases. The local master at Hamilton in the county of Wentworth gave leave to sign final judgment under Rule 80 O. J. Act (Con. Rule 739), in an action in which the solicitor for the defendant had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton:—Held, that under Rule 422, O. J. Act (See Con. Rules 41, 138), the local master had no jurisdiction to make the order. *Freel v. Macdonald*, 10 P. R. 170.—*Boyd*.

Local masters and County Court judges acting under Rule 422, O. J. Act (see Con. Rules 41, 138), have no jurisdiction, under sections 47 and 48 O. J. Act, to order references in opposed cases. *White v. Beemer*, 10 P. R. 531.—*Boyd*.

Local masters have no greater powers in matters coming before them in chambers under the jurisdiction given them by the Ontario Judicature Act and 48 Vict. c. 13, s. 21 (Ont.), than those conferred upon the master in chambers, and from these powers the power of referring causes under the Common Law Procedure Act is excepted. A local master has, therefore, no power to make an order to proceed against an absconding debtor, upon default, after service of the writ of attachment, where such order contains a clause directing a reference under section 197 of the Common Law Procedure Act. *Bank of Hamilton v. Baine*, 12 P. R. 418.—*Street*.

Application was  
e at the same  
and reinstated  
the plaintiff.  
Application to  
the master in  
Act, (Con. Rule  
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before Rose,  
that Rule 270  
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e in chambers  
thor, 10 P. R.

*Brigham v. Mc-  
Bigan v. Sils, 13*

jurisdiction to  
O. c. 120, s. 23,  
the lien when  
O. Re Cornish,  
house and Leak,

pleadings. See

*v. Ontario and  
1658; Thuford  
v. Mc-  
Bank of Hamil-*

subsection (a)  
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similar cases.  
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Rule 739, in an  
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Rule 422, O. J.  
the local master  
order. *Freel v.*

judges acting  
Con. Rules 41,  
er sections 47  
ices in opposed  
s. 531.—Boyd.

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Procedure Act.  
2 P. R. 418.—

It is intended by sections 8 and 9 of the Ab-  
sconding Debtors' Act that only one order shall  
be made under which the plaintiff may proceed  
to judgment, and therefore, where an order of  
reference is necessary the order to proceed must  
be made by a judge who has jurisdiction to refer  
causes. *Id.*

The expression "the referring of causes under  
the Common Law Procedure Act" is not re-  
stricted to causes which have been begun by  
writ of summons. *Id.*

Held, that a local master has no jurisdiction  
to make an order under Con. Rule 1187 allowing  
the parties to an action or proceeding for adminis-  
tration and partition taxed costs instead of the  
commission provided for by the Rule, "unless  
otherwise ordered by the court or a judge."  
This was an action in which a judgment for par-  
tition and administration was pronounced by  
Boyd, C.—Held, that more especially in this  
case a local master had no power to interfere,  
for by ordering taxed costs instead of commis-  
sion he was varying the judgment. *Hendricks  
v. Hendricks, 13 P. R. 79.*—Boyd.

Where lands are situate in different counties,  
a local master has no jurisdiction to make an  
order for the partition or sale thereof, and such  
an order and the proceedings thereunder, even  
as to lands within the county in which he is  
master, are wholly void. *Regina v. Smith, 7 P.  
R. 429* followed. *Nichol v. Allenby, 17 O. R.  
275.*—Robertson.

See *Lambier v. Lambier, 9 P. R. 422, p. 1647.*

## 2. Appeals From.

### (a) Judge.

The decision appealed from was given on the  
14th, and the notice of appeal on the 26th  
November, the first day of Michaelmas Sittings  
being the 17th November:—Semble, that this  
was an appeal from a judge, and not a substan-  
tive motion to rescind his order, and if so, and  
Rule 414, (see Con. Rule 847) was to govern, the  
appeal was too late; but:—Held, even so, that  
the court would extend the time, as the merits  
were with the appellant. *McLaren v. Marks,  
10 P. R. 451.*—Q. B. D.

See *Sarnia Agricultural Implement Manufac-  
turing Co. v. Perdue, 11 P. R. 224, p. 1653;  
Pierce v. Palmer, 12 P. R. 308, p. 1673.*

### (b) Local Judge or Local Master.

An ex parte order for the production of docu-  
ments was made by the local master at Belleville  
on the 17th August, 1885, and an order was made  
by the same officer on the 9th September, 1885,  
refusing to rescind his former order. The defend-  
ants appealed from the latter order:—Held,  
that the appeal was, in effect, an appeal from the  
original order as the result, if the appeal were  
successful, would be to rescind that order, and  
the appeal was therefore dismissed as too late,  
under Rule 427, O. J. Act (Con. Rule 846).  
*Jamieson v. Prince Albert Colonization Co., 11  
P. R. 115.*—Ferguson.

An appeal from an order made by a local mas-  
ter on Saturday, the 17th April, was set down to

be heard on Monday, the 26th April, which was  
Easter Monday, a dies non. The appeal was put  
on the paper for the following Monday:—Held,  
that this course was proper and convenient, and  
also that the proper mode of objecting to the  
appeal was by a motion to strike it off the list  
as improperly set down. *McCue v. Ponton, 11  
P. R. 328.*—Boyd.

Leave was given to the defendants to read  
new affidavits upon their appeal from an order  
of a local master obtained ex parte by the plain-  
tiff. *Taylor v. Sisters of Charity of Ottawa, 11  
P. R. 490.*—Ferguson.

Christmas vacation is not to be excluded in  
reckoning the eight days within which an ap-  
peal from the master or local judge or master  
in chambers is to be brought on under Rule 427,  
O. J. A. (Con. Rule 846). As such appeals are  
not heard in vacation, the time for appealing  
will be extended as a matter of course upon an  
ex parte application. *Snowden v. Huntington,  
12 P. R. 1.*—Ferguson.

See *Ryan v. Canada Southern R. W. Co., 10  
P. R. 535, p. 1654; Locomotive Engine Co. v.  
Copeland, 10 P. R. 572, p. 1654; Waterhouse v.  
McVeigh, 12 P. R. 676, p. 1655.*

### (c) Master or Referee in Chambers.

The eight days for appealing from an order of  
the referee under Rule 427 (c), of the O. J. Act.  
(Con. Rule 846) count from the making of the  
decision, not from the entry of the order, as  
formerly. Where the plaintiff's solicitors, owing  
to a misapprehension on this point, allowed the  
eight days to elapse, Proudfoot, J., granted  
further time. *Dwyer v. Robertson, 9 P. R. 78.*

Held, that appeals from the master in cham-  
bers are governed by Rule 427, (Con. Rule 846)  
and not by Rule 414, O. J. Act, (see Con. Rule  
847) which applies to appeals to a Divisional  
Court. *Lowson v. Canada Farmers' Ins. Co., 9  
P. R. 185.*—Boyd.

Where a stay was granted on an ex parte ap-  
plication, it was held that an appeal might be  
had direct to a judge in chambers, without ap-  
plying to the master to rescind his order. *Grand  
Trunk R. W. Co. v. Ontario and Quebec R. W.  
Co., 9 P. R. 420.*—Proudfoot.

A writ was endorsed specially for \$910, the  
amount of a bill of exchange, and also asked to  
have certain conveyances, etc., set aside as  
fraudulent. The master in chambers made an  
order for judgment under Rule 80, O. J. Act,  
(Con. Rule 739) on January 11th. Proudfoot,  
J., on an ex parte application of the defendant  
for leave to bring on an appeal from the master's  
order on the 17th January, directed the appeal  
to be set down for Monday, January 21st:—  
Held, that the appeal was properly brought.  
*Standard Bank v. Wills, 10 P. R. 159.*—Fergu-  
son.

No objection to his jurisdiction was taken  
before the master:—Held, that the application  
having been entertained, an appeal to a judge  
in chambers of the Chancery Division, instead  
of to a judge of the C. P. or Q. B. Divisions, was  
proper under R. S. O. (1877) c. 39, s. 31, and

Rule 427, O. J. Act (Con. Rule 846), the effect of the O. J. Act being to abolish all distinctions between Superior Courts of law and equity. *Brigham v. McKenzie*, 10 P. R. 406.—Boyd.

Appeals from the master in chambers may be brought on for hearing before a judge of the High Court sitting in chambers without reference to the division in which the action is commenced. *Laidlaw Manufacturing Co. v. Miller*, 11 P. R. 335.—Armour.

An appeal lies to a judge in chambers from the decision of the master in chambers, under Rule 544, O. J. Act (Con. Rule 854), upon appeal from a pending taxation. *Re Montith—Merchants' Bank v. Montith*, 11 P. R. 361.—Boyd.

A Divisional Court has no jurisdiction to hear an appeal direct from the master in chambers, or a substantive motion to set aside a judgment by default of appearance. *Bail v. Cathcart*, 16 O. R. 525.—C. P. D.

See *Christie v. Conway*, 9 P. R. 529, p. 1025; *Union Loan and Savings Co. v. Boomer*, 10 P. R. 630, *infra*; *Snowden v. Huntington*, 12 P. R. 1, p. 1658; *Milligan v. Sills*, 13 P. R. 350, p. 1594.

#### XVIII. REFERENCES TO MASTER IN ORDINARY, LOCAL MASTERS AND REFEREES.

##### 1. Jurisdiction to Order Reference.

The master in chambers, and local masters and county judges, acting under Rule 422 O. J. Act (See Con. Rules 41, 138), have no jurisdiction under sections 47 and 48, O. J. Act to order references in opposed cases. *White v. Beemer*, 10 P. R. 531.—Boyd.

Held, following *White v. Beemer*, 10 P. R. 531, that the master in chambers has no jurisdiction to order a reference under sec. 47 O. J. Act. An appeal from the master's order directing a reference was treated as a substantive motion, and a reference was directed, under Rule 323 O. J. Act (Con. Rule 323). *Union Loan and Savings Co. v. Boomer*, 10 P. R. 630.—Rose.

A judge has jurisdiction under section 48 O. J. A. to make a compulsory order referring not only questions of account, but also all the issues of fact in any action to an official referee. *Ward v. Pilly*, 5 Q. B. D. 427, followed. *Shields v. MacDonald*, 14 A. R. 118.

A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered so to do. The various kinds of references to judicial officers under the Ontario Judicature Act commented upon. *In re Queen City Refining Co.*, 10 P. R. 415.—Hodgins, *Master in Ordinary*.

##### 2. What May be Referred.

Reference directed to determine the amount of damages sustained by the plaintiff under an agreement to serve defendant, as manager of a tannery, for six years, the agreement reciting that plaintiff was to manage the works and the defendant was to furnish the capital, for failure of the defendant to perform his part of the agree-

ment, and for the dismissal of the plaintiff. *Blake v. Kirkpatrick*, 6 A. R. 212.

The plaintiff sued for alleged breach of a contract to sell and deliver a quantity of hay to be inspected. The plaintiff gave evidence of shortage and defective quality, and asked for a reference as to damages; but the judge who tried the case refused the reference, and gave judgment for the defendant:—Held, that the matters in question were proper for trial by a judge, and that the plaintiff was not entitled to give *prima facie* evidence of a breach of contract and then have a reference as to damages. *Cook v. Patterson*, 10 A. R. 645.

The defendant, having delivered ties to a railway company, in excess of his contract, as he alleged, arranged that such ties should be returned as received by the company on a contract with the plaintiff. In anticipation of such returns, and of payment therefor, the plaintiff paid the defendant \$1,000, and brought this action to recover the same, alleging that he never was able to procure returns or payment from the railway company, and that the consideration for the \$1,000 had therefore failed. It was shewn in evidence that the plaintiff had, in a claim against the railway company for 19,883 ties, included 3,260 delivered by the defendant, and that, the railway company disputing such claim, a settlement had been effected, the plaintiff accepting \$1,000 in full of his claim, and giving the company a formal release of all demands:—Held, that, to the extent to which the ties were delivered by the defendant on plaintiff's account, the latter could not, in view of the circumstances, allege failure of consideration; but that he was not bound by the settlement to pay for ties that were not delivered, and therefore that the determination of the action depended upon the result of the inquiry directed as to the number of ties delivered by defendant; and an appeal from the judgment directing such inquiry was accordingly dismissed. The objection, that the judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone v. VanAllen*, 12 A. R. 133.

A judgment directed that the master should take the usual accounts for redemption or foreclosure of mortgaged premises and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the master should take into account a certain sale by the plaintiff, as mortgagee, to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment:—Held, that the proposed inquiry was not within the scope of the pleadings or the judgment or of Con. Rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the court, and not delegated to the master. *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. at p. 725; *McDougall v. Lindsay Paper Mill Co.*, 20 U. C. L. J. N. S. 133; *Wiley v. Ledyard*, *ib.*, 142, referred to. *Roelant v. Burnell*, 12 P. R. 607.—Armour.

The plaintiff's claim was upon a verbal agreement entitling him to one-half of certain com-

of the plaintiff.  
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607.—*Armour*.

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mission received by the defendant; and his case depended upon his being able to prove the agreement, and to show that he performed the services which were to form the consideration for it; if the plaintiff succeeded in establishing the agreement and the performance, the taking of an account would necessarily follow. The defendant filed a counter claim, as to which there was no question that it would be proper to direct a reference either to arbitration or to an official referee. Two days after the action was commenced, the defendant's solicitor wrote suggesting that all accounts between the parties should be settled by arbitration. The plaintiff subsequently made a motion to refer to an official referee under section 48, O. J. Act, and the defendant moved to refer to a named arbitrator, or to some other arbitrator to be named by the court. The affidavit filed in support of the defendant's motion, stated the belief of the deponent that the whole matter could be settled by a reference to an arbitrator to be appointed by the court, who would have authority to decide as to the validity of the alleged agreement; the court being of opinion that the real contest was as to the person to whom the reference should be made, refused to interfere with the discretion exercised by Wilson, C. J., in referring the action to the referee, though made without the consent of the defendant. *Shields v. MacDonald*, 14 A. R. 118.

In an action against a municipal treasurer a reference was directed to ascertain what was due from him, and an order was made permitting the sureties to appear upon the reference and contest the claims of the municipality. This order was varied by making provision for awarding costs as between the municipality and the sureties. *County of Essex v. Wright—County of Essex v. Duff*, 13 P. R. 474.—*Galt*.—C. P. D.

See *International Bridge Co. v. Canada Southern R. W. Co.*, 7 A. R. 226; 7 App. Cas. 723, p. 1680; *In re Munzie*, 10 P. R. 98, p. 1662.

### 3. Changing Reference.

Where the business of the partnership in question in this suit had been carried on in the county of Simcoe, and the parties resided there, and it was found the master in ordinary could not proceed with the reference directed for two months from the date of this application, the reference was changed to Barrie. *Aitkin v. Wilson*, 9 P. R. 75.—*Boyd*.

### 4. Jurisdiction of Master on Reference.

Where an application for a commission to examine a witness in New York, was made before an official referee, and referred by him to a judge, it was:—Held, that matters coming within the jurisdiction of any officer of the court should be disposed of by him in the usual way, and the parties might then appeal from such decision. *Hughes v. Rees*, 9 P. R. 86.—*Boyd*.

A decision of the Supreme Court of Nova Scotia confirming the report of a master on a reference reversed, on the ground that the master had exceeded his authority and reported on

matters not referred to him. *Doult v. McIlreith*, 14 S. C. R. 739.

The jurisdiction of the master's office is not co-extensive with that of the court in enquiring into and adjudicating upon the validity of documents; and there is no authority to support any implied or assumed delegation of the functions of the court to the master. Nor is there any practice in the master's office which allows parties to obtain a reference to the master so as to evade the ordinary judicial functions of the court, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction. *In re Munzie*, 10 P. R. 98.—*Holguins*, *Master in Ordinary*.

The plaintiffs, when taking accounts before the master under the ordinary chamber order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was valid:—Held, 1. That the master had no jurisdiction, under such order and on oral pleadings, to adjudicate upon the validity of the will: 2. That even if there was such jurisdiction it could not be exercised in the absence of a personal representative of R.'s estate. *Id.*

The plaintiff, as mortgagee of the defendants, by an instrument dated 30th January, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued duly endorsed under Rule 17 O. J. Act (Con. Rule 248), and default being made, judgment was obtained under Rule 78, O. J. Act (Con. Rule 718 *part*), referring it to the master at Lindsay to make and take the enquiries and accounts as prescribed by G. O. Chy. 441 (Con. Rule 776, and Form 138). The master gave certain execution creditors, who had been made parties in his office and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid, the terms of section 85 of the Canada Joint Stock Company's Act of 1877, which requires the sanction of a two-thirds vote of the shareholders, not having been complied with:—Held, that under the decree the master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors not having moved against the judgment by virtue of which they were made parties were also bound by the decree. *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247.—*Boyl*.

As to power of master in ordinary to order payment of insurance money into court in a case where the administration of the testator's estate had been referred to him. See *Merchants' Bank v. Monteith*; *Ex parte Standard Life Insurance Co.*, 10 P. R. 58<sup>o</sup> p. 1004.

Held, that on a chamber reference for partition or sale of lands made by the master in chambers, the master in ordinary has no jurisdiction to try the question of the validity of a lease under seal from the intestate, set up as a ten years' lease by one of the heirs-at-law, who claimed that the lands should be sold subject to his lease, some of the other heirs-at-law disputing the validity of the lease, and alleging that it was either a five years' lease, or that there had been a fraudulent alteration of the sealed instrument, there being an alteration in a material part ap-

parent on the face. The reference was adjourned till after the trial of the question raised, and an issue was directed by a judge in chambers under Rule 256, O. J. Act (Con. Rule 655), to be tried at the next sittings for the trial of actions in the Chancery Division; the lessee to be plaintiff in the issue. *Re Rogers—Rogers v. Rogers*, 11 P. R. 90.—Hodgins, *Master in Ordinary*.—Ferguson.

See *In re Munsie*, 10 P. R. 98, p. 728; *In re Queen City Refining Co.*, 10 P. R. 415, p. 290; *Clarke v. Langley*, 10 P. R. 208, p. 1664; *Hughes v. Rees*, 10 P. R. 301, p. 1622; *Boswell v. Grant*, 11 P. R. 376, p. 1647; *Bank of Hamilton v. Baine*, 12 P. R. 418, p. 1656.

### 8. Proceedings on Reference.

#### (a) Taking Accounts.

The circumstances under which interest on a claim ought to be allowed or refused in the master's office, considered and acted on. *Re Ross*, 29 Chy. 385.—Boyd.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal he should be required to report the facts to enable the court to determine on the propriety of his decision. Quere, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case. *Sievwright v. Legs*, 1 O. R. 375.—Proudfoot.

Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed after decree, in the master's office. *Court v. Holland*, 4 O. R. 688.—Proudfoot.

Manner of taking accounts in fixing an occupation rent to be charged against one who had occupied land under mistake of title. See *Munsie v. Lindsay*, 11 O. R. 520.

See *Carnegie v. Federal Bank of Canada*, 8 O. R. 75, p. 1664; *In re Munsie*, 10 P. R. 98, pp. 728, 1662.

#### (b) Other Cases.

Adding parties in the master's office for the purpose of discovery. See *Hopper v. Harrison*, 28 Chy. 22, p. 1680.

In his pleadings, in an action for an account the plaintiff set up that on 23rd April, 1878, he transferred to the defendant 160 shares of a certain bank, as a security for a loan, and that pending the loan the defendants had sold the said stock and realized more than the indebtedness, whereof he claimed an account, and the parties went to trial on admissions that the bank stock was in the defendants' hands at the said date. In the master's office the plaintiff sought to raise an issue as to whether the defendants actually did hold the bank stock on that date, or whether, having held it previously as security for another loan, they had not parted with it before the said date, and falsely represented to the plaintiff that they still held it, and whether they were not liable to be charged with its mar-

ket value as of that date:—Held, affirming the decision of the master in ordinary, that the plaintiff could not be allowed thus to set up a different state of facts and cause of action from that spread upon the record. *Carnegie v. Federal Bank of Canada*, 8 O. R. 75.—Boyd.

Admissions made before the master in the course of a reference should be put into writing and signed by the party making the same. *Foster v. Allison*, 11 P. R. 233.—Boyd.

By an agreement for the sale of certain land, the vendor was to give a good marketable title, of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds, or evidences of title other than those in the vendor's possession. Subsequently, on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the master leave to file other objections. On appeal, Proudfoot, J.:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the court he gave the leave required on terms. *Clarke v. Langley*, 10 P. R. 203.

The master has no jurisdiction to make amendments to the pleadings after judgment; nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings. *Hughes v. Rees*, 10 P. R. 301.—Hodgins, *Master in Ordinary*.

In a mortgage action there was a reference to a master for sale, etc. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in court, which R. G. applied to the master to have paid out to her. Upon such application R. G. was examined before the master, who refused the application. An order was afterwards made by a judge referring to the master to ascertain who was entitled to the fund, and to settle priorities. Upon such reference the master ruled that the depositions of R. G. taken upon the former application could be read:—Held, reversing the decision of Robertson, J., in chambers, that the depositions could be read subject to the right of A., an opposing claimant of the fund, to cross-examine R. G. upon them; R. G. to attend for such cross-examination upon payment of conduct money by A. *Maclean v. Gray*, 12 P. R. 431.—Chy. D.

See *In re Munsie*, 10 P. R. 98, p. 728; *Re Rogers—Rogers v. Rogers*, 11 P. R. 90, p. 1663.

### 9. Confirming Report.

A certificate given by a master that certain accounts filed under his order are not sufficient in substance and form, comes within G. O. 642 (See Con. Rule 849), and cannot be enforced by attachment until confirmed by the lapse of a month. *Foster v. Morden*, 9 P. R. 70.—Proudfoot.

A decree directed a reference to a local master to ascertain such sums as would be sufficient to satisfy the damages complained of, awarded costs and directed payment to be made forth-



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with after the making of the report :—Held, that the report did not require confirmation, and therefore that the executions issued under it by the plaintiff were valid ; but pending an appeal from the report the executions were stayed in the sheriff's hands. *Lewis v. Talbot St. Gravel Road Co.*, 10 P. R. 15.—Osler.

Unless by consent a report cannot be confirmed until after the lapse of the time limited by Con. Rule 848. It is an undesirable practice for an officer to make an order confirming his own report. *Patterson v. Gilbert*, 12 P. R. 652.—Rose.

### 10. Appeals From.

#### (a) From Master.

An appeal was not made within the time required by Rule 461, O. J. Act (Con. Rule 484), as it was supposed that Christmas vacation did not count. On the facts stated in the judgment leave was given to appeal on payment of costs. *Sieweright v. Leys*, 9 P. R. 200.—Dalton, *Master*.

The report in an action for dower was filed on 29th May, during the Easter sittings of the court. A motion was made against it within the first four days of the Michaelmas sittings :—Held, that the motion was too late, for it should have been made to a vacation judge under Rules 482 and 483 (Con. Rule 215). *Giles v. Morrow*, 4 O. R. 640.—Q. B. D.

The solicitors for the defendants (except L.) had given due notice of appeal, but through inadvertence set down the appeal on behalf of the defendants the gravel road company only. Under the circumstances stated in the judgment the other defendants were allowed to set down their appeal. *Lewis v. Talbot St. Gravel Road Co.*, 10 P. R. 15.—Osler.

Where, after the argument in chambers of an appeal from the master's report, counsel for one of the parties asked that the appeal might be treated as though argued in court, and any order made thereon issue as a court order ; or, at all events, that costs should be allowed as of a court motion :—Held, that although the appeal would, on account of its nature, have been adjourned into court, if such adjournment had been asked before the argument of it, the present application was too late, and the court had no power to grant it. *Re Fleming*, 11 P. R. 272.—Ferguson.

There should be no alteration in the amount found due by the master when such amount has not been appealed against. Judgment of Proudfoot J. 11 O. R. 611, upheld in part. *Gordon v. Gordon*, 12 O. R. 593.—Chy. D.

Having regard to the provisions of 44 Vict. c. 5, section 25 (O. J. A.) the setting down of an appeal from a report in an action in the Chancery Division, to be heard at a sittings of chambers in another division, is a nullity. *Re Christie—Christie v. Christie*, 12 P. R. 15.—Ferguson.

An appeal from the ruling of a master in the course of a reference should be brought on within a month from the date of the ruling, irrespective of the date of the certificate of such ruling. *MacLennan v. Gray*, 12 P. R. 431.—Chy. D.

Held, also, that A. was estopped from appealing from the master's ruling by reason of his not having objected to the evidence being referred to at a certain stage of the proceedings. *Id.*

G. O. Chy. 642 provided for an appeal to a judge in chambers against any decree, order, report, ruling, or other determination of any master ; but this order has been abrogated, and the provisions for appeals from masters and referees are now contained in Con. Rules 848-850, in which there is no provision for an appeal from a ruling or certificate, but from a report only. *Markle v. Ross*, 13 P. R. 135.—Rose.

Held, that a party to any reference has a right to come to the court, at any stage with any well founded complaint against the conduct of the referee, either personal misconduct or error in receiving or rejecting evidence, or otherwise ; and Con. Rule 39 shews the intention to permit interlocutory rulings to be considered ; but a judge in chambers has no longer any jurisdiction, and the appeal must be to a judge in court. *Comtee v. Canadian Pacific R. W. Co.*, 16 O. R. at pp. 641, 642, and cases cited at p. 657, referred to. *Id.*

Quere, whether upon a reference to a local master, quâ master, an appeal from an interlocutory order would lie under Con. Rule 846. *Id.*

Where the court at the trial of a partnership action, after declaring that a partnership existed and adjudging that it be dissolved and wound up, ordered that all other matters in dispute in the action be referred for inquiry and report to a master under section 101 of the Judicature Act :—Held, that the report of the master under such reference was not subject to the provisions of Con. Rule 848 as to confirmation by filing and lapse of time ; but that any time after it was made, a motion for judgment upon it was in order under Con. Rule 753, and upon such motion the court could adopt it wholly or in part, and any party dissatisfied with it might before or on the return of the motion for judgment move to set it aside or vary it. *Raymond v. Little*, 13 P. R. 364.—Robertson.

See *Sieweright v. Leys*, 1 O. R. 375 ; *Snowden v. Huntington*, 12 P. R. 1 ; *Re Gabourie—Casey v. Gabourie*, 12 P. R. 252, p. 30.

#### (b) From Referee.

An order extending the time for appealing from a report of an official referee under O. J. Act, section 47, should not be made ex parte. *Hamilton v. Tweed*, 9 P. R. 448.—Proudfoot.

At the trial of this action a compulsory order of reference was made, referring "all questions arising upon the pleadings of this action between the parties, including all questions of account, (if any)," to an official referee "for enquiry and report" :—Held, that this was a reference under section 47 of the Judicature Act, and not one under section 48, and the referee having made a general finding by his report (set out in the statement), the case was referred back to him to give specific findings. *Lunry v. Essery*, 10 i. R. 285.—Rose.

Held, that objections to special findings in a report must be raised by notice of motion. *Id.*

Held, that a single judge sitting as the court has power to review the findings of an official referee upon a reference under section 48 O. J. Act. *Hill v. Northern Pacific Junction R. W. Co.*, 11 P. R. 103.—Ferguson.

In an action for wages, there was a dispute as to the nature of the agreement for hiring; there was evidence at the trial which would have supported a finding for either party. The question was wholly one of fact, and of the credibility of witnesses. The jury found in favour of the plaintiff; but the judge set it aside, and sent the case to a referee, who found substantially as the jury had done. Upon motion the judge made an order sending the case back to the referee with instructions to find against the plaintiff on one branch of the case:—Held, that the case was one specially proper for the decision of a jury, and that neither the verdict nor the finding of the referee should have been interfered with. *Logg v. Ellwood*, 14 A. R. 493.

The report of a referee is equivalent to the verdict of a jury. It should state the referee's conclusions; and he need not give the reasons for his findings. *Fawcett v. Winters*, 12 P. R. 232.—O'Connor.

The referee, who was a barrister, found that there was a want of reasonable and probable cause for the defendant proceeding criminally against the plaintiff. It was objected that this was a finding of law and not of fact:—Held, that this was equivalent to a verdict for the plaintiff rendered by a jury under instructions by a judge of what would be evidence of want of reasonable and probable cause; and on the evidence the findings could not be interfered with. *Id.*

Held, that after the report of a referee has become absolute and a judgment on further directions founded thereon has been pronounced, drawn up, and entered, a judge in chambers has no jurisdiction to entertain an application for leave to appeal; nor could any appeal be entertained unless the judgment on further directions were set aside; and that could not be done even by a judge in court, but only by the proper appellate tribunal. *Re Dingman and Hall*, 13 P. R. 232.—Boyd.

Where, in a consent judgment in the usual form in lien cases, a reference was made to a local registrar of the court:—Held, that an appeal lay from his report, it appearing from the whole judgment that the reference was to him as master. *Kennedy v. Haddow*, 19 O. R. 240.—Boyd.

#### XVIII. REGISTRARS OF DIVISIONS OF THE HIGH COURT.

The registrar of a Division of the High Court has power to receive evidence by affidavit to shew that an order of court has not been obeyed, and to enforce the order by striking out paragraphs of the defence. *Hamilton Road Co. v. Platt*, 10 P. R. 581.—Dalton, Master.

Where an action in the Queen's Bench or Common Pleas Division of the High Court of Justice is, under Rule 590 (Con. Rule 600), set down for trial at a sittings for trial of actions in the Chancery Division, any order made in

such action by the judge presiding at such sittings should be signed by the officer who acts as registrar at such sittings, and not by the registrar of the Division to which the action belongs. *Wayhorn v. Hawkins*, 12 P. R. 145.—C. P. D.

#### XIX. NOTICE OF MOTION.

Irregularities relied on, need not be stated in a notice of motion if they are set out in affidavits, filed on the motion, and referred to in the notice. *Blain v. Blain*, 9 P. R. 269.—Dalton, Master.

A notice of motion for irregularity should shew or refer to affidavits shewing what the irregularity is. *Dominion Savings and Investment Co. v. Kitroy*, 12 P. R. 19.—Dalton, Master.

An objection that a notice of motion given for a sittings of the Divisional Court, and served in time to be set down during that sittings, could not be set down in the following sittings was overruled. *Brassett v. McEwen*, 10 O. R. 179.—C. P. D.

Where the defendant's solicitor was served with a short notice of motion which was admitted to be defective:—Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to shew that the notice was irregular. *Waller v. Claris*, 11 P. R. 139.—Wilson.

Where a defendant, upon being sued in the First Division Court in the county of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion returnable before a judge in chambers, for an order directing the issue of a writ of prohibition to the said Division Court, to prohibit the judge thereof and the plaintiff from proceeding with the suit in that Division Court on the ground of want of jurisdiction in that court to hear and determine the same, but did not entitle his notice of motion, nor the affidavit filed in support of the motion, in any Division of the High Court of Justice:—Held, affirming the order of O'Connor, J., in chambers, granting the writ, not a fatal objection, but one which could and should be amended under Rule 474, O. J. Act, (Con. Rule 444). *Re Olmstead v. Errington*, 11 P. R. 336.—Q. B. D.

No order of any moment should be made ex parte, except in a case of emergency. *Thomas v. Storey*, 11 P. R. 417.—Rose.

A notice of motion to a Divisional Court against the verdict and judgment at the trial, on the ground of non-direction, should shew how and in what matter there was non-direction. The court may allow an amendment of the notice in a proper case; but it declined to assist the defendant by doing so where the non-direction was not material in view of other facts and findings, and the rule of law invoked by the defendant would have operated against a meritorious claim of the plaintiff. *Pfeiffer v. Midland R. W. Co.*, 18 Q. B. D. 243, followed. *Furlong v. Reid*, 12 P. R. 201.—Chy. D.

Dispensing with service of notice of motion for judgment. See *Dominion Bank v. Doddridge*, 12 P. R. 655, p. 1067.

Upon the proper construction of Con. Rule 830 a notice of motion to a Divisional Court must be made returnable on the first day of the sittings.

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But where, although the notice of motion had been made returnable on the fifth day of the sittings, it appeared that there had been a bona fide intention to move ten days before the sittings, when the notes of evidence were ordered, leave was given to set the motion down, costs being given against the party moving. *Sierichs v. Woodcock*, 13 P. R. 260.—C. P. D.

## XX. MOTIONS AND ORDERS.

Remarks upon the multiplication of orders and summonses in actions. *Snyder v. Snyder*; *Snyder v. Orr*, 11 P. R. 140.—Boyd.

Where a party obtains an enlargement of a motion for the purpose of procuring further affidavits, but does not comply with the terms on which the enlargement was granted, he is not entitled to read the affidavits. *Campbell v. Martin*, 11 P. R. 509.—Ferguson.

Upon an interlocutory application the court will not hear more than one counsel for any party. *Langton v. Robertson*, 12 P. R. 139.—C. of A.

Con. Rule 544 provides that all orders made by a judge of the High Court in chambers shall be signed by the clerk in chambers:—Held, that an order for the arrest of the defendant signed by the judge who made it, and not by the clerk, was not properly issued. *St. Croix v. McLachlin*, 13 P. R. 438.—Ferguson.

The defendant served upon the convicting magistrates notice of a motion by way of appeal from an order of a judge in chambers refusing a certiorari to remove his conviction, returnable before a Divisional Court in Michaelmas sittings, but did not set the motion down for hearing before the sittings or take any steps after serving the notice of motion to bring it to a hearing during the sittings. The court ordered the defendant to pay to the magistrates their costs of appearing to shew cause against the motion. *Regina v. Armstrong*, 13 P. R. 306.—C. P. D.

## XXI. VARYING MINUTES.

On a motion to vary minutes, nothing can be done at variance with the order as granted, but additions or variations may be made so as to carry out the intention of the court in pronouncing it. *Hendrie v. Beatty*, 29 Chy. 423.—Chy. D.

## XXII. TERM'S NOTICE.

Where neither party has taken any proceedings in a suit for a year a term's notice to proceed, which was required under the Common Law practice, is not necessary under the O. J. Act. *Beaver v. Boardman*, 9 P. R. 239.—Dalton, *Master*.—Armour.

## XXIII. SERVICE OF PAPERS.

### 1. Generally.

Where a judgment debtor had absconded, and his place of abode could not be ascertained, substitutional service upon him of a summons to set aside fraudulent conveyances made by him,

was allowed. *Dobson v. Marshall*, 9 P. R. 1.—Osler.

Service of papers on a Toronto agent for an outside solicitor is not good, unless accompanied with a statement of the name of the solicitor for whom the agent is served. *Prettie v. Lindner*, 11 P. R. 313.—Dalton, *Master*.

Service of papers on a solicitor as agent for another solicitor is not good service unless the solicitor served is the booked agent of the other, even though he has acted as agent in the same suit. *Robinson v. Robinson*, 13 P. R. 61.—MacMahon.

## XXIV. STAYING AND SETTING ASIDE PROCEEDINGS.

### 1. Till Costs of Former Proceedings are Paid.

In 1879, the Grand Junction Railway obtained from the Court of Queen's Bench a rule for a mandamus to enforce the delivery of bonds by the defendants to the amount of \$75,000, pursuant to a by-law of the defendants to aid in the construction of the plaintiff's road. On appeal to the Court of Appeal this rule was discharged, and on appeal to the Supreme Court of Canada, the Court of Appeal's judgment was affirmed, with costs against the plaintiffs. Since then the road had been completed, but the costs of the above proceedings had not been paid. This action was brought in the name of the Grand Junction Railway and the Midland Railway to recover the aforesaid sum of \$75,000 in money. Upon motion to stay all proceedings in this action till the costs of the former proceedings should have been paid:—Held, notwithstanding that new circumstances had arisen, and the proceeding not being the same as the first proceeding nor grounded upon exactly the same facts, and notwithstanding that the Midland Railway Company were now joined as plaintiffs, the attempt to proceed in this action without first paying the costs of the former action was vexatious, and the order asked for must be made; following *Cobbett v. Warner*, L. R. 2 Q. B. 108. *Grand Junction R. W. Co. v. County of Peterborough*, 10 P. R. 107.—Dalton, *Master*.

In equity, if interlocutory costs payable by the plaintiff remained unpaid, the court might, but was not bound to, stay proceedings, and would not if it were not equitable to do so. At common law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they were paid, the court in the exercise of its inherent jurisdiction might direct a stay. The common law practice is the more convenient one, and should now be followed. *Stewart v. Sullivan*, 11 P. R. 529.—C. P. D.

Where the plaintiff served in succession four notices of trial for the same assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid. *Ib.*

Where the plaintiff is acting in good faith his action should not be stayed for non-payment of interlocutory costs; and an action of trespass is in that respect in no way different from any other. *Stewart v. Sullivan*, 11 P. R. 529, followed. *Wright v. Wright*, 12 P. R. 42.—Rose.

## 3. Other Cases.

As to effect of obtaining order to postpone trial. See *Allen v. Mathers*, 9 P. R. 477.

Held, that a præcipe order for security for costs is a stay of proceedings while it exists, and a motion for judgment made simultaneously with the motion to set aside the præcipe order for security for costs was refused. *Doer v. Rand*, 10 P. R. 165.—Dalton, Master.—Galt. See *Bank of Nova Scotia v. LaRoche*, 9 P. R. 503, p. 358.

An action against the sureties upon a bond given by the defendants in the action of *McLaren v. Canada Central R. W. Co.*, upon the appeal of the defendants to the Court of Appeal in that case. The defendants in *McLaren v. Canada Central* appealed from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren v. Stephens*, 10 P. R. 88.—Dalton, Master.

On the 4th February, 1885, the Confederation Life Association commenced an action in the Chancery Division to set aside a policy of insurance. On the 13th May, 1885, Miller et al. brought an action to recover the amount of the policy, and on the 23rd May moved to stay proceedings in the former action:—Held, following the rule laid down in *Thomson v. South Eastern R. W. Co.*, 9 Q. B. D. 320, that there is no hard and fast rule in cases of cross actions, that the one commenced last should be stayed. The court should take the circumstances into consideration, and exercise its discretion as to what is the fairest mode of settling the dispute, and give the conduct of the litigation to the party upon whom the substantial burden of proof rests. On appeal *Rose, J.*, declined to make any order. Subsequently, on the 27th June, 1885, the defendants in the first action moved for a stay of proceedings in it, and the master made an order accordingly. On appeal, on 22nd October, Boyd, C., declined to interfere at present, as the action of *Miller v. Confederation Life* had been tried and a verdict given for the plaintiffs, but reserved leave to renew the motion if the verdict should be set aside, and varied the order of the master by consolidating the two actions. *Miller v. Confederation Life Association—Confederation Life Association v. Miller*, 11 P. R. 241.

The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal upon a question arising in the action as to the method of trial of the issues in this and a cross action. *Comtee v. Canadian Pacific R. W. Co.*, 11 P. R. 356.—Dalton, Master.—Galt.

Upon failure of the plaintiff to attend for examination the action should not be stayed until he does attend; it is sufficient to impose a stay for a definite time. *Comstock v. Harris*, 12 P. R. 17.—Boyd.

The order of the master in chambers (9 P. R. 229) staying proceedings on the ground that this action had been settled by the plaintiff's solicitor was reversed because the evidence shewed that the settlement was a provisional one, and

that the plaintiff himself had not adopted it. *McDonald v. Field*, 12 P. R. 213.—C. P. D.

Where counter claim filed in a mortgage action for the purpose of delay. See *O'Dell v. Bennett*, 13 P. R. 10, p. 1612.

An order to set aside proceedings must be served forthwith; otherwise the opposite party may treat it as abandoned. Where final judgment was cut down to interlocutory judgment by order of a master, granted on the 9th July, but not issued or served till the 19th of November:—Held, that the delay was fatal, and the master was wrong in allowing the stale order to be used against the judgment as originally signed. *Molson's Bank v. Dillabaugh*, 13 P. R. 312.—Boyd.

See *Taylor v. Bradford*, 9 P. R. 350, p. 1647; *Grand Trunk R. W. Co. v. Ontario and Quebec R. W. Co.*, 9 P. R. 420, p. 30; *Hughes v. Hand-in-Hand Ins. Co.*, 7 O. R. 615, p. 974; *Niagara Grape Co. v. Nellis*, 13 P. R. 179, p. 1647.

## XXV. WAIVER OF IRREGULARITIES.

Held, that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their forum; but the defendant having submitted to the jurisdiction by his answer, and himself asked the intervention of the court could not now be heard to object. *Moore v. Buckner*, 28 Chy. 606.—Spragge.

Held, that when a foreign commission had been opened before trial for the convenience of parties it was too late at the trial to object to the mode of its execution. *Walton v. Appuhn*, 5 O. R. 65.—Q. B. D.

Leave was given to the plaintiff to amend by setting up the Statute of Limitations upon payment of costs, which were paid to and accepted by the defendant. Upwards of a year afterwards the defendant objected that such order had been improperly made:—Held, that it was then too late to object that the order had been made in error. *Court v. Walsh*, 9 A. R. 294.

Held, that the service of the writ in this action on the station master of the defendants at Bowmanville was void, but the defendants having appeared at the trial and after their objection to the jurisdiction had been overruled having proceeded with the defence and cross examined witnesses, etc.:—Held, that they had thereby precluded themselves from objecting to the jurisdiction. *In re Guy v. Grand Trunk R. W. Co.*, 10 P. R. 372.—Osler.

The defendants appeared to the writ of summons, and set up in their statement of defence that the High Court of Justice had no jurisdiction; that the cause of action arose in Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London:—Held, that there was nothing in these facts to shew want of jurisdiction; and that the appearance had precluded all question as to the sufficiency of the service. *Dart v. Citizens' Insurance Co.*, 11 P. R. 513.—Dalton, Master.

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By an order of Boyd, C. (12 P. R. 275), a motion by the defendant to set aside a judgment for irregularity was refused, but the defendant was let in to defend upon paying into court or securing \$700 within a month. The defendant moved for and obtained an order extending the time for paying the money in, and then appealed from the part of the order refusing to set aside the judgment for irregularity:—Held, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it. *Pierce v. Palmer*, 12 P. R. 308.—Chy. D.

Waiver in pleading. See *Hughes v. Rees*, 10 P. R. 301, p. 1618.

Laches in moving against notice of trial. See *Whitney v. Stark*, 13 P. R. 129.

See *Cochrane Manufacturing Co. v. Lamou*, 11 P. R. 162, p. 99; *Re Merchants' Bank v. Van Allen*, 10 P. R. 348, p. 549; *Hughes v. British America Ins. Co.*, and *Hughes v. London Assurance Co.*, 7 O. R. 465, p. 382; *In Re Mawrie*, 10 P. R. 98, p. 728; *MacLennan v. Gray*, 12 P. R. 431, p. 1660; *Re Smart Infants*, 12 P. R. 635, p. 848.

## XXVI. SECOND APPLICATIONS.

Second application for writ of attachment. See *Bank of Hamilton v. Baine* (2), 12 P. R. 439, p. 3.

Upon a motion to commit the defendant the court refused to allow the plaintiffs to read affidavits filed upon a previous application, the date of their filing not having been stated in the notice of motion; and also refused to allow the plaintiffs to read an affidavit filed after the service of the notice. *Mackenzie v. Carter*, 12 P. R. 544.—Falconbridge.

It is only by the indulgence of the court that a second application is permitted or entertained, where the first application has been refused. And where the defendants' applications for orders nisi to quash convictions were refused on the ground of non-compliance with the statute and Rule requiring a recognizance and affidavit of justification to be filed, and the court upon such applications was not favourably impressed by what was urged as to the merits of the applications:—Held, that the indulgence of the court ought not to be extended in favour of fresh applications made by the defendants upon new material supplying the defects. *Regina v. Richardson—Regina v. Addison*, 13 P. R. 303.—C. P. D.

Where the plaintiff's motion for judgment under Con. Rule 739 was dismissed because he had not observed the practice under Con. Rule 1251 of partly complying with an order upon him for security for costs by paying \$50 into court, and he subsequently paid the money in and renewed the application upon the same material:—Held, that the dismissal of his first application was no bar to the second one. Semble, it would have been otherwise had the plaintiff failed in his first application by reason of defects in his material, and made a second one upon new material supplying the defects. *Payne v. Newberry* (No. 2), 13 P. R. 392.—Dalton, Master.

See *Hilliard v. Arthur*, 10 P. R. 426, p. 1656; *MacLennan v. Gray*, 12 P. R. 431, p. 1664.

(Before the Judicature Act, 1881)

## PRACTICE AT LAW.

### I. WRIT OF SUMMONS.

#### 1. Service.

##### (a) On Foreign Corporations.

The defendants were a foreign insurance company doing business in Ontario and having a head office for this province at Toronto. The writ of summons was served on the local agent of the defendants' company at Ottawa:—Held, that the service was good. *Wilson v. Etawa Life Ins. Co.*, 8 P. R. 131.—Dalton, Q. C.

##### (b) Absconding Defendants.

The writ of summons in ejectment was served upon the defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance. *Trust and Loan Co. v. Jones*, 8 P. R. 65.—Dalton, Q. C.

##### (c) Service Abroad.

A copy of a writ of summons, instead of a notice thereof, had been served upon a defendant, not a British subject, outside of Ontario:—Held, that this was an irregularity which could not be amended, and that the copy and service of the writ should be set aside. *Henderson v. Hall*, 8 P. R. 353.—Cameron.

#### 2. Special Endorsement.

The particulars of claim upon a writ of summons specially endorsed to which the defendant appears do not bind the plaintiff as particulars under a declaration on the common counts, and in such a case, he must comply with a demand for particulars made by the defendant. *Huggins v. Guelph Barrel Co.*, 8 P. R. 170.—Dalton, Q. C.

#### 3. Substitutional Service.

A writ of summons in ejectment was served upon defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance. *Trust and Loan Co. v. Jones*, 8 P. R. 65.—Dalton, Q. C.

## II. CLERK OF THE CROWN AND PLEAS.

### 1. Jurisdiction.

Held, that it is within the power of the Clerk of the Crown in chambers to make an order for the payment of a weekly allowance to a debtor, under the Indigent Debtors' Act (R. S. O. 1877, c. 69), where it can legally be made. *Wheatly v. Sharp*, 8 P. R. 189.—Cameron.

### 2. Appeal from.

Semble, that a judge has power to extend the time for appealing against the order of the Clerk of the Crown in chambers on an application for an allowance under the Indigent Debtors' Act



(R. S. O. 1877, c. 69), made after four days from the making of the order. *Wheatly v. Sharp*, 8 P. R. 189.—Cameron.

Held, that there is no appeal to the full court in term from an order of the Clerk of the Crown and Pleas, made on an application to change the venue in county court cases under R. S. O. (1877) c. 50, s. 155; but the only appeal in such cases is to a judge in chambers, under section 31 of the Act:—Held, however, that if an appeal did lie to the full court, it might be made direct thereto, without first going before a judge in chambers. *Mahon v. Nicholls*, 31 C. P. 22.—C. P. D.

### III. REFERENCES—APPEALS FROM.

In ejectment it was ordered in Hilary term, 1879, that a verdict should be entered for the plaintiff, but no execution to issue until the value of the improvements was ascertained and the amount thereof paid to the defendant, and that it be referred to the master in chancery at Ottawa, to ascertain such value. The master made his report on the 30th of October, 1879, merely finding the value of the improvements, without making any allowance for the rents and profits. In Easter Term, 1880, the plaintiff moved to refer back the report to the master to make such allowance:—Held, reversing the decision of Galt, J. (31 C. P. 227), that the reference was to the master as an officer of the court, and that there was nothing in any of the sections of the C. L. P. Act (R. S. O. 1877 c. 50), relating to arbitrations, which interfered with the right of the court, under the circumstances, to review the act of their officer, and to send the matter back for his reconsideration. The matter was therefore referred back to the master to make such allowance. *McCarthy v. Arbuckle*, 31 C. P. 405.—C. P. D.

### IV. RULES AND ORDERS.

Leave was granted, notwithstanding the lapse of two terms, to rehear a rule made absolute setting aside a by-law, on no cause being shewn. *Re Chamberlain and the United Counties of Stormont, Dundas, and Glengarry*, 45 Q. B. 26.—Q. B. D.

Held, where an order directing a reference to the master has been made in chambers to determine the amount due from an attorney to his client, and the reference completed under it, an application for relief therefrom must be made to the court. *In re An Attorney*, 8 P. R. 102.—Osler.—C. P. D.

See *McCarthy v. Arbuckle*, 31 C. P. 48, p. 578.

### V. SERVICE OF PAPERS.

Held, that service on the defendant's attorney at his house at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p.m. on the following Tuesday, was irregular, the notice not being sufficient:—Held, also, that Rule of court 135, applies to the service of orders and appointments to examine, and that this service must be treated as if made on the fol-

lowing Monday. *Seann v. Hewitt*, 8 P. R. 70.—Q. B. D.

Plaintiff's and defendant's attorneys had an arrangement between themselves by which papers in the suit should be sent by mail. The notice of trial was posted the day before the last for giving notice, but reached defendant's attorney one day too late. It was shewn that the practice of both attorneys had been to admit service as of the day of receipt:—Held, that the notice of trial must be set aside. *Robson v. Arbutnot*, 3 P. R. 313, distinguished. *Donough v. Alison*, 9 P. R. 4.—Dalton, Master.

### VI. TERM'S NOTICE.

Where no proceeding has been taken in the cause for a year subsequent to issue being joined, the plaintiff must give a term's notice of his intention to serve notice of trial. *McCleary v. Morrow*, 8 P. R. 12.—Dalton, Q. C.

Where a summons was enlarged sine die by the consent of counsel and nothing further was done in the suit for more than a year:—Held, that a term's notice of the plaintiff's intention to proceed was necessary, before he could make any motion in the cause. *Bank of Montreal v. Foulds*, 8 P. R. 182.—Dalton, Q. C.

Issuing a side-bar rule to discontinue the action is not a proceeding within the meaning of the rule which requires a term's notice of plaintiff's intention to proceed where no proceeding has been taken in the cause for a year. *S. C., lb.* 236.—Osler.

### VII. STAYING AND SETTING ASIDE PROCEEDINGS.

#### 1. Delay in Moving.

Defendant precluded both by delay and acceptance of service of the writ from moving to set aside proceedings. See *Regina v. Stewart*, 8 P. R. 297, p. 4.

#### 2. Staying Proceedings on Equitable Grounds.

See *Bates v. Mackey*, 1 O. R. 34.

#### 3. Other Cases.

A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was held to be regular. *Merchants' Bank v. Pierson*, 8 P. R. 129.—Dalton, Q. C.

After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine v. Carling*, 8 P. R. 171.—Osler.

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(Before the Judicature Act, 1881.)

## PRACTICE IN EQUITY.

### I. BILLS.

#### 1. Service of.

##### (a) Absconding Defendants.

Where a bill had been filed for foreclosure, and the defendant, the official assignee of the mortgagor, absconded before the bill was served an order was granted allowing substitutional service on one of the two inspectors of the insolvent's estate. *London and Canadian Loan and Agency Co. v. Thompson*, 8 P. R. 91.—Stephens, Referee.—Proudfoot.

Where the defendant in a suit had absconded to the United States before the filing of the bill, and two months after the filing of the bill an assignee in insolvency was appointed by the creditors of the defendant, and the assignee was served with the bill, but not within the time limited by the General Orders, the referee in chambers made an order allowing the service as good, though made fourteen months after the bill was filed:—Held, on appeal, affirming the referee's order, that the defendant having absconded was a sufficient reason for not proceeding with greater diligence. *Goderich v. Brudie*, 8 P. R. 486.—Blake.

##### (b) Service Abroad.

See *Exchange Bank v. Springer*, 29 Chy. 270, p. 606.

##### (c) By Publication.

Where a defendant is served by publication under G. O. 100, in order that a praecipe decree may be obtained, the notice should contain the special endorsement in schedule G. to Order 436, otherwise the cause must be set down to be heard pro confesso. *Pherrill v. Forbes*, 8 P. R. 408.—Proudfoot.

##### (d) On Infants.

Service of bill in partition suit on infant. See *Weatherhead v. Weatherhead*, 9 P. R. 96, p. 1531.

#### 2. Dismissing for Want of Prosecution.

In a suit to set aside a conveyance of the equity of redemption in certain lands as fraudulent as against creditors, one sitting of the court having been lost, a defendant, the grantee of the equity of redemption, moved to dismiss the bill for want of prosecution. More than two weeks before the sittings commenced, the plaintiff's solicitors were notified to file a replication and proceed to a hearing, but did not do so. The excuses offered by the plaintiff were, that the defendant was a material witness, and was absent prior to the hearing, and that the property had been sold under a power of sale contained in one of the mortgages, and little or no surplus remained after paying the mortgages. It appeared that no effort had been made to find the defendant in order to subpoena him as a witness at the hearing, and that the sale of the land did not take place until a month after the sittings at

which the cause might have been heard:—Held, that the delay was not excused, and the bill should be dismissed:—Held also, that the failure of the defendant to comply with an order to produce did not, under the circumstances of the case, deprive him of the right to move to dismiss. *Elliott v. Gardner*, 8 P. R. 400.—Stephens, Referee.—Proudfoot.

Seemable, that a plaintiff cannot, in answer to a motion to dismiss, ask to have the bill dismissed without costs, but must make a substantive motion for that purpose. *Ib.*

#### 3. Undertaking to Speed.

The plaintiff undertook, upon a motion to dismiss his bill, to bring the cause down to the then next sittings at Guelph. From some correspondence it appeared that if the plaintiff had set the cause down for the then next Guelph sittings, a postponement would have been asked for and granted, on the ground of the attendance at the House of Commons of a member who was a defendant. The plaintiff offered to bring the cause down to the then next sittings at Toronto, to which a conditional consent was given; but the cause was not set down. The referee dismissed the bill:—Held, on appeal, reversing the referee's decision, that under the circumstances, more fully set out in the report, the plaintiff was relieved from his undertaking to bring the cause down to Guelph, and that he was under no obligation to bring the cause down to Toronto; and as no intentional delay was shewn on the part of the plaintiff, the bill was restored. *Petrie v. Guelph Lumber Co.*, 9 P. R. 52.—Ferguson.

### II. NEW HEARING.

A defendant knew precisely the question to be tried at the hearing, but took no steps to adduce any evidence on his behalf, and a witness, whom he would have called was called by the plaintiff, and gave evidence which the defendant swore was different from what he had anticipated he would give:—Held, that this was not such a case of surprise, as entitled the defendant to have the cause reopened, in order that there might be a new hearing, and a motion made for that purpose was refused with costs, although the defendant swore that the evidence given by the witness had taken him by surprise, and that the same was incorrect, and would be contradicted by the wife and son of the defendant. *Sherrill v. Beattie*, 27 Chy. 492.—Proudfoot.

### III. DECREE.

#### 1. Amendment of.

By the decree an assignment of a bond was declared to have been by way of security only; and further, that the plaintiff was entitled to certain credits, and referred it to the master to take the accounts. In proceeding with the accounts the defendant was hampered by this declaration in the decree, as the master felt bound by it, whereupon the defendant moved upon petition to amend the decree so as to make it conform to the judgment:—Ferguson, J., before whom the motion was heard, being of opinion that the judgment was directed solely to the

fact that the bond was assigned as a security only, and that the view taken as to the credits was a ground for so holding, and was not a substantive part of the judgment, and therefore that the declaration as to the credits was unauthorized, ordered the same to be struck out of the decree upon payment of costs of the application and of all additional costs incurred or to be incurred in the master's office, caused by the decree not having been properly drawn in the first instance. *Livingston v. Wood*, 29 Chy. 157. —Ferguson.

## 2. Review of, on New Evidence.

In applications to open up proceedings by way of review, on the ground of newly discovered evidence, it is necessary for the party applying to establish, (1) that the evidence is such that if it had been brought forward at the proper time, it might probably have changed the result; (2) that at the time he might have so used it neither he nor his agents had knowledge of it; (3) that it could not with reasonable diligence have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence. *Dumble v. Colbourn and Peterborough R. W. Co.*, 29 Chy. 121. —Ferguson.

Where a railway company in the construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of \$1,800 was found to be the value of such plot, which sum, together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company; and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof; the court (Ferguson, J.), refused the relief asked with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment. *Ib.*

## 3. Other Cases.

The court will not assist in carrying on or perpetuating error, by enforcing an erroneous decree. *Mitchell v. Strathy*, 28 Chy. 80. —Spragge.

A decree had been made on consent, referring to the master the question whether or not the defendant had performed certain work for the plaintiff at a specified rate, who reported that he had not. On appeal, the court (Blake, V.C.), considering that this was a question that should have been disposed of by the court, set aside the report and directed a trial to be had upon that issue reserving the costs of the proceedings before the master and of the appeal:—Held, on further directions, that these costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should pay his own costs. *Dalby v. Bell*, 29 Chy. 336. —Proudfoot.

A decree which had been made against several defendants, one of them A., being administrator ad litem of a defendant who had died before answer, was vacated as to the defendant B., and leave given to him to file a supplemental answer and have a new hearing of the cause. Subsequently C., who had, since the decree and before the appeal been appointed administrator in place of A., who died after decree, applied for leave to file an answer setting up defences which his predecessor had omitted. It was shewn that he had been appointed pro forma to represent the estate; that no proceedings in appeal had been served upon him, and that no further relief was sought against the estate. The referee granted the leave asked:—Held, affirming the order of Proudfoot, V. C., that the vacating of the decree as against B., did not, under the circumstances, open up the decree as against the deceased defendant's estate, and that the referee had, therefore, no power to allow C., to file a supplemental answer. *Peterkin v. McFarlane*, 6 A. R. 254.

## IV. MASTER.

### 1. Reference To, and When Ordered.

Where a question is directly raised by the pleadings, and is distinctly presented to the court for its decision, and evidence has been given upon it in order to obtain the judgment of the court it will not be referred to the master for his decision. *International Bridge Co. v. Canada Southern R. W. Co.*, and *Canada Southern R. W. Co. v. International Bridge Co.*, 7 A. R. 226; see *S. C.* 8 App. Cas. 723, p. 1011.

Held, in this case that it was not proper to refer to the master the enquiry as to the reasonableness of the tolls charged by the International Bridge Co. *Ib.*

See *Williamson v. Ewing*, 27 Chy. 596, p. 327.

### 2. Proceedings in Master's Office.

In proceeding upon a reference under a decree, the master cannot under the General Orders 244, 245 (Con. Rules 46, 47), order a person to be made a party to the suit against whom any relief is sought, and where in proceeding under a decree for the administration of a testator's estate, the master directed one D., who had been in partnership with the testator up to the time of his death, to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which D. appealed, the court (Proudfoot, V. C.):—Held, the object of making D. a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness. *Hopper v. Harrison*, 28 Chy. 22.

### 3. Report.

#### (a) Confirming.

A report requiring confirmation does not become absolute until thirty days from the making, and fourteen days from the filing thereof

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have elapsed. *Re Eaton—Byers v. Woodburn*, 8 P. R. 280.—Blake.

Where a decree ordered payment forthwith after the making of a report, an execution issued before the report had been filed, was set aside with costs. Semble, the report did not require confirmation, under the wording of the decree. *Jellet v. Anderson*, 8 P. R. 387.—Stephens, *Referee*.

#### (b) Other Cases.

A master's report made during long vacation in contravention of G. O. 425, is as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void. *Fuller v. McLean*, 8 P. R. 549.—Boyd.

After the closing of his report, a master should not certify as to any matters before him in the course of the inquiry upon which he has reported, unless called upon to do so by the court. After report, any certificate, unless called for by the court, is irregular and improper. *Rosebatch v. Parry*, 27 Chy. 193.—Spragge.

The master, at the request of the defendant, reported specially in his favour as to many matters not particularly referred to him, but which formed the subject of charges of fraud made in the bill of complaint.—Held, that the master had power to report specially any matters he deemed proper for the information of the court, and that it was his duty to so report any matter bearing on the question of costs. *Hayes v. Hayes*, 29 Chy. 90.—Ferguson.

#### 4. Appeal from.

Where a master in his discretion fixes the commission to be allowed to parties under G. O. 643 (Con. Rule 1187), and settles the disbursements in the suit, there is an appeal to a judge in chambers from his finding. The disbursements should still be submitted to the master in ordinary for revision, like other bills of costs. *Campbell v. Campbell*, 8 P. R. 159.—Blake.

A report must be filed before a notice of appeal from it is given. Semble, that seven clear days' notice of appeal is necessary. *Hayes v. Hayes*, 8 P. R. 546.—Blake.

On a question of rent, there was a conflict of evidence as to the amount thereof. On appeal from the master's finding.—Held, that the witnesses having been examined before the master, he was a better judge than the court as to the weight to be given to the testimony of the respective witnesses; and the question as to the proper sum to be allowed for rent, was one with which the master was quite as competent to deal, as the court could be. *Little v. Brunker*, 28 Chy. 191.—Spragge.

Held, that as the matter in question in this case had been referred to the master by the decree, which was for specific performance, it should have been disposed of in his office under G. O. 226 (Con. Rule 62). *Stammers v. O'Donohoe*, 29 Chy. 64.—Boyd.

The defendant was the assignee of a policy of assurance on his brother's life, in trust to pay himself certain moneys and expend the residue

in the support and maintenance of the assured's family, and having made further advances on the advice of his brother, who was a practising barrister, he took a second assignment of the policy absolute in form. On the death of the assured, the defendant, asserting a right to obtain payment of the policy, went to the head office of the company in the United States, in order to hasten the payment, pending a dispute with the plaintiffs—the family of the assured—as to his rights. In taking the accounts between the parties, the master found that the defendant acted bona fide in so doing, and allowed his expenses, although the company, at the instance of the plaintiffs, refused to pay him, and sent the proceeds of the policy to their solicitors in Toronto, to be paid over to the party entitled.—Held, on appeal from the master (affirming his ruling), that as the defendant was under either assignment entitled to possession of the fund—either as trustee or individually—and as the master under all the circumstances, thought fit to allow such expenses, and it did not appear clear to the court that such allowance was wrong the item should be allowed.—Held, also, that the master had properly allowed to the defendant in his accounts a fee of \$10 paid by him to counsel for advice as to his action in respect of the two assignments. *Hayes v. Hayes*, 29 Chy. 90.—Ferguson.

On an appeal from the master on a question of the weight of evidence, the court, though not satisfied as to what was the actual truth of the case, could not say that the master was wrong, and therefore dismissed the appeal, with costs; liberty being given to the appellant, however, to examine the witnesses again at the next sittings before the judge who heard the appeal so as to enable him to dispose of the matter with greater satisfaction to himself, in which case costs would be reserved. *McArthur v. Prittie*, 29 Chy. 500.—Blake.

#### V. JURISDICTION OF JUDGE OR REFEREE IN CHAMBERS.

A motion under R. S. O. (1877) c. 49, s. 9, to appoint an administrator ad litem of the estate of a deceased person, may be made before the referee, as that section merely extends a jurisdiction already possessed by him under G. O. 56. *Colver v. Swayzie*, 8 P. R. 42.—Stephens, *Referee*.—Spragge.

The referee has no jurisdiction to strike out interrogatories for impertinence. *Williams v. Corby*, 8 P. R. 83.—Stephens, *Referee*.—Proudfoot.

The referee in chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry—Wright v. Curry*, Curry v. Curry, 8 P. R. 340.—Stephens, *Referee*.

See *In re Selby*, 8 P. R. 342, p. 1568; *Peterkin v. McFarlane*, 6 A. R. 254, p. 1680.

#### VI. ACCEPTANCE OF SERVICE.

Notice of examination and hearing was served at a few minutes past four, on the last day for

giving notice, on solicitors of one defendant, who admitted service, but on the same day, discovering that the notice had been served too late, they wrote to the plaintiff's solicitors repudiating their admission, and saying that they would move to set aside the notice. On a motion it was not shown that there was no other service or notice than as above mentioned, and the application was thereupon refused: *Scott v. Burnham*, 3 Chy. Chamb. 402, followed. Semble, that the acceptance of service would not be binding, having been so soon repudiated. *Wright v. Way*, 8 P. R. 328.—*Stephens, Referee*.—Blake.

#### VII. STAYING PROCEEDINGS.

Where a decree had been made declaring the plaintiff to be entitled to insurance moneys, and directing a reference to ascertain the amount and payment forthwith after the making of the report, an order staying proceedings in the master's office was refused pending an appeal from the decree. *Butler v. Standard Fire Ins. Co.*, 8 P. R. 41.—*Stephens, Referee*.

#### PRECEDENCE AT THE BAR.

See *Lenoir v. Ritchie*, 3 S. C. R. 575, p. 147.

#### PREFERENTIAL ASSIGNMENTS.

See BANKRUPTCY AND INSOLVENCY—FRAUDULENT CONVEYANCES.

#### PREFERENTIAL STOCK.

See COMPANY.

#### PREMIUM NOTES.

See INSURANCE.

#### PREScription.

See LIMITATION OF ACTIONS.

#### PRESUMPTIONS.

See EVIDENCE.

Of payment of mortgage. See *Imperial Bank of Canada v. Metcalf*, 11 O. R. 467, p. 1270; *McIntosh v. Rogers*, 12 P. R. 289, p. 1270.

#### PRINCIPAL AND AGENT.

##### I. APPOINTMENT.

1. *Evidence of Agency*, 1684.

2. *Ratification of Agency*, 1685.

3. *By Companies*—See COMPANY.

##### II. POWER AND AUTHORITY OF AGENT.

1. *Agents of Corporations and Companies*,

- (a) *Generally*, 1685.

- (b) *Of Banks*—See BANKS.

- (c) *Of Insurance Companies*—See INSURANCE.

- (d) *Of Railways*—See RAILWAYS AND RAILWAY COMPANIES.

2. *Execution of Deeds*, 1686.

3. *Promissory Notes*, 1687.

4. *Sale of Goods*, 1687.

5. *Sale of Lands*, 1687.

6. *Receiving Payment*.

- (a) *Generally*, 1688.

- (b) *On Mortgages*—See MORTGAGE.

7. *Delegation of Authority*, 1688.

8. *Other Cases*, 1688.

##### III. REVOCATION OF AUTHORITY TO AGENT, 1689.

##### IV. RIGHTS OF AGENT AGAINST PRINCIPAL.

1. *Remuneration and Commission*, 1689.

2. *On Illegal Contracts*, 1692.

##### V. LIABILITY OF AGENT TO PRINCIPAL.

1. *Agent Purchasing Property of Principal*, 1692.

2. *Investment of Money*, 1692.

##### VI. RIGHTS OF PRINCIPAL AGAINST THIRD PARTIES, 1693.

##### VII. LIABILITY OF PRINCIPAL TO THIRD PARTIES.

1. *For Fraud of Agent*, 1694.

2. *Other Cases*, 1695.

##### VIII. PARTICULAR AGENTS—See THE SEVERAL TITLES.

##### I. APPOINTMENT.

1. *Evidence of Agency*.

One C. entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant, not mentioning any particular vessels in which the same were to be carried, and then agreed with the defendant as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendants and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being, *prima facie*, payable to the master of a vessel, and the cargo need not



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be delivered by him until the freight is paid, although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Merchants' Bank v. Graham*, 27 Chy. 524. —Proudfoot.

Upon the insolvency of J. B., who carried on business under the name of B. & Co., his wife purchased the estate from his assignee, the business was continued under the same name, and was entirely managed and controlled by J. B. and his wife, who authorized him by power of attorney to manage the same, and to make promissory notes in and about her said business. Being pressed for payment of notes which he had given for a debt due before his insolvency, he gave his creditor notes signed per pro. B. & Co. J. B. Subsequently he was sued on these notes, when he swore they were his wife's notes, and made with her authority, whereupon the holder sued the wife. In the action against her she swore that she had separate estate and that she had purchased her husband's estate with it; but on the advice of her counsel, she declined to give any information concerning it. She swore that J. B. had no authority to give the notes in question, but it appeared that he frequently discussed his own affairs with her, and he would not swear that he did not tell her that he had given these notes:—Held, affirming the judgment of the County Court, that notwithstanding the power of attorney, the real scope of J. B.'s agency could be ascertained from any admissible evidence, and that there was sufficient to justify the finding of the judge that J. B. had authority to sign the notes.—*Cooper v. Blacklock*, 5 A. R. 535.

In an action for the non-delivery of certain groceries sold:—Held, that upon the evidence set out in the report K., by whom the sale was made, was shown to be the defendants' agent authorized to sell on their behalf. *Ockley v. Masson*, 6 A. R. 108.

See *Williams v. Corbey*, 5 A. R. 626; 7 S. C. R. 470; *Kitchen v. Dolan*, 9 O. R. 432, p. 653.

## 2. Ratification of Agency.

See *Albert Cheese Co. v. Leeming*, 31 C. P. 272, p. 1686; *Vanderlip v. Smyth*, 32 C. P. 60; *Cameron v. Tate*, 15 S. C. R. 622, p. 1687.

## II. POWER AND AUTHORITY OF AGENT.

### 1. Agents of Corporations and Companies.

#### (a) Generally.

The plaintiffs were a company incorporated under C. S. C. c. 63, and 24 Vict. c. 19, for the manufacture and sale of cheese, etc. On the 10th of August, 1873, a written agreement was entered into between one C., the plaintiffs' secretary and salesman, and one M., on behalf, as was stated, of the plaintiffs and defendants respectively, and which was signed by C. and M., for the sale of the whole of the plaintiffs' July cheese, as also of their August, September, and October cheese, at prices named:—Held, that upon the evidence set out in the case, C., in entering into the contract for the plaintiffs, was acting within the

scope of his employment and duties; and that the defendants could not deny M.'s authority to act for them, for they had adopted and ratified the agreement. *Albert Cheese Co. v. Leeming*, 31 C. P. 272.—C. P. D.

Held, that, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.—Proudfoot.

The general manager of a company had authority to do acts which occasionally required legal advice:—Held, that he had implied authority to retain a solicitor whenever in his judgment it was prudent to do so, but that such authority ceased on the suspension of the company. *Clarke v. Union Fire Insurance Co.—Coston's Case*, 10 P. R. 330.—Hodgins, *Master in Ordinary*.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager. *Id.*

Semble, that even if a general manager of a company positively agreed that any winding-up proceeding that should be necessary should be taken in Ontario rather than elsewhere, this would not bind the company, for the business of the manager is to manage a going concern. It is no part of his duty nor within his power to arrange about putting an end to it. *In re Briton Medical and General Life Ass. Co. (Limited)*, 11 O. R. 478.—Proudfoot.

See *Nasmith v. Manning*, 5 A. R. 126, p. 243.

### 2. Execution of Deeds.

To an action by L. against A., the defence was release by deed. On the trial it was proved that A. had executed an assignment for benefit of creditors, and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A., as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected, and not lose one cent by you. After you get matters adjusted, I would like you to send me a cheque for \$800." \* \* \* In April, 1885, A. wrote a letter to L., in which he said: "In one year more I will try again for myself, and I hope to pay you in full." In November, 1886, the account sued upon was stated:—Held, reversing the judgment of the Court below, *Taschereau and Patterson, JJ.*, dissenting, that the execution of the deed on his behalf being made without sufficient authority, L. was not bound by the release contained therein, and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it:—Held, per *Taschereau and Patterson, JJ.*, that though A. had no sufficient authority to sign the deed, yet there was an agreement to compound which was binding on L., and the understanding that L. was to be paid in full, would be a fraud upon

the other creditors of A., who could only receive the dividends realized by the estate. *Lawrence v. Anderson*, 17 S. C. R. 349.

### 3. Promissory Notes.

See *Cooper v. Blacklock*, 5 A. R. 535, p. 1685.

### 4. Sale of Goods.

The plaintiff sued the defendant, a piano-maker, for breach of a warranty given by his salesman on the sale of a piano that the instrument was then sound and in good order:—Held, that the salesman had authority to give the warranty. *McMullen v. Williams*, 5 A. R. 518.

The plaintiffs delivered to one R. some cultivators for the purpose of selling, as their agent, for cash or good notes. Three of these he exchanged with the defendant, who was aware of the fact of agency, for a buggy, which he sold and retained the proceeds. It was shown that on a previous occasion R. had traded a cultivator with one M. for a horse, which he sold and gave the plaintiffs a forged note purporting to be that of the purchaser; and on the same day he traded another cultivator with one D., for a watch and \$7, but for this also it was said he returned a note to the plaintiffs. It was not shown that defendant knew of either transaction, and the plaintiffs had prosecuted R. for the forgery. In an action of replevin the jury gave a verdict in favour of the defendant, but the county judge in term set it aside, and directed judgment to be entered for the plaintiffs, which on appeal was affirmed, with costs. *Stewart v. Rounds*, 7 A. R. 515.

An agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of the goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent:—There can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf. *Cameron v. Tate*, 15 S. C. R. 422.

See *Bush v. Fry*, 15 O. R. 122, p. 745.

### 5. Sale of Lands.

C. R. S. being the owner of certain leasehold property, wrote to E. E. K., a land agent a letter in these words, "Please call on J. J. R. He keeps a small shop . . . He resides in my house on P. street, and has been wanting to purchase it for some time. Tell him if he gives me \$235, cash at once I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following day E. E. K., wrote J. J. R. as follows: "Mr. S. of Meaford wishes me to say that if you desire to purchase some property he owns on P. street, that if you give him \$235 cash

he will send the deeds to me and deliver them to you. Your reply early will very much oblige." About a month after an acceptance was endorsed in the latter letter in these words, "I heroby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R. Upon an action being brought for specific performance by J. J. R., against C. R. S. It was:—Held, that the letter from C. R. S., did not contain authority to E. E. K., to enter into a contract for the sale of the property. *Ryan v. Sing*, 7 O. R. 266.—Ferguson.

A power of attorney by mortgagees authorized their agent to enter and take possession of the mortgaged lands and sell the same at public or private sale, and for the best price that could be got for them, and to execute all necessary receipts, etc., which receipts "should effectually exonerate every purchaser or other person taking the same from any liability of seeing to the application of the money therein mentioned to be received and from being responsible for the loss, misapplication or non-application thereof." The agent took possession and sold the land, receiving part of the purchase money in cash and the balance in a promissory note of the purchaser payable to himself, which he caused to be discounted, and appropriated the proceeds. The purchaser paid the note to the holders at maturity:—Held, affirming the judgment of the court below, that the power of attorney did not authorize a sale upon credit, and the sale by the agent was, therefore, invalid, and the purchaser was not relieved by the above clause from seeing that the authority of the agent was rightly exercised. The sale being invalid the subsequent payment of the note by the purchaser could not make it good. *Rodburn v. Swinney*, 16 S. C. R. 297.

Held, reversing the decision of the Common Pleas Division (19 O. R. 739), that the power of attorney to the husband of the married woman, defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others, or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby. *McMichael v. Wilkie*, 18 A. R. 462.

### 6. Receiving Payment.

#### (a) Generally.

An agent instructed to receive payment for his principal, cannot as a general rule accept anything but money. See *Fraser v. Gore District Mutual Fire Ins. Co.*, 2 O. R. 416, p. 935.

### 7. Delegation of Authority.

See *Summers v. Commercial Union Ass. Co.*, 6 S. C. R. 19, p. 935.

### 8. Other Cases.

Power of Toronto agent to change destination of goods or vary the terms of a bill of lading placed in the hands of an agent of a forwarding company at Waterford, Ont., for carriage to Liverpool. See *Monteith v. Merchants' Dispatch and Transportation Co.*, 9 A. R. 282, p. 214.

and deliver them very much obliged." The answer was endorsed in words, "I hereby understanding that I signed by J. J. R. R. S. It was:— R. S., did not con- sider into a con- ty. *Ryan v. Sing,*

the mortgagees authorized possession of the same at public or price that could be necessary re- should effectually other person taking of seeing to the ap- mentioned to be possible for the loss, tion thereof." The id the land, receiv- ey in cash and the e of the purchaser caused to be dis- the proceeds. The e holders at matur- tment of the court rney did not autho- d the sale by the e and the purchaser e clause from seeing nt was rightly exer- d the subsequent purchaser could not *Swinney*, 16 S. C. R.

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Where the principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals. In this case, upon the letters and evidence, set out in the report, it was held that the defendant had not withdrawn his prior proposals and abandoned the negotiations before a final arrangement had been come to by the respective solicitors. *Vardon v. Vardon*, 6 O. R. 719.—*Wilson*.—*Chy. D.*

Authority of agent to give notice of abandonment to underwriters. See *Merchants' Marine Ins. Co. v. Barrs*, 15 S. C. R. 185, p. 988.

See *Bush v. Fry*, 15 O. R. 122, p. 745.

### III. REVOCATION OF AUTHORITY TO AGENT.

*Vardon v. Vardon*, 6 O. R. 719, *supra*; *Adamson v. Yeager*, 10 A. R. 477, *infra*.

### IV. RIGHTS OF AGENT AGAINST PRINCIPAL.

#### 1. Remuneration and Commission.

The defendant at the instance of the plaintiffs placed his, the defendant's, farm in his hand, for sale, subject to the payment of a certain commission in case the farm should be disposed of through him, and if the defendant himself sold without the aid of the plaintiff, the commission should be only one-half. The defendant alleged that it was a term of the arrangement that if the land remained unsold at the end of two years the agreement should cease:—Held, that if parol evidence as to the limitation of time, was not admissible, the law would infer its continuance for a reasonable time only, and that in deciding what was a reasonable time the time spoken of by the parties which was two years, might be considered. Per *Burton* and *Patterson*, JJ.A., such parol evidence was admissible:—Held, also, that the defendant having refused to sell to a proposed purchaser found by the plaintiff, the plaintiff was not entitled to recover his full commission as on a sale, but the value of his services as on a quantum meruit or damages for the defendant's wrongful refusal. *Adamson v. Yeager*, 10 A. R. 477.

The plaintiff, a land agent, was employed by defendants to sell certain land at a stipulated price, and in the course of his employment, and after negotiating with an intending purchaser, an exchange was effected by certain of his lands being taken in part satisfaction of the defendants' price, and the plaintiff demanded commission from the purchaser for effecting such exchange, which the purchaser, without acknowledging the plaintiff's right to make it, acceded to, and paid a sum of money to the plaintiff. The plaintiff said that such sum was paid not as commission, but as a gratuity:—Held, that such a sum, whether received as a commission strictly so called, or as a gratuity, was a profit directly made in the course of and in connection with the plaintiff's employment, and would, therefore, belong to his employers, the defend-

dants; but as it appeared that the defendants were fully aware of the plaintiff having received such sum, and made no objection to his retaining it, but with full knowledge thereof negotiated with him for a settlement of his remuneration, they could not afterwards, in an action by the plaintiff for such remuneration, set off such sum. *Culverwell v. Campton*, 31 C. P. 342.—C. P. D.

Land agents have no right to accept commission from parties with whom they deal without the fullest notice to their employers that they hold themselves at liberty to do so, and assent on the latter's part to such right; but neither express notice or assent is necessary. It is sufficient if from the nature of the circumstances the principal must have been aware of the fact, and by making no active objection must be deemed to intend to make none; and in the absence of specific agreement to the contrary commission must be estimated on the whole value of the property without regard to incumbrances. *Culverwell v. Birney*, 11 O. R. 265.—C. P. D.

The plaintiff had been employed by the defendants to procure offers for the purchase or exchange of three blocks of land owned by them, and he accordingly procured from one R. an offer at an estimated price of \$97,000 which he submitted to the defendants, and which they, on the 10th September, 1884, accepted conditionally that R. would agree to a variation of the terms of his offer. R. being then absent from the country, the plaintiff, without any instructions, agreed on behalf of R. to the proposed variation. R. returned shortly afterwards, and on the 18th September, signed a formal ratification of the plaintiff's act, but it was not shown that this was ever communicated to the defendants. Meanwhile the defendants being pressed for money by a mortgagee of one of the properties had arranged a sale of that property to one S., at a price \$8,000 less than it was valued at in the offer of R., part of the consideration given by S. being some of the same lands offered by R. in exchange, of which it appeared that S. and not R. had the control; and by a subsequent arrangement the defendants' other two properties were sold to R. The defendants and S. were brought together during the negotiations arising out of R.'s offer:—Held (reversing the judgment of the C. P. D. 11 O. R. 265), that as between R. and the defendants, the matter had never passed beyond the stage of negotiation; R.'s offer was not one that he could carry out, and therefore the plaintiff was not entitled to commission upon the offer of R., or alleged contract of sale made with him; neither was he entitled to anything either on the footing of his agreement or quantum meruit by way of commission on the sales that were actually made. S. C., 14 A. R. 206.

McK. et al. the appellants, real estate brokers at Winnipeg, received verbal instructions from the respondents to sell certain lands of their's at a certain price and terms of payment. McK. et al. sold the land at the price named, receiving from the purchasers the sum of \$5,000 as a deposit on account of the purchase money, and giving therefor a receipt. Prior to the expiration of the delay within which the balance of the purchase money was to be paid, the purchasers refused to complete their pur-

chase for want of title in the respondents to a certain portion of the land, and contended that from the absence of writing signed by them they could not be compelled to do so. The appellants then brought an action for commission upon the entire purchase money. The respondents set up the defence that the appellants promised to sell the lands and to complete such sale by preparing the necessary agreement in writing to make a binding contract with the purchasers. The case came on for trial before a jury who followed the charge of the Chief Justice, and found a verdict in favour of the appellants for the full amount of their claim, thereby giving them two and a-half per cent. upon the entire purchase money of both parcels of land. The jury were not asked by the judge to pronounce upon the nature of the terms upon which appellants were employed, upon the question whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so. In review before the full court a judgment was rendered directing that the verdict should be reduced to \$125, being commission at the rate of two and a-half per cent. on the \$5,000 actually paid, or, in the alternative, that there should be a new trial:—Held, affirming the judgment of the court below, Strong J. dissenting, that there had been a mistrial, and therefore the order for a new trial should be affirmed, appellants to have the alternative of reducing his verdict to \$125. Per Henry, J.—It was the duty of the appellants to take from the purchasers a binding agreement under the statute, and having neglected to do so, they were not entitled to any compensation. *MacKenzie v. Champion*, 12 S. C. R. 649.

The defendants, type founders in Edinburgh, employed plaintiff's father as their agent in Canada to be paid by a commission "on the receipts, i.e., in cash, bills, and value of old metal received." He also had a small guaranteed salary. It was understood that as soon as the father got too old to manage the business, the plaintiff was to succeed him; and in 1880 this was effected. In 1882 the plaintiff was dismissed. He wrote complaining thereof, but said the sting was taken out of it by reason of a yearly allowance to the father of \$1,250 for which he was grateful. In January, 1884, the defendants annoyed at a loss occasioned by plaintiff's brother, threatened that the father's allowance would be stopped; and the father wrote plaintiff that he could make any claim he wished. The plaintiff then made a claim on defendants, being for commission on sales, made before, but the amount thereof was received after plaintiff had left defendants' employment. On defendants notifying the plaintiff that if the claim were pressed the father's allowance would be discontinued, nothing further was done by plaintiff until after his father's death, when the claim was pressed and this action commenced. It appeared that had the claim been pressed the allowance would have been stopped; and that defendants paid the allowance under the belief that the claim would not be pressed:—Held, that the plaintiff was not entitled to recover. Per Rose, J.—The plaintiff was equitably estopped from maintaining the action. Per Cameron,

C. J.—The plaintiff by the express terms of the contract was only entitled to commission on moneys received during his employment, and not afterwards. *Palmer v. Millar*, 13 O. R. 567.—C. P. D.

## 2. On Illegal Contracts.

Liability of principals to brokers for moneys advanced for the purpose of buying and selling grain on margin. See *Rice v. Gunn*, 4 O. R. 579, p. 832.

## V. LIABILITY OF AGENT TO PRINCIPAL.

### 1. Agent Purchasing Property of Principal.

The rule of equity which prevents an agent acquiring a benefit for himself in any dealings with the estate of the agency, acted upon where an agent had been employed to sell or exchange certain lands of the principal, which, however, the agent had been unable to effect, and the property was shortly after offered for sale by auction under a power of sale in a mortgage, when the agent bid, and became the purchaser. The court (*Spingale, C.*), in a suit impeaching the purchase, declared the agent a trustee for the principal; but as the plaintiff made several unfounded charges of fraud and other misconduct, the relief asked was given, without costs. *Thompson v. Holman*, 28 Chy. 35.

The defendant had for some years acted for the plaintiff in looking after his lands, and paying the taxes; but in 1874, they had some difficulty, and from that time the plaintiff ceased to correspond with the defendant, and employed one H. to pay the taxes, and look after the property. H., without any instructions from the plaintiff, on one occasion wrote to the defendant requesting him to ascertain the amount of the taxes, and to draw on him therefor, with which request the defendant complied, but nothing further occurred to change the relative position of the parties before the sale:—Held, per Burton J. A., that under these circumstances the confidential relations which had previously existed must be held to have ceased, and that the defendant was not precluded from purchasing the plaintiff's land at a sale for taxes. Per Proudfoot, J., that what took place could not have the effect of determining the fiduciary relationship between them, and the defendant could not purchase the plaintiff's land to his prejudice. *Fleming v. McNabb*, 8 A. R. 656.

Sale to agent of land bought by him in contemplation of a sale at an advanced price to parties whom he misrepresented to the principals as having withdrawn from the position of purchasers. See *Walmsley v. Griffith*, 10 A. R. 327, p. 776.

Purchase of mortgaged premises sold under power of sale by agent of mortgagee. See *Inghalls v. McLaurin*, 11 O. R. 380, p. 1304.

See *Culverwell v. Campton*, 31 C. P. 342, p. 1690.

See also, TRUSTS AND TRUSTEES.

### 2. Investment of Money.

Held, that it is a breach of duty in a person entrusted with money to invest on real estate to

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TRUSTEES.

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invest on the security of a second mortgage, unless with the sanction of the lender, which such person must prove, and which the evidence in this case failed to establish. The value of the property herein was about \$1,000; the first mortgage being for \$325, and the second for \$400, taken to the plaintiff. The borrower was a respectable mechanic in receipt of good wages, occupying the property himself, which was situated in the place where all the parties resided and carried on business. The judge at the trial found that the defendant was not guilty of negligence so far as the value was concerned, and the court refused to interfere. Remarks as to the proper form of declaration in such a case, where the defendant was not paid by the lender but by the borrower. Upon the conflicting evidence, set out in the case, the judge at the trial found that the plaintiff had not been informed of the first mortgage, under which the property was sold, leaving only about \$60 applicable to the second mortgage. The court refused to set aside this finding, and sustained the verdict for the plaintiff. *Carter v. Hatch*, 31 C. P. 293.—C. P. D.

An agent employed to purchase lands is not authorized to purchase lands which are subject to mortgage. Where, however, the principal was made aware of the incumbrance and still agreed to accept two lots out of ten lots alleged by the agent to have been bought for himself and his principal, this was deemed a waiver of the objection to the act of the agent and to the right of the principal to demand a return of the money placed in his agent's hands. But the principal having ascertained that the two lots offered to him fell short in quantity, of which fact the agent was aware when offering them:—Held, under these circumstances, that the principal's right of action revivied, and that he was entitled to enforce payment from the agent of the principal money and interest. *Butterworth v. Shannon*, 11 A. R. 86.

#### VI. RIGHTS OF PRINCIPAL AGAINST THIRD PARTIES.

W. signed and sealed a deed of conveyance of certain land to C., who supposed him to be the owner of the land, as he professed himself to be, whereas he was really only acting as agent for M. the owner. M. now brought this action against C. for specific performance of, as he alleged, a contract on C.'s part to purchase the land. There was no note or memorandum of the alleged contract, other than the said deed, which was signed and sealed by C., and was in the ordinary short form, and acknowledged the receipt and payment of the purchase money, though the evidence shewed that only ten per cent. of it had been actually paid. It did not appear that the deed had ever been delivered:—Held, that the deed, though incomplete as a conveyance, was evidence of a contract of sale, sufficient to satisfy the Statute of Frauds:—Held, also, that though W. professed at the time that the contract to be the owner of the land, yet, as in reality he was acting as agent for M., M. could avail himself of the contract, and was entitled to judgment. *McCarthy v. Cooper*, 8 O. R. 318.—Ferguson. Affirmed, 12 A. R. 234.

In an action by the Canada Shipping Co. to recover \$3,038.43, the price of 810 tons 5 cwt. of steam coal sold by their agents Thompson, Murray & Co., through T. S. Noad, broker, as per following note: "Montreal 13th Aug., 1879. Messrs. Thompson, Murray & Co.: I have this day sold for your account to arrive to the V. Hudson Cotten Mill Co. the 810 tons 5 cwt. best South Wales black vein steam coal per bill of lading per 'Lake Ontario' at \$3.75 per ton of 2240 pounds duty paid ex ship, ship to have prompt despatch. Terms net cash on delivery or thirty days, adding interest buyer's option. Brokerage payable by you; buyer to have privilege of taking bill of lading or reweighing at sellers expense." The defendants pleaded 1. That the contract was with Thompson, Murray & Co. personally, that the plaintiffs had no action, and, 2. That the cargo contained only 755 tons, 590 lbs., the price of which was \$2,868.72, which they offered Thompson, Murray & Co., together with the price of ten tons more to avoid litigation, in all \$2,890.72, which they brought into court without their acknowledging their liability to plaintiffs, and prayed that the action be dismissed as to any further or greater sum:—Held, per Ritchie C. J., and Taschereau and Gwynne, JJ. that it was unnecessary to decide the question as to whether the action could be brought by the undisclosed principal, for by their plea of tender and payment into court the defendants had acknowledged their liability to plaintiffs, although such tender and deposit had been made "without acknowledging their liability." Fournier and Henry JJ. dissenting. Per Strong J. that the action by the respondents (undisclosed principals) was maintainable. Per Fournier and Henry JJ. that the action by respondents was not maintainable, and that the appellants were not precluded from setting up their defence by their plea of tender and payment into court. *V. Hudson Cotton Co. v. Canada Shipping Co.* 13 S. C. R. 491.

See *Stewart v. Round*, 7 A. R. 515, p. 1687; *Wainley v. Griffith*, 10 A. R. 327, p. 776.

#### VII. LIABILITY OF PRINCIPAL TO THIRD PARTIES.

##### 1. For Fraud of Agent.

On the 22nd August, 1879, the defendants' account at the Bank of Montreal, where the corporation account was kept, was overdrawn \$1,157.64. A resolution of the council was thereupon passed, authorizing the mayor to borrow from some banking institution a sum not exceeding \$2,000, to meet the current liabilities until the taxes were available, and authorizing him and the town clerk to sign the necessary documents therefor, and to affix the corporation seal. On 2nd September, a promissory note, in accordance with this resolution, was made, and was discounted at the Bank of Montreal, and the proceeds placed to the defendants' credit. On 5th September, a similar note was made and discounted at the plaintiffs' bank, where the defendants had kept an account, but which was virtually closed, though there was a small balance still remaining to their credit. The last note was in fact fraudulently procured to be made and discounted by one T., who was the defendants' clerk and treasurer, and who was in



default, to cover up his defalcations, but of this the plaintiffs knew nothing. T., as such treasurer, then, chequed out of plaintiffs' bank \$1,656 of this amount, which he deposited to the defendants' credit at the Bank of Montreal, and then paid it out on corporation cheques for authorized corporation purposes:—Held, in an action for money had and received, that the plaintiffs were entitled to recover the \$1,656, for that T., though acting fraudulently, had acted in a matter within the scope of his authority, and the defendants had received the benefit of the fraud. *Molson's Bank v. Town of Brockville*, 31 C. P. 174.—C. P. D.

In consideration that the plaintiff would act as agent for the defendant in the purchase and consignment of furs to the defendant, and assume one-third of the losses to the extent of \$3,000, all losses above that amount to be borne by the defendant, he agreed to pay plaintiff one-half the net profits of each year's transactions. The plaintiff impugned the bona fides of a settlement which he had been induced to make with the defendant, acting through an agent, and the court being satisfied that the settlement had been secured by the fraudulent misrepresentations of such agent:—Held, the plaintiff entitled to an account of the transactions and an inspection of the books of the defendant, notwithstanding the provisions of the statute 36 Vict. c. 25, s. 1 (R. S. O. 1877, c. 133, s. 3). *Rogers v. Ullmann*, 27 Chy. 137.—Proudfoot.

The plaintiff, who applied to the defendants, through one W., their agent, for a loan, requested them by his application to send the money "by cheque, addressed to W." In accordance with their custom to make their cheques payable to their agent and the borrower, to insure the receipt of the money by the latter, they sent W. a cheque, payable to the order of himself and the plaintiff. W. obtained the plaintiff's endorsement to the cheque, drew the money, and absconded. The plaintiff swore that he did not know that the payer he signed was a cheque, and there was no evidence to shew that he had dealt with W. in any other character than as the defendants' agent, through whose hands he expected to receive the money:—Held, affirming the decree of Proudfoot, V. C., restraining proceedings on the mortgage which the plaintiff had given to defendants for the loan, and directing a reconveyance, that it was W.'s duty to endorse the cheque to the plaintiff or to see that he received the money, and that the defendants, who had put it in his power to commit the fraud, must bear the loss. *Finn v. Dominion Savings and Investment Society*, 6 A. R. 20.

C., freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favour of B. & Co., for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co., and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts:—Held, (Fournier and Henry, JJ., dissenting), that the act of C. in issuing a false and

fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable. *Erb v. Great Western R. W. Co. of Canada*, 5 S. C. R. 179; 3 A. R. 446; 42 Q. B. 90; *Oliver v. Great Western R. W. Co.*, 28 C. P. 143.

The plaintiff, assignee of an insolvent estate, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits assigned to him as security, and payment of any balance. Part of the timber had been placed in the hands of K. & Co. for sale:—Held, upon the facts stated in the report of the case, affirming Ferguson, J., that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by them. *Bell v. Fraser*, 12 A. R. 1.

The fraudulent act of an agent does not bind the principal unless it is done for the benefit of the principal, or unless he knows of or assents to it, or takes an advantage of it. *Gibbons v. Wilson*, 17 O. R. 290.—Chy. D.

## 2. Other Cases.

The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, and which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refused to pay it, the porter by the purser's direction, laid hold of a valise which the plaintiff was carrying and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured. Held:—Osler, J., dissenting, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid. Per Wilson, C. J. This under 32-33 Vict., c. 20, s. 45 (Dem.), though a release to the purser, did not constitute any bar to the present action against the company. Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for nonpayment of his fare, not being an act which the defendants themselves could legally have done, the defendants were not liable for it. *Emerson v. Niagara Navigation Co.*, 2 O. R., 528.—C. P. D.

Action against a bank to recover amount paid on forged endorsements. Negligence of agent—Estoppel. See *Agricultural Savings and Loan Association v. Federal Bank*, 6 A. R. 192, p. 136.

A petition of right does not lie to recover compensation from the Crown for damages occasioned by the negligence of its servants to the property of an individual using a public work. *Regina v. McFarlane*, 7 S. C. R. 216. See also *Muskoka Mills Co. v. The Queen*, 28 Chy. 563, p. 1580; *Regina v. McLeod*, 8 S. C. R. 1, p. 1582.

Liability of a municipal corporation for the act of its servants.—"Respondent superior."

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es not lie to recover Crown for damages gnance of its servants ividual using a public *lane*, 7 S. C. R. 216. *Co. v. The Queen*, 28 a *v. McLeod*, 8 S. C.

al corporation for the Respondent superior."

See *McSorley v. Mayor, etc., of the City of St. John*, 6 S. C. R. 531.

In torts the principle of agency does not apply; each wrong door is a principal. *Ontario Industrial Loan and Investment Co. v. Lindsey*, 4 O. R., 473.—Chy. D.

Action for damages caused by ill-usage upon the occasion of initiation into a secret society—Liability of lodge for acts of members during the ceremony. See *Kniver v. Phoenix Lodge I. O. O. F.*, 7 O. R. 377, p. 279.

Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants but on the order of one G. C., between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover:—Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessities did not make the registered owner liable. *Nelson v. Wigle*, 8 O. R. 82.—Boyd.

See *Mail Printing Co. v. Berlin*, 17 O. R. 15.—p. 324.

## PRINCIPAL AND SURETY.

### I. CONTRACT OF SURETYSHIP.

#### 1. Generally, 1698.

#### 2. Bills and Notes—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

#### 3. Guarantees—See GUARANTEE AND INDemnITY.

### II. LIABILITY OF SURETY.

#### 1. For Fidelity and Honesty of Persons, 1699.

#### 2. Other Cases, 1702.

#### 3. Bail—See BAIL.

### III. DISCHARGE AND RELEASE OF SURETY.

#### 1. Laches or Neglect of Obligor, 1703.

#### 2. Alteration of Principal's Position, 1704.

#### 3. Course of Dealing, 1705.

#### 4. Time given to Principal—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

#### 5. Death of Surety, 1706.

#### 6. Other Cases, 1706.

### IV. RIGHTS OF SURETIES.

#### 1. To Assignment of Securities.

##### (a) Judgments, 1707.

##### (b) Other Securities, 1707.

#### 2. To Contribution from Co-Sureties, 1708.

#### 3. Other Cases, 1708.

### V. ACTIONS AGAINST SURETIES.

#### 1. Pleading, 1709.

#### 2. Proof by Entries—See EVIDENCE.

#### 3. Other Cases, 1709.

### VI. MISCELLANEOUS CASES, 1710.

### 1. CONTRACT OF SURETYSHIP.

#### 1. Generally.

Where a mortgagor who has covenanted for payment of the mortgage debt sells his equity of redemption subject to such mortgage he becomes surety for the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt. *Campbell v. Robinson*, 27 Chy. 634.—Spragge.

Effect of innocent misrepresentation as to state of accounts between principal and obligee before obligation entered into by surety. See *Village of Gananoque v. Studden*, 1 O. R. 1, p. 779.

Where an alteration is made in the contract of suretyship, then, unless it is without enquiry self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not go into an inquiry or permit the question to be submitted to the jury, but will hold that the surety must be the sole judge as to whether he will remain liable, notwithstanding the alteration. *Citizens' Insurance Co. v. Claxton*, 13 O. R. 382.—C. P. D.

A bond, intended to be joint and several, was drawn up, to be executed by G., who was plaintiffs' treasurer, and by L. and A. as his sureties. A. executed the bond on the 16th December, 1886, on the supposition and understanding that it should not be binding on him until executed by the others. On 27th December, to enable him to run as a councillor, A. requested the council to release him from the bond, which was agreed to, and on the 17th January, 1887, a formal resolution was passed accepting H. as surety in his place, and stating that a new bond had been executed by G., L., and H. On the same day the first bond, which had not been executed by G. or L., was then executed by them. In an action against A. on the first bond:—Held, that he was not liable thereon. *Township of Oxford v. Gair*, 15 O. R. 362.—Robertson.

In an action by the Crown against C. on a bond of suretyship for the faithful discharge by a government official of his duties as such, the defendant, under a plea of non est factum, swore that he signed the bond in blank; that he made no affidavit of justification; and that the certificate of the magistrate of the execution of the bond, as required by the statute, was irregular and unauthorized. The attesting witness to C.'s execution of the bond, and the magistrate, each swore to the correctness of his own action, and that C. must have properly executed the bond or the affidavit would not have been made or the certificate given:—Held, per Ritchie C. J., Strong, Fournier and Gwynne J.J., reversing the judgment of the court below, that the weight of evidence was in favour of the due execution of the bond by C. Per Patterson J., that C. was estopped from denying that he had executed the bond:—Held also, per Patterson J., reversing the judgment of the court below, that the execution of the bond, and not the certificate of the magistrate, was the proximate, or real cause of its acceptance by the Crown. *The Queen v. Chesley*, 16 S. C. R., 306.

See *Exchange Bank v. Springer*.—*Same Plaintiff v. Barnes*, 29 Chy. 270, p. 1709; *Lightbound v. Warnock*, 4 O. R. 187, p. 841; *Birkett v. McGuire*, 7 A. R. 53, p. 1544; *Wickens v. McMeekin*, 15 O. R. 408, p. 1701.

## II. LIABILITY OF SURETY.

### 1. For Fidelity and Honesty of Persons.

The condition of a bond given by the defendants, as sureties for a postmaster, to the postmaster-general, was that the postmaster "do not and shall not commit any theft, larceny, robbery or embezzlement of, or lose or destroy, or commit any infeasance, misfeasance, or neglect of duty from which may arise any theft larceny, robbery, or embezzlement, loss or destruction of, any money, goods, chattels, valuables, or effects, or of any letter or parcel containing the same which may come into his custody or possession, as such postmaster," etc. The postmaster opened several letters which came into his possession as such postmaster, and having taken therefrom certain cheques, forged the payees' names as endorser thereof, and got them cashed by a bank upon guaranteeing the genuineness of such endorsements. The drawers refused to recognize these cheques, but issued duplicates to the payees and paid them, so that the bank lost the money. In an action by the postmaster-general on the bond, on behalf of the bank, to recover from defendants, as such sureties, the loss so incurred:—Held, referring to sections 37 and 78 of the Post Office Act of 1875, that defendants were not liable, for that the forgery and the postmaster's guarantee, and not the larceny were the proximate causes of the loss, and the contents of the letters did not belong to the bank. Remarks as to form of the condition. *Postmaster-General v. McColl*, 31 C. P. 364.—C. P. D.

The testator by his will left money to his children, which was to be paid to them on their coming of age, and to be deposited by the executors in a savings bank in the meantime. One of the executors appropriated and set apart certain of his testator to answer the trusts of the money, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian:—Held, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet under the circumstances the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced, with costs: though as against the surety the bill was dismissed, with costs. *Galbraith v. Duncombe*, 28 Chy. 27.—Blake.

A municipal corporation passed a by-law for raising a loan to liquidate a debt to be incurred in enlarging the school-house in a public school section, and providing for the issue of debentures for that purpose, and for levying a special rate

to pay the interest thereon, and to create a sinking fund for payment of the principal; and the municipal authorities paid the moneys so raised by the said special rate to the secretary-treasurer of the school board of the said section. A., the secretary-treasurer of the school board, and B., as his surety, gave a bond of office, reciting that A. had been appointed such secretary-treasurer, and that "it was required that security should be given for the due and faithful performance of any and all the duties pertaining to such office," and conditioned to "correctly and safely keep any and all moneys and papers belonging to the said school board, and to faithfully and honestly deliver up, account for, and pay over any moneys which at any time thereafter might come into his hands and possession as such secretary-treasurer," and A. received and made default in respect of certain moneys improperly paid to him as such secretary-treasurer:—Held, that the condition must be read with reference to the recital, and its scope might be thereby restricted, and reading the two together B. was not liable for the moneys so received by A., which were outside the duties pertaining to his office, and should have been retained by the municipal corporation. B. having been informed by the school board that A. was in default, but not in respect of what moneys the default was made, as to which he made no enquiries, and having at the request of the school board given a mortgage to secure the liability which he was informed he had, by reason of such default, incurred as surety under the above bond, and having subsequently ascertained that the default was partly in respect of moneys improperly paid to A.:—Held, that B. was entitled to redeem on payment of the balance only of the moneys for which he was held liable as surety, the mortgage having been executed under a mistake. *Keith v. Fenelon Falls Union School Section*, 3 O. R. 194.—Ferguson.

The defendant M. was appointed an inspector under the General Inspection Act, 1874, 37 Vict. c. 45 (Dom.). By section 6 each inspector and deputy-inspector is required to give security by bond to the Crown for the due performance of the duties of his office, and such bond shall avail to the Crown and to all persons aggrieved by any breach of the conditions thereof. By section 7 the inspectors are to appoint the deputy-inspectors, who are to be the deputies of the inspector for all the duties of his office, and their official acts shall be held to be his acts, and he is to be responsible therefor as if done by himself. A bond was given by the inspector, and the other defendants, as sureties for the faithful discharge of the duties of the said office, and for duly accounting for all moneys and property. A similar bond was given by the deputy-inspector. The deputy-inspector made a faulty inspection, and the plaintiffs purchased, relying thereon, and were damaged:—Held, under the statute and the bond given thereunder, the inspector M.'s sureties were liable for the default of the deputy; and that the fact of the plaintiff having a remedy also on the deputy-inspector's bond was no answer to the claim against M.'s sureties:—Held, also, that the plaintiffs were "persons aggrieved" within the meaning of the statute:—Quære, whether the defendants were entitled to notice of action, but the question was not decided, as want of notice was not pleaded. Sec-

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the board of trade, or where there was no such  
board, by certain specified persons:—Held, that  
the claim in this action was not a dispute within  
this section. *Verrall v. McAulay*, 5 O. R.  
313.—C. P. D.

Held, that where an official assignee in insolvency had given a bond as such with sureties, pursuant to the insolvent Act of 1875, and amending Acts, and the creditors had duly appointed the same individual to be creditors' assignee, under section 29 of that Act, but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, and were not discharged by reason of such appointment as creditors' assignee. *Armstrong v. Forster*, 6 O. R. 129.—Proudfoot.

M. having been employed by the plaintiff as a sub-agent in the collection of money, etc., the defendants gave the plaintiff a bond to secure him against loss through M. The bond recited the appointment of M., and was conditioned that if M. should, from time to time, and at all times thereafter, account and pay to the plaintiff, etc., and at all times during such period as he should act as agent, etc., pay all sums received, etc., to the plaintiff, then the obligation to be void. M.'s appointment was made before the date of the bond, and was only till the 31st December, 1884, but the defendants were not aware when they executed the bond, nor at any time afterwards till the trial of this action, that M.'s appointment was for a limited time. M., by subsequent arrangement, continued to act as agent after the year 1884, and the only defalcations committed by him were in November and December, 1886:—Held, notwithstanding the want of knowledge on the part of the sureties, that the appointment recited in the bond must be taken to have referred to the appointment made before its date; and that the creditor and the principal could not, by an arrangement made after the liability of the sureties was created, be allowed to extend that liability beyond the period which originally formed its limit. The words found in the condition which would apply to the extended period, did not justify the position that the sureties must have contracted with a view to a subsequent extension. A letter was written by one of the sureties to the plaintiff on 17th December, 1886, in which he notified the plaintiff that from that date he withdrew from his suretyship:—Held, that this could not estop the surety from denying his liability; and even if it was to be read as shewing that the surety assented to the continuation of the employment of M., it was immaterial. *Kitson v. Julien*, 4 E. & B. 854, and *Sunderson v. Aston*, L. R. 8 Ex. 73, followed. *Wickens v. McMeekin*, 15 O. R. 408.—Street.

Liability of sureties of county registrars. See *County of Middlesex v. Smallman*, 19 O. R. 349.

See *Murray v. Gibson*, 28 Chy. 12, p. 1708; *Exchange Bank v. Springer*, 29 Chy. 270; p. 1709; *Town of Welland v. Brown*, 4 O. R. 217,

p. 72; *Township of Oxford v. Gair*, 15 O. R. 362, p. 1698.

See also Subhead III. p. 1703.

## 2. Other Cases.

The bond contained a stipulation that in the event of any sum being found due by M. to the bank, interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty:—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank v. Springer*; *Exchange Bank v. Barnes*, 13 A. R. 390.

The plaintiffs were sureties to a bank for a debt due by a company and for which the bank held other notes as collaterals. Under a special agreement made in a prior suit the receiver in such suit deposited the proceeds of such collaterals in such bank subject to the order of the court. The plaintiffs claimed to apply the proceeds so deposited to reduce the debt of the company, but the bank refused to apply them without an order of court:—Held, that the bank was constituted a stake-holder of such moneys and could not so apply them unless with the sanction of the Court. The debt to the bank carried nine per cent., and in taking the accounts the plaintiffs claimed a refund of the interest beyond the lawful rate of seven per cent. on the ground that the agreement to pay nine per cent. was ultra vires:—Held, (1) that as there was nothing in the pleadings or judgment impeaching the agreement, the master had no jurisdiction to adjudicate upon such claims; 2, that overcharges beyond the lawful rate of interest if paid cannot be recovered back or applied in reduction of the debt claimed to be due. *Hutton v. Federal Bank*, 9 P. R. 568—Hodgins, *Master-in-Ordinary*.

One of the defendants, who was the husband of another of the defendants, mortgaged certain lands to the plaintiff, a member of a mercantile firm, to secure an existing indebtedness to the firm, and future advances. Subsequently the husband, by the advice of the plaintiff, conveyed his equity of redemption in the lands to his wife, subject to the mortgage. At the time of this conveyance, the debt due the plaintiffs' firm was represented by notes under discount which, as they fell due, were retired by the firm, the husband making part payments thereon, procuring fresh goods from the firm, giving renewals for the balances and getting delivery up of the original notes, the wife not being consulted as to these dealings, and rights against her not being reserved. The husband subsequently made an assignment under R. S. O. (1877) c. 124. In an action for that purpose the conveyance to the wife was declared fraudulent and void as against creditors, but not as against the creditors' assignee, it having been made before the Assignment and Preferences' Act: *Ferguson v. Kenny*, 16 A. R. 276. In this action on the plaintiff's mortgage, it was held in appeal that the plaintiff was estopped from disputing the validity of the conveyance to the wife, and that

the mortgaged lands were not chargeable with advances made after notice of such conveyance, and the action was referred back for an Official Referee's report, *Blackley v. Kenny*, 16 A. R. 522:—Held, that the course of dealing of plaintiff's firm did not operate as a payment of the original notes or debt: *Dominion Bank v. Oliver*, 17 O. R. 402, followed. But:—Held, that the wife, at the time of the conveyance to her, became a surety in respect of the lands, and that the renewal of the notes by the plaintiff's firm discharged the lands from liability:—Held, also, following the judgment in *Blackley v. Kenny*, supra, that the mortgage was not a security for advances made after the conveyance to the wife, nor could the plaintiffs claim as simple contract creditors against the lands, nor could the creditors' assignee, who was a defendant in this action, claim on behalf of the other creditors, whether execution creditors or otherwise, they not being parties to this action. The Court of Appeal allowed an appeal with costs upon the ground not taken in the court below, that as there was no evidence whatever of the plaintiff's knowledge of the covenant under which the alleged suretyship arose, and as he had no reason to think that the relation of principal and surety existed, his dealing with the debtor did not work a release, assuming that that relationship did not exist. Per Hagarty, C. J. O., and Osler, J.A., the defendant, as a volunteer, could not set up the rights of a surety under the covenant of the mortgagor, the grantor of the equity of redemption against the plaintiff, the creditor of the mortgagor. *Northwood v. Keating*, 18 Chy. 643, referred to. *Blackley v. Kenney*, 19 O. R. 169; 18 A. R. 135.

### III. DISCHARGE AND RELEASE OF SURETY.

#### 1. Laches or Neglect of Obligees.

In an action against the sureties under a bond guaranteeing the honesty of one M. as cashier of the plaintiffs' bank, charging misappropriation of funds by M., the defendants set up, as a bar to recovery, neglect of the directors of the bank in not examining the books, so as to detect any malversation on M.'s part:—Held, that to sustain this defence the sureties must shew connivance between the plaintiffs and M., or a very strong case of negligence, which they had not done in the present case. The chief reliance of the surety, in such a case, ought to be, in the honesty of the man whose honesty he has guaranteed. *Exchange Bank of Canada v. Springer*, *Exchange Bank of Canada v. Barnes*, 7 O. R. 309.—Ferguson. 13 A. R. 390; 14 S. C. R. 716.

K. and Co. were customers of the plaintiffs and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for payment of all bills, notes and paper upon which K. & Co. were then liable, together with all substitutions and alterations thereof, and all indebtedness in respect thereof, the same being a continuing security. The bank did business with K. & Co. in two different ways, one by discounting K. & Co.'s customers' notes, in which case their rule was to notify the customers that they held

their notes, and another by discounting K. & Co.'s own notes and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers. At the time the mortgage was given all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitutions nearly all the notes at the date of the mortgage had been replaced by K. & Co., in renewals and substitutions by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage, the mortgagors claimed that they, as sureties, were discharged by the bank's action:—Held, that the bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability in so far as they were prejudiced by the conduct of the bank. *Prima facie* the bank were liable to the extent of the face value of the securities surrendered, but they were at liberty to reduce such amount by evidence as they might be advised. *Merchants' Bank of Canada v. McKay*, 12 O. R. 498—Chy. D.; 15 S. C. R. 672.

Retention of municipal treasurer in office after knowledge of default.—Release of surety from liability for subsequent defalcations. *Township of Adjala v. McElroy*, 9 O. R. 580, p. 1333. See also *Town of Meaford v. Lang*, 20 O. R. 42.

#### 2. Alteration of Principal's Position.

The annual reappointment of a municipal treasurer:—Held not to discharge his sureties *Township of Adjala v. McElroy*, 9 O. R. 580, p. 1333.

A bond made by defendants as sureties, and B. as principal, to the plaintiffs, to secure the faithful and diligent performance of B.'s duties, including the payment over of moneys, recited that B. had been appointed agent for the plaintiffs for the province of Ontario, and as such was to discharge certain duties, and to receive certain moneys, as defined in the instrument appointing him, and as to which the parties thereby declared they had due and sufficient communication. The condition of the bond was for the performance of such duties, and the payment over of such moneys. The bond also contained the following clause:—"The said sureties, in consideration of the premises, hereby agree to \* \* \* renounce to (sic) the benefits of division, discussion and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party." The instrument of appointment provided that B. should be general agent for the province, should have control over all local agents, except some six, including those of Hamilton and Galt, and his compensation should be a commission of thirty-



discounting K. & their customers' case they always amount exceeding the customers. Given all the notes proved to be genuine, customers' paper very of K. & Co.'s notes. years later. At the discovered that by nearly all the notes had been replaced and substitutions by it of the discounts of the collaterals very of the customers' bank to foreclose the claimed that they, as the bank's action:— with genuine and, and through its y worked prejudice es; that of two inno- at suffer on account ird, the one most to ng to be committed he defendants were so far as they were of the bank. Prima to the extent of the rrendered, but they amount by evidence *Merchants' Bank of* t. 498—Chy. D.; 15

treasurer in office after ease of surety from elations. *Township* D. R. 580, p. 1333. *Lang*, 20 O. R. 42.

#### Principal's Position.

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five per cent. on all business obtained by himself or the said agents under his control he to pay the agents thereout, and on re- newals thirty per cent.; and also to have a salary of \$75 a month, which was to include travelling expenses. The plaintiffs afterwards added Hamilton and Galt to his agencies. Subsequently B.'s business was confined to Toronto, and he agreed to relinquish his commission on the outside agencies; and it was intimated to him that at the close of the year his salary would have to be rearranged:—Held, that the taking away of the outside agencies was such a change in B.'s position as could not be said to be, without enquiry, evidently unsubstantial and not prejudicial to the sureties, and would of itself discharge them; but as to Galt and Hamilton it could not be said, on the evidence, to have that effect:—Held, also, that the effect of the renun- ciation clause was to place the principal and sureties in the position of joint contractors: that the agreement confining B.'s business to Toronto amounted to a new contract; and that the sureties would only be liable as principals for default up to the date thereof and not thereafter. *Citizens' Ins. Co. v. Cluzton*, 13 O. R. 382.—C. P. D.

Temporary employment of municipal treasurer who was also clerk of the municipality as collector. Liability of surety for the performance of his office as treasurer, for moneys received by him in either capacity. See *Village of Weston v. Conron*, 15 O. R. 595, p. 1333.

The sureties of an absconding bank cashier are not relieved from liability by showing that the bank employed their principal in transacting what was not properly banking business, in the course of which he appropriated the bank funds to his own use, the claim against sureties being for the moneys so appropriated by the principal, and not for losses occasioned by such illegal transactions. *Springer v. Exchange Bank of Canada—Barnes v. Exchange Bank of Canada*, 14 S. C. R. 716; 7 O. R. 309; 13 A. R. 390.

See *Murray v. Gibson*, 28 Chy. 12, p. 1708.

#### 3. Course of Dealing.

Where sureties for a debt gave to the creditor a second mortgage on land as an additional security, and foreclosure proceedings were taken by the first mortgagee:—Held, that the creditor, on being notified thereof, should either make himself a party to the suit and prove his claim, or notify the sureties to enable them to prove it, if they so desired; but:—Held that the evidence, in this case shewed that the sureties had notice, at all events some three months before the day of redemption, which was sufficient. Held, also, that the fact of two co-debtors changing their position so as to make one of them as between themselves a surety, would not affect the creditor without his consent. *Jones v. Dunbar*, 32 C. P. 136.—C. P. D.

After the defendants had become sureties for a Division Court clerk, a special arrangement was made between the plaintiffs and the clerk, under which the latter was to receive no costs but disbursements only in all suits entered with him by the plaintiffs in which nothing was reas-

lized, and he on his part guaranteed that the court had jurisdiction. This was subsequently varied by giving to the clerk fifty cents in addition to the disbursements in such suits. Periodical statements were made from time to time according to the agreement, and a cheque given for the balance thus shewn. It was afterwards discovered that the statements were incorrect, and that moneys collected by the clerk had not been paid over:—Held, that the special arrangement made with the clerk discharged the sureties:—Held, also, that the periodical statements were not conclusive as against the plaintiffs. *Victoria Mutual Fire Ins. Co. v. Davidson*, 3 O. R. 378.—Burton.

See *Barber v. Morton*, 7 A. R. 114, p. 170; *Molson's Bank v. Turley*, 8 O. R. 293, p. 780; *Township of Adjida, v. McElroy*, 9 O. R. 580, p. 1333; *Boulton v. Blake*, 12 O. R. 532, p. 1146; *Merchants' Bank v. McKay*, 12 O. R. 498; 15 S. C. R. 672, p. 1704.

#### 5. Death of Surety.

Where the engagement of a surety is a contract and not a bare authority, it is not usually revoked by his death and his estate remains liable to the same extent, as he would have been if he had lived. *Exchange Bank of Canada v. Springer*; *Exchange Bank of Canada v. Barnes*, 7 O. R. 309; 13 A. R. 390.

#### 6. Other Cases.

Semble, that one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; and the sureties to the bond are discharged by payment to any one who recovers judgment against them. *Armstrong v. Forster*, 6 O. R. 129.—Proudfoot.

The C. company and D. by separate independent contracts guaranteed to the plaintiffs the good conduct in office of B. their city chamberlain, who afterwards was guilty of misconduct within the guarantees. The guarantee of the C. company contained a proviso that as against every person then being or thereafter becoming security or surety for the said B. as aforesaid, the C. company should have and possess the right of ratable contribution and all other the rights and remedies, both legal and equitable of co-sureties. The scope of D.'s guarantee included, and was more extensive than that of the guarantee of the C. company. The plaintiffs now sued the C. company on their guarantee, who, as a defence, set up that the plaintiffs had discharged D. from liability under his policy, and that this also discharged them:—Held, that even if the plaintiffs had so discharged D., this operated only to release the C. company to the extent to which they would have had a right of contribution from D., and that they would have been discharged to this extent as a matter of equity, independently of their contract. The C. company and D. could not be considered in any sense joint contractors or joint sureties. *Ward v. The National Bank of New Zealand*,

8 App. Cas. 755 followed. *City of London v. Citizens' Insurance Co.*, 13 O. R. 713.—Ferguson.

The defendants executed a bond as sureties for one K., which recited his appointment as agent for the plaintiffs. The bond was sent, executed, to the head office of the plaintiffs, but no appointment was, in fact, made by them for a year and a-half afterwards, when K. was notified of his appointment, but of this the defendants were not informed. About three months after the execution of the bond, the defendants, or one of them, wrote to plaintiff's head office repudiating the suretyship, but received no reply:—Held, that whether the plaintiffs were notified by one or both defendants, the latter were discharged. Per Rose, J. No appointment having been made in fact when the bond was executed, the defendants could not be held liable for defaults occurring months afterwards, for their contract was in respect of a present, not a future engagement. *North British Mercantile Ins. Co. v. Kean*, 16 O. R. 117.—C. P. D.

#### IV. RIGHTS OF SURETIES.

##### 1. To Assignment of Securities.

###### (a) Judgments.

Where one brought action against a maker of a note and an endorser thereon, and recovered judgment, with costs, which the endorser paid and took an assignment of the judgment:—Held, that the latter was entitled under R. S. O. (1877) c. 116, s. 3, to recover from the principal debtor the whole of the judgment, including the costs. *Harper v. Culbert*, 5 O. R. 152.—Ferguson.

Judgment for a debt was obtained by the plaintiffs against the defendants, who stood towards one another in the relation of principal and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judgment, and then proceeded to enforce it against his principal:—Held, that the costs as well as the debt were recoverable by the surety, as against his principal. *Victoria Mutual v. Frech*, 10 P. R. 45.—Dalton, Master.

###### (b) Other Securities.

The plaintiff sold twenty-four shares in a vessel to B. & Co., who, not being able to pay cash, procured O. to make a note in the plaintiff's favour, which was endorsed by him and B. In order to secure himself, O. took a bill of sale to himself of the shares. The plaintiff discounted the note at the bank, and after several renewals was obliged to pay it. In an interpleader issue between the plaintiff and the execution creditor of O., to try the right to the shares:—Held, Armour, J., dissenting, that the effect of this arrangement, which is more fully stated in the report of the case, was properly held at the trial to be, to make B. the principal debtor to the bank for the amount of the note, and the plaintiff and O. his co-sureties therefor; and upon payment thereof, that the plaintiff was equitably entitled to the twenty-four shares held by O., his co-surety, as security against his liability on the note:—Quere, whether interpleader is a

proper remedy in such a case, and whether the shares could be seized and sold by the sheriff. Per Hagarty, C. J. Some proceeding to which O. & B. were parties, in which the title to the shares could be cleared up, would be a better remedy. Per Armour, J. The question raised could not be properly adjudicated upon without O. & B. being parties. The plaintiff and O. were not sureties, but the plaintiff was the creditor, B. the principal debtor, and O. the surety; and on default the plaintiff was entitled to compel O. to realize the security which he held, and apply it towards payment of the debt. *Terence v. Burkett*, 1 O. R. 80.—Q. B. D.

##### 2. To Contribution from Co-Sureties.

A loan and savings society appointed G. their treasurer, and the plaintiffs and defendant by two separate bonds became sureties for the due discharge of the duties of such officer. By several Acts of the legislature the society was incorporated, and its powers materially increased, and G. appointed its manager, the duties of which it was shown were similar to those of treasurer, the name of "manager" being given simply as one of honour, and did not involve any additional duties. G. made default in his office, and a suit was instituted by the society against all the sureties which was compromised by the plaintiffs paying about one-half of the sum claimed by the society:—Held, that the defendant was bound to contribute his share of the money so paid, and that the change in the name of the officer afforded no defence to the claim of the plaintiffs:—Held, also, that in such a case the entries of G. in the books of the society were not evidence against the sureties during the lifetime of G. *Murray v. Gibson*, 28 Chy. 12.—Spragge.

See *Small v. Riddle*, 31 C. P. 373, p. 1541; *City of London v. Citizens' Ins. Co.*, 13 O. R. 713, p. 1707.

##### 3. Other Cases.

P. lent N. an accommodation note which N. deposited with R. as collateral security for a mortgage debt. N. & B. afterwards went into partnership, and a new mortgage on partnership property was given to R. for N.'s debt, the note being still left with R. The partnership being dissolved, B. agreed to pay all debts of the firm including the mortgage and on settling the accounts between himself and the mortgagees B. was given credit for the amount of the note which P. had paid to the mortgagees, P. sought to recover from B. the amount so paid:—Held, reversing the judgment of the Court of Appeal (15 A. R. 244), which reversed the judgment of the Q. B. D. (16 O. R. 699) Ritchie C. J., and Fournier J. dissenting, that N. having authority to deal with the note as he pleased and having given it as a collateral security for the joint debt of himself and B., on such security having been realized by the mortgagees and the amount credited on the joint debt, P. the surety could recover it from either of the debtors:—Semble assuming P. not to have been liable to pay the note to the mortgagees and that it was a voluntary payment it having been credited on the mortgage

, and whether the sold by the sheriff, proceeding to which the title to the would be a better The question raised upon without the plaintiff and O. plaintiff was the debtor, and O. the plaintiff was entitled security which he payment of the debt. 80.—Q. B. D.

debt and B. having adopted the payment on the settlement of the accounts between him and the mortgagee he was liable to repay it. *Pardon v. Nichol* 15 S. C. R. 610.

In an action against a municipal treasurer a reference was directed to ascertain what was due from him, and an order was made permitting the sureties to appear upon the reference and contest the claims of the municipality. The order was varied by making provision for awarding costs as between the municipality and the sureties. *County of Essex v. Wright, and County of Essex v. Duff*, 13 P. R. 474—Galt—C. P. D.

## V. ACTIONS AGAINST SURETIES.

### 1. Pleading.

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appointed G. their and defendant by sureties for the due officer. By several society was incorporated increased, and G. of which it was e of treasurer, the even simply as one of ve any additional his office, and a suit ights against all the ised by the plain- of the sum claimed the defendant was re of the money so in the name of the to the claim of the in such a case the of the society were ties during the life- son, 28 Chy. 12—

C. P. 373, p. 1541;  
es. Co., 13 O. R. 713,

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ation note which N. teral security for a afterwards went into tgage on partnership or N.'s debt, the note partnership being all debts of the firm on settling the ac- and the mortgagees amount of the note mortgagees, P. sought unt so paid :—Held, the Court of Appeal sed the judgment of Ritchie C. J., and t N. having authority pleased and having erty for the joint debt security having been and the amount credit- surety could recover :—Semble assuming to pay the note to the as a voluntary pay- ed on the mortgage

One M., and the defendants as his sureties, executed a bond conditioned for the good behaviour of M., a clerk of the plaintiffs' at Montreal. The bond was executed at Hamilton by the defendants who were resident there. M. made default at Montreal and absconded. Proceedings were taken against the sureties, without joining M.:—Held (affirming the order of Proudfoot, V. C.), that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him. Per Spragge, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, coeval with the execution of the bond, which became a right of suit on the default of M.; and there was also an implied contract on the part of M., upon execution of the bond, to repay to his sureties any money that they might have to pay by reason of his default. *Exchange Bank v. Springer—Same Plaintiffs v. Barnes*, 20 Chy. 270.—Chy. D.

An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiff by H. & McT. on their banking account with the plaintiffs. Counter-claim by the defendant against the plaintiff and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiff ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount, and indemnify the defendant. As the counter-claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor, and surety, it was held bad, and ordered to be struck out. *Federal Bank v. Harrison*, 10 P. R. 271.—Dalton, Master—Rose.—Chy. D.

See *Village of Gananoque v. Studden*, 1 O. R. 1, p. 779; *Waterloo Mutual Ins. Co. v. Robinson*, 4 O. R. 295, p. 782.

### 3. Other Cases.

One of the defendants herein set up as a defence that he was surety for part of the claim and principal debtor as to the residue, and as to the latter admitted his liability, but claimed that he could only be called upon to pay it on the execution of a proper release by the plaintiff of all liability against him in respect of the said

claim :—Held, clearly no defence. *Jones v. Dunbar*, 32 C. P. 136.—C. P. D.

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages, and to sue at law in different actions the same parties on notes held by the plaintiffs, to which the mortgages were collateral :—Held, that only one suit in equity was necessary as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits; and the court would not be deterred from granting relief by the circumstance of a decree being complicated. *Merchants' Bank v. Sparkes*, 28 Chy. 108.—Spragge.

Defence of Fraud. See *Waterloo Mutual Insurance Co. v. Robinson* 4 O. R. 395, p. 782; *Merchants' Bank of Canada v. Moffatt*, 5 O. R. 2; 11 S. C. R. 46, p. 774; *Toronto Breeding and Mating Co. v. Hery*, 13 O. R. 64, p. 781.

Defence that when bond was executed it had no seals. See *Marshall v. Municipality of Shelburne*, 14 S. C. R. 737, p. 675.

See *Chamberlain v. Sorais*, 28 Chy. 404, p. 1303; *Cochrane v. Boucher*, 3 O. R. 462, p. 197.

## VI. MISCELLANEOUS CASES.

When a claim against an estate of a deceased person is one arising out of a contract of suretyship, the court will not, unless by consent of all parties, make an administration decree except on a bill filed. *Re Colton—Fisher v. Colton*, 8 P. R. 542.—Proudfoot.

The principal and surety being here the plaintiff and defendant respectively, *Re Colton*, 8 P. R. 542, which decides that in a case of principal and surety a summary application to administer under G. O. Chy. 638 (Con. Rule 972) is improper, was held not to apply. *Re Allan—Porock v. Allan*, 9 P. R. 277.—Chy. D.

Soon after B.'s defaultations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs, to realize and apply the money therefrom towards satisfying B.'s defaultations, but without indicating to what part of such defaultations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants were not liable, since by a condition of their policy they were not liable except for losses occurring within a year before notice of claim made to them :—Held, that the case was similar to payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it, and the defendants had no right to complain of the appropriation made in this case. *City of London v. Citizens' Ins. Co.*, 13 O. R. 713.—Ferguson.

Held, also, that the defendants should pay interest on the amount due from them, from three months after the proofs of loss were delivered. *Ib.*

**PRINTING.**POLICY OF INSURANCE—*See* INSURANCE.Parliamentary contract. *See Regina v. MacLean*, 8 S. C. R. 210, p. 1580.**PRIORITY.**

- I. OF EXECUTIONS—*See* EXECUTION.
- II. OF MORTGAGES—*See* MORTGAGE.
- III. EFFECT OF REGISTRATION—*See* REGISTRY LAWS.

**PRISON.***See Hamilton v. Massie*, 18 O. R. 581, p. 215.**PRISONER.**

- I. CHARGING IN EXECUTION, 1711.
- II. DISCHARGE OF—*See* HABEAS CORPUS.
- III. EXTRADITION OF—*See* EXTRADITION.

**I. CHARGING IN EXECUTION.**

The defendant was arrested under a ca. sa. and afterwards admitted to bail. The trial was in the vacation before Michaelmas term, and the render in the vacation after that term. The plaintiff having omitted to charge the defendant in execution during Hilary term:—Held, on an application for a supersedeas, that the render in Michaelmas vacation related back to the preceding term, which should count as one of the two terms within which the plaintiff must charge the defendant in execution, under Reg. Gen. H. T. 26 Geo. III. The defendant was therefore discharged. *Golding v. Mackie*, 8 P. R. 237.—Osler.

Judgment was signed against defendant in Michaelmas term, and he was rendered in discharge of his bail in the vacation following:—Held, on application for a supersedeas, that the render related back so as to include Michaelmas as one of the two terms within which the plaintiff must charge the defendant in execution; and that not having been charged in execution until Easter term he was entitled to his discharge. *Wheatley v. Sharpe*, 8 P. R. 307.—Osler.

Where a person is once supersedeable for want of being charged in execution, he always continues so, even though he is afterwards charged in execution, before the application for a supersedeas. *Ib.*

An application for a supersedeas was entertained, although a similar application in the same case had already been dismissed. *Ib.*

**PRIVATE PROSECUTOR.***See* CRIMINAL LAW—PARLIAMENTARY ELECTIONS.**PRIVILEGED COMMUNICATIONS.***See* DEFAMATION—EVIDENCE.**PRIVY COUNCIL.****I. APPEAL TO.**

1. *Bond and Security*, 1712.
2. *When Allowed*, 1712.

**II. RIGHT TO ORDER NEW TRIAL, 1713.****III. ENFORCING JUDGMENT OF PRIVY COUNCIL, 1713.****I. APPEAL TO.****1. Bond and Security.**

On a motion to disallow a bond filed by the defendants (appellants) pending an appeal to the Privy Council, which was in the form given in O. J. Act, s. 38, with some further recitals, it was objected that the condition of the obligation ought to read "do and shall effectually prosecute such appeal, and pay," etc., instead of "or pay," as given in the form; and also that the condition should be to pay "what had been found due by the court appealed from," instead of "such costs and damages as shall be awarded;"—Held, that "or" was the correct word to use, and that "effectually prosecute" meant "successfully prosecute," but the bond was disallowed on the second objection, it being held that the proper condition must be drawn based upon the language in R. S. O. (1877), c. 38, s. 27, sub-s. 4. *International Bridge Co. v. Canada Southern R. W. Co.*, 9 P. R. 250.—Burton.

An action against the sureties upon a bond given by the defendants in the action of *McLaren v. Canada Central R. W. Co.*, upon the appeal of the defendants to the Court of Appeal in that cause. The defendants in *McLaren v. Canada Central*, appealed from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren v. Stephens*, 10 P. R. 88.—Dalton, *Master*.

*See Citizens' Ins. Co. v. Parsons*, 32 C. P. 492, p. 412.

**2. When Allowed.**

40 Vict. c. 41, s. 28 (Dom.), providing that the judgment of the Court of Appeal in matters of insolvency should be final is within the competence of the Dominion Parliament and does not infringe the exclusive powers given to the provincial legislatures by section 92 of the Imperial Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, quere, what powers may be possessed by

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the Parliament of Canada so to do. *Cuvillier v. Aylwin* (2 Knapp's P. C. C. 72) reviewed. *Cush- ing v. Dupuy*, 5 App. Cas. 409.

Their lordships will not advise Her Majesty to admit an appeal from the Supreme Court of the Dominion save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character. *Prince v. Gagnon*, 8 App. Cas. 103.

Petition for special leave to appeal refused the case depending on a disputed matter of fact whether there had been a gift or sale of certain goods of the value of £1,000. *Ib.*

Petition for special leave to appeal in a case involving only an issue of fact refused. *Canada Central R. W. Co. v. Murray*, 8 App. Cas. 574.

Such petition must state fully but succinctly the grounds upon which it is based; the record not being before their lordships until forwarded by the proper authorities. *Ib.*

The rule of the Judicial Committee is not to grant leave to appeal in criminal cases, except when some clear departure from the requirements of justice is alleged to have taken place. *Riel v. The Queen*, 10 App. Cas. 675.

See *Valin v. Langlois*, 5 App. Cas. 115, p. 306;

## II. RIGHT TO ORDER NEW TRIAL.

Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence, or failed to understand or appreciate it. *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644.

## III. ENFORCING JUDGMENT OF PRIVY COUNCIL.

Where the judgment of the Supreme Court of Canada has been reversed by the Privy Council the proper manner of enforcing the judgment of the Privy Council is to obtain an order making it a rule of the Supreme Court of Canada. *Levin v. Howe*, 14 S. C. R. 722.

Where such judgment of the Privy Council was made a rule of court the court ordered the repayment by one of the parties of costs reversed pursuant to the judgment so reversed. *Ib.*

## PROBATE.

See EXECUTORS AND ADMINISTRATORS.

## PRODUCTION OF DOCUMENTS.

See EVIDENCE.

## PROHIBITION.

TO JUDGES OF DIVISION COURTS—See DIVISION COURTS.

Held, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint, as by R. S. O. (1877) c. 74, s. 4, the practice of appealing in such a case is assimilated to that under Dom. Stat. 33 Vict. c. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.—Osler. See 51 Vict. c. 45 s. 7 (Dom.).

The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor, or by a partner of the attorney. Sensible, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice. *In re Sato v. Hubbard*, 8 P. R. 445.—Osler.

The municipal corporation of the county of H. in the province of Quebec, made an assessment roll according to law, in 1872. In 1875 a triennial assessment roll was made, and the property subject to assessment was assessed at \$1,745,588.58. In 1876, without declaring that it was an amendment of the roll of 1875, the corporation made another assessment in which the property was assessed at \$3,138,550. Among the properties that contributed towards this augmentation were those of appellants who, by their petition, or requête libellée, addressed to the Superior Court of Quebec, alleged that the secretary-treasurer of the county of H. was about selling their real estate for taxes under the provisions of the municipal code for the province of Quebec, 34 Vict. c. 68, s. 998 et seq., and prayed to have the assessment roll of 1876, in virtue of which the officer of the municipality was proceeding to sell, declared invalid and null and void, and that a writ of prohibition should issue to prevent the respondents from proceeding to sell. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits, held the roll of 1876 valid as an amendment of the roll of 1875. The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially a new roll, and therefore null and void:—Held, per Henry, Taschereau and Gwynne, JJ., affirming the judgment of the Court of Queen's Bench, that the roll of 1876 not being a triennial assessment roll, or an amendment of such a roll, was illegal and null, and that respondents were entitled to an order from the Superior Court as prayed for to restrain the municipal corporation from selling their property, and the writ which issued, whether correctly styled "writ of prohibition" or not, was properly issued, and should be maintained. Per Ritchie, C.J., Strong and Fournier, JJ., that a writ of prohibition issued under art. 1031, as was the writ issued in this case, will only lie to an inferior tribunal, and not to a municipal officer. The court being equally divided, the judgment appealed from was confirmed, but without costs. *Côté v. Morgan*, 7 S. C. R. 1.



To restrain partition proceedings. See *Murray v. Bolton*, 5 O. R. 164, p. 1529.

To Minister of Agriculture to restrain enquiry under the Patent Act, 1872. See *In re Bell Telephone Co. and the Telephone Manufacturing Co. and the Minister of Agriculture*, 7 O. R. 605, p. 1557.

Held, reversing the judgment of Prondfoot, J., (9 O. R. 274,) that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the county judge to determine upon C.'s application to him, under R. S. O. (1877) c. 111, s. 84, to amend the plan, and that his decision was not examinable in prohibition. *In re Chisholm and Town of Oakville*, 12 A. R. 225.

A judge of a County Court, acting under the authority of 48 Vict. c. 26, s. 6 (Ont.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the judge made an order for the issue of a writ of attachment against the first assignee for contempt:—Held, that the judge, in acting under the statute, was not exercising the power of the County Court, but an independent statutory jurisdiction as persona designata, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Paquette*, 11 P. R. 463.—Wilson.

The inspector of licenses for the revenue district of Montreal charged R., a drayman in the employ of J. H. R. M. & Bros., duly licensed brewers under the Dominion statute 43 Vict. c. 19, before the court of special sessions of the peace at Montreal, with having sold beer outside the business premises of J. H. R. M. & Bros., but within the said revenue district in contravention of the Quebec License Act, 1878, and its amendments, and asked a condemnation of \$95 and costs against R. for said offence. Thereupon J. H. R. M. & Bros. and R., claiming inter alia that being licensed brewers under the Dominion statute, they had a right of selling beer by and through their employees and draymen without a provincial license, and that 41 Vict. c. 3 (Que.) and its amendments were ultra vires, and if constitutional did not authorize his complaint against R., caused a writ of prohibition to be issued out of the Superior Court enjoining the court for special sessions of the peace from further proceedings with the complaint against R.:—Held, per Ritchie, C.J., and Strong, Fournier and Henry, JJ., that the Quebec License Act and its amendments were intra vires, and that the court of special sessions of the peace of Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the questions of fact and of law involved, a writ of prohibition did not lie. Per Taschereau and Gwynne, JJ., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition. Per Gwynne, J., the Quebec License Act of 1878 imposes no obligation upon brewers to take out a provincial license to enable them to sell their beer, and therefore the court of special sessions of the peace had no jurisdiction and prohibition should issue absolutely. *Molson v. Lambe*, 15 S. C. R. 263.

By R. S. O. (1877) c. 52, s. 2, a successful party on an application for a writ of prohibition is entitled to and should be awarded costs unless the court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof. Under the circumstances of this case reported 12 P. R. 450, the defendant was allowed costs of a successful motion for prohibition to a Division Court. *Re McLeod v. Emigh*, (2) 12 P. R. 503.—C. P. D.

Where the County Court judge is making an investigation pursuant to the resolution of a council under R. S. O. (1887), c. 184, s. 477, he is acting as persona designata and not in a judicial capacity, and is not subject to control by a writ of prohibition. That writ is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual. *Re Squier*, 46 Q. B. 474, considered. Decision of Robertson, J., 16 O. R. 275, reversed. *Re Godson and the City of Toronto*, 16 A. R. 452.

A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess. *Re Chapman and the City of London, and Re Chapman and the Water Commissioners of the City of London*, 19 O. R. 33.—Robertson.

Prohibition will not lie to a Division Court merely because the judge has erred in his construction of a statute, where he does not by this error in construction give himself jurisdiction he does not in law possess. *In re Long Point Co. v. Anderson*, 18 A. R. 401; see *S. C.*, 19 O. R. 487, reversed, 18 A. R. 401.

See *In re Wilson v. McGuire*, 2 O. R. 118, p. 305; *Re O'Brien*, 3 O. R. 326, p. 709; *Nash v. Corkindale*, 4 O. R. 317, p. 399; *Regina v. Lee*, 15 O. R. 353, p. 1032.

## PROMISSORY NOTES.

See BANKS—BILLS OF EXCHANGE AND PROMISSORY NOTES.

## PROTEST.

OF BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

By master of vessel. See *Robertson v. Pugh*, 15 S. C. R. 706, p. 992.

## PROVIDENT SOCIETY.

See BENEVOLENT SOCIETIES.

## PROVINCIAL LAND SURVEYOR.

See SURVEY.

s. 2, a successful writ of prohibition awarded costs unless exercise of a wise discretion for depriving such party should not be there appear impropriety of the litigation, or thereof. Under the reported 12 P. R. 450, costs of a successful Division Court. *Re* R. 503.—C. P. D.

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## PUBLIC HEALTH.

See MUNICIPAL CORPORATIONS.

A medical health officer is not an "employee" within the meaning of R. S. O. (1877), c. 47, s. 125. See *Re Macfie v. Hutchinson*,—City of London *Garnishers*, 12 P. R. 167—Rose.—Q. B. D., p. 543.

Section 49 of the Public Health Act, R. S. O. (1887) c. 205, provides that "The treasurer of the municipality shall forthwith upon demand payout of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act." A physician recovered judgment in a Division Court against a township local board of health, sued as a corporation, for services performed in a smallpox epidemic. It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the board he had brought an action against the municipal corporation for his services, in which he failed. Upon motion by the physician for a mandamus under section 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered:—Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the Division Court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no other remedy, the applicant was entitled to the mandamus. *Re Derby and the Local Board of Health of South Plantagenet*, 19 O. R. 51.—Q. B. D.

By the sixth clause of a city by-law passed under the "Public Health Act," P. S. O. (1887) c. 205, it was provided that be' re proceeding to construct, reconstruct, or alter any portion of the drainage, ventilation, or water system of a dwelling-house, etc., "the owner or his agent constructing the same" should file in the engineer's office an application for a permit therefor, which should be accompanied with a specification or abstract thereof, etc.; and by the eleventh clause, that after the approval of such plan or specification no alteration or deviation therefrom would be allowed, except on the application of the "owner or of the agent of the owner" to the city engineer. By section 22 of the "Public Health Act," owner is defined as meaning the person for the time being, receiving the rents of the lands on his own account, or as an agent or trustee of any such person who would so receive the same if such lands and premises were

let:—Held, that the agent intended by the Act and coming within the terms of the by-law, meant a person acting for the owner as trustee, or in some such capacity, etc., and did not include a plumber employed by the owner to reconstruct the plumbing in his dwelling-house. *Regina v. Watson*, 19 O. R. 616.—C. P. D.

See *Regina v. Rowlin*, 19 O. R. 199, p. 1112.

## PUBLIC MORALS AND CONVENIENCE.

I. HOUSES OF ILL-FAME, 1718.

II. VAGRANTS, 1719.

III. SEDUCTION, 1721.

IV. GAMING—See GAMING.

V. BY-LAWS RELATING TO. See MUNICIPAL CORPORATIONS.

### I. HOUSES OF ILL-FAME.

Held, that a conviction under 32-33 Vict. c. 32, s. 2, sub-s. 6 (Dom.), for being an unlawful (instead of an habitual) frequenter of a house of ill-fame, and which adjudged the payment of costs which is unauthorized by the statute, must be quashed. That section makes the being such habitual frequenter a substantial offence, punishable as in section 17, and does not merely create a procedure for trial and punishment. *Regina v. Clark*, 2 O. R. 523.—Armour.

On an application to the Divisional Court to quash a conviction made by the police magistrate of the city of Toronto, against the defendant for keeping a house of ill-fame, there being evidence, as set out in the report of the case, upon which the magistrate could convict, the court refused to interfere. In the conviction the offence was stated to be against the statute in such case made and provided:—Held, that if not constituted an offence under 32-33 Vict. c. 32 (Dom.), the reference to the statute might be treated as surplusage, and the conviction sustained under the common law; but that the reference to the statute might be supported, because section 17 imposes a punishment in some respects different from the common law. *Regina v. Flint*, 4 O. R. 214.—C. P. D.

A conviction under 32-33 Vict. c. 28 (Dom.), for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment:—Held, good. *Regina v. Walker*, 7 O. R. 186.—Rose.

A conviction, for keeping a disorderly house and house of ill-fame, was:—Held, bad for awarding, after the adjudication of a penalty by fine and imprisonment, further imprisonment in default of sufficient distress or of nonpayment of the fine; and:—Held, also, that this was not a mere formal defect within section 30 of 32 & 33 Vict. c. 32 (Dom.):—Held, also, that the effect of section 28 was not to take away the writ of certiorari. *Regina v. Richardson*, 11 P. R. 95.—Osler.

The defendant was convicted under the proceedings taken under 32 & 33 Vict. c. 32 (Dom.),

not 32 & 33 Vict. c. 28 (Dom.), for keeping a house of ill-fame. The conviction merely "ordered" but did not "adjudge" any imprisonment or any forfeiture of the fine imposed:—Held, bad, as substituting the personal order of the magistrate for a condemnation of adjudication. *Regina v. Newton*, 11 P. R. 98.—O'Connor.

The conviction and warrant of commitment ordered the defendant to be imprisoned for six months, and to pay within the said period to said magistrate the sum of \$100 without costs to be applied according to law, and in default of payment before the termination of said period, further imprisonment for six months:—Held, bad, for uncertainty in requiring the fine to be paid to the magistrate personally instead of to the gaoler. *Id.*

The conviction and warrants charged that plaintiff "did unlawfully keep a certain bawdy house and house of ill-fame for the resort of prostitutes, and is a vagrant within the meaning of the statute," etc., not alleging that she did not give a satisfactory account of herself:—Held, sufficient. *Regina v. Arscott*, 9 O. R. 541, disented from. *Arscott v. Lilley*, 11 O. R. 153.—Q. B. D.

Upon a motion on the return of a habeas corpus to discharge the prisoner, who was convicted of keeping a house of ill-fame:—Held, that the conviction was bad on its face for uncertainty in not naming a place where the offence was committed:—Held, also, that it was defective because it did not contain an adjudication of forfeiture of the fine imposed. *Regina v. Cyr*, 12 P. R. 24.—O'Connor.

The Act 32 & 33 Vict. c. 32, s. 17, provides that the magistrate may condemn the party accused to pay a fine not exceeding, with the costs in the case, \$100:—Held, that the meaning of this is, that the amount of the costs in the case shall be deducted from \$100, and that the balance or difference shall be the utmost limit of the fine; and that the conviction in this case, being to pay the sum of \$100 without costs, was therefore bad. *Id.*

Upon a charge against an inmate of a house of ill-fame under sub-section (j.) of section 8, of R. S. C. c. 157, it is not necessary to shew that the accused was called upon to account for her presence in the house before arrest; the concluding words of the sub-section, "not giving a satisfactory account of themselves," are to be read as applying only to frequenters, and not to keepers or inmates. *Regina v. Leveque*, 30 Q. B. 509, distinguished. *Regina v. Remon*, 16 O. R. 560.—MacMahon.

There may be a joint conviction against husband and wife for keeping a house of ill-fame: the keeping has nothing to do with the ownership of the house, but with the management of it. *Regina v. Williams*, 10 Mod. 63, and *Rex v. Dixon*, *ib.* 335, followed. *Regina v. Warren*, 16 O. R. 590.—MacMahon.

See *Regina v. Arscott*, 9 O. R. 541, p. 1720.

## II. VAGRANTS.

The Vagrant Act, 32 & 33 Vict. c. 28 (Dom.), declares certain persons or classes of

persons to be vagrants, amongst others, "all common prostitutes or night walkers wandering in the fields, public streets, highways, lanes, or places of public meeting, or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves;" and that they "shall upon conviction be guilty of a misdemeanour, and punishable," etc.:—Held, that the Act does not, on its true construction, declare that being a prostitute, etc., makes such person liable to punishment as such; but only those who when found at the places mentioned, under circumstances suggesting impropriety of purpose, on request or demand are unable to give a satisfactory account of themselves. *Regina v. Arscott*, 9 O. R. 541.—Rose. But see *Arscott v. Lilley*, 11 O. R. 153, p. 1719.

The defendant registered his name and address at the American Hotel, Toronto, and on the same day was arrested at the Union Railway Station, having been pointed out to the police by some of the railway officials as a suspicious character. On his person were found two cheques, one for \$700 the other for \$900, which were sworn to be such as are used by "confidence men," a mileage ticket nearly used up in favour of another person, and \$8 in cash. He offered no explanation of the cheques or the ticket, and gave no information about himself:—Held, that the Vagrant Act did not warrant his arrest, much less his conviction. *Regina v. Bassett*, 10 P. R. 386.—Osler.

Before a person can be convicted of being a vagrant of the first class named in the Act ("all idle persons who, not having visible means of maintaining themselves, live without employment") he must have acquired in some degree a character which brings him within it as an idle person, who having no visible means of maintaining himself, i.e., not "paying his way," or being apparently able to do so, yet lives without employment. *Id.*

The defendant was summarily convicted under 32 & 33 Vict. c. 28, s. 1 (Dom.), as "a person who, having no peaceable profession or calling to maintain himself by, but who does, for the most part, support himself by crime, and then was a vagrant," etc. The evidence shewed that the defendant did not support himself by any peaceable profession or calling, and that he consorted with thieves and reputed thieves; but the witnesses did not positively say that he supported himself by crime:—Held, that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding and acting with thieves, or by such other acts and means as shewed he was pursuing crime. *Regina v. Organ*, 11 P. R. 497.—Wilson.

The Act, R. S. C. c. 157, s. 8, (f.), provides that "all persons who cause a disturbance in any street or highway by screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers" are loose, idle, or disorderly persons within the meaning of this section. The defendant was convicted and committed for that he "unlaw

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O. R. 541.—Rose,  
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evidence disclosed that the defendant was  
drunk, and that he was guilty of impeding and  
incommoding peaceable passengers, but it nega-  
tived his causing a disturbance in the street by  
being drunk:—Held, that no offence of the  
nature described in the conviction and commit-  
ment was committed by the defendant, and an  
order was made for his discharge. *Regina v.*  
*Daly*, 12 P. R. 411.—MacMahon.

By sub-section 2 of section 8 of the R. S. C.  
c. 157, any loose, idle, or disorderly person, or  
vagrant, shall upon summary conviction before  
two justices of the peace be deemed guilty of a  
misdemeanour, and liable to a fine not exceeding  
\$50, or to imprisonment not exceeding six  
months, or to both. By section 62 of R. S. C.  
c. 178 the justices are authorized to issue a dis-  
tress warrant for enforcing payment of a fine;  
and, if issued, to detain the defendant in cus-  
tody, under section 62, until its return; and, if  
the return is "not sufficient distress," then to  
imprison for three months. Two justices of the  
peace for the city of Toronto, in the absence of  
the police magistrate for the said city, convicted  
the defendant for an offence under said Act, and  
imposed a fine of \$50, and, in default of pay-  
ment forthwith, directed imprisonment for six  
months unless the fine were sooner paid:—Held,  
that under the said sub-section the justices had  
jurisdiction to adjudicate in the matter; and  
that it was not necessary to consider the effect  
of an agreement entered into between the police  
magistrate and one of the justices to assist him  
in the trial of offences:—Held, also, that the  
conviction was bad, for under R. S. C. c. 157 there  
was no power to award imprisonment as an al-  
ternative remedy for nonpayment of the fine;  
while under R. S. C. c. 178, imprisonment could  
only be awarded after a distress has been directed  
and default therein; and furthermore the im-  
prisonment in such case could only be for three  
months. *Regina v. Lynch*, 19 O. R. 664.—C.  
P. D.

### III. SEDUCTION.

A prisoner was convicted under R. S. C. c.  
162, s. 44, the Act relating to "offences against  
the person," for unlawfully taking an unmar-  
ried girl under the age of sixteen years out of  
the possession and against the will of her father.  
On the same day the prisoner was again tried  
and convicted, under R. S. C. c. 157, s. 3, the  
Act relating to "offences against public morals,"  
for the seduction of the said girl, being previ-  
ously of chaste character, and between the ages  
of twelve and sixteen years of age:—Held, that  
the offences were several and distinct, and that  
a conviction on the first indictment did not pre-  
clude a conviction on the second one. *Regina*  
*v. Smith*, 19 O. R. 714.—C. P. D.

See also SEDUCTION.

### PUBLIC OFFICER.

See OFFICE AND PUBLIC OFFICER.

### PUBLIC SCHOOLS.

#### I. TRUSTEES.

##### 1. Election of, 1722.

##### 2. Disqualification of.

(a) *Contracts with Board of Trustees*,  
1722.

(b) *Declaring Seats on Board Vacant*,  
1723.

#### II. EVIDENCE OF FORMATION OF SCHOOL SECTIONS, 1724.

#### III. DISSOLUTION OF UNION SCHOOL SECTIONS, 1724.

#### IV. DISSOLUTION OF TOWNSHIP BOARDS, 1724.

#### V. SCHOOL SITES.

1. *Application to Municipal Councils for*  
*Funds*, 1725.

2. *Borrowing Money for*, 1725.

3. *Change of*, 1725.

#### VI. ASSESSMENT, 1726.

#### VII. SECRETARY-TREASURER, 1728.

#### VIII. TEACHERS, 1729.

#### IX. RIGHT OF ADMISSION AS PUPIL, 1729.

#### X. EXPULSION AND SUSPENSION OF PUPILS, 1729.

#### XI. HIGH SCHOOLS.

1. *Distriets*, 1730.

2. *Appointment of High School Boards*,  
1732.

3. *Application to Municipal Councils for*  
*Funds*.

(a) *For Buildings*, 1733.

(b) *For School Maintenance*, 1733.

#### XII. MISCELLANEOUS CASES, 1733.

#### I. TRUSTEES.

##### 1. Election Of.

Where certain persons were elected school  
trustees, and, at a meeting of the board held  
subsequently to the election, were declared duly  
elected, but, proceedings having been meanwhile  
commenced to question the validity of the elec-  
tion, at a subsequent meeting of the board, they  
acquiesced in the conclusion of the board to hold  
a new election, and became candidates again, and  
canvassed as such, until the twenty days allowed  
for disputing the first election had elapsed (the  
proceedings formerly commenced for that pur-  
pose having been meanwhile dropped), and were  
not elected at the second election:—Held, they  
could not afterwards maintain a suit to have it  
declared they were the duly elected trustees.  
*Foster v. Stokes*, 2 O. R. 590.—Ferguson.

##### 2. Disqualification Of.

(a) *Contracts with Board of Trustees*.

Held, Osler, J., doubting, on a special case  
stated for the opinion of the Court of Chancery,  
and transferred to this court, that the fact of the  
public school board of the city of Toronto en-  
tering into an agreement with and purchasing

their stationery and school supplies from a publishing company, and having obtained gas from a gas company, and insured their property in certain insurance companies, of which said companies the plaintiff was a shareholder, did not disqualify him from acting as a trustee of the school board, or render his seat vacant, under 44 Vict. c. 30, s. 10, (Ont.). *See v. Public School Board of the City of Toronto*, 32 C. P. 78.—C. P. D.

Quære, per Osler, J., whether the case could properly be entertained, no fact being disclosed by which jurisdiction could be exercised under the Act relating to mandamus and injunction, R. S. O. (1877), c. 52, s. 30, no wrongful act having been actually done by the school board, but merely an injury to the plaintiff's rights threatened, it being alleged that the board intended to declare the seat vacant. *Ib.*

Where a school trustee, who was a medical practitioner, acted in his professional capacity under engagement by the board for examining the pupils attending the school as to the prevalence of an infectious disease, and made a charge of \$15 therefor, which the board ordered to be paid, but he afterwards declined to accept payment:—Held, that this disqualified him as trustee, and rendered his seat vacant, under 44 Vict. c. 30, s. 13 (Ont.). *Regina ex rel. Stewart v. Staulish*, 6 O. R. 408.—C. P. D.

*See Chaplin v. Public School Board of the Town of Woodstock*, 16 O. R. 728, *infra*.

#### (b) Declaring Seats on Board Vacant.

In an action brought by a ratepayer against a school board, three of the persons elected as trustees, and one G., the statement of claim alleged that the three defendant trustees had by reason of their being interested in certain contracts with the board ipso facto vacated their seats, by virtue of section 247 of the Public Schools' Act, R. S. O. (1887), c. 225; that they nevertheless continued to sit and vote, and had voted in favour of certain resolutions which were passed, whereby the principal of the school was dismissed and the defendant G. appointed in his place; and that but for the votes of the three defendant trustees the result would have been different. The prayer was that the seats of the three should be declared vacant, and the votes and resolution declared void, and for an injunction restraining the defendants, the trustees, from further acting as members of the board:—Held, upon demurrer, following *Hardwick v. Brown*, L. R., 8 C. P. 406, that the seat of a trustee does not under section 247 actually become vacant until the other members of the board have declared it to have become vacant; and in this case, no action having been taken by the remaining members of the board, that the seats of the three defendant trustees were full; and being full, that the court would not interfere by injunction to restrain the occupants of them from acting as trustees. 2. That quo warranto proceedings were the only means by which the seats could be declared vacant by the court; that the duty of declaring them vacant, if the facts charged were established, devolved upon the remaining individual members of the board, who were not

parties to the action and were not made parties by the fact that the school corporation was a party defendant. *Regina v. Mayor of Hereford*, 2 Salk. 701; *Rex v. Smith*, 2 M. & S. 583, referred to. 3. That the defendant G. was an unnecessary and improper party to the action. *Chaplin v. Public School Board of the Town of Woodstock*, 16 O. R. 728.—Street.

#### II. EVIDENCE OF FORMATION OF SCHOOL SECTIONS.

As evidence of the formation of school sections in a township by the municipal council thereof a rough sketch or map designated "school section map township of B," but without signature, seal, or date, having the appearance of being very old and there being no other map to be found, was produced from the proper custody. In 1888, before this action was commenced, but after the beginning of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct the map, etc.; and when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map:—Held, that the map must be assumed to be drawn in pursuance of section 11 of the "Public Schools Act," and therefore afforded evidence of the original division of the township into school sections by the township council. *Trustees for School Section No. 24 of the Township of Burford v. Township of Burford*, 18 O. R. 546.—Ferguson.

#### III. DISSOLUTION OF UNION SCHOOL SECTIONS.

On application to quash a by-law dissolving a union school section:—Held, that the council were not bound to go behind the assessment roll to ascertain whether the petition for such dissolution was signed by a majority of the assessed freeholders and householders, as required by section 140 of the Public Schools' Act, R. S. O. (1877) c. 204. The petition was, that the section might be dissolved, "when," it was added, "a new section may be formed, and a few lots from sections 2, 7, and 8, might be annexed to equalize the area with other sections"—Held, that this addition being a mere suggestion, formed no objection. *In re McAlpine and the Township of Euphemia*, 45 Q. B. 199.—Osler.

The by-law provided that the dissolution should take effect "from and after," instead of on "the 1st January, 1880":—Held, no objection. *Ib.*

The by-law was passed on the 7th April, and this motion was not made until December following:—Semble, that this delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit. *Ib.*

#### IV. DISSOLUTION OF TOWNSHIP BOARDS.

In a case submitted by the Minister of Education under section 237 of the Public Schools Act:—Held, that the plain meaning of section 63 of the Public Schools Act, R. S. O. (1857), c.



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#### TOWNSHIP BOARDS.

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225, is that after the township public school board has existed for five years at least, the submission of a by-law for the repeal of the by-law under which that board was established, may be required at any time upon the presentation of a properly signed petition therefor. The by-law establishing the township board may be attacked with a view to its repeal again and again, so long as the agitation against it subsists. *Re Public School Board of the Township of Tucker-smith*, 16 O. R. 604.—Chy. D.

#### V. SCHOOL SITES.

##### 1. Application to Municipal Councils for Funds.

A municipal corporation has no discretion in accepting or rejecting the requisition of school trustees for funds for a school site, except by a two-thirds vote. An adverse vote by a smaller majority is a virtual acceptance, and the requisition must therefore be complied with. *Re Board of Education of Napanee and the Town of Napanee*, 29 Chy. 395.—Proudfoot.

See *Re Board of Education of the Village of Morriburgh and the Township of Winchester*, 8 A. R. 169, p. 1731.

##### 2. Borrowing Money for.

It appeared from the affidavit of the secretary and treasurer of a school section, that at two regularly called meetings of the duly qualified electors of a school section at which a chairman was appointed, proposals to purchase a site, build a school-house, and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed, authorizing the issue of debentures to raise money for the above purposes:—Held, that under 42 Vict. c. 34, s. 29, sub-s. 3 (Ont.), this was a sufficient submission to and approval of the proposal by the duly qualified school electors of the section, and a rule to quash the by-law was discharged. *In re McCormick and the Township of Colchester South*, 46 Q. B. 65.—Armour.

See *In re Oakwood High School Board and the Township of Mariposa*, 16 A. R. 87, p. 1733.

##### 3. Change of.

Held, affirming the decree of Proudfoot, V. C., (26 Chy. 590) that the board of education formed by the union of high school and public school trustees, had power to change the site for a school, and purchase another without a by-law or resolution of the county council, or the approval of the Lieutenant-Governor in Council, and that the plaintiff was entitled to specific performance of an agreement by the board to purchase land for such purpose. *Moffatt v. Board of Education of Carleton Place*, 5 A. R. 197.

A new rural school section being formed, it became necessary for the then trustees to provide a school site, etc. A public meeting of the ratepayers was called pursuant to 48 Vict. c. 49, s. 64 (Ont.), which nearly all the ratepayers attended, when the T. site was chosen by a majority vote of both the ratepayers and trustees as against the C. site. A complaint against this result was lodged with the school inspector un-

der section 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site, at which meeting a unanimous vote was had in favour of a third site, called the C. site. In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal, and to restrain building on the C. site, in which it appeared that fifty out of the sixty-seven ratepayers approved of the latter site, it was:—Held, that the necessary prerequisite, under section 64 of the statute, of taking the opinion of the ratepayers had been complied with, and the selection made was the T. site: that no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose, and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change the site with the consent of the necessary majority. *Walters v. Board of Public School Trustees for Union School Section Number Nine of the Township of Lobo*, 11 O. R. 648.—Boyd.

Where it appeared that at a meeting of ratepayers, called, pursuant to section 64 of R. S. O. (1887), c. 225, to provide for a change of the school site, a resolution for that purpose, and also an amendment thereto, were submitted, both of which, in addition to the main question as to change of site, embraced matters collateral thereto, the former of which was carried:—Held, that the resolution was invalid, and that certain deeds of conveyance, executed pursuant thereto, must be set aside. It is essential that the vital matter voted on should be so laid before the meeting that a fair vote thereon can be given, unequivocally indicating the mind of the majority on the particular point:—Held, however, that as the plaintiffs were present at the meeting, and it was their business to have then objected to the way in which the question was being submitted, and complained to the inspector under section 32 of the said Act, they should not have their costs of action. *McGugan v. School Board of Southwold, Section No. 7*, 17 O. R. 428.—Boyd.

#### VI. ASSESSMENT.

Per Ritchie, C. J.—That the town of Dartmouth is not, but that the city of Halifax is, exempted by chapter 32, R. S. N. S. from contribution to the county school rates. *Town of Dartmouth v. The Queen*, 9 S. C. R. 509.

Held, Ritchie, C. J., dissenting, that the town of Dartmouth is not liable to contribute to the assessment for the support of schools in the municipality of the county of Halifax:—Held, also, that if so liable a writ of mandamus could not issue to enforce the payment of such contribution as the amount of the same would be uncertain and difficult to be ascertained:—Held, also that the ratepayers of 1893 could not be assessed for school rates leviable in previous years:—Held, per Ritchie, C. J., dissenting, that only the city of Halifax is exempt from such

contribution, and the town of Dartmouth is liable. *Dartmouth v. The Queen*, 14 S. C. R. 45.

In each of the years 1881 to 1886 inclusive, the defendants levied a rate to raise the sums required by the plaintiffs for school purposes. The rate was imposed in good faith as being the nearest which could be struck in order to insure the collection of the sum demanded with the necessary expenses, but in each year a small surplus was produced by it, which the council refused to pay over to the trustees, but held that they were entitled to retain and apply it towards payment of any sum which might be demanded by the trustees in a future year, as in the case of an excess collected on account of a special municipal tax for a local object under section 305 of the Municipal Act:—Held (affirming the judgment of the County Court), that this section did not apply, and that the money having been collected for school purposes the council was required by the statute to pay it over to the trustees in each year. It was not intended by the Consolidated Public Schools' Act of 1855, 48 Vict. c. 46; R. S. O. (1887), c. 225, to alter the law in this respect. *Public School Trustees of Section No. 3, Nottawasaga v. The Township of Nottawasaga*, 15 A. R. 310.

The difference between the powers of public school trustees and of the Roman Catholic separate school trustees to levy school rates by their own authority observed upon. *Ib.*

Held, that if the assessor is satisfied with the *prima facie* evidence of the statements made by or on behalf of any ratepayer, that he is a Roman Catholic pursuant to R. S. O. (1887) c. 225, s. 120, sub-s. 2, and thereupon (asking and having no other information) places such person upon the assessment roll as a separate school supporter, this ratepayer, though he may not, by himself or his agent, give notice in writing pursuant to R. S. O. (1887) c. 227, s. 40, may be entitled to exemption from the payment of rates for public school purposes, he being in the case supposed assessed as a supporter of Roman Catholic separate schools. *In re Roman Catholic Separate Schools*, 18 O. R. 606.—Chy. D.

Held, that the Court of Revision has jurisdiction, under R. S. O. (1887) c. 225, s. 120, sub-s. 3, on application of the person assessed, or of any municipal elector (or ratepayer, as under R. S. O. (1887) c. 227, s. 48, sub-s. 3), to hear and determine complaints, (a) in regard to the religion of the person placed on the roll as Protestant or Roman Catholic, and (b) as to whether such person is or is not a supporter of public or separate schools within the meaning of the provisions of law in that behalf, and (c), which appears to be involved in (b), where such person has been placed in the wrong column of the assessment roll for the purposes of the school tax. *Ib.*

It is competent for the Court of Revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll, should be inserted therein upon the complaint of the person himself, or of any elector, or ratepayer. *Ib.*

Held, that the assessor is not bound to accept the statements of, or made on behalf of, any ratepayer under R. S. O. (1887) c. 225, s.

120, sub-s. 2, in case he is made aware, or ascertains before completing his roll, that such ratepayer is not a Roman Catholic, or has not given the notice required by section 40 of R. S. O. (1887) c. 227, or is for any reason not entitled to exemption from public school rates. *Ib.*

Held, that a ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of separate schools, who through inadvertence or other cause does not appeal therefrom, is not estopped (nor are other ratepayers) from claiming with reference to the assessment of the following or future years, that he is not a Roman Catholic. *Ib.*

Held, that a ratepayer, being a Roman Catholic, and appearing in the assessment roll as such and as a supporter of separate schools, who has not given the notice required by R. S. O. (1887) c. 227, s. 40, is not (nor are other ratepayers) estopped from claiming, in the following or future year, that he should not be placed as a supporter of separate schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in R. S. O. (1887) c. 227, s. 47. *Ib.*

Plaintiffs complained that for the years 1853 to 1887 certain lots which formed part of their section had not been so assessed, but had been assessed as part of school section 23, and the taxes thereon levied and paid over to section 23, and that plaintiffs were entitled to be paid their taxes either by the township or by section 23. In each of these years, so far as regards this matter, the rolls were finally passed by the Court of Revision and certified by the clerk, etc.:—Held, that the plaintiffs could not now maintain such claim, for they were bound by section 57 of R. S. O. (1877) c. 180, under which the rolls as finally passed by the Court of Revision, etc. were valid and binding on "all parties concerned," the plaintiffs coming within the designation, but apparently they were not entitled to the notice provided for by section 41 of that Act. *Trustees for School Section 24 of the Township of Burford v. Township of Burford*, 18 O. R. 546.—Ferguson.

#### VII. SECRETARY-TREASURER.

One T., who acted in the capacity of secretary-treasurer of the plaintiffs, who had not been appointed in writing, and had not given security as required by the statute in that behalf, absconded with certain moneys which had been received by him, as such secretary-treasurer, from the defendants. The plaintiffs had recognized T. as their secretary-treasurer by entrusting him with the custody of their books and papers, by allowing him to receive moneys for them, by auditing his accounts and receiving and approving of the auditor's reports:—Held, that R. S. O. (1877), c. 204, s. 99, which provides that, in the case of a rural school section corporation, the resolution, action or proceeding of at least two of the trustees shall be necessary in order lawfully to bind such corporation, does not apply to acts of duty of the secretary-treasurer; and that payment by the municipality of school moneys to T. was binding on the trustees:—Held, also, that if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appoint-

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#### TREASURER.

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ment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment. *School Trustees of the Township of Hamilton v. Neil*, 28 Chy. 408.—Proudfoot.

See *Keith v. Fenelon Falls Union School Section*, 3 O. R. 194, p. 1700.

#### VIII. TEACHERS.

In an action by a school teacher to recover damages as for a wrongful dismissal, it was shewn that the agreement to employ the plaintiff was made in writing, under seal and signed by two, of the three school trustees, but not at the same time or at any meeting of the trustees called for the purpose of transacting school business:—Held, reversing the judgment of the County Court (Haldimand), that the agreement was void under section 97 of the Public Schools' Act, which provides that "no act or proceeding of a school corporation which is not adopted at a regular or special meeting of the trustees shall be valid or binding on any party affected thereby." *Lambert v. School Trustees of Section No. Three, South Cayuga*, 7 A. R. 506.

The right of public school trustees to dismiss for good cause a teacher engaged by them, necessarily exists from the relation of the parties. 49 Vict. c. 49 (Ont.), ss. 165, 168, provides a proceeding by which the status or qualification of the teacher may be determined; and the result of such proceeding may be in effect the same as dismissal; but such enactment does not deprive the employer of the inherent right to dismiss. *Raymond v. School Trustees of Cardinal*, 14 A. R. 562.

See Subhead X., *infra*.

#### IX. RIGHT OF ADMISSION AS PUPIL.

A mandamus to compel the admission of a child to a public school will not be granted where it is shewn that there is not accommodation for her, for this is a valid answer to such an application, especially where it appears, as here, that there is sufficient accommodation at another public school in the same town; nor where it is shewn that the application for admission was not made in the regular and proper way, under the Public School Regulations, as was the case here, inasmuch as, although the child in question was a registered pupil at the other public school in the same town during the preceding term, she had not attended there at the commencement of the present one, nor had application been made to the inspector to have her admitted to the school to which admission was now sought. *Dunn v. Board of Education for the Town of Windsor*, 6 O. R. 125.—Ferguson.

#### X. EXPULSION OR SUSPENSION OF PUPILS.

On the 3rd of December, 1884, a school teacher dismissed the plaintiff, a boy thirteen years of age, for disobedience, speaking impudently when questioned about it, and refusing to be punished for misconduct. The matter was

brought before the trustees, and on the 6th January they held a meeting and passed a resolution that the boy could return to school on his expressing regret for his misconduct. After the receipt of a solicitor's letter on behalf of the father, the trustees, on the 10th February, held another meeting and passed a resolution that the boy could return to school after one day's suspension. On the 11th February another meeting of the trustees was held and a resolution passed reinstating the resolution of the 6th January. The father was not notified nor was he present at the meetings of the 6th January and 11th February; but he was notified of, and was present at the meeting of the 10th February. The boy returned to school, but, relying on the resolution of the 10th February, made no apology, and remained there for several days, but was not interfered with by the teacher, who, however, would give him no instruction. In an action in the Division Court against the teacher and trustees for an alleged wrongful dismissal, the learned judge dismissed the case against the teacher, but held the trustees liable:—Held, that the action must be dismissed against the trustees: that it was not their act, but that of the teacher, that caused the boy's removal: that the passing of the resolution as to apologising was not an expulsion: that the teacher in not instructing the boy was not acting under the trustees' direction; and that they were not liable for not compelling her to give the instruction:—Quere, whether in such a case as this malice must not be shewn, unless followed by some act amounting to assault or trespass; and whether a mandamus, and not an action, was not the proper remedy. The action of the trustees in proceeding in the absence and without notice to the parties interested, and also the unreasonable conduct of the father, commented on. *In re the Minister of Education—McIntyre v. Public School Trustees of Section Eight in the Township of Blanchard*.—11 O. R. 439.—C. P. D.

A pupil at a public school having injured the top of a school desk by cutting it, he was ordered by the schoolmaster to replace the top with his own hands, and was suspended till he should do so. The suspension was on the 20th February, 1888, and on the 7th of May, 1889, notice of motion was served by the father of the pupil for a mandamus to compel the trustees to readmit the son. In the meantime appeals had been made by the father to three of the trustees, to the public school board, and to the annual school meeting, on all of which applications the action of the teacher was sustained. During this time the pupil attended another public school:—Held, that the discretion exercised by the master and trustees should not be interfered with, especially after the delay and change in the position of affairs. *Re McCallum and Board of Public School Trustees of Section 6, Township of Brant*, 17 O. R. 451.—Rose.

#### XI. HIGH SCHOOLS.

##### 1. Districts.

After the repeal of 37 Vict. c. 27, s. 38 (Ont.), by 40 Vict. c. 16, s. 18, sub-s. 2 (Ont.), a county council, having no power to determine the limits

of high school districts, passed a by-law determining the same. By another by-law they repealed it, and established new limits:—Held, that such last mentioned by-law was valid so far as it repealed the first by-law, which was invalid, but that the rest of it must be quashed. *Re Chamberlain and the United Counties of Stormont, Dundas, and Glengarry*, 45 Q. B. 26.—Q. B. D.

In 1879 the township of Grimsby passed a by-law attaching a certain portion of the township to the village of Grimsby for high school purposes. In 1881 the same council similarly annexed another portion. Corresponding by-laws were passed by the village of Grimsby. By 45 Vict. c. 33 (Ont.), the township was divided into two townships of North and South Grimsby. In 1882 the council of the township passed a by-law, on the petition of less than two-thirds of the ratepayers, repealing the two former by-laws:—Held, that the two township by-laws, with the corresponding village by-laws, formed an agreement, pursuant to R. S. O. (1877), c. 205, s. 30, as amended by 42 Vict. c. 34, s. 32 (Ont.), which could not be rescinded by one of the municipalities without the concurrence of the other; and therefore that the repealing by-law should be passed only upon the petition of two-thirds of the ratepayers. *Re Wolverton and the Townships of South and North Grimsby*, 3 O. R. 293.—Wilson.

The county council of the united counties, acting under 37 Vict. c. 27, s. 38 (Ont.), which gave power to every county council from time to time to determine the limits of a high school district for each high school existing in the county and within its municipal jurisdiction, had, on 23rd June, 1876, by by-law No. 516 declared that district No. 4 should consist of the village of Morrisburgh and the townships of Williamsburgh and Winchester. Section 38 was repealed by 40 Vict. c. 16, s. 18 (Ont.), which, however, declared that all high school districts which existed at the time of its passing (viz., 2nd March, 1877), should continue until the county council should think fit to discontinue them. On 12th October, 1877, the county council passed by-law No. 551 in which, after reciting, inter alia, that it was expedient to consolidate all acts and by-laws of those counties which in any way related to high school districts, proceeded in direct terms to repeal several by-laws including No. 516, and then went on to enact that the united counties should be divided into five districts for high school purposes. No. 4 and No. 5 being in the county of Dundas, and No. 4 embracing Williamsburgh, Winchester, and Morrisburgh:—Held, that although the reconstruction of the districts was ultra vires and void, because the power to determine the districts had ceased at the passing of 40 Vict. c. 16 (Ont.); yet the repeal of by-law 516, being within the power to discontinue the districts which that statute preserved, was valid, and the township of Winchester had therefore ceased to be part of district No. 4 before the resolution of April, 1878, was passed. *Re Board of Education of the Village of Morrisburgh and the Township of Winchester*, 8 A. R. 169.

The board of education, acting under the resolution of April, 1878, had on 19th July, 1878, made a demand upon the township of Winches-

ter for its proportion of the money required. Before that demand was made another by-law, No. 590, had been passed on 22nd June, 1878, by the county council, repealing that portion of by-law No. 551, which related to high school districts for high school purposes in the county of Dundas, and enacting, inter alia, that district No. 4 should embrace the village of Morrisburgh only. This by-law was passed after a majority of the reeves and deputy reeves of the county of Dundas had, under the power given by 41 Vict. c. 15 (Ont.), requested the county council to abolish the districts Nos. 4 and 5, and to constitute the corporation of the village of Morrisburgh high school district No. 4:—Held, that this by-law was effectual to abolish district No. 4, it that district had continued to exist after the passage of by-law No. 551. *Id.*

When the demand was made in July, 1878, by-law 590 was in force. It was moved against in the Court of Queen's Bench in November, 1878, and was quashed so far as it assumed to determine the limits of districts, but not so far as it repealed by-law No. 551: (*Chamberlain v. Stormont*, 45 Q. B. 26). On 27th June, 1879, the county council passed another by-law No. 617, simply abolishing the existing high school districts in the county of Dundas. At this time no part of the money demanded had been levied. This by-law was passed after the rule nisi for a mandamus in the matter had been granted, but before it was argued:—Held, agreeing with Galt, J., who had discharged the rule nisi for a mandamus and with Hagarty, C. J., who dissented from the judgment of the majority of the Court of Queen's Bench (45 Q. B. 460), that if the demand had been originally valid, it could not be enforced after the passage of by-law No. 617, and nothing would have remained in question but the costs of the application. *Id.*

## 2. Appointment of High School Boards.

On motion to continue an injunction to restrain the corporation of a town in a judicial district from paying over to the high school board of said town, and the said board from receiving, the sum of \$15,000 raised by by-law of said town, for acquiring a site and erecting a high school thereon:—Held, that under the provisions of sections 4 and 10 of R. S. O. (1887) c. 228, taken in connection with section 1 of 50 Vict. c. 64 (Ont.), incorporating the said town, the corporation were authorized to appoint a high school board therefor, and to pass the by-law for the erection of said school; and that the consent of the Lieutenant-Governor, provided for by section 8, was not required, as this was not an additional high school:—Held, also, that the appointment of the board must be by by-law; but a by-law therefor passed after the motion was made but before the hearing thereof was sufficient. The court refused to entertain an objection that the board were about to build the school on land not acquired by them, for it could not be assumed that the money would be spent until the title to the land had been acquired; and also it was not necessary to shew that specific portions of the \$15,000 had been appropriated to the purchase of the land and the erection of the building. *Dawson v. Town of Sault Ste. Marie*, 13 O. R. 556—Galt.





trustees discontinued such distribution and allowed the funds realized from said lands to accumulate, the reason alleged therefor being that the schools of the township had become so numerous that the sum appropriated to each would be too small to be of use, and also, that under the free school system all the poor children of the township were educated free of expense and the object for which such funds had previously been supplied no longer existed. The present defendants were invested with the said trust in 1879, when the revenue of the said lands had accumulated until they amounted to over \$1,200. Shortly after they became such trustees it was determined to build a school-house in a certain district in said township with the money. A meeting of the vestry of the church was held and a resolution passed authorizing such school-house to be built on land leased from the church; the school was to be non-sectarian, but after school hours any of the children that wished could receive instruction in the doctrines of the Church of England. On a suit to restrain the defendants from using the trust funds to build such school-house and praying for an account:—Held, reversing the judgment of the Supreme Court of Nova Scotia, and restoring that of the court of first instance, that the trustees had no discretion as to the application of the trust funds, but were bound to distribute them among all the schools of the township, which would be entitled to participate under the terms of the trust, however wanting in utility such a disposition of said funds might be:—Held, also, that the Attorney-General of the province was the proper person to bring this suit.—Held, per Strong J., that in interpreting the trust, in order to explain the apparent repugnancy in the grant in providing that the rents were to be distributed among one or more schools, etc., and also among all the schools in the township, the probable condition of the township, in respect to the number of schools therein, at the time the grant was made, coupled with the long continued usage which has prevailed in the manner of administering the trust, could be considered as a rule of guidance for such interpretation:—Held, also, per Strong J., that under the doctrine of cy-près, a reference might be made to the master, to report a scheme for the future administration of the charity. *Attorney-General of Nova Scotia v. Axford*, 13 S. C. R. 294.

The whole tendency of recent amendments of the Education Acts has been to give the rural school sections greater powers of self-regulation and self-government, and the courts should not be astute to interfere unless there has been a plain violation of the statute, or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights. This action was therefore dismissed, but without costs, as it was a new point and the statute was not plainly expressed. *Wallace v. Public School Trustees for Union School Section Number Nine of the Township of Lobo*, 11 O. R. 648.—Boyd.

#### PUBLIC WORKS.

See PETITION OF RIGHT.

Expropriation of roads for public works. See *Re Trent Valley Canal*, "*Re Water Street*," and "*The Road to the Wharf*," 11 O. R. 687.

Having liquor for sale near public works. See *Bond v. Conmee*, 15 O. R. 716, p. 1063.

#### PUBLICATION.

- I. OF AWARD.—See ARBITRATION AND AWARD.
- II. OF DEFAMATORY MATTER.—See DEFAMATION.
- III. OF BY-LAWS.—See MUNICIPAL CORPORATIONS.
- IV. OPENING PUBLICATION.—See OPENING PUBLICATION.
- V. SERVICE BY PUBLICATION.—See PRACTICE.

#### QUAKERS.

See *Dorland v. Jones*, 12 A. R. 543; 14 S. C. R. 39, p. 232.

#### QUALIFICATION.

- I. OF DIRECTORS OF COMPANIES.—See COMPANY.
- II. OF JUSTICES OF THE PEACE.—See JUSTICE OF THE PEACE.
- III. OF MEMBERS OF MUNICIPAL COUNCILS.—See MUNICIPAL CORPORATIONS.
- IV. OF MEMBERS OF PARLIAMENT.—See PARLIAMENTARY ELECTIONS.
- V. OF VOTERS.—See PARLIAMENTARY ELECTIONS.

#### QUARANTINE.

See HUSBAND AND WIFE.

#### QUASHING.

- I. CONVICTIONS.—See INTOXICATING LIQUORS—JUSTICE OF THE PEACE.
- II. BY-LAWS.—See MUNICIPAL CORPORATIONS.

#### QUEBEC.

See FOREIGN LAW.

#### QUEEN VICTORIA NIAGARA FALLS PARK.

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 "Re Water Street,"  
 11 O. R. 687.  
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 716, p. 1063.

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LAND FOR—See CROWN.

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## QUI TAM ACTION.

See PENAL ACTIONS AND PENALTIES.

## QUIET ENJOYMENT.

See COVENANTS FOR TITLE—LANDLORD AND  
 TENANT.

## QUIETING TITLES ACT.

### I. PETITION.

1. Generally, 1737.

2. Service, 1737.

### II. POSTING ADVERTISEMENT, 1737.

### III. EVIDENCE.

1. Abstract, 1738.

2. Other Cases, 1738.

### IV. OUTSTANDING CLAIMS, 1738.

#### I. PETITION.

##### 1. Generally.

Where a petitioner under the Quieting Titles Act has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed. *Re Pelten*, 8 P. R. 470.—Blake.

A contestant under the Quieting Titles Act must file a petition in his own name before a certificate can issue in his favour, but he may use on such petition, the evidence adduced on the petition in which he was contestant. *Re Dunham*, 8 P. R. 472.—Blake.

Parties to whom land has been conveyed after the registration of the certificate of the filing of the petition, and pending the investigation of the title, must be substituted as petitioners. *Re Cummings*, 8 P. R. 473.—Proudfoot.

Where pending the investigation of the title, the petitioner laid out the land in village lots and registered a plan :—Held, that the petition must be amended in accordance with the plan. *Re Morse* 8 P. R. 475.—Blake.

##### 2. Service.

In a proceeding by petition under the Quieting Titles Act service on the official guardian is good service upon infants who are required to be notified of the proceedings. *Re Murray*, 13 P. R. 367.—Ferguson.

### II. POSTING ADVERTISEMENT.

Where the advertisement in a quieting titles proceeding was posted at another court-house

than that required by G. O. Chy. 504 (Con. Rule 1020):—Held, that the irregularity might be waived under R. S. O. (1887) c. 113, ss. 45, 46. *Re Harris*, 12 P. R. 430.—Boyd.

### III. EVIDENCE.

#### 1. Abstract.

Registrars' abstracts must be continued to the date of the certificate of title. *Re Cummings*, 8 P. R. 473.—Proudfoot.

Where in a petition under the Quieting Titles Act it was shewn that the registrations on the whole lot, of which the land in question formed a part, numbered over 560, and that it would take six months and cost \$100 to prepare an abstract:—Held, that the abstract might be dispensed with, if the affidavit of a provincial land surveyor were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question. *Re Morse* (2), 8 P. R. 477.—Blake.

#### 2. Other Cases.

Where there was no evidence to shew that infants had been served with a decree of foreclosure, reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with. *Re Gilchrist*, 8 P. R. 472.—Blake.

Where a petitioner under the Quieting Titles Act claimed title as devisee of certain land, but the description of the land in the will was different to that of the land which he claimed:—Held, that he might establish a title by shewing a misdescription in the will. But where a misdescription occurred in a deed:—Held, that the petitioner had merely established an equity to have the deed reformed, and that under the Act the court could not declare the title as though the deed had in fact been reformed. *Re Callaghan*, 8 P. R. 474.—Chy. D.

When a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit:—Held, under *Gunn v. Doble*, 15 Chy. 665, that in the absence of proof to the contrary, the order should be assumed to be regular, and that it was unnecessary to give evidence shewing title. *Re Morse*, 8 P. R. 475.—Blake.

See *Re Dunham*, 8 P. R. 472, p. 1737.

### IV. OUTSTANDING CLAIMS.

Where the title of a petitioner under the Quieting Titles Act was established except as to an undivided one-fifth interest in the bare legal estate, which appeared to be outstanding in an infant:—Held, such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding. *Re Raynerd*, 8 P. R. 476.—Proudfoot.

Quære, whether an order made by the referee of titles barring the claims of an infant heir at

law would have the effect of divesting the estate of the infant. *Re Shaver*, 6 O. R. 312.—Boyd.

See *Re Pelten*, 8 P. R. 470, p. 1737.

### QUO WARRANTO.

See MUNICIPAL CORPORATIONS.

Where the actual holder of an office is charged with holding it improperly, quo warranto proceedings on behalf of the Queen are the only means by which it can be declared vacant. *Chaplin v. Public School Board of the Town of Woodstock*, 16 O. R. 728.—Street.

An appeal from a decision of the Court of Queen's Bench for Lower Canada, appeal side was quashed on motion for want of jurisdiction, the proceedings being by quo warranto as to which there is no appeal by the statute. *Walsh v. Heffernan*, 14 S. C. R. 738.

See *Chaplin v. Public School Board of the Town of Woodstock*, 16 O. R. 728, p. 1724.

### RACING.

See *Davis v. Hewitt*, 9 O. R. 435, p. 833.

### RAILWAYS AND RAILWAY COMPANIES.

#### I. POWERS OF DOMINION AND PROVINCIAL LEGISLATURES, 1741.

#### II. RAILWAY DECLARED A WORK FOR THE GENERAL ADVANTAGE OF CANADA, 1744.

#### III. LANDS AND THEIR VALUATION.

##### 1. Filing Plans, 1745.

##### 2. Lands Taken,

###### (a) Government Lands, 1746.

###### (b) Infants' Estate, 1747.

###### (c) Tenant for Life and Estate in Remainder, 1747.

##### 3. Lands Injurious Affected, 1748.

##### 4. Lands Granted on Conditions,

###### (a) Erection of Stations, 1751.

###### (b) Farm Crossings, 1752.

##### 5. Other Cases, 1753.

##### 6. Order for Immediate Possession, 1757.

##### 7. Compensation,

###### (a) Generally, 1758.

###### (b) Interest Allowed, 1762.

##### 8. Reference and Award.

###### (a) Submission, 1762.

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###### (c) Objections to Award, 1763.

###### (d) Costs, 1766.

###### (e) Other Cases, 1767.

##### 9. Action for Wrongful Taking, 1768.

##### 10. Alienating Lands Taken for the Purposes of the Railway, 1768.

##### 11. Resuming Title to Lands Taken by Railways, 1768.

#### IV. CONSTRUCTION OF RAILWAYS.

##### 1. Commencement of Work, 1768.

##### 2. Running on or Crossing Highways, 1769.

##### 3. Bridges and Subways, 1770.

##### 4. Fences, 1771.

##### 5. Gates, 1773.

##### 6. Farm Crossings, 1773.

##### 7. Packing Railway Frogs—See SUB-HEAD V. 8, p. 1781.

#### V. INJURY TO PERSONS AND ANIMALS.

##### 1. By Collision Between Trains, 1773.

##### 2. Running Reverse, 1775.

##### 3. At Crossings, 1775.

##### 4. On Tracks, 1778.

##### 5. Sounding Whistle or Bell, 1779.

##### 6. Defective Construction of Roadbed, 1780.

##### 7. Fences or Gates out of Repair—See SUB-HEAD IV. 4, 5, pp. 1771, 1773.

##### 8. Packing Railway Frogs, 1781.

##### 9. Getting On or Off Trains in Motion, 1782.

##### 10. Liability for Injuries to Servants, 1783.

##### 11. Animals Trespassing on Railways, 1785.

#### VI. FIRE FROM ENGINES, 1785.

#### VII. CARRIAGE OF PASSENGERS AND THEIR LUGGAGE.

##### 1. Government Railways, 1789.

##### 2. Passenger Tickets and Passes, 1790.

##### 3. Liability for Luggage, 1790.

#### VIII. CARRIAGE OF GOODS.

##### 1. Liability as Carriers or Warehousemen, 1793.

##### 2. Liability Beyond the Line, 1795.

##### 3. Other Cases, 1796.

#### IX. TRAFFIC ARRANGEMENTS, 1798.

##### X. ARRANGEMENTS WITH EXPRESS COMPANIES, 1799.

##### XI. ARRANGEMENTS WITH TELEGRAPH COMPANIES, 1799.

#### XII. LIABILITY FOR ACTS OF AGENTS, 1800.

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#### XIV. STOCK—See COMPANY.

#### XV. DIRECTORS, 1802.

#### XVI. BONDS AND BONDHOLDERS.

##### 1. Right of Bondholders to Register and Vote, 1802.

##### 2. Other Cases, 1804.

#### XVII. AID TO RAILWAY COMPANIES BY MUNICIPALITIES. 1806.

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# XIX. RAILWAYS IN HANDS OF RECEIVER, 1814.

## XX. INJUNCTIONS AGAINST—See INJUNCTION.

## XXI. MISCELLANEOUS CASES, 1815.

## XXII. SPECIAL ACTS RELATING TO PARTICULAR RAILWAYS.

1. *Canada Atlantic Railway Company*, 1816.

2. *Canada Central Railway Company*, 1816.

3. *Canada Southern Railway Company*, 1816.

4. *Canadian Pacific Railway Company*, 1816.

5. *Erie and Huron Railway Company*, 1816.

6. *Grand Junction Railway Company*, 1817.

*Grand Trunk Railway Company*, 1817.

8. *Midland Railway*, 1817.

9. *Northern Railway Company*, 1817.

10. *Ontario and Sand Ste. Marie Railway Company*, 1817.

11. *International Bridge Co.*—See INTERNATIONAL BRIDGE COMPANY.

## XXIV. TRAMWAY—See STREET RAILWAYS.

## I. POWERS OF DOMINION AND PROVINCIAL LEGISLATURES.

Held, Armour, J., dissenting, that the timber licenses claimed by the plaintiff as licensee of the Ontario Government were subject to the right of the Canada Central Railway Company acquired before confederation to construct their road across the Crown lands over which the licenses in question extended, and that the defendants, assignees of the railway company, were, therefore, not liable in trespass for entering upon, and cutting the timber on the limits in prosecution of the work of building said railway. *Foran v. McIntyre*, 45 Q. B. 288.—Q. B. D.

Held, that the Canada Central railway acquired under their charter granted by the Act 19 & 20 Vict. c. 112, and subsequent Acts relating thereto passed prior to confederation the right, which was preserved by section 109 of the B. N. A. Act, to enter on the Crown lands in the province of Ontario on the line of the railway included in a subsequent timber license granted to the plaintiff, and to cut the timber within six rods of either side thereof, without any restriction as to obtaining the consent of the Lieutenant-Governor in Council. *Booth v. McIntyre*, 31 C. P. 183.—Osler.

Semble, that in the case of railway companies within its exclusive jurisdiction the Dominion Parliament has the power to confer upon them the right of constructing their lines through the Crown lands of the several provinces through which they may pass, without such consent of the Lieutenant-Governor in Council. *Ib.*

Per Patterson, J. A., the legislation of the Dominion Parliament forbidding the defendants contracting against liability for their own negli-

gence is not ultra vires. *Vogel v. Grand Trunk R. W. Co.*—*Morton v. Grand Trunk R. W. Co.*, 10 A. R. 162.

The defendants, a railway company incorporated by an Act of the Parliament of Canada and subject to the provisions (among others) of section 27 of the Railway Act of Canada, built their road through lands in the Province of Ontario, the fee of which was in the Crown but over which the plaintiffs had for three successive years held timber licenses issued by the Provincial Government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectively the 5th of July, 1883, the 10th of December, 1884, and the 22nd of July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884 and the road was completed in July, 1886. In building the road the defendants cut down timber on the line and also both within and outside of the six rod belt mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th of September, 1886, to recover damages for the timber cut. It was admitted that as to timber cut outside the six rod belts, they were entitled to recover, but it was contended that as to timber cut on the line and within those belts the action was barred. The defendants had filed their plan and book of reference but they had not taken any of the statutory steps to acquire the interest of the plaintiffs:—Held, per Street J. (15 O. R. 733), that under the sub-section 12 R. S. C. c. 109, s. 6, the timber cut within the six rod limit became the property of the railway, and that the loss of the trees was damage or injury sustained by the plaintiffs by "reason of the railway," under section 27 of R. S. C. c. 109, and the action was therefore barred by that section by reason of its not having been brought within the six months:—Held, in the Court of Appeal, per Hagarty C. J. O., and Osler J. A., that the damage to the timber on the line and within the six rod belts was damage "sustained by reason of the railway" within the meaning of section 27 of R. S. C. c. 109, and that that section was intra vires the Dominion Parliament. That the plaintiffs were entitled to damages for the illegal occupation of the limits and as consequent thereon to damages for all injury done during the illegal occupation; but that the plaintiffs had no title to the limits sufficient to maintain an action, either on legal or equitable principles, in the intervals between the licenses. That, therefore, the right of action was barred except as to damages sustained during the currency of the last license, but was saved as to those by virtue of the occupation being illegal up to the 30th of April, 1886, less than six months before action; per Burton J. A., and MacLennan J. A., that the section was ultra vires the Dominion Parliament as being an unnecessary interference with property and civil rights within the Province, but that even if valid would not avail for the protection of the defendants as they were mere trespassers; per MacLennan J. A., that even if the section were valid and applied, the plaintiffs were entitled to recover all the damages, the trespass having been a continuous uninterrupted one and the plaintiff's right of renewal of their licenses being

sufficient to enable them to recover notwithstanding the intervals between them. *McArthur v. Northern Pacific Junction Ry.*, 17 A. R. 86.

Under the British North America Act, 1867, s. 108 read in connection with the third schedule thereto, all railways belonging to the province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada; but not for any larger interest therein than at that date belonged to the province. The railway in suit being at the date of the statutory transfer subject to an obligation on the part of the provincial government, confirmed by 30 Vict. c. 38 (N. S.), to enter into a traffic arrangement with the respondent company, the Dominion government, in pursuance of that obligation entered into a further agreement relating thereto, of the 22nd of September, 1871:—Quere, whether it was ultra vires the Dominion parliament by an enactment to that effect to extinguish the rights of the respondent company under the said agreement. But:—Held, that 37 Vict. c. 16 (Dom.), did not upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondents' rights under the agreement of the 22nd of September, 1871, or otherwise. *Western Counties R. W. Co. v. Windsor and Annapolis R. W. Co.*, 7 App. Cas. 178.

The plaintiff, being the holder of a debenture issued by the B. & O. R. W. Co. under 23 Vict. c. 100, sued thereon. By the 27 Vict. c. 57, the railway company were authorized to issue preferential bonds, and to execute a mortgage to a trustee to secure payment thereof. The railway, being at the time of confederation a local work, the 31 Vict. c. 44 (Ont.), was passed, which recited that the trustee was in possession and about to foreclose the mortgage, and amongst other things, directed that the debentures (therein called ordinary bonds) should be converted into stock at a certain rate on the dollar; and that the holders thereof should have no other claim on the company than for conversion of their debentures into stock. By the 41 Vict. c. 36 (Dom.), the B. & O. Railway Co. and the defendant company were amalgamated. The defendants set up that their liability on the debentures in question was extinguished by the 31 Vict. c. 44 (Ont.), and that they were ready and willing to take the debentures in exchange for reduced stock thereunder. Third replication that the Act was not binding because it was a private Act, and the plaintiff was not named therein, nor a petitioner therefor, nor were his rights specially taken away thereby. Fourth replication, that the Act was ultra vires, because the debenture was payable in London, England, and was there domiciliated, and the holder resided there at the time of the passing of the Act, beyond the jurisdiction of the Ontario legislature:—Held, on demurrer, third replication bad; for, though the Ontario Act was in the nature of a private Act, it sufficiently referred to the plaintiff by referring to the class of bondholders to which he belonged, and that he was therefore bound thereby:—Held, also, fourth replication bad, for the local legislatures were not restricted by the term "property and civil rights in the province" to legislation respecting

bonds held therein, and that where debts or other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of the local legislature, such debts may be dealt with by subsequent Acts of the same legislature, notwithstanding that by a fiction of law they may be domiciled out of the province. *Jones v. Canada Central R. W. Co.*, 43 Q. B. 250.—Osler.

Held, that the Grand Junction Railway being wholly within the province of Ontario, the Dominion parliament had no power, under the B. N. A. Act, to incorporate the company without expressly declaring the work to be one for the general advantage of Canada or of two or more of the provinces. *Re Grand Junction Railway v. County of Peterborough*, 6 A. R. 339. See *S. C.*, 45 Q. B. 302; 8 S. C. R. 76.

See *Monkhouse v. Grand Trunk R. W. Co.*, 8 A. R. 637, p. 1781; *Norvell v. Canada Southern R. W. Co.*, 9 A. R. 310, p. 1765; *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 App. Cas. 295, p. 314.

See also Subhead II., infra.

## II. RAILWAYS DECLARED A WORK FOR THE GENERAL ADVANTAGE OF CANADA.

Land was expropriated by the defendants in 1876, and proceedings to obtain compensation therefor were begun in 1884. On the 25th May, 1883, the defendants' railway became by statute a Dominion road having previously been an Ontario road:—Held, that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied to the proceedings, and therefore that an appeal under the provisions of the Revised Ontario Railway Act could not be prosecuted. *Darling v. Midland R. W. Co.*, 11 P. R. 32.—Boyd.

In an application for an injunction to restrain the defendants, who were incorporated by Statutes of the Ontario Legislature, from applying to a county judge for a warrant for possession of certain lands required by them, and being expropriated by them under the provisions of the Ontario Railway Act, on the ground that the defendants' railway had been declared a work for the general advantage of Canada, and that no notice of expropriation had been served as required by the provisions of the Ontario Railway Act:—Held, under the circumstances of this case, and following *Clegg v. The Grand Trunk Railway Co.*, 10 O. R. at p. 713; and *Darling v. The Midland Railway Co.*, 11 P. R. 32; that the defendants were no longer within the operation of the Ontario Statutes: Held also, that a notice requiring the lands given under the Dominion Railway Act, was not sufficient notice under the Provincial Railway Act. *Barbeau v. St. Catharines and Niagara Central R. W. Co.*, 15 O. R. 586.—Ferguson.

A railway company, incorporated by an Act of the Ontario legislature, was thereby authorized to construct, equip, and operate a railway, between certain points. By an Act of the Dominion Parliament the Governor-in-Council was authorized to grant a subsidy to the company; and by another Act of the Dominion Parliament the company's railway was declared to be a work for the general advantage of Canada, and the

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Trunk R. W. Co., 8 v. Canada Southern p. 1765; Attorney- v. Attorney-General 35, p. 314.

II., *infra*.

#### WORK FOR THE GEN- OF CANADA.

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incorporated by an Act was thereby author- and operate a railway, By an Act of the Domi- nior-in-Council was idy to the company; e Dominion Parliament e declared to be a work e of Canada, and the

company was authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion Parliament:—Held, that the effect of the declaration that the railway was a work for the general advantage of Canada was to bring it under the exclusive legislative authority of the parliament of Canada, but that the Acts of the Ontario legislature, previously passed, were in no way affected; that the railway in question was not one "constructed or to be constructed under the authority of any Act passed by the parliament of Canada" (see R. S. C. c. 100 s. 3); and therefore sections 4 to 39 of R. S. C. c. 109 did not apply to it; and a motion to a judge of the High Court under section 8 for a warrant of possession of certain lands was refused. *Re St. Catharines and Niagara Central R. W. Co. and Barbeau*, 15 O. R. 583.—Street.

The defendants, who were originally incorporated under an Ontario Act, gave notice of their intention to expropriate certain lands, and also executed the usual bond, which was duly allowed by the County Judge, and possession taken by them. Subsequently, the Act 51 Vict. c. 78 (Dom.) was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to expropriation of lands, except where inconsistent with the Ontario Act, but ratifying all acts already done in that regard. Afterwards the arbitrators who had been appointed in the matter of the above lands to give the compensation therefor, gave notice of intention to proceed with the arbitration, immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only:—Held, that the notice of desistment served avoided the original bond, and the defendants must now give security by deposit of money in a bank instead of a bond, that being the mode of giving security under the Dominion Railway Act, and unless they did so, the plaintiff was entitled to an injunction restraining the defendants from using the land. *Nihan v. St. Catharines and Niagara Central R. W. Co.*, 16 O. R. 459.—Robertson.

Part I. of the R. S. C. c. 109, does not apply to the applicants, a company incorporated under a local Act, 52 Vict. c. 82 (Ont.), though under Dominion control, as being a railway for the general advantage of Canada, it being only applicable to railways constructed or to be constructed under the authority of a Dominion Act. *Toronto Belt Line R. W. Co. v. Laufer*, 19 O. R. 607.—Rose.

See *Clegg v. Grand Trunk R. W. Co.*, 10 O. R. 708, 713, p. 1781; *Re Grand Junction R. W. Co. v. County of Peterborough*, 6 A. R. 339, p. 1807.

#### III. LANDS AND THEIR VALUATION.

##### 1. Filing Plans.

See *Kington & Pembroke R. W. Co. v. Murphy*, 17 S. C. R. 582, p. 1756; *Ontario and Sault Ste. Marie R. W. Co. v. Canadian Pacific R. W. Co.*, 14 O. R. 432, p. 1769; *Corporation of Parkdale v. West*, 12 App. Cas. 602, p. 1757.

#### 2. Lands Taken.

##### (a) Government Lands.

By section 4 of 19 & 20 Vict. c. 112, the clause, amongst others, of the Railway Clauses Consolidation Act, 14 & 15 Vict. c. 51, relating to lands were incorporated therewith, whereby the company were empowered to enter upon the crown lands on the line of their railway, and to fell and remove the trees standing thereon, etc. By section 8 of the 16 Vict. c. 109, the possession of such lands was not to be taken without the consent of the Governor in Council, but it was expressly provided that this was not to limit or affect the powers given by the special Act:—Held, that the last named proviso showed that section 8 was not to apply to this company. *Booth v. McIntyre*, 31 C. P. 183.—C.P. D.

The Ontario, Simcoe, and Huron Railway Company (afterwards changed to "The Northern Railway of Canada"), in the course of the construction of their roadway, acting in assumed and alleged pursuance of the powers conferred on the company by its charter, entered upon and took possession of certain government lands held by the principal officers of Her Majesty's ordnance for ordnance purposes, and proceeded to construct their road thereon. Afterwards negotiations were opened between the company and the principal officers for acquiring such right of way, in the course of which numerous letters passed between the parties and between the several departments connected with the ordnance department, from which it appeared that the parties concerned had arrived at the conclusion that the company were acting within their statutory powers, and that all the department could require was compensation for the land taken. Subsequently all these lands were, by the Imperial Government ceded to the government of Canada, and in the year 1875 it was ascertained that the sum for which the government held a lien upon the road amounted to about £600,000; and by an Act of the legislature of that year that claim was compromised by the government for £100,000 sterling which was paid. In the year 1856 or 1857, this company agreed with the Grand Trunk Railway Company for the use of a portion of this land for the purposes of the line of the latter company, who it was shewn had entered upon and continued in the use of this land until 1879, when the Credit Valley Railway Company, with a view of obtaining an entrance into the city of Toronto, entered upon this tract of land, and were proceeding to construct their line of road thereon. Upon a bill filed by the Grand Trunk Railway Company an interlocutory injunction was granted to restrain the further construction of the Credit Valley Railway, until the hearing, when the injunction was made perpetual, the court being of opinion that the Northern Railway Company, under their dealings with the board of ordnance, and under the various statutory enactments appearing in the case, had acquired an absolute title to the land in question, free from any lien in respect thereof. *Grand Trunk R. W. Co. v. Credit Valley R. W. Co.*, 27 Chy. 232.—Proudfoot.

Taschereau J. was of opinion that the award in this case included compensation for the beach lying in front of plaintiff's property, which

belongs to the Crown, and, for that reason should be set aside. *Bigaquette v. North Shore R. W. Co.*, 17 S. C. R. 363.

See *Foran v. McIntyre*, 45 Q. B. 288, p. 1741; *Booth v. McIntyre*, 31 C. P. 183, p. 1741; *Attorney-General v. Midland R. W.*, 3 O. R. 511, p. 1755; *McArthur v. Northern & Pacific Junction R. W. Co.*, 15 O. R. 733; 17 A. R. 86, p. 1743.

(b) *Infant's Estate.*

The mother of infant children, resident with her, being entitled to a third undivided interest in the land, they owning the residue, by deed agreed with a railway company, in consideration of an extension by them of their line of railway from R. to P., and for one dollar to grant to them in fee the right of way "through my land in P., consisting of such portion of lots eighteen and nineteen as may be required to carry the railway across said lots," and conveyed to them accordingly. At the time of the conveyance she had not been appointed guardian to her children:—Held, that under the Railway Act of 1868 (31 Vict. c. 68, s. 9, sub-ss. 3, 9, Dom.), her deed barred the children's interest in the land as well as her own, and that they were therefore not entitled to compensation from the company. *Dunlop v. Canada Central R. W. Co.*, 45 Q. B. 74.—Q. B. D.

See *Re Dolsen*, 13 P. R. 84, p. 1748.

(c) *Tenant for Life and Estate in Remainder.*

A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the cesser of the life estate the parties entitled in remainder filed a bill stating that the railway company assumed to purchase the lands for the right of way; that the company alleged that they had paid the full consideration for the land to the tenants for life; submitting that even if the company did make such payment they did so in their own wrong, and asking for payment of the plaintiffs' share of the purchase money:—Held, that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground. *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 428.—Spragge.

An "action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another." Therefore, where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the

company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors . . . of money to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs." *S. C. Ib.* 431.—Spragge.

Under the Railway Act, C. S. C. c. 66, s. 11, sub-s. 1, as interpreted and explained by 24 Vict. c. 17, s. 1, a tenant for life had power to convey the fee to a railway company, but had no power to receive the purchase money; and, therefore, a railway company which took a conveyance in fee from a tenant for life and paid her the purchase money, remained responsible for the payment. The meaning of sub-section 22 of section 11 is that the money value of the land is converted into a piece of real estate, which the railway company holds for the owner of the land in place of which it stands, and that the estates in the land existing at the time the land is taken become estates in the compensation instead; and upon the tenant for life, in this case, conveying the fee, she became tenant for life in the compensation, and those entitled to the inheritance to the land became entitled to the reversion in fee in the compensation as against the railway company; and the Statute of Limitations did not begin to run against them till the death of the tenant for life. *Young v. Midland R. W. Co.*, 16 O. R. 738.—Street.

The tenant for life conveyed to the railway company in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heir-at-law, died in 1884, leaving a will, in which he devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company:—Held, that this will did not pass to the plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate and it descended to her heirs-at-law, of whom the plaintiff was one; and the plaintiff was allowed to amend by adding the other heirs-at-law as parties. *Ib.*

Where land was conveyed to C. D. for life with remainder to her children, and C. D. during the infancy of her children agreed to sell and convey the land to a railway company for the purposes of its railway:—Held, that C. D., notwithstanding the provisions of section 36 of the Railway Act of Canada, 51 Vict. c. 29, had no right in law to sell; to get such a right an order of a judge under section 137 was required; and where the proceeding was entirely for the benefit of the railway company, and no factious opposition was raised by anyone, the company should pay the costs of the order as part of the price of the land. *Re Dolsen*, 13 P. R. 84.—Boyd.

See *Wilson v. Graham*, (2), 13 O. R. 661, p. 896.

3. *Land Injuriouly Affected.*

The plaintiff in his statement of claim claimed damages from the defendants for "unlawfully,

medly over against them, and on the alleged all facts as to a direct de- the bill was not remedy against ment being made by of money plaintiffs were en- made without the became money had to the use of the drage.

S. C. c. 66, s. 11, explained by 24 life had power to company, but had chase money; and, which took a con- for life and paid nained responsible of sub-section money value of the ce of real estate, y holds for the, which it stands, land existing at become estates in and upon the tenant ying the fee, she compensation, and itance to the land rson in fee in the railway company; ions did not begin death of the tenant R. W. Co., 16 O. R.

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negligently and wrongfully" depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to approach the plaintiff's store for business; also for, in like manner, blocking them up and rendering them almost impassable in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully, and wrongfully," preventing customers or others coming thereto, and almost entirely destroying the plaintiff's business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to plaintiff; or that it be referred to the proper officer to ascertain and state such compensation:—Held, on demurrer, that the statement of claim was sufficient; for it alleged that the work was negligently done, and this gave a cause of action, even though the work itself might be lawful. Quære, whether a mandamus would be granted; for if the plaintiff was entitled to compensation the proper remedy would apparently be by reference to the proper officer, as asked by way of alternative relief, also whether it is necessary to allege that defendants' railway touches or takes a portion of plaintiff's land; and whether also, under the Railway Acts, defendants are liable to make compensation except for lands taken. As to the latter points, as the judgment could not be reviewed until after the trial they were enlarged before the judge thereat. *Quillman v. Canada Southern R. W. Co.*, 6 O. R. 567.—Rose.

The appellants made a railway upon the fore shore of a tidal and navigable river by means of an embankment extending along the entire length of the respondents' frontage, cutting off all access to the water from the respondents' land except through one opening left in the said embankment and another opening just outside the respondents' boundary:—Held, affirming *Pion v. North Shore R. W. Co.*, 14 S. C. R. 677, that by the French law prevailing in Lower Canada, the respondents as riparian owners had the same rights of *accès et sortie* as they would have had if the river had not been navigable; that the above obstruction to such rights without parliamentary authority was an actionable wrong; that the substituted openings above-mentioned were no answer to a claim for indemnity. *North Shore Railway v. Pion*, 14 App. Cas. 612.

There is no distinction in principle between riparian rights on the banks of navigable or tidal and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation, and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically. *Lyon v. Fish-mongers' Company* (1 App. Cas. 662) followed and held to be applicable to every country in which the same general law of riparian rights prevails unless excluded by some positive rule or binding authority of the *lex loci*. *Id.*

Held, that under the Quebec Railway Consolidation Act 1880, section 9, no authority is given to a railway company to exercise its powers in such a manner as to inflict substantial damage upon land not taken without compensation. *Id.*

A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *accès et sortie* and such obstruction without parliamentary authority is an actionable wrong. (*North Shore R. Co. v. Pion*, 14 App. Cas. 612 followed) *Bignouette v. North Shore R. W. Co.*, 17 S. C. R. 363.

The lands in question were lots three, four and six on Clinton avenue, in the town of Niagara Falls. The defendants had taken for the purposes of their railway a small part of lot three and the plaintiff claimed damages for the injury caused to that lot and lots four and six, by lowering the street in front of these lots so as to enable the railway to be carried over the highway, and which was done in such a manner as to obstruct the plaintiff's access to his land:—Held (affirming the judgment of the court below), (1) that upon the evidence the sum paid to plaintiff for the part of lot three actually taken, included any damage to that lot, but not to lots four and six. (2) That the claim as to lots four and six was in respect of lands injuriously affected by the exercise of the powers granted for the railway within the meaning of the Consolidated Railway Act, 1879, s. 9, sub-ss. 10 and 12 (Dom.). Quære, whether the compensation clauses of Part I. of the Consolidated Railway Act, 1879, apply to the defendants' railway; but:—Held, that either under that Act or the Consolidated Statutes of Canada, chapter 66 as applied to these defendants by their special Act compensation was recoverable:—Per Burton, J. A., Part I. of the Act of 1879 applies to the defendants' Welland branch on which the work in question was done. *Boven v. Canada Southern R. W. Co.*, 14 A. R. 1.

Held, also, that there was nothing to exonerate the defendants in the fact that they had obtained the leave of the municipality for doing as they had done. Per Burton, J. A., that the court had no power to compel a reference to an officer of the court to ascertain the damages, but only to compel an arbitration, to which the plaintiff was entitled under the Act. *Id.*

Where under the Railway Act, 51 Vict. c. 29 (Dom.) the owner of a mill who was also the owner of a lot adjoining it, which was used as the principal means of communication between the mill and a public highway, and across which lot a railway company had erected a trestle bridge, also sought compensation for the loss of local custom to and from the mill, not arising from the construction of the railway, but from a subsequent user of it:—Held, that the damages were too remote and speculative to be allowed. *St. Catharines R. W. Co. v. Norris*, 17 O. R. 667.—Galt.

The plaintiff was in possession of certain lands under an oral agreement of purchase at \$450, payable in bricks deliverable as demanded, of which \$100 worth had been demanded and delivered. The defendants, without making any compensation or taking any steps under the statute therefor, built their railway in front of the land so as to interfere with the plaintiff's right of access, whereupon this action was brought, and damages recovered by the plaintiff, he being treated as entitled to the whole estate in the land and the injury permanent, reducing the value of the land:—Held, that the company

were trespassers, and could not justify the acts complained of under the statute: that substantial damages, on proof of them, were recoverable for the disturbance of the possession; but in a first action only nominal damages for the injury to the reversion:—Held, therefore, that the damages here were not properly assessed, and a new trial was directed. *Semble*, that the damages for injury to the reversion belonged to the vendor; and leave was given to add him as a party plaintiff. *Mason v. South Norfolk R. W. Co.*, 19 O. R. 132.—C. P. D.

See *In re Arbitration between Ontario and Quebec R. W. Co. and George Taylor*, 6 O. R. 338, p. 1759; *Wells v. Northern R. W. Co.*, 14 O. R. 594, p. 1760; *McArthur v. Northern Pacific Junction R. W. Co.*, 15 O. R. 733; 17 A. R. 86, p. 1743.

#### 4. Lands Granted on Conditions.

##### (a) Erection of Stations.

An engineer of the defendants, whose duty it was to obtain transfers of land and determine the situation of station houses, procured from the plaintiffs, for nominal considerations, grants of land for a station-house and ground, representing that the station would be put, as desired by the plaintiffs, at a certain point advantageous to both. The deed of the plaintiff S. contained this proviso:—"Provided that the said company their successors and assigns, do erect and maintain on the said lands a station for the accommodation of passengers and freight, and name the same B." The station was erected on the land in the deed containing this proviso, but not at the point represented:—Held, that though the plaintiffs had the expectation that the station would have been placed where they desired, yet there had been no deceit practised by the defendants' engineer for the purpose of obtaining the grants of the land: that the engineer had no power to bind the defendants to such a thing; and that the defendants had done all they were bound to do by observing the proviso in the deed, which called for the erection of the station-house on the lands without specifying any particular point. *Schliehauf v. Canada Southern R. W. Co.*, 28 Chy. 236.—Spragge.

The plaintiff agreed with contractors for the building of a railway to convey to them in fee simple six acres, to be increased to ten if necessary, in consideration of their placing the station for the town of Prescott thereon. After the road had been surveyed and the station buildings erected on the property, the plaintiff executed a conveyance thereof to the contractors which contained a covenant by them to continue and maintain the station on those lands from thenceforth, but the deed was never executed by the grantees. The company continued to use such station for about ten years, when they removed it to a distance of one and a-half miles: Held, reversing the judgment of the court below (28 Chy. 583), that the act of the company in thus placing and using the station was a substantial compliance with the agreement, and that they were not bound to continue that station there for all time. Per Hagarty, C. J. *Semble*, that upon the defendants ceasing to use the lands for the purpose for which alone they had been conveyed, the grantor would be at liberty to resume

possession. Per Patterson, J. A. That even if the plaintiff were entitled to claim such possession in consequence of the company ceasing to use the land for the purpose for which alone it had been conveyed, the fact that the company had resumed the use and occupation during the progress of the cause would be considered a material fact upon an application to alter the frame of the bill in order to ask that relief; and under the prayer for general relief the Court would not determine that the plaintiff was entitled to re-enter, even though facts apparently sufficient to justify such a decree might be alleged in the the pleadings and deducible from the evidence. The proper form of conveyance that should have been used for effecting the plaintiff's purpose suggested. *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 128.

See *Clouse v. Canada Southern R. W. Co.*, 4 O. R., 28; *Bickford v. Chatham*, 10 O. R. 257; 14 A. R. 32; 16 S. C. R. 235, pp. 1810, 1811.

##### (b) Farm Crossings.

A deed conveying a right of way to the defendants in 1869, contained the following stipulation:—"The company to make and maintain a farm crossing, with gates at the present farm lanes, the fence at crossing to be returned as much as possible." R. the company's engineer, treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised if he should find a second crossing necessary he would, so far as in him lay, get it done, and the deed was executed upon this understanding:—Held, (reversing the decree of Proudfoot, V. C., 27 Chy. 95), that the defendants could not be compelled to make a second crossing for use in winter; and that, upon the construction of the words above set forth, they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow. Proudfoot, V. C. dissenting. *Cameron v. Wellington, Grey & Bruce R. W. Co.*, 28 Chy. 327.—Chy. D.

In negotiating for the sale of lands taken by the Canada Southern Railway Company for the purposes of their railway the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle, the company will so construct their fence on each side thereof as not to impede the passage thereunder":—Held, reversing the judgment of the court below (11 A. R. 306), Ritchie, C. J. dissenting, that under this agreement the only obligation on the company was to maintain a cattle pass so long as the trestle bridge was in existence and did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor, without providing a pass under such embankment. *Canada Southern R. W. Co. v. Erwin*, 13 S. C. R. 162.

The C. S. R. Co. having taking for the purposes of their railway the lands of C., made a verbal agreement with C., through their agent

A. That even if claim such possession company ceasing to for which alone it that the company upation during the ce considered a man to alter the frame t relief; and under the Court would not was entitled to re- nently sufficient to be alleged in the from the evidence. ce that should have plaintiff's purpose. *Trunk R. W. Co., 7*

*thern R. W. Co., 4*  
*ham, 10 O. R. 257;*  
*5, pp. 1810, 1811.*

esings.

of way to the defen- e following stipula- eake and maintain a at the present farm to be returned as company's engineer, but had no power to though it was said ould find a second l, so far as in him d was executed upon , reversing the de- y Chy. 95), that the mpelled to make a winter; and that, the words above set ontinue the crossing, or alter its character e not obliged to keep ot, V. C. dissenting. y & Bruce R. W. Co.,

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taking for the pur- lands of C., made a through their agent

T., for the purchase of such lands, for which they agreed to pay \$462, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and th. such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid. The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction:—Held, reversing the judgment of the court below (11 A. R. 287), which varied the judgment of Proudfoot, J. (4 O. R. 28), Ritchie, C. J., dissenting, that the evidence shewed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm:—Held also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the master of the court below. The substitution of the word "at" in section 13 of cap. 60 of the Consolidated Statutes of Canada, for the word "and" in section 13 of c. 51 of 14 and 15 Vict., is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect. *Brown v. Toronto & Nipissing R. W. Co. 26 C. P. 206 overruled. Canada Southern R. W. Co. v. Clouse, 13 S. C. R. 139.*

See *Fargy v. The Grand Junction R. W. Co., 4 O. R. 232, p. 1814; Vezina v. The Queen, 17 S. C. R. 1, p. 1761; Guay v. The Queen, 17 S. C. R. 30, p. 1762.*

### 5. Other Cases.

Where land had been taken by the Great Western R. W. Co., for the purpose of their railway under 9 Vict. c. 81, s. 30, and 16 Vict. c. 99, the company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove strictly the title of their grantors. *Great Western R. W. Co. v. Lutz, 32 C. P. 166.—C. P. D.*

The P. & C. L. R. W. Co., incorporated in 1855, by 18 Vict. c. 194, had acquired the land in question as part of their road bed. In 1865, its charter expired, the road not having been put in operation. In 1866, 29-30 Vict. c. 98, was passed, by which the road was to be sold at auction, the Act of Incorporation was revived, and the time for completing the railway extended for five years from the passing of the Act, and there was a further provision for sale under order of the Court of Chancery. Within the five years a conveyance was executed to the defendant company, which took possession, but did not use the land till a short time before the suit. In 1872, the C. P. & M. R. & M. Co. filed a map and book of reference of a proposed extension of their line over the land in question, and constructed part of their road thereon, but ceased in 1873. In 1880, under 43 Vict. c. 54 (Ont.), the C. P. & M. R. & M. Co., leased to the plaintiff company the land in question, and this action was brought to recover possession thereof:—Held, affirming the judgment of the court below, that the partial construction of their road by the C. P. & M. R. & M. Co. in 1872, was an act of trespass: that the defendant company under the Reviving Act and conveyance in pursuance thereof acquired a title to the land: that the power to sell by order of the Court of Chancery was permissive merely: that their right to the land was not forfeited by non-completion of the work on the land within the five years, and therefore that the plaintiff company should not succeed. *Grand Junction R. W. Co. v. Midland R. W. Co. 7 A. R. 681.*

The deed to the defendant company described it by its original name of P. H. L. & B. R. Co., when in fact its name had been changed:—Held, a sufficient descriptio persone, to enable the company to take, though it might not be sufficient to sue in. *Id.*

There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. *Harding v. Township of Cardiff, 29 Chy. 308.—Proudfoot.*

In an action by the Attorney-General, upon the relation of the bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the university, the defendants pleaded that the said lands had been, with the assent of the university and bursar, taken possession of by them for the purposes of their railway under their statutory powers, and that they had since retained and then were in possession thereof, and they also pleaded the Statute of Limitations:—Held, on demurrer, that it was not necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements:—Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under Rule



144 (Con. Rule 416):—Held, also, that even if under R. S. O. (1877) c. 165, the assent of the Lieutenant-Governor in Council to the expropriation of the lands by the railway was necessary, which it was not, yet after a user of the land by the railway for ten years, coupled with the legislative recognition of the status of the railway company, and with the fact that the taking of it was with the assent of the university, and colleges, and bursar, the formal assent of the Crown must be held to have been dispensed with, and trespass or ejectment would not lie:—Held, also, that the Statute of Limitations was no bar to the action, although brought by the Crown in its capacity as trustee of the land in question. *Regina v. Williams*, 19 Q. B. 397, followed. *Attorney-General v. Midland R. W.*, 3 O. R. 513.—Boyd.

Expropriation of mining lands—Injunction. See *Jenkins v. Central Ontario R. W. Co.*, 4 O. R. 593, p. 920.

The Northern Railway Company of Canada have no power to take land compulsorily under section 7, sub-section 2, or section 8, sub-section 10 of the Railway Act of 1868, incorporated in their special Act 38 Vict. c. 65 (Dom.), for the purpose only of obtaining therefrom gravel or other material for the repair or maintenance of their road, because these sections do not confer compulsory powers to take land. Nor have they such powers under section 9, sub-section 38 and 39 of the Railway Act of 1879, because that Act does not apply to their railway:—Semble, even if compulsory powers are conferred by section 9, sub-section 10 of the Act of 1868 the powers are to take materials only, not the land itself, as was attempted in this case. *Re Watson v. Northern R. W. Co.*, 5 O. R. 550.—Osler.

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully compos mentis, and no unfair advantage having been taken of her, the agreement could not be set aside. B.'s marriage took place in 1876, and the land was held by her to her separate use:—Held, that the concurrence of her husband in the contract was unnecessary, nor was it necessary for him to join in the conveyance. *Bryson v. Ontario & Quebec R. W. Co.*, 8 O. R. 380.—Ferguson.

A company built its line to the termini mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired, but the company had terminated the representation on the board of directors, which by statute, was to continue during construction, and had claimed and obtained from the city of K. exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute:—Held, affirming the judgments of the court below (11 O. R. 382, 582), that the statutory provisions that land required for a railway shall be indicated on a map or plan filed in the department of rail-

ways before it can be expropriated applies as well to a deviation from the original line as to the line itself, and the company, having failed to show any statutory authority therefor, could not take the said land against the owners' consent:—Held, also, that the proposed extension was not a deviation within the meaning of the statute 42 Vict. c. 9, s. 8, sub-s. 11 (Dom.). Per Ritchie C. J., Strong, Fournier and Taschereau J.J., that the road authorized was completed as shown by the acts of the company, and upon such completion the compulsory power to expropriate ceased. Per Gwynne J., that the time limited by the charter for the completion of the road not having expired the company could still file a map or plan showing the lands in question and acquire the land under section 7, sub-section 18 of the Act 42 Vict. c. 9. *Kingston and Pembroke R. W. Co. v. Murphy*, 17 S. C. R. 582.

Held, that 46 Vict. c. 64 (Dom.), which empowered the company to hold and own land in any municipality through or in which the main line or any branch was carried for the erection and maintenance thereon of stations, sidings, etc., as might be necessary for the purposes of the company, did not empower them to expropriate against the will of the owner. *S. C.*, 11 O. R. 302.—Boyd.

The plaintiffs were incorporated under 37 Vict. c. 91 (Ont.), for the purpose of building a cathedral, and were the owners of a block of land enclosed within one fence, and bounded on three sides with streets, known as the Cathedral or Chapter House Block, upon which they had erected a Chapter House as part of the cathedral, and had leased other portions, but for want of funds the other part of the cathedral was not proceeded with for some years. The defendants, in constructing their railway, required part of the block, which would cut off a part of the cathedral, when erected, for their line, and took possession of it, but the plaintiffs, under the circumstances, declined to sell or convey, or arbitrate as to the value of anything less than the whole block. In an action to compel the railway to take the whole and desist from their proceedings as to part only, it was:—Held, that the block of land was set apart for cathedral purposes, and had not, by any default of the plaintiffs, lost that distinctive ecclesiastical character, and an injunction was granted against the railway taking a part only, as in *Sparrow v. Oxford, etc.*, R. W. Co., 2 D. M. & G. 94. *Cathedral of the Holy Trinity v. West Ontario Pacific R. W. Co.*, 14 O. R. 246.—Boyd.

It was contended by the plaintiffs that the defendants having taken possession could not withdraw, but must take the whole block:—Held, that the mere going into possession of part, although a high-handed act on the part of the defendants did not necessarily commit them to the purchase of the whole, and that the defendants should have the option to take the whole or withdraw, and pay all damages and costs sustained by the plaintiffs. *Id.* But see 50 & 51 Vict. c. 19, s. 4 (Dom.).

Where a railway company gave notice of their intention to expropriate certain lands adjoining their lines, but which were not required for building any of their works upon, and the evidence shewed grounds for supposing that the

ated applies as original line as to , having failed therefor, could the owners' composed extension meaning of the 11 (Dom.). Per and Taschereau as completed as any, and upon power to expro... that the time completion of the npany could still and in question 7, sub-section 11, *Pen- S. C. R. 582.*

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plaintiffs that the ossession could not the whole block:— into possession of d act on the part of ssarily commit them e, and that the de- opation to take the y all damages and ntiffs. *Ib.* But see m.).

y gave notice of their ain lands adjoining ere not required for upon, and the evi- supposing that the

powers were to be exercised for other than those purposes which the railway laws of this country permit and allow:—Held, that they should be enjoined from proceeding with the expropriation. *Nihan v. St. Catharines and Niagara Central R. W. Co.*, 16 O. R. 459.—Robertson.

The position of a vendee under a contract for sale of land considered. See *Mason v. South Norfolk R. W. Co.*, 19 O. R. 132.

Held, that an order of a railway committee under section 4 of the Dominion Act, 46 Vict. c. 24, does not of itself and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's right:—Held, that such provisions of law include all the provisions contained in the Consolidated Railway Act, 1879, under the headings of "Plans and surveys" and "Lands and their valuation" which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that Act. When a railway company, acting under an order of the railway committee, did not deposit a plan or book of reference relating to the alterations required by such order:—Held, that it was not entitled to commence operations:—Held, further, that under the Act of 1879, the payment of compensation by the railway company is a condition precedent to its right of interfering with the possession of land or the rights of individuals. *Jones v. Stanstead Railway Co.*, (L. R. 4 P. C. 98) distinguished. *Corporation of Parkdale v. West*, 12 App. Cas. 602. Judgment of Supreme Court 12 S. C. R. 250, affirmed; Judgment of Court of Appeal 12 A. R. 393, reversed; Judgment of Divisional Court 8 O. R. 59, affirmed; Judgment of Wilson, C. J., 7 O. R. 270, affirmed.

See *Gooderham v. Toronto and Nipissing R. W. Co.*, 28 Chy. 212, p. 1815.

#### 6. Order for Immediate Possession.

Seuble, that the powers conferred on the county judge under the Railway Act of Ontario, R. S. O. (1877), c. 165, s. 20, sub-s. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this court to enjoin the taking of possession, if the company is making use of its powers to attain any object collateral to that for which it was incorporated; but otherwise it is not within the jurisdiction of a judge of this court to interfere with an order of a county judge, though granted ex parte. *Jenkins v. Central Ontario R. W. Co.*, 4 O. R. 593.—Proudfoot.

Immediate possession of land, alleged to be necessary for the purposes of a railway, should not be granted to the railway on summary process under the Railway Act unless two points are very clearly established: 1st, That the company has an indisputable right to acquire the land by compulsory proceedings; and 2nd, That there is some urgent and substantial need for immediate action; and inasmuch as these points could not be said to have been clearly established by the affidavits and arguments in this present

case, the court declined to interfere summarily, and dismissed the application of the railway company for a warrant to enter forthwith upon the lands:—Quere, as to power of judge to award costs directly under the Statute, 47 Vict. c. 11 (Dom.). *Re Kingston and Pembroke R. W. Co. and Murphy*, 11 P. R. 304.—Boyd.

In the computation of the ten days previous notice, necessary to be given under 51 Vict. c. 29, s. 164 (Dom.), to obtain a warrant for the possession of land by a railway company, the day of the service of the notice and the day of the return must both be excluded. *Re Ontario Tanners' Supplies Company and Ontario and Quebec R. W. Co.*, 12 P. R. 563.—Armour.

Where a railway company, having a right to expropriate land, obtains under section 163 of the Railway Act 51 Vict. c. 29 (Dom.), a warrant for immediate possession, and the amount subsequently awarded to the landowner is not more than he was previously offered by the company as compensation, the costs of the application for the warrant should, under section 165, be paid by the landowner. *Re Shibley and The Napanee, Tamworth and Quebec R. W. Co.*, 13 P. R. 237.—Street.

An order granted under the Railway Act, R. S. C. c. 109, s. 8 (31) by a judge in chambers granting payment of money deposited by a railway company as security for land taken for railway purposes is not appealable as a proceeding originated in a superior court within the meaning of R. S. C. c. 135, s. 28. See *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Therese*, 16 S. C. R. 606.

The application for a warrant for possession of land required by a railway company under sub-section 23 of section 20 of R. S. O. (1887), c. 170, should be made to the county judge and not to a judge of the high court. *Toronto Belt Line R. W. Co. v. Lander*, 19 O. R. 607.—Rose.

#### 7. Compensation.

##### (a) Generally.

The plaintiff herein, a timber licensee, sold his interest in the license and limits to one W., who entered and cut timber, but the transfer was not proved, and by the regulations of the Crown Lands Department all transfers were to be in writing and subject to their approval, and were to be valid only from such approval:—Held, that the legal title to the limits and timber thereon was in the plaintiff, and that W.'s possession was the plaintiff's, who was entitled to maintain an action for damage done to the limits. *Booth v. McIntyre*, 31 C. P. 183.—C. P. D.

Where a railway company in construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of \$1,800 was found to be the value of such plot, which sum together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company: and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously

paid a prior owner of the land for a portion thereof:—The court (Ferguson, J.), refused the relief asked with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment. *Dunblie v. Coboury and Peterborough R. W. Co.*, 29 Chy. 121.

S., being the owner of lands through which the defendants desired to build their road, agreed to give them the right of way, and the company, with his written permission, took possession without compensation and constructed their road, and had up to this time been in uninterrupted possession for more than ten years. The plaintiff, claiming under S., now demanded compensation and obtained a mandamus nisi to proceed to arbitration under the Railway Act, 1868:—Held, affirming the judgment of Galt, J., that the plaintiff was not entitled; that S., having the right to accept any or no compensation, and having elected to take none, the company then became entitled to the lands, and the plaintiff could not succeed. Per Galt, J. The ten years possession of the company had extinguished the title of S. and those claiming under him, and vested it in the company. *Thompson v. Canada Central R. W. Co.*, 3 O. R. 136.—Q. B. D.

The owner of land taken by a railway, is entitled to compensation; and the company must proceed to settle the amount thereof, under R. S. O. (1877) c. 165, s. 20; if they do not the proper course is to apply for a mandamus. On such application a formal title in the absence of proof to the contrary, need not be proved; it is sufficient if the applicant swear that he is the owner of the land taken. *Demorest v. Midland Railway of Canada*, 10 P. R. 73.—Cameron.

The right of a railway company to cut down trees for six rods on each side of the railway under the Consolidated Railway Act, 1879, s. 7, sub-s. 14, is entirely distinct from their right to expropriate land for the road. If compensation can be claimed for it, it must be distinctly demanded by the notice:—Held, therefore, that an award was bad in allowing compensation to the owner of lands expropriated for the damage that might accrue to the owner by the possible exercise of such right. *In re The Ontario and Quebec R. W. Co. and Taylor*, 6 O. R. 338.—Cameron.

Quære, whether under the Consolidated Railway Act, 1879, more than the value of the land actually taken can be allowed, as the Act does not contain a section equivalent to section 7 of R. S. O. (1877) c. 165, and section 5 of C. S. O., c. 66, giving compensation for damages to lands injuriously affected. *Ib.*

Seemle, that where a parcel of land is severed by the railway the actual value is the difference between the value of the land of which it forms part before the expropriation, and the value to the owner of the remainder after the expropriation. *Ib.*

Held, that the possible damages to bush land from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway, were contingencies too remote to be considered in estimating

the amount of compensation where there were no buildings to be endangered. *Ib.*

The notice by the railway company included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned":—Held, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation. *Ib.*

Where in building their road the defendants left a subway under a trestle bridge, and the evidence showed that the plaintiff, the owner of the land crossed by the railway at this point, had enjoyed the open and continuous user of this subway as of right ever since 1862, but that the defendants were now proceeding to fill it up:—Held, that though the plaintiff could not prevent the filling up of the subway, he was entitled to damages for his property in the easement. The plaintiff was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the railway company, which deed was lost, or he was entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right. *Clouse v. Canada Southern R. W. Co.*, 4 O. R. 28, 11 A. R. 287, 13 S. C. R. 139, distinguished. *Wells v. Northern R. W. Co.*, 14 O. R. 594.—Proudfoot.

Held, that the right of compensation for land taken by a railway company is not barred short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years. *Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447.—Q. B. D. See also *Esery v. Grand Trunk R. W. Co.*, 21 O. R. 224.

Per Armour, J., the plaintiff's claim to compensation was not money secured by lien, or otherwise charged on land, within section 23 of R. S. O. (1879) c. 108, and he had not a vendor's lien, for the relation of vendor and purchaser never arose between him and the company. *Ib.*

In fixing compensation to a landowner for lands expropriated by a railway, the rule is, to ascertain the value of the land of which it forms a part before the taking, and the value of such land after the taking, and deduct one from the other, the difference thus arrived at being the actual value to the owner of the part taken. Rule laid down by Cameron, C. J., in *Re Arbitration between the Ontario and Quebec R. W. Co. and Taylor*, 6 O. R., at p. 348, followed. *James v. Ontario and Quebec R. W. Co.*, 12 O. R. 624.—Ferguson.

The "taking" is properly fixed as at the date of the company giving notice to the landowner of their intention of taking the land; and it is not correct to say that the value of the lands should be taken as of a date prior to knowledge of intention to construct, or in anticipation of the construction of the railway. *Ib.*

Held, by the Court of Appeal affirming the judgment of Ferguson, J., (12 O. R. 624,) that in ascertaining the compensation to be made to a landowner for land expropriated for a railway under R. S. C. c. 109, s. 8, the value of the part taken (as well as the increased value of the part not taken, which by sub-section 21 is to be set off) must be ascertained with reference to the

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date of the deposit of the map or plan and book of reference, under sub-section 14 (or in this case with reference to the date of the notice or determination to expropriate), and therefore, such value should include an increase which may have been caused by, or is owing to, the contemplated construction of the railway:—Semble, per Burton, J. A., that what is intended by sub-section 21 is a direct or peculiar benefit accruing to the particular land in question and not the general benefit to all landowners resulting from the construction of the railway:—Semble, per Osler, J. A. The land in question not having been taken for the purpose of the railway strictly, but, after the same had been laid down, for the purpose of effecting a deviation in a street in order that the railway might run along the original street, there was no right to set off the increased value of the land not taken, caused by the construction of the railway. S. C., 15 A. R. 1.

Held, that where a railway company had failed to pay the balance of compensation awarded to landowners in accordance with a judgment obtained for the same, although it had entered into possession and was operating its railway over the lands, the landowners were entitled to an order declaring them to have a vendor's lien on the lands for the amount, with such provisions as were necessary to realize by means of a sale; but they were not entitled to an injunction to restrain the defendants from operating the railway on the lands, nor to an order for delivery up of possession. Allgood v. Merrybent and Darlington R. W. Co., 33 Ch. D. 571, distinguished. Lincoln Paper Mills Co. v. St. Catharines and Niagara Central R. W. Co., 19 O. R. 106.—Ferguson.

Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land where there is no market for the gravel. *Pécha v. The Queen*, 17 S. C. R. 1.

The compensation to be paid for any damages sustained by reason of anything done under and by authority of R. S. C. c. 39, s. 3, sub-s. (e), or any other Act respecting public works or government railways, includes damages resulting to the land from the operation as well as from the construction of the railway. 1b.

The right to have a farm crossing over one of the government railways is not a statutory right, and in awarding damages full compensation for the future as well as for the past for the want of a farm crossing should be granted. 1b.

Gwynne J., dissenting, was of opinion that the owner had the option of demanding, and the government had a like option of giving, a crossing in lieu of compensation, and that on the whole case full compensation had been awarded by the court below. 1b. (See now 52 Vict. c. 38, s. 3.)

Where land expropriated for government railway purposes severed a farm, the owner although not at the time entitled to a farm crossing apart from contract was entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing. Gwynne, J., dissenting on the ground

that the owner was entitled to a crossing as a matter of law. *Guay v. The Queen*, 17 S. C. R. 30. (See now 52 Vict. c. 38, s. 3.)

See *Dunlop v. Canada Central R. W. Co.*, 43 Q. B. 74, p. 1747; *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 428, S. C. 1b. 431, pp. 1747, 1748; *Norvall v. Canada Southern R. W. Co.*, 5 A. R. 13, p. 1761; *Bryson v. Ontario and Quebec R. W. Co.*, 8 O. R. 380, p. 1755; *Clouse v. Canada Southern R. W. Co.*, 11 A. R. 287; 13 S. C. R. 139, p. 1753; *Erwin v. Canada Southern R. W. Co.*, 11 A. R. 306; 13 S. C. R. 162, p. 1752; *Young v. Midland R. W. Co.*, 16 O. R. 738, p. 1748.

See also Subhead III. 8, *infra*.

#### (b) Interest Allowed.

Money was paid into a bank under Consolidated Railway Act, 1879 (Dom.), s. 9, sub-s. 28, and an order for immediate possession of lands expropriated by the company was made by a judge under the sub-section, and an award of compensation was made subsequently:—Held, that the landowner was entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in and not at the legal rate. *Re Taylor and The Ontario and Quebec R. W. Co.*, 11 P. R. 371.—O'Connor.

An order was obtained for immediate possession of land under the Consolidated Railway Act, 1879 (Dom.), and money was paid into the Canadian Bank of Commerce under the same Act by the company:—Held, that the landowner was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the bank upon a deposit and not at the legal rate of six per cent. *Re Lea*, 21 U. L. J. 154, followed. *Re Philbrick and Ontario and Quebec R. W. Co.*, 11 P. R. 373.—Boyd.

Interest is properly allowed to the landowner on the amount of his compensation from the time of the taking to the time of the award. *James v. Ontario and Quebec R. W. Co.*, 12 O. R. 624.—Ferguson.

#### 8. Reference and Award.

##### (a) Submission.

The railway company served a notice on H. under 42 Vict. c. 9 (Dom.), offering a sum of money as compensation for land to be expropriated by them, and naming an arbitrator. H. served a notice on the company, naming his arbitrator, and the two appointed a third:—Held, that the notices of appointment of arbitrators and the appointment of the third arbitrator might be made a rule of court under C.L.P. Act, section 201. *Re Credit Valley R. W. Co. v. Great Western R. W. Co.*, 4 A. R. 532, distinguished. *Herring and Napanee, Tamworth, and Quebec R. W. Co.*, 5 O. R. 349.—Rose.

##### (b) Desistment.

Held, that a railway company having desisted once from their notice to take land, given under R. S. O. (1877) c. 165, s. 20, could not again de-

ist, pending an arbitration proceeding, under a second notice. The company's arbitrator having withdrawn from such arbitration, in deference to a notice of desistment given by the company, after the amount to be awarded had been agreed upon by the other two:—Held, that the company could not object to the award on the ground that the company's arbitrator had not been asked to sign it. *Moore v. Central Ontario R. W. Co.*, 2 O. R. 647.—Q. B. D. See R. S. O. (1887) c. 170 s. 20 (16).

A railway company at different times served H. with three several notices under the Dominion Railway Act, stating that portions of land owned by him were required for the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation:—Held, that the company had not exhausted their powers of desistment, but had the right to desist from their third notice. H. could not be allowed to complain of the abandonment by the company of proceedings to compel him to sell his land to them when he had notified them at every opportunity that he intended to contest their right to compel him to do so; after they had acted upon his expressed intention, and abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity. *Grierson v. Cheshire Lines' Committee*, L. R. 19 Eq. 83, referred to. *Re Hooper and the Erie and Huron R. W. Co.*, 12 P. R. 408.—Street.

Per Gwynne and Patterson J.J. That an abandonment of a notice to take lands for railway purposes must take place while the notice is still a notice and before the intention has been exercised by taking the lands. R. S. C. c. 109, s. 3, sub-s. 26. *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Therese*, 16 S. C. R. 606.

See *Nihan v. St. Catherine's and Niagara Central R. W. Co.*, 16 O. R. 459, p. 1745.

#### (c.) Objections to Award.

This court has no jurisdiction to set aside an award made under the Railway Act of 1868 (31 Vict. c. 28 (Dom.)), but:—Held, that even were there jurisdiction the court would not have interfered in this case, as the instrument in question was in no sense an award under the statute, the provisions of the statute not having been observed, there having been only two arbitrators appointed, who had not been sworn, and subsection 26 of section 9, not having been complied with. *In re Horton and Admaston and Canada Central R. W. Co.*, 45 Q. B. 141.—Galt.

Held, affirming the decree of Proudfoot, V.C., that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of

the arbitrators; and Quare, whether, if shewn, it would be a defence in such a proceeding:—Quare, also, the land having been taken under an Act of the Dominion Parliament, whether the finding of the arbitrators could be reviewed under the statute of Ontario, 35 Vict. c. 15. *Norwell v. Canada Southern R. W. Co.*, 5 A. R. 13.

After the evidence had been closed the construction committee of the railway company wrote a letter addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the company before the award was made and by him to the umpire, but was not communicated to H. until after the award, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, and reduced the sum awarded, while the other two arbitrators swore it had no effect upon their finding:—Held, that the award was bad. *Herring and Napanee, Tumworth and Quebec R. W. Co.*, 5 O. R. 349.—Rose.

Remarks as to the caution to be observed by arbitrators in such cases in considering or acting upon such agreements made pending the arbitration. *Ib.*

An appeal on petition will not lie from the award of arbitrators appointed under the Dominion Railway Act 1879, 42 Vict. c. 9 (Dom.). The only mode of impeaching such an award is by an action to set it aside; or else to make the submission a rule of court, and then move to set it aside. The appeal given by R. S. O. (1877) c. 165, s. 20, sub-s. 19, only applies to railways over which the provincial legislature has jurisdiction, and is not available in such a case as the present:—Sembie, the court has no power to turn such a petition as the present into an action. *Re Lea and The Ontario and Quebec R. W. Co.*, 8 O. R. 222.—Proudfoot.

On an arbitration with regard to land taken by a railway company, the argument closed on the 10th of August, and the arbitrators adjourned until the 11th, when, after discussion, one of them said he was sorry he could not concur with the others in the sum they had agreed upon, and withdrew. The other two then signed the award in presence of each other, and reacknowledged it in presence of a witness on the 14th of August:—Held, that the meeting having been adjourned to the 11th the case was within the terms of 42 Vict. c. 9, s. 9, sub-s. 17 (Dom.):—Held, also, after reviewing the authorities, that the award was valid at common law. *Freeman v. Ontario and Quebec R. W. Co.*, 6 O. R. 413.—Rose.

Held, that the Canada Southern Railway, although brought under the jurisdiction of the Dominion before proceedings had been taken for expropriation, was still subject to the Railway Act then in force in Ontario, C. S. C., c. 66. An award having been declared void by the Supreme Court was amended so as to meet the objection, given effect to by that court and was re-executed by the arbitrators after the time limited for making the award had expired. The company having filed a bill to set aside such award, as well as the original award, the defendant, by his answer,



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asserted the validity of both. The bill was dismissed on the ground that it was unnecessary:—Held, that this, in effect, affirmed their validity, and an appeal was allowed. *Norvell v. Canada Southern R. W. Co., and Canada Southern R. W. Co. v. Norvell*, 9 A. R. 310.

Held, that where the company's arbitrator had not been notified pursuant to the statute of time and place appointed for signing awards between the company and landowners, such awards were invalid by the statute C. S. C. c. 66, s. 11 sub-s. 11, and that although he had notified the other arbitrator that he would not attend, and waived any notice. *Ib.*

E. B., et al. joint owners of land situate in the city of Quebec were awarded \$11,900 under 43-44 Vlot. c. 43, s. 9, for a portion of said land expropriated for the use of the North Shore Railway Company. On the 12th March, 1885, E. B. et al. instituted an action against the North Shore Railway Company, based on the award. The notice of expropriation and the award, both described the land expropriated as No. 1. on the plan of the railway company deposited according to law, but in another part of the notice it described it as forming part of a cadastral lot 2345 and in the award as forming part of lots 2344-2345. On the 5th December judgment was rendered in favour of E. B. et al., for the amount of the award. From this judgment the railway company appealed to the Court of Queen's Bench (appeal side) and that court reversed the judgment of the Superior Court, holding inter alia the award bad for uncertainty. On appeal to the Supreme Court of Canada it was:—Held, reversing the judgment of the Court of Queen's Bench (appeal side) that there was no uncertainty in the award as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by the arbitrators. *Beaudet v. The North Shore R. W. Co.*, 15 S. C. R. 44.

On an appeal to the Supreme Court from a judgment of the Exchequer Court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the Intercolonial R. W.:—Held, reversing the judgment of the Exchequer Court, and restoring the award of the official arbitrators that to warrant an interference with an award of value necessarily largely speculative, an appellate court must be satisfied beyond all reasonable doubt that some wrong principle has been acted upon or something overlooked which ought to have been considered by the official arbitrators and upon the evidence in this case the Court refused to interfere with the amount of compensation awarded by the official arbitrators. *Regina v. Paradis; Regina v. Beaulieu*, 16 S. C. R. 716.

In the matter of expropriation of land for the Intercolonial R. W. Co. the award of the arbitrators was increased by the judge of the Exchequer Court from \$4,155 to \$10,824.25 after additional witnesses had been examined by the judge. On appeal to the Supreme Court:—Held, affirming the judge of the Exchequer Court, that as the judgment appealed from was supported by evidence and there was no matter of principle upon which such judgment was fairly open to blame nor any oversight of material consideration, the judgment should

be affirmed. Gwynne, J., dissenting. *Regina v. Charland*, 16 S. C. R. 721.

In an award for land expropriated for railway purposes where there is an adequate and sufficient description, with convenient certainty of the land intended to be valued, and of the land actually valued, such award cannot afterwards be set aside on the ground that there is a variation between the description of the land in the notice of expropriation and in the award. *Biguouette v. North Shore R. W. Co.*, 17 S. C. R. 363.

See *Moore v. Central Ontario R. W. Co.*, 2 O. R. 647, p. 1763; *In re Ontario and Quebec R. W. Co. and Taylor*, 6 O. R. 338, p. 1759.

#### (d) Costs.

Where it was determined that neither party was entitled to the costs of arbitration under the statute; but the company, in order to take up the award, paid the whole of the arbitrators' fees:—Held, that a summary order could not be made to recoup the company for one-half the fees out of the moneys payable to the landowner, and such order was refused without prejudice to an action for the same purpose. *Re Philbrick and Ontario and Quebec R. W. Co.*, 11 P. R. 373.—Boyd.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same, which offer was not accepted and the matter was referred to arbitration under the Consolidated Railway Act, 1879. On the day that the arbitrators met, the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer:—Held, affirming the judgment of the Court of Appeal, which affirmed Galt, J. (5 O. R. 674), Gwynne, J. dissenting, that under the circumstances neither party was entitled to costs. *Ontario and Quebec R. W. Co. v. Philbrick*, 12 S. C. R. 288.

By the Dominion Railway Act, R. S. C. c. 109, s. 8, sub-s. 22, the costs of an arbitration as to the value of land expropriated for a railway may be taxed by the judge. The judge in this case, by an order not appealed against, referred the taxation to a taxing officer:—Held, that the question whether the judge had power to delegate the taxation could not be raised, and that an appeal lay from the taxing officer to the judge. *Re McRae and the Ontario and Quebec R. W. Co.*, 12 P. R. 282.—Proudfoot. *Ib.* 327.—Chy. D.

Quære, whether "the judge" named in sub-s. 22 could delegate the taxation of costs. *S. C.*, 12 P. R. 327.

By sub-section 23 of section 8 of R. S. C. c. 109 "the arbitrators" may examine on

oath \* \* the parties, or such witnesses as may voluntarily appear before them." In this case subpoenas were issued, and witnesses attended upon them and were examined:—Held, that there was no power to compel the attendance of witnesses, and those who attended must have done so voluntarily; there was no power, therefore, to tax the subpoenas as such, but as they operated as notices, the proper costs of notices should be allowed, and also the cost of the attendance of the witnesses. *S. C.*, 12 P. R. 282.

In expropriation cases the costs should be taxed liberally in favour of the proprietor; but where the statutes mention "costs" only, and not "full costs," costs as between solicitor and client are not intended. Where a railway company in expropriating land under the Dominion Railway Act agreed to pay to the landowners "all costs incidental to the arbitration" had to fix the compensation to be paid:—Held, that the works did not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration. *Re Bronson and Canada Atlantic R. W. Co.*, 13 P. R. 440.—Boyd.

#### (e) Other Cases.

D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that therefore the sum of \$400 offered by the railway company before proceedings taken had become the amount of the compensation. The judge found on the evidence that no time had been fixed by the arbitrators for making the award:—Held that as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff, the sum of \$400 offered had not become the compensation to be paid, and a reference back was ordered. *Demorest v. Grand Junction R. W. Co.*, 10 O. R. 515.—Ferguson.

The proper mode of enforcing an award of compensation made under the Railway Act is by an order from the judge. *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Therese*, 16 S. C. R. 606.

Quare—Whether sub-section 34 of section 8 of chapter 109 R. S. C. permits possession to be given before the price is fixed and paid of any land except land on which some work of construction is to be at once proceeded with. *Ib.*

A motion was made to Galt, J., under R. S. C. c. 109, s. 8, sub-s. 23, to determine the validity of the cause of disqualification urged by landowners against the arbitrator appointed by a railway company under the provisions of the Act. The objection was, that the arbitrator was a ratepayer of a city largely interested in the rail-

way company as a shareholder and creditor. He was not himself a shareholder, nor had he any personal interest in the matter, except as a resident of the city, in which he had no real estate, and was assessed on income only:—Held, by Galt, J., that the arbitrator was not disqualified. *Re McQuillan and The Guelph Junction R. W. Co.*, 12 P. R. 294.—Galt.—Chy. D.

Held, by the Chancery Divisional Court, that no appeal lay to a Divisional Court from the decision of the judge acting under the statute. *Ib.*

Held, also, that the Divisional Court had no power to remove the proceedings by certiorari. *Ib.*

See *Bowen v. Canada Southern R. W. Co.*, 14 A. R. 1, p. 1750.

Limitation of actions. See Subhead XIII., p. 1800.

#### 9. Action for Wrongful Taking.

Held, that as the appellants had not taken the steps necessary under the Act of 1880, to vest in them the power to exercise the right or do the thing for which compensation would have been due under the Act, an action by the respondents for damages and the removal of the obstruction would lie; in which if the obstruction were not ordered to be removed damages as for a permanent injury to the land could be recovered. *Corporation of Parkdale v. West*, 12 App. Cas. 602, followed. *North Shore R. W. Co., v. Pion*, 14 App. Cas. 612.

#### 10. Alienating Lands Taken for the Purposes of the Railway.

Held, that the Grand Trunk R. W. Co., under 14 and 15 Vict. c. 51, had no power to convey or alienate lands; and certainly not lands acquired by them for the purposes of the railway, and which were necessary for its construction, maintenance and accommodation:—Quare, as to such power under C. S. C. c. 66, s. 9, sub-s. 2. As the deed from the company was not shown to contain any covenant:—Held, in ejectment against them, that they were not estopped; and:—Quare, whether, in any case, they could be estopped in such an action. *Pratt v. Grand Trunk R. W. Co.*, 8 O. R. 499.—O'Connor.

#### 11. Resuming Title to Lands Taken by Railways.

See *Jesup v. Grand Trunk R. W. Co.*, 7 A. R. 128, p. 1752; *Erie and Niagara R. W. Co. v. Rosseau*, 17 A. R. 483, p. 1802.

### IV. CONSTRUCTION OF RAILWAYS.

#### 1. Commencement of Work.

The plaintiffs were empowered by their Act of incorporation to construct a railway in sections between the River S. S. M. on the west, and J. on the east, and such railway was by the twenty-third section of their Act to be commenced within three years, and to be completed within six years from 4th March, 1881. In the years

1881 and 1882 they surveyed, located and filed plans from the river S. S. M. easterly to S. R. about one-third of the entire length of their road, and did some work thereon of the character of "construction" such as grading, blasting and chopping. Little more was done by them from 1882 to 1886 owing to financial reasons, but with no intention of abandoning the road. The defendants who had constructed a line of railway as far west as A. proceeded, in December, 1886, to continue the construction of their line westerly from A. to the River S. S. M. and in doing so used this line which plaintiffs had located:—Held, on the evidence, that the work done by the plaintiffs was a bona fide commencement of their railway within the three years required by their Act. *Ontario and South Ste Marie R. W. Co., v. Canadian Pacific R. W. Co.*, 14 O. R. 432.—Ferguson.

Held, that as the plaintiffs were authorized to construct their railway in sections, they were not bound before commencing work to file plans of their whole line. *Ib.*

See *Corporation of Parkdale v. West*, 12 App. Cas. 602, p. 1757.

## 2. Running on or Crossing Highways.

A municipality may file a bill to compel a railway company to put streets and highways improperly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information. *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4.—Boyd.

The plaintiffs, a municipal corporation, filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their tracks along one of the streets of the municipality without the consent thereof, thus impeding traffic, in contravention of the Railway Act, C. 66, s. 12, sub. 1:—Held, that by virtue of the Municipal Act there is such power of management, control, etc., bestowed upon municipalities, and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights:—Sembly, but for the language used in *Geoph. The Canada Co.*, 4 Chy. 656, the proper frame of the suit would have been by way of information in the name of the Attorney-General, with the corporation as relator. *Ib.*

The City of Ottawa, passed resolutions providing for a lease of right of way to the Canada Atlantic Railway Company over lands expropriated by the city for water-works purposes, under 35 Vict. c. 80 (Ont.):—Held, that though *prima facie* the only right intended to be conferred on a company is that of expropriating the private property of individuals or corporations, and not property already devoted to the public uses, or already expropriated under other Acts, yet under some circumstances the right to make such expropriation might exist, and if so, then the city would have the corresponding power to convey; and as the applicant had not shewn to the court that circumstances did not exist under which the railway company could take the land, the court would not assume that the city had committed a breach of trust in passing the resolutions:—Held, also, that there was nothing in

the resolutions authorizing the railways to cross the streets at a grade different from that prescribed by the Railway Act of 1879. *In re Brownson and City of Ottawa*, 1 O. R. 415.—Q. B. D.

Per Armour, J., the jury were rightly directed, under the facts stated in the report of this case, that the defendants had laid down the track, on which the accident happened, in the city of Ottawa, without authority, it being a third track or switch for use in connection with their station, for purposes of shunting, etc., and if illegally laid down no acquiescence, except by by-law, would make it rightful as against the plaintiff. Per Hagarty, C. J. Having been there for many years with the knowledge and acquiescence of the corporation, its existence could not alone make defendants liable, but it was properly left as a circumstance to be considered by the jury. *Let v. St. Lawrence and Ottawa R. W. Co.*, and *Hinton v. St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.—Q. B. D.

Where a railway company constructed their railway along a highway in a municipality, the council whereof were not formally applied to for leave, but subsequently passed a resolution notifying the railway company to fill up the ditch existing on both sides of the railway, and to put down proper crossings:—Held, that the corporation had thereby admitted that the railway company were lawfully in occupation of the highway, and could not afterwards object. *Township of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503.—Osler.

The leave of the municipal or local authorities required by 31 Vict. c. 68 (Dom.), before a railway is carried along an existing highway, may be granted at any time whether before, during, or after the construction of the railway, and need not necessarily be given by by-law:—Sembly, that R. S. O. (1877), c. 174, s. 277, enacting that the powers of township councils shall be exercised by by-law, must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature. *Ib.*

Held, that the corporation having stood by while the railway was constructed, and subsequently for upwards of five years, while it was in operation, and having also by the resolution aforesaid, procured further expenditure by the company, were bound by acquiescence, and could not now maintain an action for the removal of the railway from the street. A corporation may be bound by acquiescence as an individual may:—Quere, whether such acquiescence would have availed as a legal justification for the defendants on an indictment for a nuisance at the suit of the Crown. *Ib.*

## 3. Bridges and Subways.

The plaintiff, as administratrix, sued the defendants, under 44 Vict. c. 22, s. 7, (Ont.), for the death of her illegitimate son, a brakeman on the defendants' railway, who was killed by being carried against a bridge, not of the height required by that Act, while on one of their

trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge:—Held, that the plaintiff was not entitled to recover because section 7 of the Act applies only to bridges within the control of the company whose servant had been injured. *Gibson v. Midland R. W. Co.*, 2 O. R. 658.—Q. B. D.

Action to recover damages for injuries sustained by the plaintiff by reason of an overhead bridge being less than seven feet above the top of the defendants' car. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22nd September, 1883, whereby it was agreed that the defendants should take over all the lines of the Midland Railway Company, buildings, rolling stock, stores, and materials of all kinds, and should during the continuance of the agreement well and efficiently work the said lines and keep and maintain them with all the works of the Midland Railway in as good repair as they were when so taken over. The agreement was to be in force for twenty-eight years. The Midland Railway Company, though incorporated under 44 Vict., c. 67 (Ont.), was brought under the control of the parliament of Canada, and made a Dominion Railway, by 46 Vict. c. 24 (Dom.), passed in 1883, before the agreement was made. By the Act of 1881, 44 Vict. c. 24, s. 3 (Dom.), amending the Consolidated Railway Act of 1879, every bridge or other erection or structure under which any railway passes, etc., existing at the time of the passing of the Act, of which the lower beams were not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, shall be reconstructed or altered within twelve months from the passing of the Act, so as to admit of such open and clear headway of at least seven feet, at the cost of the company, municipality, or other owner thereof, as the case may be, etc. By 44 Vict. c. 22 (Ont.) passed when the Midland Railway was under the legislative authority of the province of Ontario, that railway was required to reconstruct bridges owned by the company within twelve months from the passing of the Act in terms identical with the Dominion Act except that the former Act makes every railway liable to its servants for any neglect, etc. —Held, Galt, J., dissenting that the defendants were not liable for the injury sustained by the plaintiff. *McLaughlin v. Grand Trunk R. W. Co.*, 12 O. R. 418.—C. P. D.

See *West v. Village of Parkdale*, 12 A. R. 393, p. 464; 12 S. C. R. 250; 12 App. Cas. 602, p. 1377.

#### 4. Fences.

The plaintiff sued the defendants for the loss of certain cattle which had escaped to their road by reason, as he alleged, of the neglect of the company to fence, and were killed by their train. It appeared that the plaintiff owned land on either side of the defendants' railway, but the Toronto, Grey, and Bruce R. W., which lay to the north of defendants' railway, and had also

been taken from his farm, ran between his land and defendants' railway:—Held, upon the facts stated in the report, that there was no evidence that the cattle had reached the railway from the south side; and the fact that the Toronto, Grey, and Bruce R. W. Co. had neglected to fence did not give the plaintiff, in respect of the occupation of their land by his cattle, the status of that company for the time, as adjoining proprietors, against whom only the defendants were bound to fence, so as to make the defendants liable. *Douglass v. Grand Trunk R. W. Co.*, 5 A. R. 585.

Sheep belonging to the plaintiff escaped from his premises on the highway, and from thence owing to defects in the fences of the defendants into lands of theirs, whence they strayed on to the railway track where they were killed by a passing train:—Held, (reversing the judgment of the County Judge) that the defendants were not liable for the loss, the sheep not being lawfully on the highway. *Daniels v. Grand Trunk R. W. Co.*, 11 A. R. 471.

The plaintiffs occupied about an acre of lot twenty-nine adjoining the railway of the defendant company. Their horses pasturing on another part of the lot, which the plaintiffs did not occupy and to which they had no title, passed on to the track and were killed by a passing train:—Held (affirming the judgment of the Q. B. D., 7 O. R. 673), that the plaintiffs were not entitled to call upon the defendant company to fence across that part of the lot from which the horses escaped; and therefore, that the company were not liable to make good their loss to the plaintiffs. *Conway v. Canadian Pacific R. W. Co.*, 12 A. R. 708.

The meaning of the terms "Proprietor," "Tenant," and "Occupant," considered. *S. C.* 7 O. R. 673—Q. B. D.

The plaintiff and one Nadeau, occupied adjoining lots on the line of the defendants' railway; Nadeau as the locater of the Crown, plaintiff as a squatter, and by agreement between them it was arranged that their horses should pasture together. One of the plaintiff's horses strayed from Nadeau's lot on to the track of the defendants' which at that point was unfenced—and was killed by a passing train. In an action for the value of the horse it was:—Held, that "occupied lands" under the Railway Act, 46 Vict. c. 24 (Dom.), denote lands adjoining a railway and actually or constructively occupied up to the line of the railway by reason of actual occupation of some part of the section, or lot by the person who owns it or is entitled to possession of the whole, and that although mere occupation such as that of a squatter is not provided for in the Act, N. was, under the circumstances, entitled to require the defendants to fence, notwithstanding he had omitted to fulfil the conditions of his location by performance of the settlement duties required thereby—the Crown never having taken steps to cancel such location; that under the circumstances the question as to contributory negligence did not arise, and therefore plaintiff was entitled to recover. *Davis v. Canadian Pacific R. W. Co.*, 12 A. R. 724.

Held, O'Connor, J., dissenting, that in the face of 46 Vict. c. 18, s. 480, sub-s. 15 and 16

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country road along the line of their railway  
could not be treated as a nuisance, no by-law of  
the locality in which the accident complained of  
in this case having been passed respecting fences  
of the kind, and that defendants were not there-  
fore liable for the loss of the plaintiff's colt,  
which while following its dam as the latter was  
being led by the plaintiff's servant ran against the  
fence and received the injuries resulting in its  
death. *Hillyard v. Grand Trunk R. W. Co.*, 8 O.  
R. 583.—Q. B. D.

### 5. Gates.

The defendants' line of railway ran through  
the plaintiff's farm, and the plaintiff's mare es-  
caped from a field adjoining the railway through  
a gate opposite a farm-crossing which the defen-  
dants had constructed, and which was out of  
repair, and was killed on the railway:—Held,  
that the duty imposed by law upon the railway  
company to erect and maintain fences on each  
side of the railway with openings or gates  
or bars therein at farm crossings of the road,  
is not at all dependent upon whether or not  
a duty is imposed upon them by law to erect  
and maintain such crossings, but wholly inde-  
pendent of it. *Murphy v. Grand Trunk R. W.  
Co.*, 1 O. R. 619.—Q. B. D.

Plaintiff's horses, in consequence of insecure  
fastening of the gates at the farm crossing  
where the defendants' railway crossed their  
farm, got through the gates and on the railway  
track, and were killed by a passing train:—  
Held, that the plaintiff by reason of the con-  
tinued use of the faulty fastening, could not be  
deemed to have adopted them as sufficient, and  
that it was the duty of the defendants to pro-  
vide and maintain proper fastenings for the gate.  
Section 9 of the statute 47 Vict. c. 11 (Dom.),  
commented on as to the nature of the duty cast  
on the plaintiff to keep the gate closed; and:—  
Quere, whether the words in that Act, that the  
owners must keep the gates closed, extend  
further than in respect of their own use of them;  
or whether, if the gate became open by any ac-  
cidental means, or by the act of a stranger, and  
remained open without any person being near to  
prevent animals passing through it, the owner or  
occupier would be liable to the full extent pro-  
vided by the Act, although it had become open  
without his agency or neglect, and remained so  
without his knowledge. *McMichael v. Grand  
Trunk R. W. Co.*, 12 O. R. 547.—Cameron.—  
Q. B. D.

### 6. Farm Crossings.

See *Murphy v. Grand Trunk R. W. Co.*, 1 O. R.  
619, *supra*.

See also Subhead III. 4, (b) p. 1752.

### V. INJURY TO PERSONS AND ANIMALS.

#### 1. By Collision Between Trains.

The Grand Trunk Railway crosses the Great  
Western Railway, about a mile east of the city

of London, on a level crossing. On 19th June,  
1876, a Grand Trunk train, on which plaintiff  
was on board as a conductor, before crossing, was  
brought to a stand. The signal man, who was  
in charge of the crossing and in the employment  
of the Great Western Railway Company, dropped  
the semaphore, and thus authorized the Grand  
Trunk train to proceed, which it did. While  
crossing the track, appellants' train, which had  
not been stopped, owing to the accidental burst-  
ing of a tube in air-brakes, ran into the Grand  
Trunk train and injured plaintiff. It was shown  
that these air-brakes were the best known ap-  
paratus for stopping trains, and that they had  
been tested during the day, but that they were  
not applied at a sufficient distance from the cross-  
ing to enable the train to be stopped by the  
hand-brakes, in case of the air-brakes giving  
way. C. S. C. c. 66, s. 142 (R. S. O. (1877) c.  
165, s. 90) enacts that "every railway company  
shall station an officer at every point on their  
line crossed on the level by any other railway,  
and no train shall proceed over such crossing  
until signal has been made to the conductor  
thereof, that the way is clear." Section 143,  
enacts that "every locomotive . . . on  
train of cars on any railway shall, before crossing  
the track of any other railway on a level, be  
stopped for at least the space of three min-  
utes:—Held, that the appellants were guilty  
of negligence in not applying the air-brakes at  
a sufficient distance from the crossing to enable  
the train to be stopped by hand-brakes in case  
of the air-brakes giving way. That there was  
no evidence of contributory negligence on the  
part of the Grand Trunk railway, as they had  
brought their train to a full stop, and only pro-  
ceeded to cross appellants' track when author-  
ized to do so by the officer in charge of the sema-  
phore, who was a servant of the Great Western  
Railway Company. *Great Western R. W. Co. of  
Canada v. Brown*, 3 S. C. R. 159. Affirming  
S. C. 2 A. R. 64; 40 Q. B. 333.

The plaintiff was going from I. to M. by train  
in charge of cattle. At T. the train on which  
he had come from I. was partly broken up, to  
be remade with some cars which were standing  
on another track. While there the plaintiff,  
unknown to the defendant's, went into the  
caboose at the end of the cars which were to be  
added to the cars from I., and when the connec-  
tion was about to be made, deliberately stood  
up, and was washing his hands, when the shock  
of the connection caused the injury, for damages  
for which this action was brought:—Held,  
affirming the decision of Rose, J., that there  
was no evidence of negligence on the defendants'  
part; and the mere fact of the accident happen-  
ing to the plaintiff was not in itself sufficient  
evidence of negligence:—Held, also, that there  
was evidence of contributory negligence, in that  
the plaintiff knew that he was in a freight train,  
where there would not be so much care shown,  
and yet stood up, instead of sitting down, as he  
might have done, while the connection was  
being made, especially as he entered the caboose  
before the train was made up, and had no reason  
to think that the defendants knew that he was  
there. *Hutchinson v. Canadian Pacific R. W.  
Co.*, 17 O. R. 347.—Chy. D.; 16 A. R. 429.

See *Conger v. Grand Trunk R. W. Co.*, 13  
O. R. 160, p. 1801.



### 2. Running Reversely.

Semble, that section 145 of C. S. C. c. 66, requiring a person to be stationed on the last car in the train, applies to the station grounds of railway companies in cities, towns, and villages, as well as to the limits outside of such station grounds. *Bennett v. Grand Trunk R. W. Co.*, 3 O. R. 446.—C. P. D.

The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train:—Held, that the defendants did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the tracks. In this case there was no brake at the rear end of the last car. The brakeman on the last car, seeing the track clear a few minutes before the accident, went to the front end, and the plaintiff then attempting to cross, was injured:—Held, evidence of negligence to go to the jury. *Leroy v. Midland R. W. Co.*, 3 O. R. 623.—Q. B. D.

The train was backing at the time the accident happened. Per Armour, J.—The jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing; and having regard to the fact that they had without authority increased the number of tracks there, it was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precautions. *Lett v. St. Lawrence and Ottawa R. W. Co. and Hinton v. St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.—Q. B. D.

See *Crosby v. Canadian Pacific R. W. Co.*, 15 O. R. 374, p. 1778.

### 3. At Crossings.

The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at Georgetown station, at about ten feet from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a freight train was then on the track near the crossing, he started off to cross it, and did not hear or see anything of the approaching train until within about four feet of him, when he was unable to avoid it, and the omnibus and harness were considerably damaged. It was not shewn that the driver of the train had given any warning of its approach by sounding the whistle or bell on its nearing the part of the track where it crossed the road to the station. At the trial the plaintiff was nonsuited on the ground of the contributory negligence of the plaintiff's servant:—Held, on appeal (reversing the judgment of the County Court), that the question of contributory negligence had been improperly withdrawn from the jury, and that a new trial must be had in order to submit that question to them. *Bennett v. Grand Trunk R. W. Co.*, 7 A. R. 470.

Held, that a mere track crossing, on a road or way on a railway company's own grounds for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within C. S. C. c. 66, s. 104, so as to subject the company to the requirements of that section of ringing the bell or sounding the whistle when approaching such crossing; but, semble, apart from the statute, care must be taken when starting their engines from the station. *Bennett v. Grand Trunk R. W. Co.*, 3 O. R. 446.—C. P. D. See the last case.

The plaintiff, early in the morning, it not being quite day-break and snowing a little, was driving a yoke of oxen and a pair of bob sleighs along the highway towards a railway crossing, sitting on the front bob, low down behind the oxen. The track crossed the highway at an acute angle, and was some seven feet above the highway, which was graded up to it. At the crossing there were some bushes which obstructed the view, but before reaching them there was a view of the track for some sixty or seventy rods, but not while in the hollow at the bottom of the grade and sitting as the plaintiff was. The plaintiff, without looking for the train, drove on to the track, and as he did so he saw a train approaching a few rods off, when he jumped to the off side and hit the off ox, causing it to spring aside and clear the track, but before he could get clear himself he was struck by the train and injured. It was urged that the plaintiff by so doing voluntarily exposed himself to danger; but there was evidence to the contrary. The defendants' engine had an automatic bell. A witness stated that these bells do not always ring when the train is in motion. The engineer stated that the bell was in good order when the engine left the last station, but he could not say whether or not it was ringing when the accident happened, while a number of witnesses stated that the bell was not then ringing. The jury found that the bell was not ringing; that it was not in good order; and that the plaintiff exercised reasonable care. On motion to enter a nonsuit:—Held, Wilson, C. J., doubting, that there was evidence for the jury; that it could not be said that the findings were not justified, and the court therefore refused to interfere. *Wilton v. Northern R. W. Co.*, 5 O. R. 490.—C. P. D.

The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded at another crossing, three-fifths of a mile off, but was not continued; and that deceased was not guilty of contributory negligence. The Common Pleas Division, upon the evidence, more fully stated in the report, refused to disturb this verdict, and on appeal their judgment was affirmed, Cameron, C. J., dissenting, on the ground that the plaintiff was bound to disprove contributory negligence; that she had failed to do so, for had deceased looked he must have seen the train coming; and that there should therefore have been a nonsuit. *Davey v. The London and South-Western R. W. Co.* 11 Q. B. D. 215; 12 Q. B. D. 70, and *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App.

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Cas. 1155, commented on. Per Patterson, J. A., and Rose, J., without admitting Davey v. The London and South-Western R. W. Co., to decide that the plaintiff must negative contributory negligence, it is inapplicable here, in view of the statutory duty to give warning by bell or whistle, which does not exist in England. *Peart v. Grand Trunk R. W. Co.*, 10 A. R. 191.

M. B. while driving along the highway at the crossing of the G. W. railway in the town of S. operated by the defendants, was killed by a train of the defendants, which was then, as found by the jury, running at a high rate of speed without ringing a bell continuously or sounding a whistle at short intervals. The jury at the trial answered all the questions submitted to them in a manner favourable to the plaintiff and adversely to the company, and negatived any contributory negligence on the part of the deceased. On appeal it was:—Held, by this court, affirming the judgment of the court below, 8 O. R. 601, that there was sufficient evidence of negligence to warrant the findings of the jury in favour of the plaintiff. *Beckett v. Grand Trunk R. W. Co.*, 13 A. R. 174; 16 S. C. R. 713.

For the defence it was shown that the deceased was driving slowly across the track with his head down and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching, when he whipped up his horses and endeavoured to drive across the track and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view:—Held, per Ritchie, C. J., and Fournier and Henry, JJ., that the finding of the jury that there was no contributory negligence should not be disturbed. *Strong, Taschereau and Gwynne, JJ., contra. S. C., sub nom. Grand Trunk R. W. Co. v. Beckett*, 16 S. C. R. 713.

Action against defendants for an injury sustained by plaintiff being run over by defendants' train at a highway crossing, caused, as alleged, by the omission to ring the bell or sound the whistle. The persons in charge of the train swore that the whistle was sounded in compliance with the statutory requirements. The plaintiff said he heard a whistle which he thought came from a round house near by, but which might have been from the approaching train, and though the plaintiff's witnesses stated they did not hear the whistle it was quite consistent with their evidence that the whistle was sounded. The plaintiff, as he approached the track, looked to the north-west for shunting engines, which he knew were going backwards and forwards all the time, and so did not look to the south-west, being the direction in which the train was approaching, and if he had been looking he would have seen the train and the accident would have been avoided. A person following immediately behind plaintiff, saw the train and stopped his wagon. Per Rose and MacMahon, JJ.—No negligence on defendants' part was proved, for it could not be held on the evidence that the whistle was not sounded as required. Per Galt, C.J.—There was contributory negligence on the plaintiff's part in approaching the crossing in not looking in the direction of the approaching train. Per Rose,

J.—The mere fact of plaintiff not looking in that direction was not, under the circumstances, evidence of contributory negligence. *Blake v. Canadian Pacific R. W. Co.*, 17 O. R. 177.—C. P. D.

The plaintiffs, husband and wife, sued for damages for injuries sustained by the wife, charging the defendants with negligence in using their railway in shunting cars, etc., and in not notifying and protecting the public at crossings. The wife was being driven in a cutter by her son along a street which crossed three tracks of the defendants, and when the cutter was thirty feet away a "silent" car passed along one of the tracks. The son pulled the horse up suddenly, with the effect of throwing the mother out of the cutter and so producing the injury complained of. The jury found that the defendants were guilty of negligence, and that the son by his driving contributed to the accident:—Held, that, upon the evidence, the finding of contributory negligence could not be interfered with; and that the injury was too remote a consequence to be attributed to the negligence of the defendants. *Atkinson v. Grand Trunk R. W. Co.*, 17 O. R. 220.—Q. B. D.

A traveller on approaching a railway crossing is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view, and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to cross the track in front of it, without looking, merely because the warning required by law has not been given. *Heir v. Canadian Pacific R. W. Co.*, 16 A. R. 100.

#### 4. On Tracks.

The defendants' station at A. was on what was known as the side track, between which and the main track there was a centre platform for passengers alighting from and getting on to trains on the main track. The plaintiff had come to the station to meet a friend, and was attempting to cross over the side track to reach the centre platform, when the engine and tender which had been detached from the rest of the train and switched on to the side track, and were backing down to pick up a car some fifty yards distant, ran over and injured him. The plaintiff was looking in the opposite direction from that from which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out he must have seen them before he attempted to cross, and so could have avoided the accident, as it was only a second or two from the time he started to cross until he was struck, and there was no obstruction to his view. In an action for damages the jury having disagreed:—Held, that the plaintiff's evidence having shown that the accident was caused by his own negligence and want of care, the defendants were not liable; and judgment was ordered to be entered for them:—*Querre*, whether an engine and tender constitute a train within section 52 of R. S. C. c. 109, so as to require a man to be stationed on the rear thereof to warn persons of their approach; but in any event, there was a man so stationed here who did give warning. *Cusey v. Canadian Pacific R. W. Co.*, 15 O. R. 754.—C. P. D.

To reach from the highway the station of the defendants at Point Edward, it was necessary to go through the railway yard and cross eleven railway tracks. A plank walk, unfenced and unguarded, runs across these tracks, extending from the street to the east end of the station platform. The husband of the plaintiff, who was familiar with the locality, while hurrying to the station before daylight, left this plank walk upon reaching the track nearest the platform in order to walk round the rear of a train that was coming in from the east on that track and was still in motion. While some twenty feet from the plank walk, walking between the tracks and near the rails of the track second from the platform, he was struck by the buffer beam of a shunting engine and killed. This shunting engine had been standing some 150 feet to the west of the plank walk, and was passing slowly to the east for the purpose of being switched on to the track nearest the platform, and then aiding in placing in the ferry boat the cars of the train that had just come in. The shunting engine had been standing to the west of the plank walk for the purpose of convenience in giving orders to the engineer; its headlight was burning and as it moved its bell was ringing. There was ample space between the two tracks for a person to stand in safety, and the approach of the shunting engine could easily be noticed:—Held (Hagarty, C. J. O., dissenting), reversing the decision of the Chancery Division, that the accident was due to the carelessness of the deceased and not to the negligence of the defendants, and that the plaintiff could not recover. *Jones v. Grand Trunk R. W. Co.*, 16 A. R. 37.

The extent of the duty of railway companies in providing safe access to their stations considered. *Id.*

On appeal to Supreme Court:—Held, Fourrier and Gwynne, JJ., dissenting, that the company had neglected no duty which it owed to the deceased as one of the public:—Held, per Strong and Patterson, JJ., that while the public were invited to use the plank walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass around a train in motion:—Held, per Taschereau, J., that the death of the deceased was caused by his own negligence. *S. C.* 18 S. C. R. 696.

### 5. Sounding Whistle or Bell.

Held, by the Supreme Court, affirming the judgment of the Court of Appeal for Ontario (8 A. R. 482), that Consolidated Statutes of Canada c. 66, s. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or as in this case by a horse being brought over near the crossing and taking fright

at the appearance or noise of the train. The jury in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "Yes":—Held, though this question was indefinite, the answers to the questions as a whole, viewed in connection with the judge's charge and the evidence, warranted the verdict. *Grand Trunk R. W. Co. v. Rosenberger*, 9 S. C. R. 311.

In 1871 the owner of a block of land had a plan made and registered laying out the land into lots and streets, etc. Most of the land including that part marked on the plan as O. street, was fenced in and used for pasturage and so continued until 1881 when a portion thereof including O. street, no lots fronting thereon having been disposed of, was sold by the owner to the defendants who treated the land as their private property, using it as a shunting yard. The plaintiff, a little boy, who lived with his father near by, was standing on a snowbank on the side of the track where it crossed O. street. He saw a train approaching and when it came opposite where he was it gave a jerk which frightened him and he slipped down on to the track and was run over by the train and injured. No whistle was sounded or bell rung:—Held, that the omission to sound the whistle or ring the bell did not impose any liability on the defendants as it in no way contributed to the accident:—Held, also, that O. street as marked on the plan was not a highway within the meaning of the Railway Act. *Shoebrink v. Canada Atlantic R. W. Co.*, 16 O. R. 515.—C. P. D.

Held, that the statutory obligation to ring the bell, or sound the whistle, only applies to a highway crossing, and not to an engine shunting on defendants own premises. *Cusey v. Canadian Pacific R. W. Co.*, 15 O. R. 574.—C. P. D.

At a place which was not a station nor a highway crossing, the N. B. R. W. Co. had a siding for loading lumber delivered from a sawmill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber, when a train coming out of a cutting frightened the horses, which dragged the deceased to the main track where he was killed by the train:—Held, that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding. *New Brunswick R. W. Co. v. Vaneart*, 17 S. C. R. 35.

At Crossings.—See Subhead V. 3 p. 1775.

See *Lett v. St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545, p. 1775; *Hurd v. Grand Trunk R. W. Co.*, 15 A. R. 58, p. 1785; *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316, p. 1785.

### 6. Defective Construction of Roadbed.

Semble, that where a railroad crosses a public highway at a level crossing, and it is open to observation that the highway is in a dangerous state, liability will rest upon the operating company for resulting accident, even although a different company was responsible for the original faulty construction of the railway roadbed which led to the unsafe condition of the high-

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Liability of railway company for loss of luggage caused by defects in roadbed, constructed under contract for the government before the acquisition of the road by the defendants. See *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625; 15 A. R. 388; 18 S. C. R. 697, p. 1792.

#### 8. Packing Railway Frogs.

The plaintiff, a workman employed by the Grand Trunk Railway Company, was injured while in discharge of his duties, by reason of his foot having been caught in one of the frogs of the rails, which was not packed in the manner prescribed by 44 Vict. c. 22 (Ont.):—Held, that the Grand Trunk Railway being a Dominion Railway, and within section 92, No. 10 (a) of the B. N. A. Act, was not affected by the statute, which professed only to apply to railway companies in respect of which the provincial legislature had authority to enact such provisions; and therefore, that the defendants were not liable. *Monkhouse v. Grand Trunk R. W. Co.*, 8 A. R. 637.

Action by plaintiff, as administrator of C., for damages under 44 Vict. c. 22 (Ont.), by reason of the omission to pack a frog on the Midland Railway which the defendants were operating, whereby C.'s foot was caught in the frog and he was killed by a train:—Held, that defendants were not liable; that the Midland Railway was a railway connecting with or crossing the defendant's railway, and under 46 Vict. c. 24 (Dom.), was exempt from the operation of the Ontario Act. *Clegg v. Grand Trunk R. W. Co.*, 10 O. R. 708.—C. P. D.

Held, that the omission to state in the statement of claim, as required by sub-section 2 of section 8 of 44 Vict. c. 22 (Ont.), and to prove, that the defendants knew that the frog was not packed, or that the deceased did not know it, or that he had notified the defendants or any person superior to himself in the service of the defendants, or that such person was not aware thereof would preclude any recovery. *Ib.*

Section 262, sub-section 3, of 51 Vict. c. 29 (Dom.), provides that "the spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch, where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail," and section 289 of the same Act provides that "every company, \* \* \* causing or permitting to be done, any matter, act or thing contrary to the provisions of this Act or the special Act \* \* \* or omitting to do any matter, act or thing required to be done on the part of any such company, \* \* \* is liable to any person injured thereby for the full amount of damages sustained by such act or omission," etc. The plaintiff, who had been for some months employed at the place where the accident happened, as a switch foreman, while in the course of his duty in the act of uncoupling cars, had his foot caught in an unpacked frog, where it was crushed by the wheels of the cars:

—Held, that, although he was a servant of the defendants, he was a "person injured" within the meaning of the statute, and entitled to maintain an action for negligence. *Le May v. Canadian Pacific R. W. Co.*, 18 O. R. 314.—Chy. D.; 17 A. R. 293.

The jury, having found that the frog was not packed, in reply to a question whether the plaintiff had "notice or knowledge or ought he to have had notice or knowledge that the frog was not packed," answered: "We believe he did not have notice, and should have had notice," and in answer to another question they negatived contributory negligence on the plaintiff's part:—Held, that even assuming that the meaning of the answer was to impute notice of the danger to the plaintiff, it would not prevent his recovering so long as he himself was not negligent, there being no finding or evidence to sustain a finding that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it. *Ib.*

Quere, per Ferguson, J., whether it is not necessary, under the present system of pleading, to set up specially a defence arising from the maxim, "*Volenti non fit injuria*," *Ib.*

#### 9. Getting On or Off Trains in Motion.

The plaintiffs, husband and wife, were on a train of the defendants, going to Lefroy. The conductor, before reaching the station, announced that the next station was Lefroy. On approaching the station the train, according to the plaintiff's witnesses, was slowed, but did not stop. The husband got off while the train was moving slowly, and his wife, seeing that the speed was increasing, and that they were passing the station, sprang after him, though he had let go of her hand, and told her not to jump, and was injured. It was left to the jury to say whether she had acted imprudently in so doing, and they found a verdict for the plaintiffs:—Held, affirming the judgment of the Q. B. D. (4 O. R. 201), that there was evidence of an invitation to alight, and that it was for the jury to say whether she had acted in a reasonably prudent and careful manner in availing herself of it. *Edgar v. Northern R. W. Co.*, 11 A. R. 452.

The plaintiff, who was a passenger on a train of the defendants, alighted at a station, and the train having started before he had re-entered it, endeavoured to jump on while it was in motion. In doing so he was injured, and brought this action for damages for negligence. There was evidence of an invitation by the conductor of the train to jump on while it was in motion, and the jury found (1) that there was such invitation. They also found (2) that the plaintiff used a reasonable degree of care in endeavouring to get on; and (3) that he was injured while trying to get on, in pursuance of the request of the conductor. It was argued by the defendants that the danger to the plaintiff was so patent and obvious that he had no right to act on the conductor's invitation, or to attempt to get on the train:—Held, that this was a matter which should have been submitted to the jury, and that it was not covered by the second finding; that the question involved in the action could

not be determined on the findings, and that there should be a new trial. *Per Armour, C.J.*—Questions for the jury suggested. *Curry v. Canadian Pacific R. W. Co.*, 17 O. R. 65.—Q. B. D.

#### 10. Liability for Injuries to Servants.

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying; that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used: that they also directed and required him to be carried, as part of his employment, on the defendants' trains: that accordingly he was received by the defendants "to be safely carried" on a train, and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured.—Held, 1. That if the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman, in that new employment, just as he had been in his former employment. 2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment; and that there was no cause of action. *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70.—Wilson.

On the undisputed facts disclosed in the plaintiff's case it appeared that there was a switch-stand erected in the defendants' yard close to the track, the deceased, who was a brakeman in the defendants' employment, being aware of its position and proximity to the track. On the day in question the deceased was engaged as a brakeman on a train passing through the yard. His position as brakeman should have been on top of the car, but for some reason which did not appear, he was on the side of the car, holding on to the ladder, by which brakemen mount to the top of the car, and his attention being drawn towards the end of the train he did not see the switch-stand, when he was struck by it and thrown under the wheels of the car and killed.—Held, that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and the case was therefore properly withdrawn from the jury. *Ryan v. Canada Southern R. W. Co.*, 10 O. R. 745.—C. P. D.

The plaintiff was necessarily on the top of the car in the performance of his duty. There was no evidence to shew that he knew, at the time of the accident, that he was near the bridge, the night being dark; and it was a matter of doubt whether he even knew that the bridge was too low. The bell rope was not connected before the train left the station, but this did not appear to have been through any neglect of his, and for all that appeared, the train might not have been completed until just before starting, and until the engine was attached no connection could be made.—Held, that the plaintiff could not be deemed guilty of contributory

negligence. *McLaughlin v. Grand Trunk R. W. Co.*, 12 O. R. 418.—C. P. D.

B., the plaintiff's son, was employed as fireman on a locomotive engine which was in charge of a driver named R., B. being under his orders. B. was severely scalded by the bursting of the boiler, from which death resulted. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to show to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman for which he also was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendants' officials, it appeared that B. had charge of the water at the time of the accident. In an action against defendants for damages under "The Workmen's Compensation for Injuries Act," 49 Vict. c. 28, s. 3, sub-s. 5 (Ont.)—Held, that the defendants were not liable. *Brunel v. Canadian Pacific R. W. Co.*, 15 O. R. 375.—C. P. D.

Action by plaintiff to recover damages for the death of her husband by reason of, as was alleged, a defective brake on a car on defendants' railway, on which deceased was employed as a brakeman.—Held, that there could be no recovery, for the evidence failed to show how the accident happened, the contention that it was the defective brake being mere conjecture; and even had it been the cause, it would have been no ground of liability, for under the defendants' rules it was the deceased's duty to examine and see that the brakes were in proper working order and report any defect to the conductor; and if he made the examination he apparently discovered no defect as he made no report, a latent defect being no evidence of negligence; and if he omitted to make such examination, etc., then the accident would be attributable to his own negligence. *Badgerow v. Grand Trunk R. W. Co.* 19 O. R. 191.—C. P. D.

J., a switch-tender of the Canada Southern R. W. Co., was obliged in the ordinary discharge of his duty to cross a track in the station yard to get to a switch and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care.—Held, that The Workmen's Compensation for Injuries Act of Ontario, 49 Vict. c. 28, applies to the Canada Southern R. W. Co., notwithstanding it has been brought under the operation of the Government Railways' Act of the Dominion.—Held, also, Gwynne and Patterson, J.J., dissenting, that there was no such negligence on J.'s part as would relieve the company from liability for the injury caused by im-



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proper conduct of their servants and the judgment of the court below sustaining a verdict for the plaintiff was right. *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316.

Injuries occasioned by omission to pack rail frogs. See Subhead V. 3 p. 1781.

See *Gibson v. Midland R. W. Co.*, 20 R. 658, p. 1771; *Jennings v. Grand Trunk R. W. Co.*, 15 A. R. 477; 13 App. Cas. 800, p. 1790; *McLauchlin v. Grand Trunk R. W. Co.*, 12 O. R. 418, p. 1771.

#### 11. Animals Trespassing on Railway.

By the negligence of the plaintiff's servants, his horses escaped upon the defendants' line of road at a farm-crossing, not far from an open overhead bridge on the track. Some of them were astray upon the track. While being driven back towards the crossing by the persons in charge a train approached, which drew up for a time, the rear cars being on the crossing, and then the track being clear the engine driver sounded the whistle for brakes off, and proceeded. The horses, or some of them, had then come nearly abreast of the engine, but, alarmed by the whistle and motion of the train, they turned and ran on towards the bridge. They got upon the bridge before they could be stopped, and some had their legs broken by getting them between the ties, and others jumped over the ties and were killed or injured. There was ample space on each side of the track by which the horses might have passed. There was no evidence that the engineer had acted recklessly or wantonly in proceeding with the train:—Held (reversing the judgment of the Queen's Bench Division), that the defendants were not liable; there was no evidence of negligence in the manner in which the train was started; the defendants were using their own property as of right and in a lawful way, and no duty was cast upon the engineer to wait until the horses had been entirely driven off their premises. *Auger v. The Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 165, considered. *Campbell v. The Great Western R. W. Co.*, 15 Q. B. 498, observed upon and distinguished. *Hurd v. Grand Trunk R. W. Co.*, 15 A. R. 58.

Fences and gates out of repair. See Subhead IV. 4, 5, pp. 1771, 1773.

#### VI. FIRE FROM ENGINES.

In answer to a question whether the plaintiff had been guilty of contributory negligence in piling his lumber so near the track, or by allowing the sawdust to remain on it, or by not having sufficient appliances to extinguish fire. If so, could the defendants by the use of ordinary care and diligence have prevented the injury, the jury answered: Not as to piling lumber or as to sawdust, but somewhat as to appliances. We think that the defendants could have prevented fire, and that the plaintiff is entitled to a verdict. The plaintiff it appeared had for many years piled his lumber upon defendants' land, with their assent, within a short distance of the track:—Held, that the plaintiff was not bound to provide appliances to guard against defendants' negligence. *McLaren v. Canada Central R. W. Co.*, 32 C. P. 324.—C. P. D.

In an action of negligence for the destruction by fire of a quantity of lumber owned by the plaintiff, and which by leave of the defendants he had piled close to their track, caused, as the plaintiff alleged, by sparks emitted from the smoke-stack of one of the locomotives belonging to the defendant company, the jury at the trial found that the fire was caused by the imperfect or defective construction of the smoke-stack, the cone being placed too close to the netting, and by reason of the bonnet rim not fitting sufficiently close to the bed. Upon a motion in banc to set aside the verdict entered by the plaintiff, the court, upon the evidence set out in the case (32 C. P. 324):—Held, that the finding of the jury was fully supported thereby, and on appeal to this court from that decision, the court being equally divided, the judgment was affirmed and the appeal dismissed with costs. After the occurrence of the accident which caused the destruction of the plaintiff's lumber, B, an engine driver of the defendants, and who was in charge of the locomotive (No. 6) on the day the fire occurred, made an entry in what was termed the repairs book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight. \* Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of the plaintiff, and proved his having made such entry in the usual course of his duties. Per Spragge C. J. O., and Hagarty C. J., such entry was properly produced and read to the jury. Per Burton and Patterson, J. J. A., such entry or report was merely a narrative of a past occurrence or something in the opinion of B. requiring attention, and in any view could only be receivable as evidence against the company, if at all, upon proof of B.'s death. With a view of shewing that engine No. 6 was defectively constructed, evidence was given that on previous occasions when it was in the same or an improved condition, it had thrown out sparks, causing fires. Per Spragge, C. J. O., and Hagarty, C. J., such evidence was properly receivable:—Semble—Per Spragge, C. J. O., and Patterson, J. A., although a party to a cause may be entitled to call for the production of documents, in order to obtain discovery, it does not follow that the contents of such documents are in themselves evidence. *S. C.*, *sub nom. Canada Central R. W. Co. v. McLaren*, 8 A. R. 564.

R. owned a barn situated about two hundred feet from the New Brunswick Railway Company's line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of the barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted, did not appear by their finding:—Held, reversing the judgment of the court below, that the company were under no obligation to use coal for fuel for their engines, and the use of wood was not in itself evidence of negligence; that the finding of the jury on

the question of negligence was not satisfactory, and that therefore there should be a new trial. *New Brunswick R. W. Co. v. Robinson*, 11 S. C. R. 688.

In an action brought by P. against the appellant company for negligence on the part of the company in causing the destruction of P.'s house and outbuildings by fire from one of their locomotives, it was proved that the freight shed of the company was first ignited by sparks from one of the company's engines passing the Chipewewa station, and the fire extended to P.'s premises. The following questions *inter alia*, were submitted to the jury, and the following answers given:—Q. Was the fire occasioned by sparks from the locomotive? A. Yes. Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes. Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty. Q. Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being the best kind, or because it was out of order? A. Out of order. P. obtained a verdict for \$800. On motion to set aside the verdict, the Queen's Bench Division unanimously sustained it. On appeal to the Supreme Court:—Held, affirming the judgment of the court below, Henry, J., dissenting, 1. That the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding. 2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by a fire communicating thereto from the property of the railway company themselves, which has been ignited by fire escaping from the engine coming directly in contact therewith. *Canada Southern R. W. Co. v. Phelps*, 14 S. C. R. 132.

The statute 14 Geo. 3, c. 78, s. 83, which is an extension of 6 Anne c. 31, ss. 6 and 7 is in force in the province of Ontario as part of the law of England introduced by the Constitutional Act 31 Geo. 3, c. 31, but has no application to protect a party from legal liability as a consequence of negligence. *Id.*

A train of the Canada Atlantic R. W. Co. passed the plaintiff's farm about 10.30 a.m., and another train passed about noon. Some time after the second train passed it was discovered that the timber and wood on the plaintiff's land was on fire, which fire rapidly spread after being discovered and destroyed a quantity of the standing wood and timber on the said land. In an action against the company it was shewn that the engine which passed at 10.30 was in a defective state and likely to throw dangerous sparks, while the other engine was in good re-

pair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous:—Held, affirming the judgment of the Court of Appeal, 14 A. R. 309, that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order and that it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order and the verdict should not be disturbed:—Held, also, Henry, J., dissenting, that the locomotive superintendent and locomotive foreman of a railway company are officers of a corporation who may be examined, as provided in R. S. O. (1877), c. 50, s. 136 (1), and the evidence of such officers as to the conditions of the respective engines and the difference as to the danger from fire between wood-burning and coal-burning engines taken under said section was properly admitted on the trial of this cause, and certain books of the company containing statements of repairs required on these engines, among others, were also properly admitted in evidence without calling the persons by whom the entries were made. *Canada Atlantic R. W. Co. v. Moxley*, 15 S. C. R. 145.

In an action for negligence by reason of which it was alleged that fire had escaped from a locomotive of the defendants, and the plaintiff's property was destroyed; there was evidence that the engine had passed only a short time before fire was discovered in a manure heap, and which communicated to the destroyed property; that a strong wind blew across the track towards the manure heap; that there was no other known source from which the fire was at all likely to have come; that the wind was not in a direction to have caused sparks from a steam sawmill close by, to reach the premises, and that cinders were found in the straw lying on the manure heap by those who went to extinguish the fire:—Held, that from these facts, there was evidence for the jury that the mischief was caused by the locomotive. The evidence further shewed that the engine had run ninety miles without the ashpan having been emptied; that ignited substances were found upon the manure heap, which were too large to pass through the net of the smoke-stack, and it was alleged must therefore have come from the ashpan, that the ashpan was perfectly good and so constructed that it was difficult for ashes to escape from it; and that the possibility of any escape would be prevented by emptying or partly emptying the pan:—Held (reversing the judgment of the court below, 11 O. R. 307), that the jury might have found as legitimate inferences of fact that the fire escaped because the pan was full, and that the result might with reasonable care have been avoided; that there was therefore sufficient evidence of negligence to go to the jury, and that a nonsuit was improper. *McGibbon v. Northern R. W. Co.*, 14 A. R. 91.

During a very dry summer—little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in

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that section of the country, the defendants allowed brush and long dry grass, which had been growing for two or three years to remain uncut on the side of the track adjoining the plaintiff's farm, while they had the day previous to the fire, for the protection of their own property on the other side of the track, burned up the dry grass, etc., there. A spark from defendants' engine having set fire to the dry grass, etc., adjoining the plaintiff's land, the fire extended and destroyed his fences, growing crops, etc. In an action against defendants therefor, all these circumstances were laid before the jury, who found for the plaintiff:—Held, that the case having been properly submitted to the jury, their verdict could not be interfered with. *Flannigan v. Canadian Pacific R. W. Co.*, 17 O. R. 6.—C. P. D.

Running a train too heavily laden on an up-grade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railroad track, was set on fire and destroyed:—Held, affirming the judgments of the courts below, that there was sufficient evidence of negligence to make the railway company liable for the damage caused by the fire. Per Gwynne J. That the "damage" referred to in section 27 of chap. 109, R. S. C. and section 287 of 51 Vict., chap 29, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present. *North Shore R. W. Co. v. McWillie*, 17 S. C. R. 511.

## VII. CARRIAGE OF PASSENGERS AND THEIR LUGGAGE.

### 1. Government Railways.

McL., the suppliant, purchased, in 1880, a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskillfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway and that he was greatly and permanently injured in body and health, and claimed \$50,000. The Attorney-General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants. The judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded \$36,000. On appeal to the Supreme Court of Canada:—Held, (Pournier and Henry, J.J., dissenting), that the establishment of government railways in Canada,

of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the nonfeasance or misfeasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways. That the Crown is not liable as a common carrier for the safety and security of passengers using said railways. *Regina v. McLeod*, 8 S. C. R. 1.

### 2. Passenger Tickets and Passes.

Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company:—Held, that the deceased being lawfully on the train, the defendants were liable for negligence in causing his death:—Held, also, that the deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company. *Jennings v. Grand Trunk R. W. Co.*, 15 A. R. 477. Affirmed Privy Council, 13 App. Cas. 800.

See *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625; 15 A. R. 388; 13 S. C. R. 607, p. 1792; *Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612, p. 1797; *Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747, p. 1792.

### 3 Liability for Luggage.

The plaintiff was a passenger on one of defendants' cars occupying a sleeping berth. Before going to sleep he had undressed himself and had put his pocket-book, containing his money in his trousers pocket, rolling up his trousers and putting his suspenders around them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocket-book and money were gone. No negligence in the defendants was shown:—Held, that no liability attached to the defendants. *Stearn v. Pullman Car Co.*, 8 O. R. 171.—C. P. D.

It is the duty of a railway company to have baggage ready for delivery on the platform at the usual place of delivery, until the owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time. Therefore, where a person on arriving at his destination deliberately refrained from applying for his baggage on being told by his cabman that he could not conveniently take it, and on sending for it on the following day, one of three trunks could not be found:—Held, in an action to recover the value of the trunk and the wearing apparel it was said to contain, that the liability of the railway company as common carriers had ceased and, in this reversing the judgment of the court below, a nonsuit was ordered to be entered.

The only claim, if any, which the plaintiff, under the circumstances, had against the company, was as warehousemen or bailees. *Vineberg v. Grand Trunk R. W. Co.*, 13 A. R. 93.

By section 25 of 42 Vict. c. 9 (Dom.), which is headed "Working of the Railway," it is enacted that the trains shall be started and run at regular hours, etc., and shall furnish accommodation for transportation of goods and passengers, etc., which are to be taken, transferred, and discharged at, from, and to such places on the due payment of the due toll, freight, and fares, etc.; and the party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants. The road bed of the defendants' railway was on an embankment about fifteen feet high, built on the side of a rock which sloped into a muskeg or small lake, the embankment, it was alleged, being made by the side of the rock being filled in with loose sand, which had no cohesion, and without any retaining wall to keep the sand from slipping. The sand slipped off the side of the rock into the muskeg, and the train on which the plaintiff was travelling was thrown into the cavity caused thereby, and took fire, and the plaintiff's baggage was burnt. This part of the road had been built by contractors under the government before the defendants acquired the road; and it was not shewn that the defendants had any notice or knowledge of the defect. The plaintiff was travelling on the train from Ottawa to Winnipeg on a ticket procured at the company's office at Ottawa. When she went to get the ticket, she asked for and obtained a return ticket, which had a condition limiting the company's liability to a sum not exceeding \$100. The agent, at the time, requested plaintiff to sign her name to the ticket, and, on plaintiff asking the reason, the agent said it was for the purpose of identification, the ticket not being transferable. The plaintiff accordingly signed her name to the ticket. The ticket was issued at a reduced rate in consideration of the plaintiff's agreement to the condition, but plaintiff was not informed, nor had she any knowledge of this, nor of the condition limiting the company's liability; and she said she had not read the ticket because her eyes were sore, and she was unable to do so. It was, however, some hours in her possession before starting on her journey:—Held (Rose, J., dissenting), that section 25 only applied to negligence in the management of the train, or handling of goods during their transport, or at the point of receipt or delivery, and not to a defective construction of the road, and therefore defendants could avail themselves of the condition, which was one they were competent to make, and the plaintiff must be bound by. *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612, commented upon. Per Cameron, C. J.—The road not having been built by the defendants, they were not chargeable as an act of negligence with a defect in the original construction, without direct notice that it was not properly built. Per Cameron, C. J., also:—Even had there been actionable negligence it was competent to the company, in consideration

of a reduced rate, to limit their liability. Per Rose, J.—The damage was caused by negligence in the construction of the road, or from want of repair of the road bed, and being so caused defendants could not limit their liability. Per Galt and Rose, JJ.—There was evidence of negligence to go to the jury; and, Per Cameron, C. J.—If the defendants could, under the circumstances, be liable for faulty construction, he was of opinion there was such evidence. *Fawcett v. Great Western R. W. Co.*, 1 Moo. P. C. N. S. 101, followed. The judge at the trial charged the jury that unless the plaintiff's attention was drawn to the ticket "sufficiently to make her understand that she was signing something more than ordinary with passengers obtaining a ticket to go to some particular place and return," then she was not bound by it:—Semble, this was misdirection. On appeal to the Court of Appeal it was:—Held (by the majority of the court), affirming the judgment of the court below, 14 O. R. 625, that there was no evidence of any negligence with which the defendants were chargeable:—Held, also (Burton, J. A., dissenting), that, whether or not the plaintiff signed the ticket or informed herself of its contents, it embodied the terms and conditions on which alone the defendants contracted to carry her and her baggage. Per Burton, J. A.—The delivery of the ticket with any condition, by itself amounted only to a proposal to carry on certain terms, and until brought to the notice of the party intended to be bound was not a contract. But on appeal to the Supreme Court it was:—Held, reversing both the judgments in the courts below, Gwynne, J., dissenting, that there was sufficient evidence that the loss of the baggage was caused by defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of plaintiff she was not bound by them and could recover her loss from the company. *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625.—C. P. D.; 15 A. R. 388; 18 S. C. R. 697.

In an action by the plaintiff, a passenger by defendants' railway, for the loss of her baggage, and in which the defence was that the defendants' liability was limited by a condition on the ticket to \$100, certain letters were admitted in evidence, one written by the defendants' baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the other the reply thereto, stating that the company's rules did not require unlimited first-class tickets to be signed, and that this ticket had been sold at full tariff rate:—Held, that the letters were properly admitted; but they were of no consequence as the ticket on its face shewed that it was not purchased subject to the condition. *Kirkstall Brewing Co. v. Furness Railway Co.*, L. R. 9 Q. B. 468, followed:—Held, also, that the six months' limitation clause, R. S. C. c. 109, s. 57, does not apply to an action of this character arising out of contract, but to actions for damages occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway. The cases on this subject reviewed. *Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747.—C. P. D.

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The appeal was taken to the Court of Appeal on two grounds: (1) that the accident was caused by the act of God or vis major; (2) that the defendants were protected by the limitation clause, R. S. C. c. 109, s. 27, the accident having taken place more than six months before action:—Held, as to the first point the court agreed with the court below, and thought that the finding of the jury was fully justified by the evidence. Upon the second point the appellants also failed, Burton and MacLennan, J. A., adhering to the opinion expressed by them in *McArthur v. Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, that the section was ultra vires, and Hagarty, C. J. O., and Osler, J. A., thinking that it did not apply to an action of contract, though not fully discussing the question as such discussion was unnecessary. S. C. 17 A. R. 480.

See *Emerson v. Niagara Navigation Co.*, 2 O. R. 528, p. 212; *Dixon v. Richelieu Navigation Co.*, 15 A. R. 647, pp. 212, 213.

### VIII. CARRIAGE OF GOODS.

#### 1. Liability as Carriers or Warehousemen.

On the back of the request note and shipping receipt given and received by the plaintiff on the shipment of goods from Montreal to Toronto and the freight advice note received by him on the arrival of the goods at Toronto, and specially referred to on the face thereof respectively, were a number of conditions under the heading: "General notices and conditions of carriage," one of which was that the company should not be liable for any goods left until called for or to order, or warehoused for the convenience of the parties to whom they belonged, etc., and that the warehousing of all goods would be at the owner's risk and expense. On the arrival of the goods at Toronto they were placed in the defendants' warehouse there, and the plaintiff, on receipt of the freight advice note called at the warehouse, and obtained permission to leave them there, nothing being said about storage. The goods were subsequently lost and the plaintiff brought an action against the defendants to recover their value:—Held, that he could not recover, for although the defendants must be deemed to have held the goods as warehousemen and not as carriers, the terms and conditions of the request note and shipping receipt, which constituted the contract between the parties, applied and bound the plaintiff, irrespective of whether he had read the conditions or knew their contents, and therefore the defendants were protected by the condition above set forth. *Mayer v. Grand Trunk R. W. Co.*, 31 C. P. 248.—C. P. D.

The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D., a brewer in Toronto, and shipped same by the defendants' railway, consigned to D. at Brock street, signing a consignment note and receiving a shipping receipt from the company, which stipulated such receipt should not be transferable, but that as to grain consigned to defendants' elevator at Toronto defendants would grant a negotiable receipt, and was subject to certain conditions, set out in the report of the case. The barley was duly carried to Toronto and warehoused by de-

fendants in their elevator there, under, as they contended, the right conferred therefor by the conditions; and they then tendered grain of the same grade as plaintiff's, which D. refused to accept:—Held, that the consignment note and shipping receipt, which constituted the contract between the parties, shewed that a distinction was made between grain consigned to the defendants' elevator and other grain; the conditions as to warehousing, set out in the report of the case, being only applicable to the former, and that the plaintiff was therefore entitled to recover the amount of the damages sustained by the nondelivery of the specific grain shipped. *Lender v. Northern R. W. Co.*, 3 O. R. 92.—C. P. D.

Four carloads of flour were delivered to defendants to be carried from Newmarket, Ont., to Chatham, N. B., under a special contract whereby defendants were not to be liable for any delay occasioned by want of opportunity to forward goods beyond places where defendants had stations, but they could forward them to their destination by public carriers or otherwise, as opportunity might offer; that pending communication with the consignees the goods remained on the defendants' premises at the owner's risk; and that defendants were not to be liable after notification to the carriers, that they were ready to deliver the goods for further conveyance; and that defendants were not to be liable for loss by fire. It appeared that the defendants line did not extend beyond Toronto, and that the goods were to be forwarded by the Grand Trunk Railway Co.; that on their arrival at Toronto, they were placed in defendants' freight sheds, and notice, addressed to the consignee, sent to the consignor at Newmarket, and also to the Grand Trunk Railway Co., that the defendants were prepared to deliver the goods for further conveyance; and that, after such notice, while the goods were in defendants' freight sheds, they were destroyed by fire without any negligence on defendants' part:—Held, that defendants were not liable as carriers, because they had expressly limited their liability; nor as warehousemen, because no negligence was shewn; the only negligence suggested being that defendants did not procure or supply cars for the transshipment before the fire, but that this was not sustainable; and even if this could constitute negligence:—*Quære*, whether the recovery could be for more than nominal damages, i.e., whether the loss by fire was the damage naturally resulting from such negligence. *Brodie v. Northern R. W. Co.*, 6 O. R. 180.—*Ross*.

Under a condition in a railway shipping bill the delivery of goods was to be considered complete and the responsibility of the company to terminate when the goods were placed in the company's warehouse at their destination. The goods were carried to the station at the place of delivery and were placed in the company's shed there used for the purpose of storing goods, where they were subsequently destroyed by fire. The station was some five miles distant from the village where the plaintiff's place of business was:—Held, that the station was the destination of the goods and not the village; that the shed was a warehouse within the meaning of the condition; and that after the goods were placed there the company's liability was at an end.



*Richardson v. Canadian Pacific R. W. Co.*, 19 O. R. 369.—C. P. D.

### 2. Liability Beyond the Line.

Where a railway company undertakes to carry goods to a point beyond the terminus of its own line its contract is for carriage of the goods over the whole transit, and the other companies over whose line they must pass are merely agents of the contracting company for such carriage, and in no privity of contract with the shipper. *Bristol and Exeter Railway Co. v. Collins* (7 H. L. Cas. 194) followed. Such a contract being one which a railway company might refuse to enter into, section 104 of the Railway Act (R. S. C. c. 109) does not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they had left its own line. The decision in *Vogel v. G. T. R. Co.*, 11 S. C. R. 612, does not govern such a contract. *Grand Trunk R. W. Co. v. McMillan*, 16 S. C. R. 543.

One of the conditions in a contract by the G. T. R. Co. to carry goods from Toronto to Portage la Prairie, Man., a place beyond the terminus of their line, provided that the company "should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by them; if such loss, misdelivery, damage or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits"—Held, that this condition would not relieve the company from liability for loss or damage occurring during the transit even if such loss occurred beyond the limits of the company's own line.—Held, per Strong and Taschereau, JJ., that the loss having occurred after the transit was over, and the goods delivered at Portage la Prairie, and the liability of the company as carriers having ceased, this condition released the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line Portage la Prairie was situate, as bailees for the shipper. (*Fournier and Gwynne, JJ.*, dissenting). *Id.*

Another condition of the contract provided that no claim for damage to, loss of, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made.—Held, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was res judicata.—Held, also, per Strong, J., Gwynne, J., contra, that part of the consignment having been lost such notice should have been given in respect to the same within thirty-six hours after the delivery of the goods which arrived safely. *Id.*

Goods were sent by another railway company and were carried by it to its crossing point with defendants' line when the goods were delivered

over to defendants to be carried to the plaintiff.—Held, that an action for the loss of the goods was not maintainable by plaintiff against defendants as there was no privity of contract between them. *Richardson v. Canadian Pacific R. W. Co.* 19 O. R. 369.—C. P. D.

See *Harvey v. Grand Trunk R. W. Co.*, 7 A. R. 715, p. 1595; *Brodie v. Northern R. W. Co.*, 6 O. R. 180, p. 1794; *Hately v. Merchants' Despatch Transportation Co.*, 12 A. R. 291; 14 S. C. R. 572, p. 214; *Worden v. Canadian Pacific R. W. Co.*, 13 O. R. 652, p. 1798.

### 3. Other Cases.

To an action for the non-delivery of goods delivered to defendants to be carried from Hamilton to Toronto, the defendants set up that they duly carried and delivered the said goods to the plaintiff at Toronto, but that he did not, as required by one of the terms of the special contract entered into between the parties, give the defendants within thirty-six hours thereafter notice of any damage or loss.—Held, that the defence failed, as the evidence showed that the goods were never carried or delivered as alleged. A further defence set up was, that the plaintiff could not maintain the action, which was in case, because he was not the owner of the goods at the time of the shipment at Hamilton, having sold them to one H.—Held, also that the evidence showed that he was the owner, for although there appeared to have been a sale, the property was not to pass until the delivery of the goods at Toronto. *Steele v. Grand Trunk R. W. Co.*, 31 C. P. 260.—C. P. D.

The respondents sued the appellant company, for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial, a verbal contract between plaintiffs' and defendants' agent at L. was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars, and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil, a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was, "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk"—Held, per Ritchie, C. J., and Fournier and Henry, JJ., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers. Per Strong, Fournier, Henry, and Gwynne, JJ. The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at L. was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in covered cars, and that non-compliance with the provision as to carriage in covered cars, pre-

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J.J. The evi-  
dence, verbal contract  
which contract the  
not enter into, and  
with the writing so  
not one for carriage  
compliance with  
covered cars, pre-

vented the appellants setting up the condition  
that "oil was carried at the owner's risk" as  
exempting them from liability. *Grand Trunk*  
*R. W. Co. of Canada v. Fitzgerald, 5 S. C. R.*  
*204.*

A dealer in horses hired a car from the Grand  
Trunk R. W. Co. for the purpose of transport-  
ing his stock over their road, and signed a ship-  
ping note by which he agreed to be bound by  
the following, among other conditions: (1) The  
owner of animals undertakes all risks of loss, in-  
jury, damage, and other contingencies, in load-  
ing, etc. (3) When free passes are given to per-  
sons in charge of animals, it is only on the ex-  
press condition that the railway company are  
not responsible for any negligence, default or  
misconduct of any kind, on the part of the com-  
pany or their servants, or of any other person  
or persons whomsoever, causing or tending to  
cause the death, injury or detention of any per-  
son or persons travelling upon any such free  
passes—the person using any such pass takes all  
risks of every kind, no matter how caused. The  
horses were carried over the Grand Trunk Rail-  
way in charge of a person employed by the  
owner, such person having a free pass for the  
trip; through the negligence of the company's  
servants a collision occurred by which the  
horses were injured:—Held, per Ritchie, C. J.,  
and Fournier and Henry, J.J., affirming the  
judgment of the Q. B. D., 2 O. R. 197, and  
the Court of Appeal, 10 A. R. 162, that under  
the General Railway Act, 1868 (31 Vict. c.  
68), s. 20, sub-s. 4, as amended by 34 Vict. c. 43,  
s. 5, re-enacted by Consolidated Railway Act,  
1879 (42 Vict. c. 9), s. 25, sub-s. 2, 3, 4, which  
prohibited railway companies from protecting  
themselves against liability for negligence by  
notice, condition or declaration, and which ap-  
plies to the Grand Trunk R. W. Co., the com-  
pany could not avail themselves of the above  
stipulation that they should not be responsible  
for the negligence of themselves or their ser-  
vants. Per Strong and Fouchereau, J.J., that the  
words "notice, condition or declaration," in the  
said statute, contemplate a public or general  
notice, and do not prevent a company from  
entering into a special contract to protect itself  
from liability. *Grand Trunk R. W. Co. v. Vogel,*  
*11 S. C. R. 612.*

Held, affirming the judgment of the court be-  
low, 9 O. R. 251, that in the absence of collusion  
the defendant would not inquire into the reasonableness  
of the rates charged by a railway company to  
an express company. *Vickers Express Co. v.*  
*Canadian Pacific R. W. Co., 13 A. R. 210.*

The plaintiff on the 2nd March, 1882, de-  
livered to the G. W. R. Co. at L., Ont., 840  
bushels of oats, to be carried by said railways  
and connecting railways to B., Man., and there  
delivered to the plaintiff. The oats were shipped  
in car No. 6,263, and while in transit were  
transferred to car No. 3,966 of the St. P., M. &  
M. R. W. Co. Before the arrival of the oats,  
the plaintiff arranged with the defendants' agent  
at Winnipeg to have car 6,263 stopped at Win-  
nipeg. The oats were not stopped at Winnipeg  
but were carried on to Brandon. The plaintiff,  
before leaving Brandon and making the Winni-  
peg arrangement, had instructed his agent at  
Brandon to receive the oats. The oats arrived  
at Brandon on the 5th May. The plaintiff's

agent at Brandon frequently applied for the  
same, but was informed they had not arrived.  
The defendants alleged that notice of arrival  
was sent by post card to the plaintiffs proper  
address at Brandon, but there was no evidence  
to show that this reached the plaintiff, and the  
goods being of a damageable or perishable nature  
were, on 22nd July, sold by defendants. In an  
action for non-delivery and conversion:—Held  
(reversing the judgment of Galt J., at the trial),  
that the plaintiff was entitled to recover; that  
the defendants were not protected by 42 Vict. c.  
9, s. 17 (Dom.), and sub-sections, for to come  
within it, the goods must remain in the defen-  
dants' possession for at least a year, unless the  
tolls have been demanded from the persons  
liable, and payment refused or neglected for six  
weeks after demand; and though sub-section  
3 says nothing of a demand, the whole section  
must be read together, which shews a demand  
was required; that the post card was not a suf-  
ficient demand, unless it was shewn to have  
reached the person it was addressed to; that  
there was no breach in not stopping at Winni-  
peg, as the contract to stop only applied to car  
6,263; and that the plaintiff was entitled to re-  
cover as damages the value of the oats at Bran-  
don at the time of conversion; but as there  
was some difficulty in ascertaining this, the  
court thought substantial justice would be done  
by allowing the plaintiff the price paid at L.  
with six per cent. interest added. *Worden v.*  
*Canadian Pacific R. W. Co., 13 O. R. 652.*  
*C. P. D.*

Construction of conditions in bill of lading.  
*See Hately v. Merchants' Despatch Transporta-*  
*tion Co., 4 O. R. 723; 12 A. R. 201; 14 S. C.*  
*R. 572, p. 214; Dymont v. Northern and North*  
*Western R. W. Co., 11 O. R. 343, p. 661.*

*See Murton v. Kingston and Montreal Forward-*  
*ing Co., 32 C. P. 300; Perkins v. Mississippi*  
*and Dominion Steamship Co. (Limited), 10 P. R.*  
*198, p. 1645.*

#### IX. TRAFFIC ARRANGEMENTS.

By an agreement entered into between the  
plaintiffs and the Toronto, Grey and Bruce Rail-  
way Company, it was agreed that there should  
be certain joint rates chargeable to passengers  
and freight by the steamship company and the  
railway company to be divided in certain pro-  
portions; and if it should be found that the  
proportion payable to the steamship company  
did not at the end of the season amount to the  
sum therein stipulated, then that the deficiency  
should be made good by a rebate from the share  
of the railway company; and, on the other  
hand, if the steamship company received more  
than the sums mentioned in the agreement, the  
railway company were entitled to a share of the  
surplus. Subsequently, an agreement was en-  
tered into whereby the Toronto, Grey and Bruce  
Railway Company leased their line to the Onta-  
rio and Quebec Railway Company, the latter  
agreeing to assume the contract with the plain-  
tiffs. This agreement was ratified by Act of  
Parliament. The Ontario and Quebec Railway  
Company made a lease of their line to the Can-  
adian Pacific Railway Company which was con-  
firmed by Act of Parliament, and by which Act  
the Canadian Pacific Railway Company were to

assume all contracts of the Toronto, Grey and Bruce Railway Company, including the one with the plaintiffs:—Held, that even if the agreement between the plaintiffs and the Toronto, Grey and Bruce Railway Company were ultra vires the latter company, it was made valid by the subsequent legislation; but, apart therefrom, it was in no sense objectionable. *Owen Sound Steamship Co. v. Canadian Pacific R. W. Co.* 17 O. R. 691.—C. P. D.; 17 A. R. 482.

Contract for carriage of goods at less than ordinary local rates. See *Langdon v. Robertson*, 13 O. R. 497.

#### X. ARRANGEMENTS WITH EXPRESS COMPANIES.

Held, affirming the judgment of the court below, 9 O. R. 251, that the railway company having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, such agents having as employees of the railway company the right to use the company's trucks and baggage house as places for storing goods; and refused the same privilege to another incorporated express company brought themselves within the provisions of sub-section 3 of section 60 of 42 Vict. c. 9 (Dom.), which enacts that any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same. *Vickers Express Company v. Canadian Pacific R. W. Co.*, 13 A. R., 210.

#### XI. ARRANGEMENTS WITH TELEGRAPH COMPANIES.

In 1869 the E. & N. A. Ry. Co. owning the road from St. John, N. B., westward to the United States boundary, made an agreement with the W. U. Tel. Co. giving the latter the exclusive right for ninety-nine years to construct and operate a line of telegraph over its road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree of the Equity Court of New Brunswick to the St. J. & M. Ry. Co., which company, in 1883, leased it to the N. B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Tel. Co., under the said agreement, and has been continued ever since without any new agreement being made with the St. J. & M. Ry. Co., or the N. B. Ry. Co. The W. U. Tel. Co. is an American company incorporated by the State of New York, for the purpose of constructing and operating telegraph lines in the State. Its charter neither allows it to engage, or prohibits it from engaging, in business outside of the State. In 1888 the C. P. Ry. Co., completed a road from Montreal to St. John, a portion of it having running powers over the line of the N. B. Ry. Co., on which the W. U. Tel. Co. had constructed its telegraph line. The N. B. Ry. Co. having given permission to the C. P. R. to construct another telegraph line over the same road, the W. U. Tel. Co. applied for and obtained an injunction to prevent its being built. On appeal to the Supreme Court of Canada from the decree of the Equity Court granting the injunction:—Held, 1. That the agreement made in 1869 between the E. & N. A. Ry. Co.

and the W. U. Tel. Co. is binding on the present owners of the road. 2. That the contract made with the W. U. Tel. Co. was consistent with the purposes of its incorporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations. 3. The exclusive right granted to the W. U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade:—Held, per Gwynne J., dissenting, that the comity of nations does not require the courts of this country to enforce, in favour of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land. *Canadian Pacific R. W. Co., v. Western Union Telegraph Co.*, 17 S. C. R. 181.

#### XII. LIABILITY FOR ACTS OF AGENTS.

C., a freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes, in the form commonly used by the railway company, to be signed by his name as the company's agent in favour of B. & Co. for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co. and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts:—Held (Fournier and Henry, JJ., dissenting), that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company was not an act done within the scope of his authority as the company's agent, and the latter was therefore not liable. *Erb v. Great Western R. W. Co. of Canada*, 5 S. C. R. 179; 3 A. R. 448; 42 Q. B. 46.

Powers of agents of railway companies in purchasing right of way. See *Schliehauf v. Canada Southern R. W. Co.*, 28 Chy. 236, p. 1751; *Clouse v. Canada Southern R. W. Co.*, 4 O. R. 28; 11 A. R. 287.

#### XIII. LIMITATION OF ACTIONS.

The plaintiff being the owner of a tract of land near Prescott, on the 29th of October, 1849, agreed with the contractors engaged in the laying out of the railway of the defendants, and in acquiring lands and rights of way for the construction thereof, in consideration of their placing the station of the railway for Prescott upon his land, to convey to the contractors, their heirs, etc., six acres of such land for that purpose, and, if necessary, for the purpose of such station, to allow them to take an additional quantity, not exceeding in all ten acres. The station was erected in 1855 on these lands, and used by the company until 1864, when it was closed, and a station erected about one-and-a-half miles from the plaintiff's lands, and station buildings erected thereon, in consequence of which

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#### OF AGENTS.

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#### ACTIONS.

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the plaintiff's remaining lands became depreci-  
ated in value:—Held, that the defendants hav-  
ing entered upon and retained possession of the  
lands, so agreed to be conveyed, for more than  
twenty years before the filing of the present  
bill (1876), afforded no defence under the  
Statute of Limitations, as up to a period much  
within the twenty years their possession could  
not be questioned, and no right of suit had ac-  
crued to the plaintiff until the use of the lands  
for the purposes of the station was discontinued  
in 1864. *Jessup v. Grand Trunk R. W. Co.*, 28  
Chy. 183.—Sprague.

Operation of statute in case of lands taken by  
railway for right of way. See *Thompson v. Canada Central R. W. Co.*, 3 O. R. 136, p. 1759.

Held, that section 34 of R. S. O. (1877), c. 165, which fixes a limitation of six months for bringing actions for any damage or injury sustained by reason of any railway, did not apply to an action brought against a railway company for damages for wrongfully taking earth from off the plaintiffs' land. The Township of Brock v. The Toronto and Nipissing R. W. Co., 37 Q. B. 372 followed. *Beard v. Credit Valley R. W. Co.*, 9 O. R. 616.—Ferguson.

In an action brought by the plaintiff for in-  
juries received while being carried on a train,  
the defendants set up that the injuries com-  
plained of happened more than six months be-  
fore action brought, and that the action was  
barred by the 27th section of the Consolidated  
Railway Act, to which the plaintiff demurred:—  
Held, that any damage done through negli-  
gence upon a railway in the carriage of passen-  
gers and the like is damage done "by reason of  
the railway." *Brownie v. Brockville and Ottawa R. W. Co.*, 20 Q. B. 202; *McCallum v. Grand Trunk R. W. Co.*, 31 Q. B. 527, and *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616, referred to and followed:—Semble, that the concluding words of the 27th section of the Consolidated Railway Act, viz., that "the defendants may prove that the same" (that is the damage) "was done in pursuance of the authority of this Act and the Special Act," should be read as meaning "in the course and prosecution of their business as a railway company, constituted in pursuance of," etc. *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70.—Wilson.

On 10th May, 1879, C. was seated in a car of the C. V. R. Co. standing on the railway of that company, when an engine of the defendants ran upon the railway of the C. V. R. Co., through gross negligence as alleged, and collided with the car in which C. was. He was injured in the collision, and died on 11th August, 1885, as alleged, from the injuries thus received. On 4th August, 1886, his executrix brought an action therefor:—Held, on demurrer, that the action was for injury sustained "by reason of the railway;" and that the limitation of six months, provided by section 83 of C. S. C. c. 66, s. 27 of 42 Vict. c. 9 (Dom.), applied and prevailed over the limitation of twelve months, provided for by section 5 of R. S. O. (1877), c. 128; and therefore the action was barred. *Conger v. Grand Trunk R. W. Co.*, 13 O. R. 160.—O'Connor.

A title by possession may be acquired as against a railway company to lands originally

obtained by them for railway purposes. *Robb v. South Eastern R. W. Co.*, 9 Q. B. D. 424, approved. Judgment of Falconbridge, J., affirmed. *Erie and Niagara R. W. Co. v. Rousseau*, 17 A. R. 483.

Action against railway for cutting and removing timber within and outside the six rod belt. See *McArthur v. Northern and Pacific Junction R. W. Co.*, 15 O. R. 733; 17 A. R. 86, p. 1743.

In action for damages for loss of luggage. See *Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747, p. 1792.

See *North Shore R. W. Co. v. McWillie*, 17 S. C. R. 511, p. 1789.

#### XV. DIRECTORS.

Personal liability of president of a railway company on an acceptance of a bill of exchange. See *Madden v. Cox*, 5 A. R. 470, p. 164.

Where the directors of a railway company passed a by-law, enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at \$1,000 per annum, which by-law was afterwards, at a meeting of the shareholders, repealed:—Held, that the by-law was within the competence of the directors, under C. S. C. c. 66, s. 47, and the shareholders could not undo the arrangement in respect of past services of the solicitor received by them. *Falkner v. Grand Junction R. W. Co.*, 4 O. R. 350.—Boyd.

Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for the manner of their payment. *Id.*

See *McLaren v. Fiske*, 28 Chy. 362, p. 292.

#### XVI. BONDS AND BONDHOLDERS.

##### 1. Right of Bondholders to Register and Vote.

A trustee held certain debentures of a railway company on trust to secure certain creditors of the company for advances made by them, which debentures were to be handed over to the creditors for sale, upon the company making default in payment of the advances. The company made default, and the debentures were delivered over to the creditors:—Held, that the creditors were entitled under 34 Vict. c. 43, s. 33, to be registered as holders of the debentures, to enable them to qualify and vote for directors; and that a mandamus should issue to compel the company so to register them. *In re Thomson and Victoria R. W. Co.*, 8 P. R. 423.—Wilson.

O., being the holder of fourteen bonds of the railway company, issued on 1st May, 1876, payable on 1st January, 1881, with interest meanwhile half-yearly at six per cent. per annum, requested the secretary of the company to register the bonds under 38 Vict. c. 56 (Ont.). This the secretary refused to do unless the intermediate transfers were produced and registered at the same time:—Held, that the secretary was bound to register the bonds without the production or registration of the transfers, and a summons for a mandamus was made absolute with costs. *In re Osler v. Toronto, Grey and Bruce R. W. Co.*, 8 P. R. 506.—Wilson.

The Canadian Bank of Commerce received from M. R. & Co., bankers in London, bonds of the T. G. & B. R. Co., to the amount of £105,800, represented by M. R. & Co. as belonging to different persons named, and tendered them for registration at the railway office, in order that these persons might vote thereon. The secretary of the railway company registered such of the bonds as stood in the names of the original holders, but refused to register the others unless written transfers from the original holders were produced:—Held, that the company should register the bonds without the production of the transfers; that the proof of title in the alleged owners was sufficient; that the issue of scrip in London as representing the bonds formed no objection; and a mandamus to register the bonds was granted. *In re Johnson and The Toronto, Grey and Bruce R. W. Co.*, 8 P. R. 535.—Wilson.

By the Act of incorporation of a railway company, every shareholder was entitled to one vote for every share held by him. It was provided by the same Act, that if the interest on the bonds issued by the company should be in arrear all holders of bonds should have the same right of voting and qualification for directors as were attached to shareholders:—Held, that the bondholders were not entitled to more than one vote on each bond. *Bunting v. Laidlaw*, 8 P. R. 538.—Galt.

To an application for a mandamus to compel a railway company to register bonds, it was objected that it did not appear the company had made default in payment of the interest, the coupons not being shown to have been presented at the place named for payment:—Held, that the fact of the company never having been ready to pay them there or elsewhere, was a sufficient answer to their objection. *Re Thomson and the Victoria R. W. Co.*, 9 P. R. 119.—Osler.

A demand upon a railway company to register the bonds was held sufficiently made upon the assistant secretary, who, it was shewn, performed all the duties of the secretary's office. *Ib.*

If the holders of railway bonds desire to acquire the right of voting thereon under the Act, all the transfers must be evidenced in such a way as to enable the company to register them in the same manner as they register shares. No special provision by by-law for the registration of such bonds is requisite. *Ib.*

It is enough that the bondholders on the application for a mandamus should make out a *prima facie* title, and the mere fact that they were directors of the company was held no objection, it not being denied that they had done what was necessary under 37 Vict. c. 63, s. 25, to entitle them to become holders. *Ib.*

Under a statute which provided that, in the event at any time of the interest upon the bonds of a railway company remaining unpaid and owing, then, at the next general meeting of the company, all holders of bonds should have and possess the same rights and privileges, and qualifications for directors, and for voting, as are attached to shareholders, provided that the bonds, and any transfers thereof, should have been first registered in the same manner as was provided for the registration of shares:—Held,

that the words "at the next general meeting" were merely indicative of the earliest period at which the bondholders might vote, and that the statute did not require a new registration in order to entitle the bondholders to vote at any subsequent meeting, so long as the interest remained unpaid. Held, also, that the bondholders' right to vote was not limited to the right of voting for directors, but that they had the right to vote on all subjects properly coming before a general annual meeting upon which shareholders might vote. And where a subsequent statute extended the bondholders' right of voting to "special meetings":—Held, also, that the bondholders had the like right to vote on all subjects coming before "special meetings." *Hendrie v. Grand Trunk R. W. of Canada—Grand Trunk R. W. of Canada v. Toronto, Grey and Bruce R. W.*, 2 O. R., 441.—Prondfoot.

Where a statute authorized the railway company to enter into agreement with any other company, for leasing or working its line, provided that assent thereto should be given by at least two-thirds of the shareholders present, or represented by proxy, at any meeting specially called for the purpose:—Held, that the word "shareholders" must be interpreted to include all who were entitled to vote as shareholders, which included bondholders. Held, also, that the registered bondholders were entitled to vote at a special meeting called for the purpose of obtaining the assent of the shareholders to such an arrangement, on the question of its adoption. *Osler v. Toronto, Grey & Bruce R. W. Co.*, 8 P. R. 506; and *Re Johnson and Toronto, Grey, and Bruce R. W. Co.*, 8 P. R. 535, followed:—Held, also, that the votes of registered bondholders having been rejected, the arrangement, though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed. *Ib.*

## 2. Other Cases.

The L. and K. R. W. Co. was incorporated in 1869 (32 Vict. c. 54, Que.), to construct a railway from Lévis to the frontier of the state of Maine, a distance of ninety miles. The company were authorized by that Act to issue bonds or debentures to provide funds for the construction of the railway. In 1872, by 36 Vict. c. 45 (Que.), power was given to issue bonds to the amount of \$3,000,000 without limitation of time, and without restriction as to the length of the railway constructed. In 1874, a statute of the Legislature of Quebec (37 Vict. c. 23), declared that debentures to the amount of \$280,000 had already been issued, and limited for the future the issuing of bonds to the amount of £30,000 sterling, to be issued as follows:—The first issue of £100,000 at once, the second issue of £100,000 when forty-five miles of the road should have been completed and in running order, as certified by the government inspecting engineer, and the third issue of £100,000 as soon as thirty additional miles—making in all seventy-five miles—should have been completed, with the same privilege for the three issues. In 1875, by the Act 39 Vict. c. 57, the legislature



general meeting" the earliest period at which, and that the registration in to vote at any time the interest relating to the bondholders was limited to the fact that they had properly come upon which where a sub- holders' right of held, also, that to vote on all al meetings." of Canada— Toronto, Grey —Proudfoot.

the railway went with any working its line, could be given by holders present, a meeting appointed. Held, that the interpretation to vote as shareholders. Held, that the shareholders were engaged called for the of the shareholders on the question of Grey & Bruce & Johnson and W. Co., 8 P. R. that the votes of the shareholders were rejected, the by two-thirds present, or represented confirmed, and an action of the agreement

was incorporated to construct a line of the state of the. The committee to issue bonds for the construction of 36 Vict. c. 45 to issue bonds to the length of 1874, a statute of 37 Vict. c. 23), the amount of the bond, and limited to the amount of the bonds as follows:—the second issue of the bond in running and inspecting of £100,000 as making in all been completed, the issue. In the legislature

amended the former Acts so as to modify the condition to be fulfilled by the L. and K. I. W. Co. before the third issue of £100,000 could be by them made. This condition was as enacted by the said Act (39 Vict. c. 57), "as soon as the rails and fastenings required for the completion of the remaining forty-five miles or thereabouts of the company's line shall have been provided, then the remaining one thousand bonds, of one hundred pounds each, to be termed the third issue may be issued by the company." In the Act lastly cited, the preamble declared:—"Whereas it appears that a total length of forty-five miles of the company's line having been completed, a first and second issue each of one hundred thousand pounds of the company's debentures have been made." In March, 1881, the L. and K. Ry. was sold by the sheriff at the suit of the plaintiffs the W. M. Co., and bought by the Q. C. R. Co., respondents, for \$195,000. In April, 1881, the corporation of the city of Quebec (appellants), filed an opposition *afin de conserver* for \$218,000 being the amount of 300 debentures of £100 sterling and interest of the second issue issued on the 25th January, 1875, numbered 1,020 and upwards, payable on the 1st January, 1894, and for the payment of which the opposants alleged that the said railroad was hypothecated. The Q. C. R. W. Co., also opposants in the case, contested the opposition of the corporation of the city of Quebec, and claimed the issue of the bonds of the second issue and held by the appellants was illegal. At the trial no certificate was produced, but the government engineer stated that he had reported to the Minister of Railways that there were only forty-three and one-half miles of the road completed, and the secretary of the company testified that the total length of railway certified by the government engineer as being completed and in running order had never exceeded forty-three and one-half miles. The judge at the trial found as a fact that there were only forty-three and one-half miles completed, and held the bonds of the second issue invalid. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal to the Supreme Court, it was:—Held, (reversing the judgment of the Court below), that the effect of the statute 39 Vict. c. 57, is to make the bonds therein mentioned good, valid, and binding upon the company, although the conditions precedent specified in 37 Vict. c. 23, might not have been fulfilled when they were issued. Ritchie C. J., and Strong J., dissenting. Per Fournier and Henry J.J., that as there was evidence that a certificate or report had been given, oral evidence of the contents of the certificate or report was inadmissible and therefore respondents had failed to prove the illegality of the second issue. *City of Quebec v. Quebec Central R. W. Co.*, 10 S. C. R. 563.

So long as a railway company is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize, or take, or sell, or foreclose any part of the property of the company. Their remedy is the appointment of a receiver. The bondholders of the defendants in this case were held not entitled to the moneys claimed by them, which were the earnings of the road deposited in a bank, and which had been attached by judgment credit-

tors of the road. Decision of Boyd C., 18 O. R. 581, reversed. *Phelps v. St. Catherine's & Niagara Central R. W. Co.*, 19 O. R. 501.—Chy. D.

See *Jones v. Canada Central R. W. Co.*, 46 Q. B. 250, p. 1744; *Bank of Toronto v. Cobourg, Peterborough and Marmora R. W. Co.*, 7 O. R. 1 p. 480.

#### XVII. AID TO RAILWAY COMPANIES BY MUNICIPALITIES.

Held, that where a by-law granting a bonus to a railway company has been carried by the electors, a municipal council may refuse finally to pass the same because the passage of the by-law has been procured by bribery, and may set up such bribery in answer to an application for a mandamus:—*Quere*, whether it must be shewn, as it was here, that enough votes have been bribed to destroy the majority. Semble, that a mandamus should not be granted at the instance of any railway company or person to be benefited by such by-law, where a single act of bribery or corruption has been brought home to the applicant. *In re Langdon and the Arthur Junction R. W. Co. and the Township of Arthur*, 45 Q. B. 47.—Osler.

By 18 Vict. c. 33 the Grand Junction Railway Company, which was to run from the town of Peterborough to Toronto, was, with certain other companies, incorporated with the Grand Trunk Railway Company. Not having been built within the stipulated time, the charter of the former company expired, and in May, 1870, the Grand Trunk Railway having refused to construct it, an Act was passed by the Dominion Parliament, 33 Vict. c. 53, dissociating the work from the Grand Trunk Railway Company, and reviving the charter of the Grand Junction Railway Company. It directed that all the corporate powers originally vested in that company should be vested in certain persons, who should exercise the same as fully as the parties named in the original charter could have done, and extended the time for construction. On the 23rd of November, of the same year, the ratepayers of the defendant municipality voted in favour of granting the company a bonus of \$75,000, but the by-law was never read a third time. At the time the municipality had no power to grant a bonus to a railway company, but subsequently, in 1871, by 34 Vict. c. 48 (Ont.), the by-law was declared as valid as if it had been read a third time. It was declared to be binding on the corporation, and they were directed to act upon it, and issue debentures, as if it had been proposed after the Act. On the same day the municipal law was amended so as to empower all municipalities to grant aid for similar purposes. 37 Vict. c. 43 (Ont.) was then passed, amending and consolidating the Acts relating to the plaintiffs' railway, but it did not expressly give retrospective validity to anything that had been done, or mention the by-law, and by 39 Vict. c. 71 (Ont.), the time for completion was further extended, and it was directed that none of the by-laws should lapse by reason of non-completion within the time previously fixed:—Held, reversing the judgment of the Q. B. (45 Q. B. 302), that the Grand Junction Railway Company, being a local work of the province of Ontario, the Act 33 Vict. c. 53 (Dom.), was ultra

vires the dominion parliament, and that the company were therefore not in existence when the defendants granted the bonus, or when the Act 34 Vict. c. 48 (Ont.), validating the by-law was passed; and as 37 Vict. c. 43 (Ont.), which was the first Act by a legislature having power to incorporate them, did not legalize the by-law in favour of the plaintiffs, they were not entitled to a mandamus to compel the delivery of the debentures. *Re Grand Junction R. W. Co. v. County of Peterborough*, 6 A. R. 339.

Per Patterson, J. A., the omission of the plaintiffs to file any plan in accordance with sec. 10, sub-section 4, of the Railway Clauses Act, 14-15 Vict. c. 51, was a sufficient answer to the application. *Ib.*

It was provided by the by-law that in the event of trustees being thereafter appointed by the legislature for receiving the debentures, the warden should, within six months after the passing of the Act, deliver the debentures to them. No special Act was passed nominating the trustees, but by the Act of 1871, 34 Vict. c. 48 (Ont.), it was enacted that whenever any municipality should grant a bonus to the company, the debentures might, at the option of the municipality, be delivered to three trustees to be named as therein directed. Per Patterson, J. A., the legislature had not appointed trustees within the meaning of the by-law, and as there was therefore no default in delivering the debentures, the mandamus must on this ground also be refused. *Ib.*

Per Gwynne, J., (Fournier and Taschereau, J.J., concurring). As the undertaking entered into by the municipal corporation contained in the by-law for granting a bonus to a railway company, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in Ontario in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of mandamus, which the writ of mandamus obtainable on motion without action still is. Per Henry, J., that if appellants had made out a right to file a bill to enforce the performance of a contract ratified by the legislature, they would not have the right to ask for the present writ of mandamus. *S. C.*, 8 S. C. R. 76.

Held, following the decision of the Supreme Court of Canada, in *re Grand Junction R. W. v. Peterborough* (8 S. C. R. 76), that a writ of mandamus to compel the issue of debentures by a municipal corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action. *In re The Canada Atlantic R. W. Co. v. Township of Cambridge*, 3 O. R. 291. -Osler.

Held, that under Ontario Act 34 Vict. c. 48 the Grand Junction Railway Company was recognized as an incorporated company, otherwise that it was actually incorporated by Act 37 Vict. c. 43 (Ont.); the effect of the two Acts being to give to the company so incorporated the benefit

of a by-law of the respondent corporation, which, under certain conditions, provided a bonus for the railway:—Held, further, that under the Act of 1871 the said by-law was legal, valid and binding on the corporation, but that the railway company had not, on the evidence, complied with the conditions precedent. The stipulated certificate of the chief engineer had not been produced, and although under paragraph 8 of the by-law, debentures might be delivered to trustees without a certificate that applied to a time when the debentures or their proceeds were to be held in suspense, not to a time when the trusts were spent and the payment, if made at all, should be made direct to the company. *Grand Junction and Midland Railways of Canada v. Corporation of Peterborough*, 13 App. Cas. 136. Judgment of the Court of Appeal, 13 A. R. 420, affirmed.

The railway company were bound by their original charter to commence within three years, and to finish the road within eight years, which they failed to do within the specified time:—Held, affirming the decision of the Chancery Divisional Court, 8 O. R. 201, and of Proudfoot, J., *Ib.* 183, that the plaintiffs were not in a position to enforce the delivery of the debentures after the lapse of nine years from the passing of the by-law, when a total change of circumstances had taken place, and when the period fixed by the plaintiffs' charter for the completion of the railway had expired. *Canada Atlantic R. W. Co. v. City of Ottawa*, 12 A. R. 244.

Held, following *Canada Atlantic R. W. Co. v. City of Ottawa*, 8 O. R. 201; 12 A. R. 234; that under section 559, sub-section 4 of the Municipal Act, R. S. O. (1877), c. 174, a grant by way of bonus may be made to a dominion railway. *Canada Atlantic R. W. Co. v. Township of Cambridge*, 11 O. R. 392. -C. P. D.

Under 44 and 45 Vict. c. 40, s. 2 (Que.), passed on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment to their charter, the town of Levis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence river, over and above \$30,000. Appellants, being ratepayers of the town of Levis, applied for and obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality. The proviso in section 2 of the Act under which the corporation of the town of Levis contended that the by-law was authorized, is as follows: "Provided that within thirty days from the sanction of the present Act, the corporation of the town of Levis furnishes the said company with its said guarantee and obligati<sup>n</sup> to pay all excess over \$30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the town of Levis, no power or authority is given to the corporation to give such guarantee. The statute 44 and 45 Vict. c. 40 (Que.), was passed on the 30th June, 18'1; and the by-law forming the guarantee was passed on the 27th July following:—Held, reversing the judgment of the Court of Queen's Bench, L. C., appeal aside, and restoring the judgment of the Superior Court, that the statute in question did not authorize the corporation of Levis to impose burdens upon

oration, which, and a bonus for under the Act, legal, valid and that the railway, hence, complied. The stipulated had not been paragraph 8 of be applied to a their proceeds to a time when yment, if made by the company. Railways of Can- rough, 13 App. court of Appeal,

found by their in three years, eight years, which specified time:— of the Chancery and of Proudford, were not in a of the debentures in the passing of range of circum- when the period for the completion Canada Atlantic A. R. 244.

atic R. W. Co. v. A. R. 234; that of the Municipal grant by way of minion railway. Township of Cam-

40, s. 2 (Que.), Quebec Central Rail- way by them, ask- ing their charter, the guaranteeing to Railway Company for the right of way to the deep, over and above ratepayers of the obtained an in- dings on this by- ality. The pro- under which the is contended that follows: "Pro- from the sanction tion of the town mpany with its to pay all excess oration for the incorporation of authority is given guarantee. The (Que.), was passed by-law forming e 27th July fol- judgment of the appeal side, and Superior Court, did not authorize these burdens upon

the municipality which were not authorized by their Act of incorporation or other special legis- lative authority, and therefore the by-law was invalid, and the injunction must be sustained. Ritchie, C. J., dubitante. *Quebec Warehouse Co. v. Lewis*, 11 S. C. R. 666.

A by-law was submitted to the council of the city of O., under 36 Vict. c. 48 (Ont.), for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provisions of the statute such by-law was to be taken into con- sideration by the council after one month from its first publication on the 24th of September, 1873. The vote of the ratepayers was in favour of the by-law, and on 20th of October a motion was made in the council that it be read a second and third time, which was carried, and the by-law passed. The mayor of the council, however, refused to sign it, on the ground that its con- sideration was premature; and on 5th Novem- ber the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the coun- cil, the original having been mislaid, and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1883 an action was brought against the corporation of the city of O. for the delivery of the debentures provided for by the by-law, in which suit the question of the val- idity of the whole proceeding was raised:—Held, affirming the judgment of the court below— 1. That the vote of 20th November, 1873, was premature, and not in conformity with the provisions of section 231 of the Municipal Act; that the mayor properly refused to sign it, and that without such signature the by-law was invalid under section 226. 2. That the coun- cil had power to consider the by-law on the 5th of November, 1873, and the matter was then disposed of. 3. That the proceedings of 7th April, 1874, were void for two reasons. One, that the by-law was not considered by the coun- cil to which it was first submitted as provided by section 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason is, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates:—Semble, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote. *Canada Atlantic Railway Co. v. City of Ottawa*, 12 S. C. R. 365; 14 A. R. 236; 8 O. R. 201.

The corporation of the County of Ottawa under the authority of a by-law undertook to deliver to the Montreal, Ottawa and Western Railway Company for stock subscribed by them 2,000 debentures of the corporation of \$100 each, payable twenty-five years from date and bearing

six per cent. interest, and subsequently, with- out any valid cause or reason, refused and neglected to issue said debentures. In an action brought by the company against the corporation solely for damages for their neglect and refusal to issue said debentures:—Held, affirming the judgment of the court below, that the corpora- tion, apart from its liability for the amount of the debentures and interest thereon, was liable under Arts. 1,065, 1,073, 1,840 and 1,841, C. C., for damages for breach of the covenant. (Ritchie, C. J., and Gwynne, J., dissenting.) *County of Ottawa v. Montreal, Ottawa & Western R. W. Co.*, 14 S. C. R. 193.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (3) that a de- benture being a negotiable instrument, a rail- way company that has complied with all the condition precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to said debentures, free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the future keeping up of the road, etc. Art. 962 Municipal Code. *Fournier J. dissenting. Parish of St. Césaire v. McFarlane*, 14 S. C. R. 738.

By an agreement between the E. & H. Rail- way Co. and the Town of C. the latter agreed to pass a by-law granting a bonus to the com- pany in aid of the construction of a railway, sub- ject to the performance of certain specified con- ditions. The by-law subsequently approved by the ratepayers, and passed by the council of the town, did not contain all the conditions of the agreement. In an action against the town to com- pel the delivery of debentures for the amount of the bonus the defendants pleaded non-perform- ance of the conditions of the agreement as just- ifying the withholding of the debentures, and, by way of counter-claim, prayed specific per- formance of such conditions by the plaintiffs:— Held, 1. Per Ritchie C.J., Strong, Fournier, and Henry J.J., Taschereau and Gwynne, J.J., contra, that the title to the debentures did not depend upon prior performance of conditions in the agreement not included in the by-law, but upon performance of those in the by-law alone, and the latter having been complied with the debentures should issue. 2. Per Fournier J., that the debentures should, nevertheless, be withheld until the damages for non-performance of the conditions in the agreement were paid or secured. 3. Per Ritchie C.J., Strong and Henry J.J., Fournier J. contra, that specific per- formance was not an appropriate remedy in such a case and the defendants could only claim damages for non-performance. 4. Per Ritchie, C.J., Strong and Fournier, J.J., that the claim of defendants for damages could be disposed of in this action under the counter-claim and there should be a reference to assess the same. 5. Per Henry J., that the evidence did not justify a reference and the counterclaim should be dis- missed with a reservation of defendants' rights. *Bickford v. Chatham*, 10 O. R. 257; 14 A. R. 32; 16 S. C. R. 235.

One of the conditions in the agreement to be performed by the railway company was "to construct at or near the corner of Colborne and William streets (in Chatham) a freight and pas- senger station with all necessary accommoda-

tion, connected by switches, sidings or otherwise with said road" upon the council of the town passing a by-law granting a necessary right of way:—Held, 1. That such condition was not complied with by the erection of a station building not used, nor intended to be used, and for which proper officers, such as station master, ticket agent, etc., were not appointed. Strong J., dissenting. 2. Per Strong J., that the condition only called for the construction of a building with the required accommodation and connections, and did not amount to a covenant to run the trains to such station, or make any other use of it. 3. The words "all necessary accommodation" in the condition required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided. *Ib.*

The Act incorporating the railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act:—Held, that such special Act was not restrictive of the Municipal Act, and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. *Ib.*

Held, that all defects of form in the by-law were cured by 44 Vict. c. 24, s. 28, providing for registry of by-laws and requiring an application to quash to be made within three months after such registry. *Ib.*

In 1880, before the passing of 46 Vict. c. 18, (Ont.), a municipal council, with the view of granting a bonus to a railway company, caused to be submitted to the vote of the ratepayers a by-law to raise money for that purpose. At the voting thereon the votes for and against it were equal, and the clerk of the municipality, who also acted as returning officer, verbally gave a casting vote in favour of the by-law:—Held (reversing the judgment of the C. P. D., 11 O. R. 392), that section 152 of the Municipal Act, R. S. O. (1877), c. 174, is not applicable to the case of voting on a by-law, and therefore the casting vote of the clerk was a nullity, and the by-law did not receive the assent of the electors of the municipality within the meaning of R. S. O. (1877), c. 174, s. 317; as such a defect could not be cured by promulgation of the by-law:—Held, also, following *Canada Atlantic v. Ottawa*, 12 A. R. 234, and S. C. 12 S. C. R. 377, that the by-law was bad for non-compliance with section 330 of the Municipal Act, R. S. O. (1877), c. 174, the section corresponding with section 248 of 36 Vict. c. 48. Per Burton, J. A. The provisions of section 248 of the Municipal Act of 1876, 36 Vict. c. 48, do not apply to by-laws for granting bonuses to railways, and the judgment of the Supreme Court of Canada in *Canada Atlantic R. W. Co. v. Ottawa*, 12 S. C. R. 377, does not so decide. *Canada Atlantic R. W. Co. v. The Township of Cambridge*, 14 A. R. 299.

Where a railway company in breach of a contract entered into by them in consideration of a large amount of debentures given them by the plaintiffs to run trains from the eastern part of the city of St. T. to the western part, ceased to run such trains:—Held, on a reference as to damages, that though the actual depreciation of property in the western

part of the city resulting therefrom was a matter pertaining to the property-owners, and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly the enquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued:—Constat, that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighbourhood could not be reckoned as constituents per se of the damages suffered by the corporation:—Held, also, that if the railway company admitted that they were never again going to run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment. *City of St. Thomas v. Credit Valley R. W. Co.*, 15 O. R. 673.—Boyd.

By agreement bearing date the 10th day of May, 1873, the defendants in consideration of a bonus of \$300,000 granted to them by a section of the county of Simcoe, of which the township of Nottawasaga forms a part, covenanted with the plaintiffs to (among other things) "erect, build, and complete good and sufficient and suitable station-buildings for passengers and freight" at five certain places within the township: to "establish at each of the places hereinbefore mentioned regular way stations," and to "well and sufficiently keep and maintain the said five stations above mentioned with all suitable, necessary and proper buildings as the business done or capable of being done at the said stations respectively may require for seven years after the trains shall have commenced to run on the said road and (to) undertake to do the passenger and freight business of the county at said stations." By a further agreement bearing date the 26th day of May, 1878, the defendants in consideration of a bonus of \$20,000 granted to them by the plaintiffs, covenanted with the plaintiffs to "erect, build, and complete good and sufficient and suitable station-buildings for passengers and freight on the line of the said railway at the several places following in the said township," five places being specified, and to "establish at each of such places regular way stations." This agreement provided that the route of the line of the railway through the township as defined in the former agreement might be deviated from to such an extent as to admit of the stations being located at the points mentioned in the second agreement, and provided further that it should not be incumbent on the defendants to erect stations at the places mentioned in the former agreement, "but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement." The defendants erected stations at the points specified, three of these stations being respectively called A, G, and N. Trains commenced to run on the line in the year 1879. In

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1880 the plaintiffs being dissatisfied with the mode in which the stations at G. and N. were being maintained brought an action against the defendants for specific performance of the agreements. In this action a consent decree was pronounced and an injunction granted restraining the defendants from ceasing to maintain the stations except in a certain manner in the decree specified. The decrees contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action. In 1886, after the expiration of the seven years, the defendants made changes in their mode of maintaining the station at A. and kept it open for about four hours a day only. The plaintiffs were dissatisfied and this action was thereupon brought by them to compel specific performance of the agreements:—Held, reversing the judgment of Robertson, J., that the word "establish," does not in itself mean "maintain and use forever;" that the seven years limitation applied to the substituted stations, and that the defendants were not bound to maintain them after the expiration of that time. *Bickford v. The Town of Chatham*, 14 A. R. 32, 16 S. C. R. 235; *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 123, and *Geauyeau v. Great Western R. W. Co.*, 3 A. R. 412, considered; *Wallace v. Great Western R. W. Co.*, 3 A. R. 44, distinguished:—Held, also, that the decree in the former action did not constitute the question of the seven years limitation res judicata; there being no adjudication on that question, and in any event an adjudication on that question being unnecessary at the date of the former action; *Concha v. Concha*, 11 App. Cas. 541, considered and followed. At the trial evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement the defendants would be bound to maintain the stations for all time:—Held, that this evidence was clearly inadmissible. *Township of Nottawasaga v. Hamilton and North Western R. W. Co.*, 16 A. R. 52.

A municipal corporation, under the authority of a by-law, issued and handed to the treasurer of the Province of Quebec \$50,000 of his debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the government provincial subsidy was payable under 44 & 45 Vict. c. 2, s. 19, viz., "when the road was completed and in good running order to the satisfaction of the Lieutenant-Governor in Council." The debentures were signed by S. M. who was elected warden and took and held possession of the office after W. J. P. had verbally resigned the position. In an action brought by the railway company to recover from the treasurer of the province the \$50,000 debentures after the government bonus had been paid and in which action the municipal corporation was *mise en cause* as a co-defendant, the provincial treasurer pleaded by demurrer only, which was overruled, and the county of Pontiac pleaded general denial and that the debentures were illegally signed:—Held, 1st, affirming the judgment of the court below, that the debentures signed by the warden

de facto were perfectly legal. 2nd, That as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieutenant-Governor in Council, the onus was on the municipal corporation, *mise en cause*, to prove that the government had not acted in conformity with the statute. Strong, J. dissenting. *County of Pontiac v. Ross*, 17 S. C. R. 406.

See *City of St. Thomas v. Credit Valley R. W. Co.*, 12 A. R. 273.

#### XVIII. AMALGAMATION OF RAILWAYS.

Part of the consideration for the right of way over plaintiff's land was that the company, the Belleville and North Hastings Railway Company, should construct a cattle-pass under the railway, for the use of the plaintiff. The company refused to construct the pass, whereupon the plaintiff, on the 30th April, 1880, filed a bill in chancery against them to enforce the agreement, to which the company on the 13th September, 1880, filed an answer, and on the 13th November a decree was obtained by consent to construct it on certain terms specified therein. In March, 1879, the Acts, 42 Vict. c. 53 and 57 (Ont.), were passed, authorizing the Belleville and North Hastings Railway Company, and the defendants to enter into an agreement for amalgamation subject to the ratification and approval of a majority of the shareholders of said companies, at public meetings called for such purpose. On the 29th June, 1880, an agreement was entered into for the amalgamation of the two companies under defendants' name, which was on the same day ratified and approved of by the respective shareholders. The plaintiff had no notice or knowledge of the deed of amalgamation, or of its contents. On the 4th March, 1881, the Act 44 Vict. c. 68, (Ont.), was passed, by section 1, of which the said deed of amalgamation was declared legal and valid, and that the two companies should be amalgamated and united, under the defendants' name, in the terms of the said deed. The decree not having been carried out, the plaintiff brought this action against the defendants to enforce it:—Held, that there was no complete amalgamation of the two companies until the passing of 44 Vict. c. 64 (Ont.), so that the Belleville and North Hastings Railway Company had not ceased to exist when the decree was made, which was therefore legal and valid; and that the plaintiff was entitled to maintain this action to enforce it against the defendants. *Farley v. Grand Junction R. W. Co.*, 4 O. R. 232.—Senkler Co. Judge.—C. P. D.

See *Jones v. Canada Central R. W. Co.*, 46 Q. B. 250, p. 1744; *Re Grand Junction Railway Co. v. County of Peterborough*, 6 A. R. 339, p. 1807.

#### XIX. RAILWAYS IN HANDS OF RECEIVER.

The receiver appointed to receive the proceeds of a railway company and apply the same in carrying on the business of the company, paid \$55.97 to the owner of land over which the line ran for the right of way over his lands, he having threatened to obstruct the passage of the company's trains unless paid. On passing his accounts the master refused to allow the pay-



ment in favour of the receiver, which ruling of the master was affirmed on appeal, as such payment did not properly come under the head of "working expenses and outgoings" for the road, and which alone the receiver was authorized to pay; but the court (Spragge, C.) gave the receiver liberty to take out an order now for the allowance of this disbursement, on payment of the costs of the appeal but refused to make such an order in respect of fees paid to the solicitor of the company for the examination of titles, as there was not any evidence to shew that the payment was such as would have been sanctioned by the court if applied to in the first instance for permission to pay the same. *Gooderham v. Toronto and Nipissing R. W. Co.*, 28 Chy. 212.

A receiver of the defendants' railway had been appointed to take the revenues, issues, and profits, to pass his accounts periodically, and to pay into court the balance due from him after providing for the working expenses and outgoings of the railway. The master was directed to take an account of all persons entitled to liens, charges, or incumbrances, and to settle their priorities, and the money to be paid into court was to be paid to such persons according to their priorities to be ascertained:—Held, affirming the decision of Proudfoot, V. C., that the master in taking the receiver's accounts, should have allowed debts paid for working expenses which were not regularly payable until after his appointment, but not those already in default at that time, which were properly payable out of the moneys to be paid into court according to their priority. *S. C.*, 8 A. R. 685.

Although the duty of the receiver of the gross proceeds and revenues of a railway, is to pay thereout all expenses necessary for the maintenance, management and working of the undertaking, he would not be warranted in expending the same in any extraordinary outlay; and where an application was made by the receiver to authorize the purchase of a large amount of rolling stock, the outlay in respect of which would require to be met by anticipating income, the court (Boyd, C.) refused to sanction the expenditure. *Lee v. Victoria R. W. Co.*, 29 Chy. 110.

See *Foz v. Nipissing R. W. Co.*; *Gooderham v. Nipissing R. W. Co.*, 29 Chy. 11, p. 1820; *Lee v. Credit Valley R. W. Co.*, 29 Chy. 480, p. 429; *Smith v. Port Dover and Lake Huron Railway Co.*, 12 A. R. 288, p. 698.

#### XXI. MISCELLANEOUS CASES.

Held, that the defendants, a railway company, were not subject to the provisions of "The Ditches and Water Courses Act," R. S. O. (1877) c. 199. *Miller v. Grand Trunk R. W. Co.*, 45 Q. B. 222.—Q. B. D.

Under the Assessment Act of 1869, 32 Vict. c. 36 (Ont.), the lands of railways might be sold for the non-payment of taxes. *Smith v. Midland R. W. Co.*, 4 O. R. 494.—Boyd.

Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway, such highway is still a public highway, within the provisions of the Municipal Act, R.

S. O. (1877) c. 184, s. 531, requiring every public road, street, bridge and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default, by the liability, if any, of the railway company. *Mead v. Township of Etobicoke and Grand Trunk R. W. Co.*, 18 O. R. 438.—Q. B. D.

A railway ticket is not a subject of copyright under C. S. C. c. 81. *Griffin v. Kingston and Pembroke R. W. Co.*, 17 O. R. 660.—Falconbridge.

See *West v. Village of Parkdale, Carroll v. Village of Parkdale*, 7 O. R. 270; 8 O. R. 59; 12 A. R. 393, 12 S. C. R. 260, p. 1377. *Bickford v. Canada Southern R. W. Co.*, 14 S. C. R. 743, p. 47.

#### XXII. SPECIAL ACTS RELATING TO PARTICULAR RAILWAYS.

##### 1. Canada Atlantic Railway Co.

The charter of the Canada Atlantic Railway Company, reciting in the preamble that the line of railway which it was proposed to construct, would afford the shortest and most convenient connection between the cities of Ottawa and Montreal, authorized the company to construct their track from the city of Ottawa to, etc. The head office was to be in Ottawa:—Held, that they had the right to enter the city and construct from a point within the limits. *In re Bronson and the City of Ottawa*, 1 O. R. 415.—Oaler.

##### 2. Canada Central Railway Co.

See *Foran v. McIntyre*, 45 Q. B. 288, p. 1741; *Booth v. McIntyre*, 31 C. P. 183, p. 1741; *Jones v. Canada Central R. W. Co.* 46 Q. B. 250, p. 1744.

##### 3. Canada Southern Railway Co.

See *Norvell v. Canada Southern R. W. Co.*, 9 A. R. 310, p. 1765; *Bowen v. Canada Southern R. W. Co.*, 14 A. R. 1, p. 1750.

##### 4. Canadian Pacific Railway Co.

Held, Henry J., dissenting, that the Canadian Pacific Railway Company have power, under their charter, to extend their line from Port Moody, in British Columbia, to English Bay. *Canadian Pacific R. W. Co. v. Major*, 13 S. C. R. 233.

##### 5. Erie and Huron Railway Co.

By the Municipal Act, R. S. O. (1877) c. 174, s. 509, sub-s. 4, authority is given to grant bonuses and issued debentures in aid of a railway company, payable at such times, etc., as the municipal council may think meet. By the defendants' special Act of Incorporation, 36 Vict., c. 70 (Ont.), the debentures were to be issued and delivered to trustees within six months after the passing of the by-law, who were to receive and convert the same into money, and deposit the proceeds in a chartered bank and pay the same out on the certificate of the chief engineer of the railway company:—Held also, that a compliance with the terms of the general Act was

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company. *Mead*  
*Grand Trunk R.*  
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*Q. B. 288, p. 1741;*  
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*Q. B. 250, p. 1744.*

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sufficient, for that the provisions of the special  
Act were not restrictive, but enabling and en-  
larging the powers under the general Act: and  
that under the circumstances the appointment  
of trustees would have been useless. *Bickford*  
*v. Town of Chatham, 10 O. R. 257.*—*Cameron.*  
*14 A. R. 32; 16 S. C. R. 235.*

#### 6. Grand Junction Railway Co.

See *Demorest v. Midland R. W. of Canada, 10*  
*P. R. 73, p. 1232; Grand Junction R. W. Co. v.*  
*County of Peterborough, 6 A. R. 339; 8 S. C.*  
*R. 76, p. 1807; Grand Junction and Midland*  
*Railways of Canada v. Corporation of Peter-*  
*borough, 13 App. Cas. 136, p. 1808.*

#### 7. Grand Trunk R. W. Co.

See *Pratt v. Grand Trunk R. W. Co., 8 O. R.*  
*499, p. 1768.*

#### 8. Midland Railway.

Under 45 Vict. c. 67, s. 6 (Dom.), the Mid-  
land railway, as constituted by the Act, is the  
company, that strangers or persons having  
claims, etc., upon any of the companies incor-  
porated by the Act, should proceed against for  
the enforcement of their rights. *Demorest v.*  
*Midland R. W. of Canada, 10 P. R. 73.*—  
*Cameron.*

#### 9. Northern Railway Co.

See *Grand Trunk R. W. Co. of Canada v.*  
*Credit Valley R. W. Co. of Canada, 27 Chy.*  
*232 p. 1746; Re Watson v. Northern R. W. Co.,*  
*5 O. R. 550, p. 1755.*

#### 10. Ontario and Sault Ste. Marie Railway Company.

By the General Railway Act R. S. O. (1877)  
c. 165, which was by the plaintiffs special Act  
incorporated therein except as varied by the  
later, ten per cent. of the capital of the railway  
was by sub-section 5 of section 36 required to be  
expended within three years, and the railway  
was to be completed within ten years of the  
passing of the special Act in default of which  
the corporate existence of the company ceased,  
and by section 4 of the general Act, sections 4  
to 36 thereof inclusive were to apply to all rail-  
ways authorized to be constructed by any  
special Act of the province, and to be construed  
therewith as forming one Act:—Held, that section  
4 of the general Act did not apply to the  
plaintiffs, and that section 23 of their special  
Act must be read in substitution for sub-section  
5 of section 36 requiring the expenditure of ten  
per cent. of the capital within the three years.  
*Ontario and Sault Ste. Marie Railway Co. v.*  
*Canadian Pacific R. W. Co., 14 O. R. 432.*—  
*Ferguson.*

### RAPE.

See CRIMINAL LAW.

### RECEIPTS.

- I. DEPOSIT RECEIPT.—See BANKS.
- II. HIRE RECEIPT. See HIRING.
- III. INSURANCE RECEIPT.—See INSURANCE.

Legatee having given a receipt not bound to  
execute a release. See *Kaiser v. Boynton, 7 O.*  
*R. 143, p. 1163.*

A receipt qua receipt is not a contract, but a  
mere acknowledgment, and is open to explana-  
tion and contradiction by parol. *Steinhoff v.*  
*McRae, 13 O. R. 546.*—*C. P. D.*

S. sold all the elm and soft maple trees on a  
certain lot to T., and at the time of sale gave T.  
the following receipt:—Received from J. L. for  
T., the sum of \$500, on account of elm and soft  
maple on," etc., the said lot, describing it. Parol  
evidence was admitted to shew, and the jury  
found that one of the conditions of the sale was  
that the timber was to be removed by T. within  
two years:—Held, that the receipt here was  
not the contract between the parties, but a mere  
acknowledgment of so much money; and there-  
fore the parol evidence was properly admitted.  
Held, also, that the effect of the condition was,  
that T. was only to have the right to cut and  
remove the timber within the two years from  
the date of the agreement. *Johnston v. Short-*  
*reed, 12 O. R. 633, followed.* *Id.*

See *Mendelssohn Piano Co. v. Graham, 19 O.*  
*R. 83, p. 1538.*

### RECEIVER.

#### I. APPOINTMENT OF.

1. *In Mortgage Cases, 1818.*
2. *In Other Cases, 1819.*
3. *By way of Equitable Execution*—See  
EXECUTION.

#### II. ATTACHMENT OF MONEYS IN HANDS OF, 1819.

#### III. POWERS OF.

1. *To Take Legal Proceedings, 1819.*
2. *To Make Assessments on Premium*  
*Notes, 1820.*
3. *Railway Companies*—See RAILWAYS  
AND RAILWAY COMPANIES.

#### IV. LIABILITY OF, 1821.

#### V. RIGHT TO COSTS, 1821.

#### VI. DISCHARGE OF, 1822.

#### I. APPOINTMENT OF.

1. *In Mortgage Cases.*

Where actions were brought by mortgagees  
without the leave of the court for sale of mort-  
gaged premises after the appointment of a re-  
ceiver to receive the rents and profits of such  
premises, an order was made, upon the petition  
of the mortgagees, allowing the proceedings in  
the actions to stand, and allowing the peti-  
tioners to proceed with the actions notwith-

standing the appointment of the receiver. *Gardner v. Burgess*, 13 P. R. 250.—Boyd.

See *Wallace v. Wallace*, 11 O. R. 574, p. 1319.

## 2. In Other Cases.

The plaintiff, carrying on the business of a druggist, mortgaged his stock-in-trade to the defendant; the instrument by which it was effected, stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure repayment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff; other money, being part of the profits of the business, was thus reinvested in new stock; some of the old stock remaining in specie. The matter was referred to the master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, the plaintiff applied on petition for the appointment of a receiver, on the ground that the mortgage had been paid in full:—Held, (1) that as the new stock belonged to the mortgagee himself, and the plaintiff could therefore have no claim upon it, and as the master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a receiver; (2) that although the defendant's right on default, was to sell the original stock en bloc after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the defendant's control, he had the right so to conduct it, subject to being called on to account. *Foster v. Morden*, 29 Chy. 25.—Boyd.

A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young v. Wright*, 8 P. R. 198.—Blake.

When the misconduct is such as would entitle a plaintiff at the outset to apply for an injunction or a receiver, an action should be brought. *Sullivan v. Hartly*, 9 P. R. 500.—Boyd.

See *McLean v. Bruce*, 13 P. R. 504, p. 635.

## II. ATTACHMENT OF MONEYS IN HANDS OF.

See *Stuart v. Grough*, 15 A. R. 290, p. 93.

## III. POWERS OF.

### 1. To Take Legal Proceedings.

In these cases an objection was taken that there was no power to sue because the company's license under 42 Vict. c. 25 (Ont.), had been revoked, but it was shewn that one B. had been appointed receiver, and was specially required by order of the chancery division, to

prosecute all members in arrears for calls, and that he had adopted these actions, and was prosecuting them as receiver:—Held, that the objection was not tenable. *Union Fire Ins. Co. v. Fitzsimmons-Union Fire Ins. Co. v. Shields*, 32 C. P. 602.—Hagarty.

After a decree had been pronounced directing the appointment of a receiver, but before the appointment was completed, the defendant company had made a payment to a creditor, which the plaintiff F., a judgment creditor, alleged to be a fraudulent preference, and moved for an order that the receiver should take proceedings to recover the money so paid:—Held, that as the payment complained of took place before the actual appointment of the receiver, it was more reasonable that those who were interested at the time the payment was made, parties to the suit, and who objected to what had been done, should in person apply for the appropriate relief. *Fox v. Nipissing R. W. Co.—Goderham v. Nipissing R. W. Co.*, 29 Chy. 11.—Boyd.

A receiver, appointed as the company were here, has a right to assert his claims actively, though he may require in some instances the sanction of the court; and a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the company to assert their claim by an action. *Re Morphy—Morphy v. Niven*, 11 P. R. 321.—Boyd.

A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where by an ex parte order made in the action in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts due to a certain Grange, and brought this action pursuant thereto. Held, that an amendment should be made adding the Grange as co-plaintiffs without security being given for their costs, they being insolvent. If there were no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the receiver. *McGuin v. Fretts*, 13 O. R. 699.—Chy. 1.

S. recovered a judgment against S. S. and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under the will of the latter. The share not being paid over plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action:—Held, that the right of action was in S. S. and not the plaintiff; by his appointment the plaintiff became entitled to receive the amount, and the defendants, the executors, having notice of his appointment could not safely pay over the money to any other, and in case of their refusal to pay, the plaintiff's duty was to apply for leave to bring an action in S. S.'s name. *McGuin v. Fretts*, 13 O. R. 699, cited and followed. *Stuart v. Grough*, 14 O. R. 255.—Robertson.

### 2. To Make Assessments on Premium Notes.

Where application was made to the court to add the persons who had signed premium notes

as parties in the master's office, and to direct the master to assess the amounts due upon the notes, and to order payment of the same to the receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R. S. O. (1877) c. 181, s. 43, et seq.—Held, that as the liability attached only upon such assessment by the directors, the court should not add to, or alter the liability of the parties who had made the notes by referring it to the master or receiver to do that which the directors only could do; clause 75 of 36 Vict. c. 44, which gave power to a receiver to do this, having been omitted from the statute on revision. *Hill v. Merchants' and Manufacturers' Ins. Co.*, 28 Chy. 560.—Blake.

#### IV. LIABILITY OF.

On the 29th of January, 1878, an order was made directing that D. be receiver in the suit, he first giving security to the satisfaction of the registrar. At the date of the order and previously thereto, D. was the agent of the mortgagor, and as such collected the rents of the property in question. D. received verbal notice of the order and executed his own bond as security, which the registrar declined to accept, and D. continued to receive the rents and pay them to the mortgagor. On the 20th of May D. executed a second bond, reciting the order of the 29th of January, and conditioned that he "do and shall account for every sum of money which he shall receive on account of rent," which was filed on the 22nd of May, and on the 3rd of June, a copy of the order of the 29th of January, was served on him, and he was notified that his security had been accepted:—Held, by the master in ordinary, and affirmed on appeal by Spragge, C., that D. was accountable for the rents received since the 29th of January, but was entitled to be allowed for any disbursements properly made by him. *Western Canada, etc. v. Ince*, 8 P. R. 262.

#### V. RIGHT TO COSTS.

A receiver is entitled as against the defendants, to the costs of a suit in which he succeeds, though the action has been brought without the sanction of the court. *Re Neill—Dickey v. Neill*, 9 P. R. 176—Proudfoot.

The receiver was served with notice of the presentation of the petition, and appeared thereon by counsel. The petition, besides praying for the relief which was granted, asked in the alternative that the receiver might be discharged or that he might be ordered to pay the petitioners the arrears of principal and interest due on their mortgages and the costs of the actions and the petition:—Held, that if the petitioners wished to protect themselves from paying costs they should have proceeded under Con. Rule 1193 and tendered the receiver \$5 with the petition; and this not having been done, and the relief asked in the alternative prayers being such as justified the appearance of the receiver, the receiver was entitled to be paid his costs by the petitioners; and the petitioners were allowed to add the sum so paid and their own costs to the mortgage debt. *Gardner v. Burgess*, 13 P. R. 250—Boyd.

#### VI. DISCHARGE OF.

See *Lee v. Credit Valley R. W. Co.*, 29 Chy. 480, p. 429.

#### RECEIVING STOLEN GOODS.

See *Regina v. St. Denis*, 8 P. R. 16, p. 446.

#### RECITALS.

In recognizance. See *Re Gauthreaux's Bail*, 9 P. R. 31, *infra*.

#### RECOGNIZANCE.

I. ON RETURN OF WRIT OF CERTIORARI—*See CERTIORARI.*

II. ON QUASHING CONVICTIONS—*See JUSTICE OF THE PEACE.*

Where caption takes place under writ of arrest. See *Needham v. Needham*, 29 Chy. 117.

A recognizance taken before a police magistrate under 32-33 Vict. c. 30, s. 44 (Dom.), Form Q. 2 (Schel.), omitted the words "to owe":—Held, fatal, and that an action would not lie upon the instrument as a recognizance. *Regina v. Hoodless*, 45 Q. B. 556.—Q. B. D.

Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtors' Act, and that such writ may be granted at the suit of the crown, where the defendant absconds to avoid being arrested for a felony. *Regina v. Stewart*, 8 P. R. 297.—Osler.

A recognizance of bail put in on behalf of a prisoner, recited that he had been indicted at the Court of General Sessions of the Peace for two separate offences, and the condition was, that he should appear at the next sittings of said court, and plead to such indictment as might be found against him by the grand jury. At the next sittings the accused did not appear, and no new indictment was found against him:—Held, that the recitals sufficiently shewed the intention to be that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made. *Re Gauthreaux's Bail*, 9 P. R. 31.—Osler.

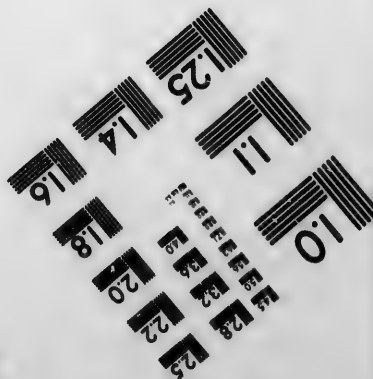
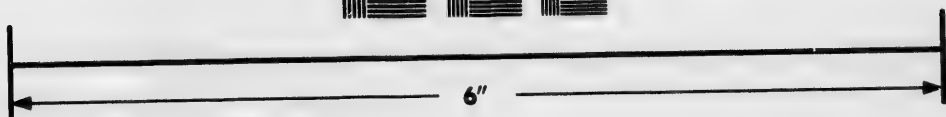
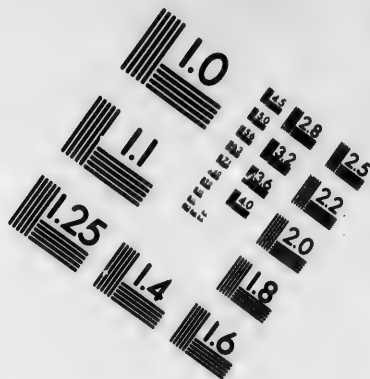
#### RECORD.

Fee on entering. See *Morton v. Grand Trunk R. W. Co.*, 10 P. R. 62; *Bunbury v. Manufacturers' Ins. Co.*, 13 P. R. 52.

#### RECTIFYING MISTAKE.

I. IN DEEDS—*See DEED.*

II. IN POLICIES—*See INSURANCE.*



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**REDEMPTION.**

- I. OF LAND SOLD FOR TAXES—*See* ASSESSMENT AND TAXES.
- II. OF MORTGAGES—*See* HUSBAND AND WIFE—MORTGAGE.

**RE-ENTRY.**

Held, that the word "possibility" in R. S. O. (1877) c. 106, s. 2, includes a "right of entry for condition broken," mentioned in section 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." *In re Melville*, 11 O. R. 626.—Proudfoot.

Held, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room. *Id.*

**REFEREE.**

*See* PRACTICE.

**REFERENCE.**

- I. TO ARBITRATION—*See* ARBITRATION AND AWARD.
- II. TO MASTER OR REFEREE—*See* PRACTICE.
- III. TO COUNTY COURT TO ASSESS DAMAGES—*See* COUNTY COURTS.

**REFORMING DEEDS.**

*See* DEED.

Semble, it does not follow because a plaintiff asks in his bill for reformation of a document that therefore a defendant is entitled to claim the same relief though he has not asked for it. *Wolfe v. Hughes*, 1 O. R. 322.—Ferguson.

**REFUSING TO ANSWER.**

*See* EVIDENCE.

**REFUSING TO PROVIDE FOR FAMILY.**

*See* CRIMINAL LAW.

**REGISTRARS.**

- I. OF DIVISIONAL COURTS—*See* PRACTICE.
- II. OF DEEDS—*See* REGISTRY LAWS.

**REGISTRATION.**

- I. OF BILLS OF SALE AND CHATTEL MORTGAGES—*See* BILLS OF SALE AND CHATTEL MORTGAGES.
- II. OF BY-LAWS—*See* MUNICIPAL CORPORATIONS.
- III. OF DEEDS—*See* REGISTRY LAWS.
- IV. OF LIS PENDENS—*See* LIS PENDENS.
- V. OF MECHANICS' LIENS—*See* LIEN.
- VI. OF MEDICAL PRACTITIONER—*See* MEDICAL PRACTITIONERS.
- VII. OF DISCHARGE OF MORTGAGE—*See* MORTGAGE.
- VIII. OF PARTNERSHIP—*See* PARTNERSHIP.
- IX. OF PLANS—*See* REGISTRY LAWS.
- X. OF RAILWAY BONDS—*See* RAILWAYS AND RAILWAY COMPANIES.
- XI. OF VOTERS—*See* PARLIAMENTARY ELECTIONS.
- XII. OF WILLS—*See* WILL.

**REGISTRY LAWS.**

- I. REGISTRY ACTS, 1824.
- II. REGISTRARS.
  1. *Liability for Wrongful or Negligent Registration*, 1825.
  2. *Fees*, 1825.
  3. *Notice of Action to*, 1827.
  4. *Liability of Sureties*, 1827.
- III. INSTRUMENTS WHICH MAY BE REGISTERED, 1828.
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  1. *Plans*, 1828.
  2. *Wills—See* WILL.
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- VI. NOVA SCOTIA REGISTRY ACTS, 1833.
- VII. MEMORIALS AS EVIDENCE—*See* EVIDENCE.

**I. REGISTRY ACTS.**

The Registry Act of 1865, section 66, and the Registry Act of 1868, section 68, are retrospective. *Miller v. Brown*, 3 O. R. 210.—Proudfoot.

Sections 82, 83, 84 and 86, of R. S. O., (1877) c. III. (Registry Act), and sections 524 and 527 of the Municipal Act considered. *In re Waldie v. Village of Burlington*, 13 A. R. 104.

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Acts, 1833. —Proud-R. S. O., (1877)  
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## II. REGISTRARS.

1. Liability for Wrongful or Negligent Registra-  
tion.

S., believing that his father (still living, but of unsound mind) was entitled to certain lands to which the plaintiffs claimed title, took the advice of his solicitor, C., who, being advised by counsel, instructed by S., prepared and registered an instrument, whereby he, S., stated that he claimed the lands, and would upon the demise of his father, commence proceedings for their recovery. The plaintiffs were thus obstructed in the sale of their lands, and brought an action against S., C., and the registrar, to remove the instrument from the register, as being a cloud on the title, and for damages. Proudfoot J., dismissed the action as against the registrar, but gave judgment, with a reference to assess damages, against S. and C., (4 O. R. 473):—Held that the Registry Act did not authorize the registration of such an instrument; and, (Cameron J. dissenting), that an action would lie for its removal. Per Cameron, J. —The instrument, being on its face one which did not affect the title, was not removable by the court, and the action should be dismissed. Per Hagarty, C. J., and Armour, J. —The act of registration was a wrongful one, and all parties concerned in it were responsible to the plaintiffs, and the registrar was therefore a proper party; but, per Hagarty, C. J., he was not a necessary party. Per Hagarty, C. J., there being no mala fides, the damages should be nominal. Per Cameron, J., the registrar was not a proper party, having acted in good faith, and in the belief that he was acting within the scope of his duty; nor was C., the solicitor, a proper party, he having acted to the best of his judgment and ability in advising his client, after consulting counsel. *Ontario Industrial Loan and Investment Co. v. Lindsey*, 3 O. R. 66.—Q. B. D.

A will relating to certain land, though registered, was not entered on the abstract index, whereby the plaintiff claimed he was damaged in purchasing a mortgage on the land, the mortgagor having no title. The mortgage was first purchased by S., a solicitor, for himself, and the assignment of it made to the plaintiff, for whom he was accustomed to act, and to whom he afterwards sold. S. was not retained by plaintiff to search the title for him; it was not searched when he sold to the plaintiff; and the judge before whom the case was tried held that he relied on the supposed title acquired by the mortgagor by possession.—Held, that the plaintiff could not claim that he was damaged by defendant's omission; and that he could found no action on the search made by S. *Green v. Ponton*, 8 O. R. 471.—C. P. D.

## 2. Fees.

The plaintiff's sued the defendant for the proportion of fees received by the defendant as registrar, to which they were entitled under R. S. O. (1877) c. 111, ss. 98-103. The defendant demurred to the declaration on the ground that these sections were ultra vires the local legislature, as they imposed an indirect tax, and not a tax for raising a revenue for provincial pur-

poses:—Held, affirming the judgment of Armour J., that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein provided:—Held, also, that if a tax at all, it was clearly a direct tax, and intra vires. *County of Hastings v. Ponton*, 5 A. R. 543.

In an action brought against a county registrar to recover back alleged overcharges, it was shewn that the plaintiff had called upon the registrar to search the books and indexes in his office, and inform him of the persons named as grantees in the last executed deed of a certain lot; and also what incumbrances there were registered against it. There were twenty-eight entries on the abstract index, and the registrar charged for these services \$1.45, being at the rate of twenty-five cents for the first four entries and five cents for each of the other entries:—Queere, whether the registrar was bound to do, or could recover for doing what the plaintiff required of him; but:—Held, that as he had done it, the charge which the plaintiff had paid, and which was reasonable on the principle of the tariff, could not be recovered back. *Macnamara v. McLay*, 8 A. R. 319.

The plaintiff told the registrar that one A. owned a lot in the township of B., but was ignorant as to the number of the lot, and asked the registrar to tell him what incumbrances there were against it, which the registrar did, and charged for those services twenty-five cents for ascertaining the number of the lot, and twenty-five cents for searching for the incumbrances:—Held, that both were proper charges. *Ib.*

The plaintiff asked to examine an original conveyance in the registry office, informing the officer of the names of the parties thereto and the lands affected thereby, but did not tell him the number of the conveyance. The registrar examined the index, for which he charged twenty-five cents, and ten cents for producing the document:—Held, to be proper charges. *Ib.*

The registrar was required to produce the abstract index of a lot, which contained 180 entries for which he required to be paid \$2 as for a general search, the plaintiff offering to pay twenty-five cents:—Held (Burton, J. A., and Morrison, J. A., dissenting), that the registrar had charged \$1.75 too much. *Ib.*

The registrar charged \$2.05 for an abstract of five folios—i.e., \$1.20 for searches, the remainder being for copying at the usual rate:—Held, the registrar was entitled to those fees, though he only copied it from the index. *Ib.*

A registrar when preparing an abstract is not bound to rely on the correctness of the abstract index, but may properly test its correctness by making all searches necessary for the preparation of the abstract; he may rely, however, on the index if he thinks proper, and charge the same fees as for searches. But if he gives a certified copy of the abstract index only he can charge no more than the rate per folio. *Ib.*

Per Burton and Morrison, J. J. A.—The registrar is the proper person to make searches, and he must produce the original instruments and the books containing copies thereof only, but not the abstract index. *Ib.*

Per Spragge, C. J. O., and Patterson, J. A.—Every person interested in a lot of land is entitled to see the abstract index thereof for the purpose of making a search, as the book containing such abstract is one of those which the registrar is bound to exhibit under the Registry Act. *Ib.*

Per Spragge, C. J. O.—A registrar, when required to furnish a copy of any document or entry can make no charge for a search for the original. *Ross v. McLay*, 25 C. P. 190, overruled in part. *Ib.*

Where a registrar of deeds was dismissed before the expiration of the year, having received in fees an amount in excess of that specified in the statute, (R. S. O., 1877, c. 111, s. 104):—Held (affirming the judgment of the Queen's Bench Division, 3 O. R. 23), that he was bound to return and pay over to the treasurer of the municipality a proportionate amount of such excess, although not in office at the time prescribed by the statute for making his return; but—Semble, that the treasurer could not maintain an action for such fees before the 15th of January, the day named in the Act for the registrar sending in his return:—Held, also, that the defendant was not entitled to notice of action. *County of Bruce v. McLay*, 11 A. R. 477.

Held, that on the proper construction of section 98 of R. S. O. (1877), c. 111, each registrar is bound to account to the county as therein mentioned only after he has first received the sum of \$2,500 and not before, and this whether there be successive holders of the position in any one year or not. The Act being in derogation of the rights of registrars as they previously existed under the common law, must be construed strictly. *Re Ingersoll, Gray v. Ingersoll*, 16 O. R. 194.—Robertson.

### 3. Notice of Action to.

See *Ontario Industrial Loan and Investment Co. v. Lindsey*, 3 O. R. 66, p. 1825; *County of Bruce v. McLay*, 11 A. R. 477, *supra*.

### 4. Liability of Sureties.

Action upon a bond of the defendants as sureties for a registrar of deeds, dated 8th January, 1886, to recover the portion of fees received by him, which he should have paid over to the plaintiffs under the Registry Act, R. S. O. (1877), c. 114, s. 107. The bond was in the form prescribed by schedule A. of the Act, and was conditioned for the performance of the duties of the Registrar's office and against neglect or wilful misconduct in office to the damage of any person or persons. The form was prescribed before the introduction of the provisions now contained in section 107 of the Registry Act, which by section 13 makes provision for the giving of special security for the payment of moneys under section 107:—Held, that the bond given by the defendants must be taken to be restricted to the performance by the registrar of the duties imposed upon him other than the duty imposed by section 107; and the action was dismissed. *County of Middlesex v. Smallman*, 19 O. R. 349.—Street. Affirmed, 20 O. R. 487.—C. P. D.

## III. INSTRUMENTS WHICH MAY BE REGISTERED.

Quære, whether a deed of land not specifying any particular lot by description is capable of registration. *Russell v. Russell*, 28 Chy. 419.—Spragge.

See *Ontario Industrial Loan and Investment Co. v. Lindsey*, 3 O. R. 66, p. 1825.

## IV. MANNER OF REGISTERING.

A discharge of mortgage referred to the mortgage as 5,764, whereas it was registered as 5,764 C. W.:—Held, that it was nevertheless a valid discharge properly registered. *Re Clarke and Chamberlain*, 18 O. R. 270.—Boyd.

The Registry Act, though requiring every instrument to be numbered, says nothing about adding letters, which appear to be only arbitrary marks adopted by the official for convenience of reference. *Ib.*

## V. EFFECT OF REGISTERING OR OMITTING TO REGISTER.

### 1. Plans.

Held, that the registration of a plan of a subdivision of a town lot and sale made in accordance with it does not constitute a dedication of the lanes thereon to the public. *In re Morton and the City of St. Thomas*, 6 A. R. 323.

A municipal corporation laying out a square or park, on lands acquired by them untrammelled by any trust as to its disposal, may deal with it in any manner authorized by section 509 of the Municipal Act, R. S. O. (1877), c. 174, at least where no private rights have been acquired in consequence of their action; but they cannot so deal with lands dedicated by the owner for a special purpose, which case is provided for by section 467. Whether the dedication arises only from the act of the owner, or by express grant, the municipality must accept it, if at all, for the purpose indicated. The owner of land dedicated to the public a square by filing a plan upon which were the words, "Square to remain always free from any erection or obstruction":—Held, that the municipality had no power to close up part thereof, and to dispose of it to trustees of a church. *In re Peck and the Town of Galt*, 46 Q. B. 211.—Osler.

Held, that though a plan not certified as required by the registry law, R. S. O. (1877) c. 111, s. 82, sub-s. 2, had, although deposited in the registry office, no effect under the registry law, yet in a deed reference might be made to it, as it might to any other document in the registry office or elsewhere, for the description or designation of a lot. *Ferguson v. Winzor*, 10 O. R. 13.—O'Connor. See *S. C. 11 O. R. 88*.

Held, reversing the judgment of Proudfoot, J., 9 O. R. 274, that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the county judge to determine upon C.'s application to him, under R. S. O. (1877), c. 111, s. 84 to amend the plan, and that his decision was not examinable in prohibition:—Semble, a person not the owner of the property may register a plan, and although this would be at the time a

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futile proceeding, yet if he afterwards became the owner of the property and adopted the plan, he would be entitled under the Act to have it amended. *In re Chisholm and the Town of Oakville*, 12 A. R. 225.

See *Nevitt v. McMurray*, 14 A. R. 126, p. 596.

#### 4. As Notice.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiff's mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, that the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiff's mortgage, and the right it conferred. *Clark v. Bogart*, 27 Chy. 450.—Blake.

See *Dike v. Douglas*, 5 A. R. 63, p. 1274, *Platt v. Grand Trunk R. W. Co.*, 12 O. R. 119, p. 427.

#### 5. iing Priority.

An execution creditor does not occupy as favourable a position under the Registry Act as a purchaser for value without notice; and he may be defeated by a deed made before though registered after the lodging of the execution in the hands of the sheriff. *Russell v. Russell*, 28 Chy. 419.—Sprague.

Where two mortgages on different properties by the same mortgagor came into C.'s hand before the Registry Act of 1865, and the mortgagor, after the passing of the said Act, assigned the equity of redemption to M. by a registered instrument:—Held, on M.'s suing for redemption, that the registered conveyance to M. prevailed under section 66 of the said Act, over C.'s equitable right to consolidate the two mortgages. *Miller v. Brown*, 3 O. R. 210.—Proudfoot.

Held, following *Truesdell v. Cook*, 18 Chy. 532, and *Dynes v. Bales*, 25 Chy. 593, that the grantee in a subsequent conveyance, registered before the registry of a previous conveyance from the same grantor, of which the grantee had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that this court had power so to order upon such terms as seemed just. *Weir v. Niagara Grape Co.* 11 O. R. 700.—Q. B. D.

R. G. and J. G. being the owners, subject to the dower of their mother R., and an annuity in her favour, of certain lands, mortgaged them to one C. to secure advances made by him to them. R. knew of the mortgage and was asked, but refused, to execute it. Subsequently R. G. and J. G. mortgaged the lands to M. to secure advances made by him. R. released all her claims for the purpose of this mortgage, but received no benefit from the advances. This mortgage was taken by M. without any notice

of the mortgage to C., and was registered before it and gained priority over it. Under this mortgage the lands were sold, and after payment of the claim of the plaintiffs a surplus remained which R. claimed in priority to C.:—Held, reversing the decision of *Boyd, C.*, 16 O. R. 321, that she was not entitled to priority. The priority gained by M. by force of the Registry Act did not enure to her benefit as she was not the purchaser or mortgagee, nor did that priority enure to her benefit as surety by virtue of the doctrine of subrogation, because that doctrine could not be invoked to defeat the honest claims and superior equities of third persons. *MacLennan v. Gray*, 16 A. R. 224, reversed by Supreme Court. See *S. C. sub nom. Gray v. Coughlin*, 18 S. C. R. 553.

Registration of a subsequent deed will not give priority over another unregistered deed from the same grantor, prior in point of time, unless a valuable consideration for the former is proved. Mere production or registration of the instrument by the party claiming under it is not sufficient proof for this purpose. *Barber v. McKay*, 19 O. R. 46.—Chy. D.

The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry office and found only two incumbrances registered against the property. Shortly after the defendant completed his purchase, and having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but as he did not make any further search, he did not discover the plaintiff's lien:—Held, affirming the decision of *Falconbridge, J.*, that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien. The Registry Act does not preclude enquiry as to whether there was knowledge in fact; and the court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake. *Brown v. McLean*, 18 O. R. 533, specially considered. *Abell v. Morrison*, 19 O. R. 669.—Chy. D.

See *Trust and Loan Co. v. Gallagher*, 8 P. R. 27, p. 1274; *Ross v. Hunter*, 7 S. C. R. 289, p. 334; *Peterkin v. McFarlane*, 9 A. R. 429, p. 1831.

#### 6. Equitable Interests.

In 1851 the defendant's father bought for defendant the land in question, and in pursuance of his instructions, to prevent the defendant disposing of the land, the deed which was registered, was made to defendant's son W., then about twelve years old. The defendant and his family thereupon took possession, and lived there up to the present time, the defendant being assessed and paying the taxes. The family residence, with the garden and orchard, which was fenced off from the rest of the land and comprised from two to four acres, was always deemed to be the defendant's special property, and he had always exclusive possession thereof, with the consent of the others. W. resided with his father for several years and then went to the United States, but returned in 1869, when he conveyed by deed in fee simple, which was registered, to one H., his



step brother, who had full knowledge of all the facts and circumstances, and who had been working the land on shares with the defendant and another. Defendant complained to him of the sale, and denied W.'s right to sell, whereupon it was arranged that things were to go on as before, and defendant was to have his share. H., in 1870, and again in 1874, without the defendant's knowledge, mortgaged the land, by mortgages duly registered, to the plaintiffs, who had no notice or knowledge of any of the circumstances, or of the defendant's possession. In February, 1881, ejectment was brought by the plaintiffs:—Held, that the plaintiffs, being purchasers for value without notice, claiming under the registered paper title, were under R. S. O. (1877) c. 111, s. 81, entitled to recover, except as to the house and plot, to which the defendant by his exclusive possession had acquired a title under the Statute of Limitations. *Canada Permanent Loan and Savings Co. v. McKay*, 32 C. P. 51.—Osler.

The rule that a mortgagee shall not be redeemed in respect of the mortgage without being redeemed also as to another mortgage created by the same mortgagor, applies as well in a suit to foreclose as to redeem. In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage which was registered after it, but without notice thereof. On a sale of the lands embraced in another mortgage a loss was sustained by the mortgagee:—Held, that the defendant, the mortgagee, had not the right as against the plaintiff, to consolidate his mortgages, and make good the loss on the one out of the surplus on the other sale, the policy of the Registry Act being to give no effect to hidden equities. *Johnston v. Reid*, 29 Chy. 293.—Spragge.

Per Hagarty, C.J. If an "equitable lien, charge or interest" be created by deed or by any writing capable of being registered actual notice of such deed or instrument will, under the 67th section of the Registry Act, 31 Vict. c. 20 (Ont.), prevent the effect of priority of registration. But as to equitable liens, etc., evidenced by parol only, amongst others a vendor's lien for unpaid purchase money, they have by that Act been prevented from affecting a duly registered title. In the disposition of real property, unless in cases of actual moral fraud a stringent observance of the registry law is the wisest rule to adopt. Per Proudfoot, J. The fact that a man who knows of another's title to land, buys in such a way as to get a title on the register and then sets the owner at defiance is such a clear case of active fraud as would deprive him of the protection of the Registry Act. Per Patterson, J.A., and Proudfoot, J. The ruling in *Forrester v. Campbell*, 17 Chy. 379, that the Registry Act of 1865 (s. 66), does not avoid an equity as against a subsequent instrument though registered, if taken with notice, approved of. *Peterkin v. McFarlane*, 9 A. R. 429.

R. S. O. (1877), c. 111, s. 81, declares that "no equitable lien, charge or interest affecting land shall be deemed valid in any court in this province after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns":—Held, that this section does not apply to a case

in which the party registering such instrument has notice of the equitable lien, charge or interest, even though the same has been created by parol. Gwynne, J. dissented from the judgment of the court, taking a different view on the facts presented by the evidence. *S.C., sub nom. Rose v. Peterkin*, 13 S. C. R. 677.

Y. being the owner of certain land, mortgaged it with other lands to the M. P. B. Society by mortgage, dated 12th July, 1873, registered 14th July, 1873. Subsequently being desirous of selling part and paying off the mortgage and getting a new loan, he by an agreement in writing, arranged with the society to leave the mortgage standing, take a further loan of \$700, and have certain of the lands (of which the lot in question was part) released by the society. A second mortgage for the \$700 advance was prepared and executed dated 1st February, 1875, registered 11th February, 1875, which by mistake, as was alleged, included all the lands in the first mortgage; and a release dated 9th February, 1875, was duly executed by the society releasing the lot in question from the operation of the mortgage of 12th July, 1873, and was afterwards registered 20th March, 1876. Z., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, loaned Y. certain moneys, and took a mortgage dated 21st May, 1877, registered 6th June, 1877, to secure the payment thereof. The society assigned the second mortgage and all moneys secured thereby to the defendants by assignment dated 1st March, 1880, registered 17th January, 1881, and by deed dated 1st March, 1882, registered 2nd June, 1883, Y. conveyed his equity of redemption to B. In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to B., it was:—Held, affirming the judgment of Ferguson, J., that the combined operation of R. S. O. (1877), c. 111, s. 81, and R. S. O. (1877), c. 95, s. 8, formed a complete defence, and for that the defendants as assignees of the mortgage for value, having the legal estate, might defend as a purchaser for value without notice, and claim also the protection of the Registry Act, as against the plaintiff a subsequent purchaser or mortgagee from the original mortgagor:—Semble, that even as against the mortgagor the defendants would also be entitled to prevail. *Bridges v. Real Estate Loan and Debiture Co.*, 8 O. R. 493.—Chy. D.

W. and his son W. W., mortgaged separate parcels of land owned in severalty to the defendant company for \$4,000, with a proviso for releasing W. W.'s land on payment of \$500 and the other parcels on payment of sums named. The covenant for payment was joint. W. W. afterwards sold his land to J. W., subject to the payment of \$500 to the company. W. then mortgaged his land to the plaintiff, by an instrument which declared it subject to the company's mortgage, and the manner in which the \$4,000 was distributed upon the lands. The various conveyances were registered. It was proved that W. W. was merely a surety for his father in the mortgage transaction with the company, but the plaintiff had no notice of this:—Held, reversing the judgment of Proudfoot J., that the plaintiff's registered title prevailed over the equity of W. W. to charge his father's lands

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with the \$500 for which he (W. W.) had made his land liable, and the land of the son was charged in favour of the plaintiff with the \$500 and interest. *Gray v. Ball*, 23 Chy. 390, approved and followed. *Core v. Ontario Loan and Debenture Co.*, 9 O. R. 236.—Chy. D.

In an action for the possession of lands under a mortgage by defendant's brother W., and the foreclosure thereof, the defendant claimed under a trust of the lands by W. in his favour; and also a title by possession. The trust was a parol one, namely, that W. should procure a release of the lands for defendant, who was then under age, from the Canada Company, the lease apparently containing a right of purchase; and should afterwards pay the purchase money and take the deed in his, W.'s name, and hold it until defendant became well when he was to transfer it to the defendant, he having been ill at the time. The defendant paid the money for the lease and the purchase money for the land:—Held, that the parol evidence was not sufficient to support the trust; but in any event, as the trust was to be enforced against W. and his grantees, it could not prevail against plaintiff's mortgage, it having been registered without notice of the trust. *Bank of Montreal v. Stewart*, 14 O. R. 482.—Rose.

#### 7. Other Cases.

Held, that a vendor does not complete his title until his deed is registered, i. e., that registration is essential to the title. *Laird v. Paton*, 7 O. R. 137.—Proudfoot.

See *Roan v. Kronsheim*, 12 O. R. 197, p. 588; *Carter v. Grasett*, 14 A. R. 685, p. 1177; *Israel v. Leith*, 20 O. R. 361.

#### VI. NOVA SCOTIA REGISTRY ACTS.

R. (the appellant) brought an action against H. (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, etc. H. pleaded inter alia, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable rejoinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one C., who then owned R.'s property, granted by deed to H. the privilege of piercing the south wall, carrying his stovepipe into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than R.'s. R. purchased the property in 1872 from the Bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R.'s solicitor in searching the title, did not search under C.'s name after the registry of the deed by which the title passed out of C. in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen:—Held, that

the continuance of illegal burdens on R.'s property since the fee had been acquired by him were, in law, fresh and distinct trespasses against him, for which he was entitled to recover damages, unless he was bound by the license or grant of C. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registry Act, 4th series, Rev. Stat. N. S., c. 79, ss. 9 and 19, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and therefore from the date of the registration of the conveyance from N. to F., that the deed of grant to H. became void at law against F. and all those claiming title through him. That to defeat a registered deed there must be actual notice or fraud, and there was no actual notice given to R. in this case, such as to disentitle him to insist in equity on his legal priority acquired under the statute. *Ross v. Hunter*, 7 S. C. R. 289.

Per Gwynne, J., dissenting.—That upon the pleadings as they stood on the record, the question of the Registry Act did not arise, and that as the incumbrance complained of had been legally created in 1859, its mere continuance did not constitute a trespass, and that the action as framed should not be sustained. *Id.*

#### RELATOR.

See MUNICIPAL CORPORATIONS.

#### RELEASE.

- I. WHO MAY GIVE, 1834.
- II. EFFECT OF, 1836.
- III. BY TAKING CRIMINAL PROCEEDINGS, 1836.
- IV. COMPELLING EXECUTION OF, 1836.
- V. BY WAY OF ACCORD AND SATISFACTION—  
See ACCORD AND SATISFACTION.
- VI. BY CREDITORS—See BANKRUPTCY AND  
INSOLVENCY.
- VII. OF MORTGAGE. See MORTGAGE.
- IX. OF SURETY—See BAIL—PRINCIPAL AND  
SURETY.

#### I. WHO MAY GIVE.

After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the defendant should plead the release, and that he was entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine v. Carling*, 8 P. R. 171.—Osler.

J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under R. S. O. (1877) c. 160, ss. 21, 22. On 4th February, J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim

was given by the receiver, who, on 27th February, sent J. M. and the other policy holder a circular notifying them of an agreement for reinsurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before 15th March. On 24th February, the property was burnt, and J. M. forthwith claimed for the whole loss:—Held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred. Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. Union Fire Ins. Co.*—*McPhee's Claim*, 6 O. R. 635.—Proudfoot.

In consideration of a conveyance to him of a certain farm, the petitioner agreed with his mother that he would during her life provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon until they reached sixteen years of age, so long as they remained at home on the said farm, and assisted him so far as they were able in the management of it:—Held, that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the above agreement, and if the children did their part they could hold their brother to his promise, though the agreement was not in terms made with them as parties. *Re McMillan*, 17 O. R. 344.—Boyd.

Quere in the present state of the law is a release to or satisfaction from one of several joint tort-feasors, a bar to an action against the others. *Grand Trunk R. W. Co. of Canada v. McMillan*, 16 S. C. R. 543.

To an action by L. against A. the defence was release by deed. On the trial it was proved that A. had executed an assignment for the benefit of creditors and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for \$800." \* \* \* In April, 1885, A. wrote a letter to L., in which he said: "In one year more I will try again for myself and hope to pay you in full." In November, 1886, the account sued upon was stated:—Held, reversing the judgment of the court below, Taschereau and Patterson JJ. dissenting, that the execution of the deed on his behalf being made without sufficient authority L. was not bound by the release contained therein and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it:—Held, per Taschereau and Patterson JJ., that though A. had no sufficient authority to sign the deed yet there was an agreement to compound which was binding on L. and the under-

standing that L. was to be paid in full would be a fraud upon the other creditors of A., who could only receive the dividends realized by the estate. *Lawrence v. Anderson*, 17 S. C. R. 349.

See *Canadian Bank of Commerce v. Jenkins*, 16 O. R. 215, p. 115.

## II. EFFECT OF.

Action for work and materials. The cause having been entered for trial, defendant paid plaintiff \$2,500, and received a release expressed in the most general terms, and the record was withdrawn. The plaintiff again gave notice of trial, alleging that the \$2,500 was only part of the consideration for the settlement, and that the defendant was also to procure for him an appointment in the civil service with a salary of at least \$2,000 a year. He refused, however, to repay the \$2,500, though defendant offered, if he would do so, to give up the release. The master in chambers having set aside the notice of trial and stayed all proceedings, Armour J., on appeal, rescinded this order on the 11th April, 1882, and permitted defendant to plead the release on that day; replication and joinder of issue to be filed on the two following days, and directed the issue to be tried at the next assizes, which began on the 17th. The defendant took out the order and pleaded the release, and the plaintiff entered the case at these assizes, but was allowed to withdraw it, and defendant in Easter term following, appealed from the order of the judge:—Held, that the order must be rescinded, for the plaintiff could not repudiate the release while retaining the money which he had received under it, and as the additional consideration alleged, was illegal, the plaintiff being participes criminis, could not set it up to avoid the release. *Hewson v. Macdonald*, 32 C. P. 407.—C. P. D.

## III. BY TAKING CRIMINAL PROCEEDINGS.

The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendants, who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a police magistrate and fined, under 32-33 Vict. c. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt, was discharged, but without costs. *Haywood v. Hay*, 46 Q. B. 562.—Q. B. D.

The purser of a steamboat had been summoned by the plaintiff before a magistrate for an assault, and a fine was imposed which he paid. Per Wilson, C. J. This under 32-33 Vict. c. 20, s. 45 (Dom.), though a release to the purser, did not constitute any bar to the present civil action against the company. *Emerson v. Niagara Navigation Co.*, 2 O. R. 528.—C. P. D.

## IV. COMPELLING EXECUTION OF.

Right to compel legatee to execute a release. See *Kaiser v. Boynton*, 7 O. R. 143, p. 1163.

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### RELIGIOUS INSTITUTIONS.

- I. CHURCHES—See CHURCH.
- II. DEVISES OR BEQUESTS TO—See WILL.

As to power to hold land. See *London and Canadian Loan and Agency Co. v. Graham*, 16 O. R. 329, p. 273; *McDiarmid v. Hughes*, 16 O. R. 570, p. 273.

### REMAINDERS.

See WILL.

### REMOVAL.

- I. OF CAUSES—See CERTIORARI.
- II. OF BUILDINGS—See WAY.
- III. FROM OFFICE—See MUNICIPAL CORPORATIONS—QUO WARRANTO.

### REMUNERATION.

- I. TO EXECUTORS AND ADMINISTRATORS—See EXECUTORS AND ADMINISTRATORS.
- II. TO AGENTS—See PRINCIPAL AND AGENT.
- III. TO EMPLOYEES—See MASTER AND SERVANT.
- V. FOR WORK AND LABOUR—See WORK AND LABOUR.
- VI. TO TRUSTEES—See TRUSTS AND TRUSTEES.

### RENDER.

See BAIL.

### RENEWAL.

- I. OF LEASES—See LANDLORD AND TENANT.
- II. OF WRITS.
  1. Of Summons—See PRACTICE.
  2. Of Execution—See EXECUTION.
- III. OF PROMISES—See LIMITATION OF ACTIONS.

### RENT.

See DISTRESS—LANDLORD AND TENANT—SHERIFF.

Devise of rent to attesting witness. See *Hopkins v. Hopkins*, 3 O. R. 223.

Rent issuing out of land is a tenement, it partakes of the nature of land, and is within the 5th section of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1. *Id.*

### REPAIRS.

- I. CONTRACTS IN LEASES—See LANDLORD AND TENANT.
- II. BY PERSONAL REPRESENTATIVES—See EXECUTORS AND ADMINISTRATORS.
- III. IMPROVEMENTS—See IMPROVEMENTS ON LAND.
- IV. OF HIGHWAYS—See WAY.

### REPLEVIN.

- I. WHEN MAINTAINABLE.
  1. *Sale of Goods*, 1838.
  2. *Sale of Timber*, 1839.
  3. *Other Cases*, 1839.
- II. DAMAGES, 1839.
- III. PLEADING AND PRACTICE, 1840.
- IV. REPLEVIN BOND.
  1. *Duty of Sheriff to Take*, 1841.
  2. *Actions on*.
    - (a) *Damages and Costs*, 1842.
    - (b) *Other Cases*, 1842.
- V. JURISDICTION OF COUNTY COURTS.—See COUNTY COURTS.
- VI. CONVERSION OF GOODS—See CONVERSION—TROVER.

#### I. WHEN MAINTAINABLE.

##### 1. *Sale of Goods*.

M. by false representations induced T. to sell him a horse, buggy and harness and to take for them two promissory notes. T. having discovered the fraud went back and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M. however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M., but before it had been executed M. sold the property to plaintiff, an innocent purchaser who having been deprived of it under the replevin, brought trover against the sheriff:—Held, that the plaintiff was entitled to recover, that the contract had not been disaffirmed when the writ of replevin issued, and that the mere issue of it was no notice to M. of disaffirmance and could not affect the plaintiff:—Held, also, following *Great Western Railway Co. v. McEwan*, 28 Q. B. 528; 30 Q. B. 559, that the defendant as sheriff having taken the property out of the plaintiff's possession could not justify under the writ of replevin. *Stoesser v. Springer*, 7 A. R. 497.

The plaintiff with the intention of parting with the possession and property in certain flour made an absolute sale of same, on apparently short terms of credit to defendant, who withheld from plaintiff his intention to pay for the flour by setting up a claim he had acquired against the plaintiff:—Held, that this did not constitute a fraud on the defendant's part so as

to entitle the plaintiff to disaffirm the contract and replevy the flour. *Baker v. Fisher*, 19 O. R. 650.—C. P. D.

See *McGregor v. McNeil*, 32 C. P. 538.

## 2. Sale of Timber.

*L. et al.*, claiming certain lands in the township of Horton under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years. In 1877 McD., setting up a title under certain proceedings adopted at a meeting of the inhabitants of the township in 1347, held for the purpose of making provision for the poor, by which certain commissioners were authorized to sell vacant lands, entered upon and cut on the lands in question some 500 trees, which he put on the ice outside and inside *L. et al.*'s boom, mixing them with some 900 logs already in said boom, and cut by *L. et al.*, in such a way that they could not be distinguished. McD. then claimed the whole as his own, and resisted *L. et al.*'s attempt to remove them. In an action of replevin brought by *L. et al.* for 1,440 logs cut on said lands:—Held, that *L. et al.*'s possession of the lands in question was sufficient to entitle them to recover in the present action against McD., who was a wrongdoer, all the logs cut on the lands in question. Per Strong, J. When one party wrongfully intermingles his logs with those of another, all the party whose logs are intermingled can require that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed. *McDonald v. Lane*, 7 S. C. R. 462.

See *McGregor v. McNeil*, 32 C. P. 538; *Bates v. Mackey*, 1 O. R. 34, p. 1842.

## 3. Other Cases.

In an action of replevin brought in the County Court of Haldimand for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there detained until replevied:—Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing the mare; and although the original taking was justified under a search warrant issued in Haldimand to search the plaintiff's premises in Haldimand for the mare, and to bring it before a justice of that county, yet the subsequent removal to the county of Brant and detention there were not, and constituted the defendant a trespasser ab initio, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant. *Hoover v. Craig*, 12 A. R. 72.

Replevin will not lie against a pound-keeper. *Ibbotson v. Henry*, 8 O. R. 625.—Q. B. D.

See *Schaffer v. Dumble*, 5 O. R. 716, p. 343.

## II. DAMAGES.

The practice, generally, as to damages in actions of replevin is that where the goods are promptly returned, only sufficient will be given to cover the expense of preparing the replevin

bond, but where the party distraining acts in a manner unnecessarily harsh or oppressive, substantial damages may be recovered. And where the sheriff was unable to replevy some of the articles mentioned in the writ, by reason of their having been lost or eloiigned by the defendant, the plaintiff was held entitled to recover their value as damages; the count being in the detinet as well as in the detinuit. *Graham v. O'Callaghan*; *Russell v. O'Callaghan*, 14 A. R. 477.

## III. PLEADING AND PRACTICE.

(See *Con. Rules 1098, et seq.*)

In an action of replevin the sheriff replevied part of the goods, and certified in his return to the writ that the remainder had been eloiigned to places unknown before the writ came into his hands. The plaintiff declared in two counts. 1. For that the defendant unjustly detained the goods of the plaintiff, specifying the goods, replevied, until, etc. 2. For that the defendant unjustly detained and still detains, against sureties and pledges, the goods of the plaintiff, specifying the goods eloiigned:—Held, under R. S. O. (1877), c. 53, s. 24, that the second count was maintainable; that the two counts were properly joined, and that the declaration was not open to objection. *Thurston v. Breard*, 8 P. R. 10.—Hagarty.

The plaintiff issued a writ of replevin directing the sheriff to replevy "two hundred and thirty sheep and lambs," unjustly detained by the defendant. On the previous day defendant had sold the property to one Gill, in whose possession it was when the seizure was made:—Held, that the above description was not sufficient, and that the articles could not be seized under the writ while they were in the possession of a party not named therein. Plaintiff was allowed to amend the description and substitute or add Gill as a defendant. *Hoerigan v. Driscoll*, 8 P. R. 184.—Dalton, Master.

Actions of replevin are not within the general provisions of Orders 1 and 2, and the practice and pleadings therein are within the exception of Rule 4. A statement of claim filed in such an action was therefore set aside, and the plaintiff allowed to declare according to the old practice. *Campan v. Lucas*, 9 P. R. 142.—Dalton, Master.

In an action of replevin ten days' notice of trial must be given, instead of eight days, as under the old practice. *Wallace v. Conan*, 9 P. R. 144.—Dalton, Master.

In an action of replevin the first count charged the defendant with taking certain goods on premises known as the "Creemore Woollen Mills;" and in the second count with taking certain goods on the premises known as the "Northern and North-Western Station at the said village of Creemore." The defendant pleaded denying the taking and the property, and then for a third plea set up, that one W. was tenant to the defendant of certain premises in the said village known as "Block B," and certain other premises known as the "Langtry Block;" that rent was in arrear, and because of such arrears of rent the defendant "well avowed the taking of the said goods on the said premises and justly, etc., as a



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distress for said rent which still remains due and unpaid :"—Held, on demurrer plea bad ; for if the "said premises" upon which the alleged taking was made were the premises set out in the plea, then the taking was on other premises than those named in the declaration, and there was no confession, and the plea of non cepit covered this defence ; but if the premises named in the declaration were referred to, then defendant confessed the taking and justified for rent due for other premises, which amounted to a taking off the demised premises, so that enough was not shewn. *Robins v. Coffee*, 9 O. R. 332.—*Rose*.

Held, that the venue in any action in replevin in a County Court except for goods distrained may be changed to any other county under R. S. O. (1877), c. 50, s. 155. *O'Donnell v. Duchenaault*, 14 O. R. 1.—*O'Connor*.

In a replevin action the writ was directed to a sheriff who was the sole liquidator of the plaintiffs, and as such instituted the action :—Held, that this was at most an irregularity, and it was too late for the defendant to raise the objection after appearance. R. S. O. (1877) c. 53, s. 9, applies to the case of an application on the merits, and not for irregularity only :—*Quære*, whether, even if the objection had been taken in time, it should have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin, and to the position of the liquidator as a mere officer under the Act. *Alpha Oil Co. v. Donnelly*, 12 P. R. 515.—*Armour*.

See *Bradley v. Clarke*, 9 P. R. 410, p. 627.

#### IV. REPLEVIN BOND.

##### 1. Duty of Sheriff to Take.

In replevin a County Court judge made an order when the writ was granted, directing the sheriff to seize the goods and hold them subject to requisition by the plaintiff to replevy to him. The sheriff seized the goods, but did not take a bond as directed by R. S. O. (1877), c. 53, s. 11 :—Held, that this order did not do away with the necessity of taking a bond, and the seizure was set aside, with costs to be paid by the sheriff. *Lavotess v. Radford*, 9 P. R. 33.—*Dalton, Master*.—*Wilson*.

Held, that it is the sheriff's duty in replevin to take a bond with two sureties, and to use due care and to exercise a reasonable discretion in inquiring into the sufficiency of the sureties, and that when he had failed to do this, and the owner of the goods replevied, and the bailiff (defendants to the replevin suit, which had resulted in their favour) brought an action against him for damages consequent thereon, they were entitled to recover all such damages as naturally flowed to them from his wrongful act, viz., the rent in arrear, the costs of distress, and of the replevin suit, and of an action against the principal and sureties on the replevin bond and incidental thereto, provided the same did not exceed the penalty named in the bond ; and the defendant could not excuse himself by shewing that the plaintiff in replevin and one of the sureties was worth the amount of the penalty of the bond at the time it was taken. *Norman v.*

*Hope*, 13 O. R. 556.—*Armour*. Affirmed, 14 O. R. 287.—*Chy. D.*

#### 2. Actions on.

##### (a) Damages and Costs.

Where the avowant successfully defends a replevin suit, and subsequently institutes proceedings on the replevin bond, he is not entitled to recover as part of his damages the excess of solicitor and client costs of his defence, over and above his taxed party and party costs in that action. *Burton, J. A.*, dissenting. *Williams v. Crow*, 10 A. R. 301.

Per *Osler, J. A.*—*Semble*, that the effect of R. S. O. (1877) c. 50, s. 352, is to make the Imperial Act 5 & 6 Vict. c. 97, s. 2, as to costs in cases of replevin on a distress for rent in arrear applicable to our practice. *Id.*

##### (b) Other Cases.

The trial of an action of replevin in a County Court was, by a judge's order, on the application of the plaintiff therein postponed to the next sittings thereof, and subsequently the action was by judge's order transferred to another County Court. In an action on the replevin bond it was held, on demurrer, that the delay being that of the plaintiff in replevin without the consent or connivance and against the opposition of the defendant therein, the sureties to the bond were not discharged. *O'Donnell v. Duchenaault*, 14 O. R. 1.—*O'Connor*.

The defendant's timber limits adjoined those of B. & C., but from uncertainty of description in their respective licenses, the division line was not defined. The defendant replevied 216 pieces of timber cut within a line run under instructions of the crown timber agent, as the boundary of the defendant's limits, but on account of the infirmity in his license, he failed in the action as to 175 pieces, for a return of which B. & C. were entitled to judgment. The latter procured an assignment of the replevin bond to themselves, and assigned it to the plaintiffs who brought this action thereon. The court was of opinion that the timber in question was cut upon lands intended by the crown to be within the limits of the defendant's license though B. & C. had some grounds for asserting title thereto :—Held, that there having been a breach of the condition of the bond, B. & C. became entitled to recover such damages as they had sustained by replevin proceedings ; that the bond, after it was assigned by the sheriff to B. & C., was a debt and chose in action assignable pursuant to the statute ; and that the plaintiff having the beneficial interest therein by assignment was entitled to recover ; but it being a case for the equitable interference of the court, it was directed that upon payment by the defendant of the cost incurred by B. & C. in cutting and transporting the timber up to time it was replevied, less a set-off found for the defendant in this action (the amount to be ascertained by a reference if the defendant should so elect), further proceedings should be stayed. *Bates v. Mackey*, 1 O. R. 34.—*Q. B. D.*

**REPORT.**

- I. OF JUDGES IN CONTROVERTED ELECTION TRIALS—*See* PARLIAMENTARY ELECTIONS.
- II. OF MASTERS AND REFEREES—*See* PRACTICE.

**REPUTATION.**

EVIDENCE OF—*See* EVIDENCE.

**RESCINDING CONTRACT.**

*See* CONTRACT—FRAUD AND MISREPRESENTATION—SALE OF GOODS—SALE OF LAND.

**RESERVED CASE.**

*See* CRIMINAL LAW.

**RESIDENCE.**

*See* DOMICILE.

**RESIDUARY ESTATE.**

*See* WILL.

**RESTRAINT OF TRADE.**

*See* CONTRACT.

In granting and regulating tavern and shop licenses. *See* *Re Croome and the City of Brantford*, 6 O. R. 188, p. 1053; *Re Boylan and the City of Toronto*, 15 O. R. 18, p. 1053.

**RESULTING TRUST.**

*See* TRUSTS AND TRUSTEES.

**RETAINER.**

*See* SOLICITOR.

**RETKING.**

*See* DISTRESS.

**RETURNING OFFICER.**

*See* MUNICIPAL CORPORATIONS—PARLIAMENTARY ELECTIONS.

**REVENUE.**

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors under 48 Vict. c. 26, (Ont.), and there passed thereunder to the plaintiff a quantity of coal in B.'s yards. By permission of the customs' department, B., on giving security therefor to the crown, had sold, before the assignment, certain other coal, imported by him, without first paying the duty upon it:—Held, 1, That there was nothing in the Customs Act, R. S. C. c. 32, nor in law, giving the crown the right of lien upon the coal assigned to the plaintiff, for duty payable by B. in respect of the other coal sold by him; 2, that the issue of a writ of extent by the crown against B. on the 19th February, 1887, for the recovery of the duty so payable in respect of such other coal would have availed the crown nothing so far as the property assigned to the plaintiff was concerned, for it could not have been seized under such extent, having previously become vested in the plaintiff; 3, That the claim of the crown for the duty payable by B. in respect of such other coal was not payable by the plaintiff out of the proceeds of the property assigned to him in preference to the claims of other creditors: the principle that when the right of the crown and the subject come into competition, that of the crown is to be preferred in any case, has now no existence in Ontario, because the effect of R. S. O. (1887), c. 94, is to do away with any distinction between debts due from the subject to the crown and debts due from subject to subject, and to place them all upon the same footing. Such principle although it has been applied to winding-up proceedings instituted under statutes in which the crown is not bound, and where the property was not divested out of the crown debtor, is not applicable to estates in bankruptcy or assigned in trust for creditors. *Clarkson v. Attorney-General of Canada*, 15 O. R. 632.—*Armour*; 16 A. R. 202.

G., manufacturer of an "Automatic Sprinkler," a brass device composed of several parts, was desirous of importing the same into Canada with the intention of putting the parts together there and putting the completed articles on the market. He interviewed the appraiser of hardware at Montreal, explained to him the device and its use, and was told that it should pay duty as a manufacture of brass. He imported a number of sprinklers and paid the duty on the several parts. There was little or no labour performed on the sprinklers in Canada. The customs officials caused the sprinklers to be seized, and an information to be laid against him for smuggling, evasion of payment of duties, under-valuation, and knowingly keeping and selling goods illegally imported, under sections 153 and 155 of the Customs Act of 1883:—Held, reversing the judgment of the Exchequer Court, that there was no importation of sprinklers as completed articles, by G. and the Act not imposing a duty on parts of an article the information should be dismissed. Held also, that the subsequent passage of an Act (48-49 Vict. c. 61, s. 12, re-enacted by 49 Vict. c. 30, s. 11), imposing a duty on such parts, was a legislative declaration that it did not previously exist. *Grinnell v. The Queen*, 16 S. C. R. 119.

## REVIEW.

See PRACTICE.

## REVISING OFFICER.

See PARLIAMENTARY ELECTIONS.

## REVISION.

I. COURT OF—See COURT OF REVISION.

II. OF TAXATION—See COSTS—SOLICITOR.

## REVIVOR.

See SCIRE FACIAS AND REVIVOR.

## RIDEAU CANAL.

Under the provisions of 8 Geo. IV., c. 1, passed on the 17th Feb., 1827, by the Provincial Parliament of Upper Canada, and generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some twenty acres were actually necessary and used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to William McQueen all his interest in the said lands, and on the 6th February, 1832, William McQueen granted to Colonel By all the lands previously granted to his mother. Colonel By died on the 1st February, 1836. By 6 Will. IV., c. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation. By the Ordinance Vesting Act, 7 Vict., c. 11 (Can.), the Rideau canal and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by section 29 it was enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken." By the 9th Vict., c. 42 (Can.), it was recited that the foregoing proviso had given rise to doubt as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 Geo. IV., c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for the re-vesting in him and his grantees of the portions of lands taken but not required for such purposes. By

the 19th and 20th Vict., c. 45, the ordinance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada. The suppliants, the legal representatives of Colonel By, brought a petition of right, alleging the foregoing facts, and seeking to have Her Majesty declared a trustee for them of all the said lands not actually used for the purposes of the said canal, and praying that such portion of said lands might be restored to them, and the rents and profits thereof paid, and as to any parts sold that the values thereof might be paid together with the rents and profits, prior to the selling thereof. By his statement in defence, the Attorney-General contended, among other things, that (par. 5) no interest in the lands set out and ascertained by Colonel By, passed to William McQueen, but the claim for compensation or damages for taking said lands was personal estate of Grace McQueen, and passed to her personal representative; that (par. 6, 7, and 8) the deeds of the 31st January and 6th February, 1832, passed no estate or interest, the title and possession of the lands, being in His Majesty, but that such deeds were void under 32 Hen. VIII., c. 9; that (par. 9) Colonel By was incapable, by reason of his position, of acquiring any beneficial interest in said lands as against His Majesty; that (par. 10, 11, 12 and 13) Colonel By took proceedings under 8 Geo. IV., c. 1, to obtain compensation for the lands in question, but the arbitrators and also a jury summoned under the Act decided that he was entitled to no compensation by reason of the enhancement of the value of his other land and of other advantages accrued by the building of the canal, and that this award and verdict were a bar to the suppliants' claim; that (par. 14 and 15) the proviso of 9 Vict., c. 42, was confined to Nicholas Sparks and did not extend to the lands in question; that (par. 16, 17, 18 and 19) by virtue of 2 Vict., c. 19 (Upper Canada) and a proclamation issued in pursuance thereof, all claims for damages which might have been brought under 8 Geo. IV., c. 1, by owners of lands taken for the canal, including claims of the said Grace McQueen or Colonel By, or their respective representatives, were, on and after the 1st April, 1841, forever barred; that (par. 26, 27 and 28) the suppliants were barred by their own laches; and that (par. 29) they were barred by the Statute of Limitations. On a special case stated on the pleadings for the opinion of the court:—Held, 1. The Statute of Limitations was properly pleadable under section 7 of the Petition of Right Act of 1876. 2. William McQueen took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown under 8 Geo. IV., c. 1, ss. 1, 3, and her right was converted into a claim for compensation under the 4th section. 3. This right of compensation or damages, if asserted under the 4th sec. of 8 Geo. IV., c. 1, would go to Grace McQueen's personal representatives, but if the land was obtained by surrender under the 2nd section of the statute, then the heir-at-law of Grace McQueen would be the person entitled to receive the damages and execute the surrender. 4. The deeds of the 31st January, 1832, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dis-

pute, except so far as the same may be considered as a surrender to the Crown under the 2nd section of the Rideau Canal Act. 5. The 9th paragraph of the statement in defence is a sufficient answer in law to the petition. 6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statements therein to be true. 7. The proviso of 9 Vict., c. 42, s. 29, was confined in effect to the lands of Nicholas Sparks only. 8. If the claim is to be made by Grace McQueen's personal representatives under the 4th section of the Rideau Canal Act (and any claim by her could only be under that section), the Acts referred to in the 16th, 17th, 18th and 19th paragraphs of the statement in defence have an application to this case and would constitute a bar against all claims to be made under the Rideau Canal Act. As to the claims to be made by the heirs of Colonel By, they have no claims under any of the statutes. 9. If the Ordinance Vesting Act vested the 110 acres in question in the heirs of Colonel By, the court was not prepared to say that their claim had been barred by laches on the statement set out in the petition. But the statute had not that effect, nor had Colonel By or his legal representatives ever had for his or their own use and benefit any title to these 110 acres. *Tylee v. The Queen*, 7 S. C. R. 651.

Under a similar state of facts to those set out in the last case the appellant, the heir-at-law of William McQueen, by her petition of rights sought to recover from the Crown ninety acres of the land originally taken by Colonel By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the Crown, and an indemnity for the value of such portions of these ninety acres as had been sold by the Crown:—Held, per Gwynne J. (in the Exchequer Court)—Under the statute 8 Geo. IV. the original owner and his heirs did not become divested of their estate in the land until after the expiration of the period given by the Act for the officer in charge to enter into a voluntary agreement with such owner unless in virtue of an agreement with such owner. Nor was there any conversion of realty into personalty effected by the Act until after the expiration of said period. By the deed made by William McQueen of the 6th February, 1832, all his estate in the 110 acres, as well as in the residue of the 600 acres, passed and became extinguished, such deed operating as a contract or agreement made with Col. By as agent of His Majesty within the provisions of the Act and so vesting the 110 acres absolutely in His Majesty, his heirs and successors. 2. Such deed was not avoided by the statute 32 Henry VIII. c. 9, Colonel By being in actual possession as the servant and on behalf of His Majesty, and taking the deed from William McQueen while out of possession, the statute having been passed to make void all deeds executed to the prejudice of persons in possession by persons out of possession, to persons out of possession under the circumstances stated in the Act. 3. There was no reversion or reversioning of any portion of the land taken by reason of its ceasing to be used for canal purposes. When land required for a particular purpose is ascertained and determined by the means provided by the legislature for that purpose, and the estate of the former owner in the land has been by like

authority divested out of him and vested in the Crown, or in some persons or body authorized by the legislature to hold the expropriated land for the public purpose, if the estate of which the former owner is so divested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him in virtue of which he can at any subsequent time claim upon any principle of the common law to have any portion of the land of which he was so divested to be revested in him by reason of its ceasing to be used for the purpose for which it was expropriated. 4. Assuming that Grace McQueen had by operation of the Act become divested of her estate in the land in her lifetime and that her right had become converted into one merely of a right to compensation which upon her death passed as personalty, the nonpayment of any demand which her personal representative might have had could not be made the basis or support of a demand at the suit of the heir-at-law of William McQueen to have revested in him any portion of the lands described in the deed of the 6th February, 1832, after the execution of that deed by him, whether effectual or not for passing the estate which it professed to pass. 5. The proviso in the 29th section of 7 Vict. c. 11, as explained by 9 Vict. c. 42, was limited in its application to the lands which were originally the property of Nicholas Sparks and not conveyed or surrendered by voluntary grant executed by him and for which no compensation or consideration had been given to him. 6. Her Majesty could not be placed in the position of trustee of the lands in question unless by the express provisions of an Act of Parliament to which she would be an assenting party. In the Supreme Court held:—1. Per Ritchie C.J. By the deed of the 6th of February, 1832, the title to the lands passed out of William McQueen, but assuming it did not, he was estopped by his own act, and could not have disputed the validity and general effect of his own deed, nor can the suppliant who claims under him. 2. Per Ritchie C.J. and Strong and Gwynne JJ. The suppliant is debarred from recovering by the Statute of Limitations, which the Crown has a right to set up in defence under the 7th section of the Petition of Right Act of 1876. 3. Per Strong J. Independently of this section, the Crown, having acquired the lands from persons in favour of whom the statute had begun to run before the possession was transferred to the Crown, that body incorporated under the title of "The Principal Officers of Ordnance" would be entitled to the benefit of the statute. 4. Per Strong J. The Act 9 Vict. c. 42 had not the effect of restricting the operation of the revesting clause of 7 Vict. c. 11 to the lands of Nicholas Sparks, and was passed to clear up doubts as to the case of Nicholas Sparks, and not to deprive other parties originally coming within section 29 of 7 Vict. c. 11 of the benefit of that enactment. 5. Per Strong J. A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under section 29. Where it is within the power of a party having a claim against the Crown of such a nature as the present to resort to a petition of right a mandamus will not lie, and a mandamus will never under any circumstances be granted where direct relief is sought against the Crown. 6. Per Strong J. By the express terms of the 3rd section of 8 Geo. IV. c. 1, the

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title to lands taken for the purpose of the canal vested absolutely in the Crown so soon as the same were, pursuant to the Act, set out and ascertained as necessary for the purposes of the canal; and all that Grace McQueen could have been entitled to at her death was the compensation provided by the Act to be ascertained in the manner therein prescribed, and this right to receive and recover the money at which this compensation should be assessed, on her death, in her personal representative as forming part of her personal estate. Therefore as regards the 110 acres nothing passed by the deed of 6th February, 1832. And up to the passing of 7 Vict. c. 11, no compensation had ever been paid by the Crown, nor any decision as to compensation binding on the representative of Grace McQueen. 7. Per Strong, J. The proviso in section 92 of 7 Vict. c. 11 applied to the ninety acres not used for the purpose of the canal, and had the effect of revesting the original estate in William McQueen as the heir-at-law of his mother, subject to the effect upon his title of the deed of 6th February, 1832. But if it had the effect of revesting the land in the personal representative, the suppliant is not such personal representative and would therefore fail. 8. Per Strong, J. This deed did not work any legal estoppel in favour of Col. By which would be fed by the statute vesting the legal estate in William McQueen, the covenants for title by themselves not creating any estoppel. But if a vendor, having no title to an estate, undertakes to sell and convey it for valuable consideration, his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards acquire even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, or his heir-at-law, will be compelled to convey to such purchaser accordingly. In other words, the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. Therefore, if the suppliant were granted the relief asked, the land and money recovered by her would in equity belong to the heirs of Colonel By. Although nothing passed under the deed of the 6th February, 1832, yet the suppliant could not withhold from the heirs or representatives of Colonel By anything she might recover from the Crown under section 20 of 7 Vict. c. 11, but the heirs or representatives of Colonel By would in turn become constructive trustees for the Crown of what they might so recover by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit. 9. Per Strong, J. The deed of the 6th February, 1832, being in equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire, there is nothing in the statute 32 Henry VIII. c. 9, or in the rules of the common law avoiding contracts savoring of maintenance, conflicting with this use of the deed. 10. Per Fournier and Henry, J.J. The mere setting out and ascertaining of the lands was not sufficient to vest the property in His Majesty, and Grace McQueen having died without having made any

contract with Colonel By the property went to William McQueen her heir-at-law. Per Fournier, Henry and Taschereau, J.J. 1. The deed of the 6th February, 1832, made before the passing of 7 Vict. c. 11, s. 20, and five years after the Crown had been in possession of the property in question conveyed no interest in such property either to Colonel By personally or as trustee for the Crown, and the title therefore remained in the heirs of Grace McQueen. 2. The proviso in section 20 of 7 Vict. c. 11 was not limited by 9 Vict. c. 42 to the lands of Nicholas Sparks and the appellant is entitled to invoke the benefit of it. 3. The ninety acres now used for the purposes of the canal did not by 19 Vict. c. 54 become vested in Her Majesty, nor were they transferred by the B. N. A. Act to the exclusive control of the dominion parliament. The words "adjuncts of the canal" in the first schedule of the B. N. A. Act could only apply to those things necessarily required and used for the working of the canal. 4. The Crown was not entitled to set up the Statute of Limitations as a defence by virtue of section 7 of the Petition of Right Act, 1876, that section not having any retroactive effect. 5. Per Fournier, Henry and Taschereau, J.J. There could be no estoppel as against William McQueen by virtue of the deed of the 6th February, 1832, in the face of the proviso in 7 Vict. c. 11. The court being equally divided the appeal was dismissed without costs. *McQueen v. The Queen*, 16 S. C. R. 1.

See *Gardiner v. Chapman*, 6 O. R. 272.

## RIGHT OF WAY.

See WAY.

## RIGHT TO BEGIN.

See NEW TRIAL—TRIAL.

## RIGHT TO REDEEM.

See MORTGAGE.

## RIGHT TO REPLY.

See TRIAL.

## RIPARIAN PROPRIETORS.

See WATER AND WATER COURSES.

## RIVERS.

See WATER AND WATER COURSES.

## ROADS AND ROAD COMPANIES.

See WAY.



## ROYALTY.

See PATENT FOR INVENTION.

## RULE IN SHELLEY'S CASE.

See ESTATE—WILL.

## RULES OF COURT.

Con. Rule 5 provides that "the division of these rules into chapters, titles and headings is for convenience only and is not to affect their construction":—Held, that Con. Rule 1008, notwithstanding the heading "Summary Inquiries into Fraudulent Conveyances," is not limited to cases of equitable interests arising under fraudulent conveyances, but applies to a case where a judgment creditor is seeking to make available the interest of his debtor under an agreement for the purchase of land. A reference was directed to ascertain what interest the debtor had in the land in question. *Wood v. Hurl*, 28 Chy. 146, not followed owing to the change of law by Con. Rule 5. *Peters v. Stoness*, 13 P. R. 235.—Galt.

The authority to proceed by rule or order nisi in quashing a by-law, conferred by R. S. O. (1887), c. 184, s. 332, is inconsistent with Con. Rule 526, and must therefore be taken to be repealed; for by 51 Vict. c. 2, s. 4 (Ont.), it is declared that all enactments in the revised statutes inconsistent with the Con. Rules are repealed. It is therefore not now proper to proceed by order nisi. *Re Peck and Ameliasburg*, 12 P. R. 664, followed. *Hewison v. Pembroke*, 6 O. R. 170, distinguished. *Re Colenutt and Township of Colchester North*, 13 P. R. 253.—Street.

See *Regina v. Birchall*, 19 O. R. 697, p. 854.

## SABBATH.

See SUNDAY.

## SALARY.

See REMUNERATION.

## SALE.

I. CONTRACT OF SALE GENERALLY—See CONTRACT.

II. BY BILL OF SALE—See BILLS OF SALE AND CHATTEL MORTGAGES.

III. OF GOODS—See SALE OF GOODS.

IV. OF LANDS—See SALE OF LAND.

## SALE OF GOODS.

I. STATUTE OF FRAUDS.

1. *Note or Memorandum*, 1852.
2. *Acceptance and Receipt*, 1854.

II. CONTRACT OF SALE.

1. *Absolute or Conditional*, 1855.
2. *Price and Payment*, 1856.
3. *When Property Passes to Buyer*, 1857.
4. *Purchase by Sample or Inspection*, 1861.
5. *Quantity and Quality*, 1863.
6. *Right of Selection*, 1865.
7. *Change of Place of Delivery*, 1866.
8. *Breach of Conditions as to Shipping*, 1867.
9. *By Auction*—See AUCTION AND AUCTIONEERS.
10. *By Bill of Sale*—See BILLS OF SALE AND CHATTEL MORTGAGES.
11. *Parol Evidence to Vary*—See EVIDENCE.
12. *Conversion of Goods*—See CONVERSION.
13. *Warranty*—See WARRANTY.
14. *Illegal Contracts*—See GAMING—SUNDAY.
15. *Fraudulent Contracts*—See FRAUD AND MISREPRESENTATION.

III. VENDORS' TITLE, 1867.

IV. RESCINDING CONTRACT, 1867.

V. PROCEEDINGS ON CONTRACT.

1. *Party Liable*, 1869.
2. *For Non-Delivery or Non-Acceptance*,  
(a) *Damages*, 1869.  
(b) *Other Cases*, 1870.

VI. STOPPAGE IN TRANSITU, 1870.

VII. SALE OF PARTICULAR ARTICLES.

1. *Intoxicating Liquors*—See INTOXICATING LIQUORS.
2. *Ships*—See SHIP.
3. *Stock*—See BROKER—COMPANY.
4. *Timber*—See TIMBER.

VIII. BY PARTICULAR PERSONS.

1. *Agents*—See BROKER—FACTOR—PRINCIPAL AND AGENT.
2. *Banks*—See BANKS.
3. *Companies*—See COMPANY.
4. *Sheriff*—See SHERIFF.

IX. DISTRESS—See DISTRESS.

X. REPLEVIN—See REPLEVIN.

I. STATUTE OF FRAUDS.

1. *Note or Memorandum*.

K. entered the sale of certain groceries in a book which was not produced, but the plaintiff

## GOODS.

Receipt, 1854.  
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Delivery, 1866.  
 as to Shipping,

## AUCTION AND AUCTION.

See BILLS OF SALE  
 MORTGAGES.

to Vary—See EVIDENCE.

See CONVERSION.

WARRANTY.

See GAMING—SUN.

See FRAUD AND

DEFRAUDATION.

187.

1867.

TRACT.

for NonAcceptance,

1870.

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ARTICLES.

See INTOXICATION.

See COMPANY.

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produced a list of the things ordered, and their prices; and K. afterwards sent the order in a letter signed by him to the defendants, who thereupon wrote the plaintiffs, "K. reports a sale that we cannot approve in full, but will accept for," enumerating certain articles. Upon the plaintiffs' insisting on the completion of the order in full, the defendants cancelled it altogether:—Held, that the letters were a sufficient memorandum within the seventeenth section of the Statute of Frauds. *Ockley v. Masson*, 6 A. R. 108.

The contract was expressed to sell "Limits Nos. 1 and 2 for \$15,500; also all the plant used in connection with the shanty now in operation on limit No. 1, included in the list made out last summer, and the material then not included which had been in use for the winter's operations of 1880 and 1881," at the price of \$3,000:—Held, sufficiently definite to satisfy the Statute of Frauds since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing, which accompanied the above contract, and which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of the \$15,500, and such parol evidence was admissible, though the contract imported *prima facie* a down payment of \$15,500. *Reid v. Smith*, 2 O. R. 69.—Chy. D.—Boyd.

The plaintiff in England sold certain goods to M. & Co., at Toronto. After the arrival of the goods at Toronto, the plaintiff discovered that M. & Co. were insolvent, and he notified his agent to stop the goods; but it appeared that M. & Co. had paid the freight and duty and removed the goods into their warehouse. After negotiations between plaintiff's agent and M. & Co., the latter verbally agreed to hold the goods subject to plaintiff's order, and on the following day wrote plaintiff's agent to the same effect, but no written assent was made thereto. M. & Co. subsequently made an assignment for the benefit of their creditors to defendant, who took possession of the goods, and on demand refused to deliver them up to plaintiff, whereupon trover was brought:—Held, that the goods having become the property of M. & Co., and being of greater value than \$40, in order to retransfer them to the plaintiff, it was necessary that there should be a memorandum in writing, shewing the terms of the transfer, or some other act sufficient to take the case out of the Statute of Frauds; but—Semble, if any consideration had been stated between the plaintiff's agent and M. & Co., for the latter assuming the position of bailees of the goods, and holding them for the plaintiff's benefit, the transaction might have been supported as not coming within the statute. *Brassett v. McEwen*, 10 O. R. 179.—C. P. D.

Held, that the letters of the defendant, set out in the report of this case and read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within the 17th section of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to. *Christie v. Burnett*, 10 O. R. 609.—Q. B. D.

Where an offer, signed by the defendant to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance:—Held, also, that an acceptance of the offer beneath the defendant's signature, signed by the plaintiff's assignor did not cure the defect. *White v. Tomalin*, 19 O. R. 513.—Chy. D.

## 2. Acceptance and Receipt.

Defendant sold the plaintiffs some tea, and verbally agreed that he would take back, at an advance of ten cents a pound, such part thereof as the plaintiffs should have in stock unsold at a certain date:—Held, (affirming the decision of the Queen's Bench Division, 46 Q. B. 1) that there was but one entire conditional contract—not one contract to sell the tea to the plaintiffs, and another to buy it back—and therefore the delivery of the tea by the defendant satisfied the Statute of Frauds, and the plaintiffs were entitled to recover for the defendant's refusal to take back the unsold tea. *Williams v. Burgess*, 10 A. & E. 499, considered and followed. *Lumsden v. Davies*, 11 A. R. 585.

Held, reversing the judgment of the court below, that in an action in the province of Quebec upon an unwritten commercial contract for the sale of goods exceeding the sum of \$50, oral evidence of acceptance or receipt of the whole or any part of the goods, is admissible, under Art. 1235 C. C. *Munn v. Berger*, 10 S. C. R. 512.

The defendant, a manufacturer of woollen goods, in company with W., his manager, went to the warehouse of the plaintiffs for the purpose of purchasing wool, where he was shewn a quantity consisting of about 200 sacks of white wool which plaintiffs offered to sell at twenty-four cents a pound for the lot. The defendant, after examining as much of the wool as he desired, ordered ten sacks thereof to be shipped to him immediately with a view of trying it, that is to see if it would produce the quality of goods he dealt in. On the following morning the defendant saw the plaintiff L. personally, and informed him that he would take the lot; and the plaintiffs agreed to carry it for him on certain terms, and on that day the ten sacks were shipped to the defendant. At the same time an invoice was sent containing the memorandum: "Terms, interest at seven per cent, from 1st February," being the terms offered to defendant if he would take the lot. The ten sacks were subsequently received at the defendant's mill and were worked up there:—Held (reversing the judgment at the trial and of the Divisional Court), that the agreement to take the lot made before the performance of the first bargain was a variation of or substitution for the first bargain, and that the delivery of the sacks was a delivery and such an actual receipt and acceptance of part of the goods purchased as satisfied the requirements of the 17th section of the Statute of Frauds, and that the plaintiffs were entitled to recover the price of the remaining 190 sacks,

together with interest from the date mentioned.  
*Leadlay v. McRoberts*, 13 A. R. 378.

The plaintiff agreed to sell the defendant a piano for \$400, to be paid by notes at one and two years with interest, with a rebate for cash. The piano was delivered at defendant's residence, who after using it for some time, objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in the County Court, claiming the \$400 and interest. At the trial leave was given to strike out the words "with interest."—Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay either by notes or cash, the plaintiff was entitled to recover in an action for goods sold and delivered. The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of goods either at the trial or in the order nisi, the court, without deciding that there had been a sufficient delivery:—Held that the objection was not open to the defendant, and refused to permit an amendment. *Greenizen v. Burns*, 13 A. R. 481.

## II. CONTRACT OF SALE.

### 1. Absolute or Conditional.

A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods, except perhaps where the goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner. In this case, being a sale of iron to be made in Scotland, it was:—Held, upon the evidence in the case, that the sale was absolute, and not subject to any condition as to the arrival of the goods. *Fleury v. Copland*, 46 Q. B. 36.—Q. B. D.

By telegrams and letters the defendant offered to sell the plaintiff twelve cars of barley, to be delivered free on the track in Toronto at sixty-six cents per bushel, of the quality of two cars previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Lansdowne. The plaintiff telegraphed, "All right, will take the lot. Ship one car on receipt—quick." By letter of same date the plaintiff said that this might save the necessity of his sending down to inspect, as if this car was all right he need not do so. The car was sent by the defendant, who, however wrote at once, when advising of the shipment, that the only way he would sell would be to have the barley inspected at his grain house. Defendant drew on the plaintiff for the price of the car sent, which was paid. The plaintiff did not inspect, but after receiving this car, the plaintiff wrote and telegraphed to defendant to ship the balance, but defendant refused to do so:—Held, *Cameron J.*, dissenting, that the contract was subject to the condition stipulated for by the defendant, that the plaintiff should inspect before shipment; and that the shipment of one car, with the letter accompanying it, was not a waiver of the condition for inspection at Lansdowne of the residue, which the defendant was therefore not bound to deliver. *Goodall v. Smith* 46 Q. B. 388.—Q. B. D.

### 2. Price and Payment.

The Albert Mining Co. (respondent) brought this action to recover for coal sold and delivered to appellants during the years 1866, 1867 and 1868. S. and M. and one McE. were partners carrying on business under the name of the Albertine Oil Company, the defendant S. furnishing the capital. The contract for the coal was made by S. who was a large stock-holder in the plaintiff company and entitled to yearly dividends on his stock. The agreement, as proved by plaintiffs, was that S. purchased the coal for the Albertine Oil Company, the members of which he named; that the president of the plaintiff company told S. they would look to him for payment, as the other partners were poor; that the terms of sale were cash on delivery on board the vessels; and that S. agreed that the dividends payable to him on his stock should be applied in payment for the coal; that in consequence of this arrangement the plaintiffs credited the Albertine Oil Company with the amount of S.'s dividends as they were declared from time to time down to August, 1866, leaving a balance of \$912 due to S. It also appeared that the coal delivered was charged in the plaintiff's books to the Albertine Oil Company, and that the bills of lading on the shipments of the coal were also made out in their name, and that some time afterwards a notice, signed by S. and M. was given to the plaintiffs, complaining of the inferior quality of the coal, and claiming damages in consequence. In the latter part of the year 1868, S. repudiated the agreement to appropriate his dividends to the payment of coal, and refused to sign the receipts therefor in the plaintiff's books. He had signed the receipt for the dividends of 1866. The present action was then brought (in 1873) against S. and M., the surviving partners of the Albertine Oil Company, McE. having died, to recover the value of the coal S. shortly afterwards brought an action against the plaintiffs for the dividends; this latter claim was referred to arbitration and an award was made in favour of S. for upwards of \$15,000, which the plaintiffs paid in July, 1874. The receipt given for the payment stated that it was in full satisfaction of the judgment in the suit of S. against the Albert Mining Company, and it appeared (though evidence of this was objected to in the present action) that it included the dividends for the years 1867 and 1868. The judge before whom the action was tried, nonsuited the plaintiffs, but the Supreme Court of Nova Scotia set aside the nonsuit:—Held, reversing the judgment of the Court below, *Strong J.*, dissenting—That there being clear evidence of the appropriation of S.'s dividends in pursuance of the agreement made with him, and therefore of the plaintiffs having been paid for the coal in the manner and on the terms agreed on, the plaintiffs were properly nonsuited. *S. v. Albert Mining Co.*, 9 S. C. R. 35.

The plaintiff bought the office and plant of a newspaper, gave a chattel mortgage thereon to W., and paid P in charge. The defendants made a dividend to P. for the purpose of carrying on the business. W. sold the property by auction for the amount of the mortgage debt to the defendants, who, supposing that P. was the owner, wished to secure themselves for the advance made to him. The defendants then

ement.

pendent) brought and delivered shares 1866, 1867 and etc. were partners in the name of the Alford S. furnished for the coal was stock-holder in the deed to yearly dividend, as proved chased the coal for the members of the president of the would look to him partners were poor; S. agreed that the his stock should be coal; and that consequently the plaintiffs credit with the amount were declared from Oct. 1866, leaving it also appeared that in the plaintiff's company, and that elements of the coal mined by S. and M. complaining of the and claiming damages. In latter part of the agreement to apportionment of coal, S. sets therein in the receipt for the present S. and action, was the Alford Oil Company to recover the value of the shares brought on or the dividend to arbitration and of S. for upwards of \$100,000. In the affidavits paid in July, the payment stated of the judgment of the Alford Mining Company (the action) that it in the years 1867 and to whom the action was brought by the plaintiffs, but the set aside the non-judgment of the action. That there appropriation of S's agreement made by the plaintiffs having been properly non-  
Co., 9 S. C. 33

The defendants purpose of carrying the property by mortgage debt to the fact that P. was the defendants then

agreed to sell the property to the plaintiff; but a dispute arose as to the price, and this action was brought to obtain specific performance of the agreement. There was written evidence of the agreement in a document signed by the defendant Moore, part of which was as follows: "Price of this office to be what it has cost Mr. Horton (the other defendant) and myself." Specific performance was decreed by consent, and it was referred to the master at London to take the accounts, and to report what was the true agreement between the parties. — Held (reversing the decision of the master and of Fergusson, J.), that the defendants had the right to shew before the master what they meant by the reference to the cost of the office as fixing the price; and that, upon the evidence, the true agreement between the parties was, that the price was to be the amount paid to W. plus the advances to P. *Hughes v. Moore*, 11 A. R. 569.

When there is no actual agreement as to price or time for payment, the law will supply the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price, and by implying, in the absence of evidence to the contrary, that payment should be made on delivery. *Christie v. Burnett*, 10 O. R. 609.—Q. B. D.

Plaintiff and defendant entered into the following contract: "To G. M. B. (plaintiff)—Please deliver to me at Port Arthur five head good steers on first 'City' up, and six steers and heifers on second trip 'City' up, and four cows on same trip, also 100 good lambs in lots of fifteen or twenty, of \$3 each lamb, to dress not less than ten pounds per quarter, price of cattle \$3.50 weighed at Port Arthur." Nothing was said as to time of payment. The cattle were all delivered, but the plaintiff refused to complete the contract until the cattle were paid for, which the defendant declined to do.—Held (reversing Armour, J.), that the price was not payable till the completion of the whole contract, and that the refusal of the defendant to pay for the part delivered did not justify the plaintiff in refusing to deliver the remainder. Per Ferguson, J. The contract being entire and containing no stipulation regarding the manner or time of payment, the defendant was entitled to refuse to pay for the part that had been delivered until the remainder should be delivered, and the refusal of the plaintiff to deliver the remainder was not justified and was a breach of the contract. Per Boyd, C.—If the contract is entire the price was not payable until all the deliveries were completed; if it is divisible proquad the cattle and the lambs, so as to be in effect two contracts, the failure to pay for the cattle by the one party would not excuse the other in not forwarding the lambs within the time limited. Where there has been partial delivery, and consumption of that part, and failure to perform the rest of the contract, the seller has a right to sue as upon a quantum meruit, and the purchaser has his cross action or counter claim for damages. Withers v. Reynolds, 2 B. & Ad. 882, considered and distinguished. *Boyd v. Sullivan*, 15 O. R. 492.—Chy. D.

### 3. *When Property Passes to Buyer.*

M. agreed to manufacture and furnish to the joint account of himself and the plaintiff a quan-

city of staves to be loaded in cars at a railway station by a day named. By the terms of the agreement the staves were to be considered at all times, whether marked or not, the property of the plaintiff as security for advances.—*Held*, that under the agreement the staves became the property of the plaintiff as soon as made, and never were the property of M.; and that the agreement did not require filing under the Chattel Mortgage Act; and that the plaintiff therefore was entitled as against an execution creditor of M. *Kelsey v. Rogers*, 32 C. P. 624.—C. P. D.

Assuming the Canadian law to be notwithstanding Arts 1472, 1025 and 1027 Civil Code) that the property in the thing sold passes by a genuine contract of sale without delivery even as against third parties.—Held, on the evidence in this case that the indicia of a bona fide sale were wanting and that the circumstances of there having been no change of possession of the thing alleged to have been sold was one of the material facts to shew that the sale was simulated. *Cushing v. Dupuy*, 5 App. Cas. 409.

W., a commission merchant residing at Toledo, Ohio, purchased and shipped a cargo of corn on the order of C. et al., distillers at Belleville, and drew on them at ten days from date for the price, freight and insurance. This draft was transferred to a bank in Toledo and the amount of it received by W. from the bank, and the corn having been insured by W. for his own benefit was shipped by him under a bill of lading, which, together with the policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy, and bill of lading to their agents at Belleville, with instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by C. et al., but the cargo arriving at Belleville in a damaged and heated condition, between the dates of the acceptance and the maturity of the draft, C. et al., refused to receive it and afterwards to pay the draft at maturity. Thereupon the bank and W. sold the cargo for behalf of whom it might concern, credited C. et al. with the proceeds on account of the draft, and W. filed a bill to recover balance and interest:—Held, reversing the judgment of the Court of Appeal (5 A. R. 626) (Strong, J., dissenting), that the contract was not one of agency, and that the property in the corn remained by the act of W., in himself and his assignees, until after the arrival of the corn at Belleville and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in W. and his assignees, C. et al. should not bear the loss. *Corby v. Williams*, 7 S. C. R. 470.

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Before making such payments, however, A. sold the oil to the defendants, without the knowledge of the plaintiff:—Held, affirming *Proudfoot, V. C.* (29 Chy. 300), that although the defendants were purchasers for value from A., in belief that he was the owner and entitled to sell the oil in question, the plaintiff, under his agreement with A., having retained the property in the oil, and not having done anything to estop him from maintaining his right of ownership, was entitled to

recover from the purchasers the price of the oil. *Forristal v. McDonald*, 9 S. C. R. 12.

Three cases of goods, exceeding \$40 in value, were verbally ordered by L. at M. from plaintiff at T., through plaintiff's traveller, and were shipped, consigned to L., and carried by railway and then by defendant's steamer to M. Two of the cases were received by L., one of which was in a damaged condition. The third case remained on board the vessel, as the purser refused to deliver it up until the freight on these cases as well as on a variety of other goods consigned to L. was paid, which L. refused to do until he had first an opportunity of checking over the goods. Before the dispute was settled the vessel left, and was subsequently wrecked and this case lost. An arrangement was made between plaintiff and L. whereby plaintiff allowed L. twenty-five per cent on the value of the two cases received by L. The plaintiff then brought an action against the defendants to recover the twenty-five per cent. so allowed, and the value of the case lost:—Held (Galt, J., dissenting), that there was an acceptance and receipt of the goods by L. so as to pass the property therein to him; and therefore the action should, under the Mercantile Amendment Act, R. S. O. (1877), c. 116, s. 5, sub-s. 1, have been maintained by him and not by plaintiff. Per Galt, J., the action was properly brought by plaintiff, as the property in the goods had not passed from him; and he was entitled to recover the twenty-five per cent. so allowed by him, as also the price of the case lost; for although the loss thereof was occasioned by the dangers of navigation, the defendants were not protected under 37 Viet. c. 25 (Dom.), the evidence shewing that the loss was by the fault or neglect of the defendants. *Friendly v. Canada Transit Co.*, 10 O. R. 756. — C. P. D. See also *Langdon v. Robertson*, 13 O. R. 497.

The plaintiffs sold to U. & Co. certain wheels, etc., to be used in the manufactory under a written agreement, whereby it was stipulated that the right and property in the goods should not pass to them until the whole price thereof was paid, the right of possession merely passing; such right to be forfeited and the plaintiffs to be at liberty to resume possession in case of default in the payments being made, or in case of seizure for rent, etc., or upon any attempt by U. & Co. to sell or dispose thereof without the consent of the plaintiffs, it being expressly declared that the sale was conditional only, and punctual payment of the instalments being essential to its existence. U. & Co. placed the machinery in the flume belonging to their factory, which was held by them under a lease from H. & Co., and subsequently the sheriff having seized other chattels belonging to U. & Co., they surrendered the possession of the premises and delivered the key thereof to H. & Co. Default having been made by U. & Co., the plaintiffs demanded the wheels of H. & Co., which demand H. & Co. refused to comply with, assigning as a reason that they had not possession thereof, and in the following month the wheels were sold under proceedings to enforce payment of the liens of certain mechanics:—Held, affirming the judgment of the Common Pleas Division, 8 O. R. 465, that the plaintiffs were entitled to recover the value of the goods. *Joseph Hall Manufacturing Co. v. Hazlett*, 11 A. R. 749.

An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E. under a written order to ship same to his address as per sum agreed on, viz., \$875; \$225 to be allowed for E.'s portable engine and boiler, and \$650 to be paid on shipment; but, if not settled for in cash and notes within twenty days, then the whole amount to become due. The order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs, E. agreeing not to sell or remove same without the plaintiffs' consent in writing. On default in payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased with right of purchase, by defendant D. to E.'s wife for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. all the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, etc., and on the same day D. leased the said premises, mill and machinery, to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery, to the defendants, the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at three months, which was renewed from time to time, but ultimately E. having failed to pay same, the plaintiffs demanded the machinery, when D. notified plaintiffs not to remove same, as also did the society:—Held, that the effect of the transaction was, that the property was in the plaintiffs, and that they were entitled thereto and that there was an illegal detention by the defendants D. and E. amounting to a conversion; and that the F. Loan Co. by having notified plaintiff not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover \$650 with interest, being the price of the machinery, and that upon removal of the engine and boiler the sum of \$60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E. *Pulson v. Degeer*, 12 O. R. 275—C. P. D.

F., a music teacher at Beardstown, Ill., wrote to K. & Co., at Chicago, that he had a customer named J. to whom he could sell a piano, and desiring them to ship one in their own name, to be subject to their order, but F. to pay freight charges in case of no sale, and return piano to plaintiffs, he, F. simply to act as their agent. K. & Co. not having the style of piano required, handed F.'s letter to plaintiffs, piano manufacturers in Chicago, who after communicating with F., shipped a piano to Beardstown, consigned to their own order, but to be delivered to F. on payment of the freight charges. The piano was received by F. at Beardstown, and its receipt acknowledged in a letter to plaintiffs. It was



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shipped by F. to Virginia City, Ill., and from  
there to F. at Toronto, under the assumed name  
of R., and was there pledged by F. under such  
assumed name, with defendant D., a pawnbroker,  
to cover an amount loaned by D. to pay the  
charges as well as a further advance, F. repre-  
senting that he intended opening an agency for  
the sale of pianos. The piano was taken by D.  
to his own premises, where it remained until  
replevied:—Held, that there was no sale to F.  
of the piano, as it never was intended that the  
property should pass to him. *Bush v. Fry*, 15  
O. R. 122.—C. P. D.

See *Thomas v. Inglis*, 7 O. R. 588, p. 753;  
*Frye v. Milligan*, 10 O. R. 509, p. 787; *Thames  
Navigation Co. (Limited) v. Reid*, 13 A. R. 333,  
p. 277; *Bertram v. Massey Manufacturing Co.*,  
15 O. R. 516, p. 1865.

#### A. Purchase by Sample or Inspection.

The defendants agreed with one W., who  
stated incorrectly that he was acting as broker  
for the plaintiff, for the purchase by sample of  
a quantity of cotton waste at one and one-fourth  
cents per pound, to be delivered at St. Cathar-  
rines. In reality W. was selling for his own  
benefit, as he arranged to purchase the waste at  
one cent a pound. Instead of inspecting the goods  
at St. Catharines, the defendants requested  
W. to consign them to their house in Cincin-  
nati, U. S., which the plaintiff did by direction  
of W. The plaintiff, at the request of W.,  
made out a bill of lading in the name of the  
defendants and drew on them for the price at  
one and one-fourth cents per pound, which  
draft was accepted by the defendants, the  
plaintiff paying W. his profit in cash. On the  
goods reaching Cincinnati, an inspection took  
place when they were found greatly inferior to  
the sample. The defendants rejected the goods  
but refused to return them to the plaintiff at  
St. Catharines, although he was willing to ac-  
cept them there. In an action on the bill of  
exchange:—Held, affirming the judgment of  
Senkler, Co. J., that the defect in quality  
formed no ground of defence, that the plaintiff's  
contract was to deliver the goods at St. Cathar-  
rines, where the inspection ought *prima facie*  
to have taken place, and that the only redress  
of the defendants was by cross-action. *Towers  
v. Dominion Iron and Metal Co.*, 11 A. R.  
315.

The plaintiff, a fruit dealer in Ottawa, went to  
Montreal for the purpose of buying fruit where  
he met the defendant, who had a quantity of  
apples for sale. The defendant in answer to a  
question by one H., his agent, said they would  
be found to be "a good lot," and H. opened  
several barrels for the purpose of plaintiff exam-  
ining the contents, which he did in five or six  
instances, when the apples "appeared to be  
good." The plaintiff might, had he so desired,  
have examined all the barrels; but having pre-  
viously bought apples packed by the defendant  
which proved satisfactory and placing reliance  
on the reputation of the defendant for being an  
honest packer, he refrained from any further ex-  
amination, and purchased 138 barrels, which, on  
subsequently attempting to sell, proved to be so  
inferior in quality that parties refused to buy;  
others returning what they had bought. There-

upon the plaintiff instituted proceedings to re-  
cover compensation for the defect in value. The  
judge of the County Court withdrew the case  
from the jury, and entered a nonsuit, which sub-  
sequently in term was set aside:—Held, on ap-  
peal, that as the sale was not a sale by sample,  
and the plaintiff had not been deterred by any  
acts or conduct of the defendant from making a  
full examination or inspection of all the barrels,  
the defendant was not liable on any warranty,  
express or implied, and that the maxim *caveat  
emptor* applied. *Borthwick v. Young*, 12 A. R.  
671.

The plaintiff contracted with the defendant, a  
dealer in lumber, to sell him 209,000 feet of  
eighteen foot plank of red or white pine two  
inches thick and from six to twelve inches wide;  
"quality the same as he had supplied the pre-  
vious year," to be paid for by acceptance at three  
months from date of shipment. The lumber  
was to be shipped f. o. b., at the plaintiff's mills  
to such places as the defendant should direct.  
A shipment was made of some car loads which  
the defendant accepted. Subsequent shipments  
were made, some carloads of which were received  
and others rejected at Hamilton where the  
defendant carried on business:—Held, in an  
action for the price, that under the terms of the  
contract the inspection should have been made  
at the plaintiff's mills and (affirming the judg-  
ment of the court below, 9 O. R. 566), that the  
defendant could not reject the lumber at Ham-  
ilton unless it was shewn that the article deliv-  
ered was not the article agreed to be delivered;  
and the evidence failed to shew that the de-  
scription of the lumber mentioned in the contract  
was not substantially satisfied. Per Burton and  
Osler JJ. A. Although in a contract for the  
sale of goods not then ascertained, words such  
as were here used as to quality would amount to  
a warranty that the article to be delivered  
should agree with that description there was  
not evidence to shew a breach of the contract in  
that respect. Therefore:—Held that the defend-  
ant's only remedy was in damages for the in-  
feriority of the article delivered.—Semble, per  
Burton J. A., assuming that the contract gave  
the purchaser the right of inspection and rejec-  
tion at Hamilton; an acceptance and payment  
for one shipment would not preclude the defend-  
ant from rejecting subsequent shipments of the  
lumber that did not substantially answer the  
contract. *Dyment v. Thomson*, 12 A. R. 659.

T. contracted for the purchase from D. of  
200,000 feet of lumber of a certain size and  
quality, which D. agreed to furnish. No place  
was named for the delivery of the lumber, and it  
was shipped from the mills where it was sawed  
to T. at Hamilton. T. accepted a number of  
carloads at Hamilton, but rejected some because  
a portion of the lumber in each of them was not,  
as he alleged, of the size and quality contracted  
for:—Held, affirming the judgment of the Court  
of Appeal for Ontario, Fournier and Henry, JJ.  
dissenting, that T. under the circumstances of  
the case had no right to reject the lumber, his  
only remedy for the deficiency being to obtain a  
reduction of the price or damages for non-  
delivery according to the contract. *S. C., sub  
nom. Thompson v. Dyment*, 13 S. C. R. 303.

See *Goodall v. Smith*, 46 Q. B. 398, p. 1855;  
*Leggatt v. Clarry*, 13 O. R. 105, p. 1864; *Leid-*

*lay v. McRoberts*, 13 A. R. 378, p. 1855; *Moore v. Gooderham and Worts*, 14 O. R. 451, p. 1864.

### 5. Quantity and Quality.

The defendants, with the knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground though negotiations took place for a reduction in price, on account of delay, etc., but took into stock fifteen out of twenty-five cases sent. The other ten cases remained in bond till they were sold to pay duties:—Held, that there was evidence on which a waiver of any objection as to the excess was properly found. *Goodyear Rubber Co. v. Foster*, 1 O. R. 242.—Q. B. D.

The defendant company agreed to purchase from the plaintiff a quantity of iron called "Depere" iron, the plaintiff to deliver the same as the defendants should require for their works. The plaintiff subsequently without any requisition from the defendants, shipped to them nearly the whole quantity agreed for, of another brand of iron manufactured by a different company, though using the same ore and fuel and making the same grade of iron as the Depere Company. The defendants refused to accept the iron offered:—Held (affirming 31 C. P. 475), that the defendants were not bound to accept the iron so tendered, neither could the plaintiff recover the value thereof, the iron being a different article from that contracted for. *Hedstrom v. Toronto Car Wheel Co.*, 8 A. R. 627.

The defendant purchased from the plaintiff a car load of "No. 1 green hoops," to be delivered at the railway station. On their arrival at the station they were removed by the defendant to his own place and some of the hoops used by him, but merely, as he said, for the purpose of testing them. He then wrote to the plaintiff that he was astonished at his sending dry and rotten hoops for first-class green hoops, and if he, defendant, had seen them before they were at his place he would not have touched them; that there were less in the car than the number stated by the plaintiff; that he enclosed a bill which was the amount he intended to pay, and not a cent more, because they were not worth that; and if the plaintiff would accept the amount offered to let the defendant know by return mail, and he would remit. In answer, the plaintiff through his solicitor, threatened a suit, when the defendant replied that if plaintiff would not accept this he might go on and sue:—Held, there was evidence to go to the jury of an acceptance of the hoops, and an agreement to pay on a quantum meruit. *McClure v. Kreutziger*, 6 O. R. 480.—C. P. D.

In an action for the price of 810 tons of coal the defendants pleaded delivery of only 755 tons and tendered the price of that quantity which was refused. At the trial it was proved that defendants agreed to take the coal as per bill of lading without having it weighed. They caused it to be weighed, however, in their own yard without notice to the vendors and it was found to consist of only 755 tons, and about three weeks after receiving the bill of lading they claimed a reduction for the deficiency:—Held, Fournier and Henry, J.J., dissenting, that the defendants had no right to refuse payment for

the cargo on the grounds of deficiency in the delivery, considering that the weighing was made by them in the absence of, and without notice to, the plaintiffs and at a time when the defendants were bound by the option they had previously made of taking the coal in bulk. *V. Hudson Cotton Co. v. Canada Shipping Co.*, 13 S. C. R. 401.

The defendant ordered a quantity of boots from plaintiff at Montreal, through G., plaintiff's agent, who showed defendant samples, some being known in the trade as "solid leather," and others as "shoddy." The defendant said he bought what was represented as solid leather, while G. said he sold by sample, and that the boots were in accordance therewith. The order was given in September, and parts delivered respectively in October and November, and the balance somewhat later. The defendant said he complained, in October, and again some three weeks later, to G. of the quality of the boots, and that he would ship them back, when G. told him to do so. The defendant said he shewed G. a pair of the boots which had turned out badly, and G. said as he was going to Montreal he would shew them to the plaintiff. On G.'s return he told defendant that if there were any more like that to send them all back. In January the defendant went to Montreal and asked for an extension of time for payment, to see if the goods turned out all right, which the plaintiff refused to give, when defendant said if they did not turn out right he would return them. The boots were taken into stock and a large quantity sold; but a few pairs were returned. In February the defendant claimed to be entitled to return the boots as not answering the contract. There was no evidence to shew what defendant's loss was; and the whole evidence was conflicting. It was urged that the defect was a latent one, and therefore not discoverable by ordinary inspection and examination. The defendant accepted four bills of exchange in payment of the price, one of which he paid after maturity. In an action on the other three the defendant denied his liability thereon; and also counter-claimed for damages. The judge at the trial found for the plaintiff on the bills, and dismissed the counter-claim, without prejudice to the defendant bringing a fresh action for damages:—Held, that the finding as to the bills was correct, as there was unquestionably a good consideration therefor; and defendant's remedy, if any, must be on his counter-claim; but, in the absence of any evidence of loss, there could be no judgment thereon; and also, if the judge at the trial had decided on the conflicting evidence the court might not be able to interfere. The right, however, conceded, of bringing a fresh action, placed the defendant in as favourable a position as he could expect. *Liggatt v. Clarry*, 13 O. R. 105.—C. P. D.

Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description. On a sale of goods when the buyer has no opportunity of inspection, the maxim caveat emptor does not apply. *Moore v. Gooderham and Worts (Limited)*, 14 O. R. 451.—Ferguson.

deficiency in the weighing was of, and without a time when the option they had in bulk. *V. Shipping Co., 13*

quantity of boots through G., plaintiff's samples, some "solid leather," the defendant said as solid leather, and that the with. The order parts delivered November, and the defendant said he again some three of the boots, and when G. told said he shewed had turned out going to Montreal plaintiff. On G.'s if there were any all back. In January, Montreal and asked payment, to see if which the plaintiff said if they could return them. Stock and a large were returned. imed to be entitled answering the con- ce to shew what the whole evidence d that the defect e not discoverable examination. The of exchange in pay- ich he paid after he other three the heron; and also The judge at the on the bills, and without prejudice fresh action for ling as to the bills estionally a good fendant's remedy, claim; but, in the ss, there could be o, if the judge at onflicting evidence o interfere. The bringing a fresh as favourable a *Leggatt v. Clarry,*

The plaintiffs agreed to deliver to the defendants a quantity of Staffordshire Crown Bar iron of the T. K. brand. A part of the iron was delivered to the defendant, of which a considerable quantity was unbranded; the defendants, however, did not treat the absence of the brand as creating a difficulty in the way of their accepting the iron, but proceeded to test it, and finding it unsatisfactory, declined to receive any more, or to pay for the whole or part. This action was then brought for the contract price of the whole. The jury found that the iron was merchantable, but not equal in quality to the standard T. K. Crown brand:—Held, that the duty of the plaintiffs under the contract would have been performed if they had supplied to the defendants merchantable iron bearing on its face the genuine brand contracted for; but in the absence of that authentication, and having regard to the conduct of the defendants, the contract must be taken to be one for the sale of iron manufactured by the T. K. Co., of the quality usually indicated by the Crown brand, and so the defendants would have the right to test it, and according to the findings of the jury would have been justified in rejecting it all; and the fact that the portion which was branded was below the standard, did not estop the defendants from shewing that the portion which was unbranded was also below the standard. But:—Held, that the defendants, having used in the manufacture of their machines, after the doubtful quality of the iron had been brought to their notice, and without the consent of the plaintiffs, a considerable quantity of what had been delivered to them as part of an entire contract, had precluded themselves from objecting to the remainder of that which came into their possession. Held, also, that the property in the part of the iron which was not delivered to the defendants, must be taken to remain in the plaintiffs; for defendants had never exercised their right to test it, and had refused to receive it, and until tested the plaintiffs could not compel the defendants to accept it. The action was treated as one for the price of iron which the defendants accepted, and for damages arising from their refusal to accept the remainder, and, in accordance with the findings of the jury, which in the opinion of this court, were sustained by the evidence, judgment was entered for the plaintiffs for the actual value of the part of the iron delivered only (the damages having been negatived by the jury), and for the defendants upon their counter-claim for damages sustained from the breach of contract, other than by reason of the inferior quality of the iron; and the plaintiffs were allowed the costs of the action, and the defendants the costs of the counter-claim. *Bertram v. Massey Manufacturing Co., 15 O. R. 516.*—Q. B. D.

See *Exchange Bank v. Stinson*, 32 C. P. 158, p. 1870; *Dymont v. Thompson*, 9 O. R. 566; 12 A. R. 659; 13 S. C. R. 303, p. 1862.

#### 6. Right of Selection.

The plaintiffs in the beginning of January, 1880, had purchased through C. & G. of Montreal, a quantity of rails, and requiring 2,000 tons more, negotiations were entered into between H., the plaintiff's agent, C. & G., and the de-

fendant, which resulted in a note being signed on the 14th January addressed to the defendant advising him that they had sold to the plaintiffs on the defendant's account 2,000 tons of rails (56 lbs. to the yard) at £8.18s. 9d. stg., per ton payment to be made in London against documents, and credit to be there opened with approved bankers in favour of defendant's agent. The defendant, who was then in Montreal, signed a sale note in similar terms to the above. The sale was immediately communicated to the plaintiffs, who signed a confirmatory note, adding the words that the make should be either Ebbwvale or Moss Bay, and wrote across the face that the rails were to be 56 lbs. "ordinary section and specification." This confirmatory note was not communicated to the defendant until after action brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in and not manufacturers of rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbwvale for the manufacture of rails of a section known as "Hamilton & North-Western," and which came within the terms, "ordinary section," by which a number of different kinds of sections were embraced; and these were the rails which the defendant intended delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary section," and when they discovered the defendant's rails were Hamilton and North-Western, they endeavoured to get defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and paid for under the credit, and it was not till afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had the right to name the section:—Held, that even if the confirmatory note were embraced in the contract, it did not give the plaintiffs the right of selection; that parol evidence was not admissible to add such a term to the contract; and that the evidence failed to establish any usage giving such right, especially as the parties were dealers and not manufacturers, and in view of the plaintiff's conduct in the matter, and that the contract was therefore performed by the section delivered. *Page v. Proctor*, 5 O. R. 238.—C. P. D.

#### 7. Change of Place of Delivery.

The defendants agreed to sell to the plaintiff a quantity of tow, to be delivered in the United States at a "Boston point," that is, a point to which the freight charged was the same as to Boston, Mass. Both parties contemplated the route from the Suspension Bridge as that by which the tow would be sent, and Bellows Falls, Vt., a Boston point on that railway system, was the place named by the plaintiff, but subsequently he desired to have the tow sent to Franklin, N. H., which was not a Boston point on that railway system, and he agreed to pay the arbitrary or extra freight, which he supposed was five cents per 100 pounds. The defendants accordingly consigned the goods to "Franklin,

N. H.," and in the ordinary course of transport they were taken to Boston, and thence to Franklin, N. H., where they were received by the plaintiff subject to railway charges greatly exceeding the five cents per 100 pounds. It happened that Franklin was a Boston point upon the lines of railway with which the Grand Trunk Railway connected at St. Albans, and the defendants had on one occasion shipped two car loads from stations of the Grand Trunk Railway by that route, but in consequence of delays at the St. Albans custom house, the plaintiff wrote directing the defendants to ship by the Suspension Bridge:—Held, that by their contract the defendants were not bound to ship to Franklin, N. H., which was not a Boston point within the contract; and that under the circumstances the plaintiff, and not the defendants, was bound to pay the extra freight. The judgment of the Queen's Bench Division affirmed; that of the Common Pleas Division reversed. *Symmers v. Livingstone*, 10 A. R. 355.

### 8. Breach of Conditions as to Shipping.

The plaintiff purchased a quantity of lambs from the defendant to be consigned to plaintiff's firm at Buffalo, which condition plaintiff stated he inserted in the contract "to help our business, \* \* and to help build the firm up," the firm being a new one. Defendant disregarded this condition and shipped the lambs to another name, and plaintiff refused to accept delivery. In an action for the deposit paid at the time of the contract and for damages, it was:—Held (affirming *Rose, J.*), that the term of the bargain as to the matter of consignment was a material part of it; material to the plaintiff as the defendant well knew, and following *Bowes v. Shand*, 2 App. Cas. 455, that the plaintiff must succeed. *Norrington v. Wright*, 115 U. S. Rep. 188, specially referred to. *McLean v. Brown*, 15 O. R. 313.—Chy. D.; 16 A. R. 106.

### III. VENDOR'S TITLE.

See *Stoesser v. Springer*, 7 A. R. 497, *infra*; *Forristal v. McDonald*, 9 S. C. R. 12, p. 1859.

### IV. RESCINDING CONTRACT.

M. by false representations induced T. to sell him a horse, buggy and harness, and to take for them two promissory notes. T. having discovered the fraud, went and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M., however, that on the following Tuesday he would bring the property or satisfaction, T. again took the notes and went away. M. did not appear as he had promised, and T. sued out a writ of replevin against M. but before it had been executed M. sold the property to the plaintiff, an innocent purchaser who having been deprived of it under the replevin, brought trover against the sheriff:—Held, that the plaintiff was entitled to recover; that the contract had not been disaffirmed when the writ of replevin issued, and that the mere issue of it was no notice to M. of disaffirmance, and could not affect the plaintiff. *Stoesser v. Springer*, 7 A. R. 497.

The defendants contracted to purchase a quantity of old iron rails from the plaintiff company, to be paid for as each 100 tons were delivered. The plaintiffs consigned 1,150 tons out of 1,300 tons stipulated for, and drew for the amount thereof at the agreed price, which draft the defendants refused to accept under the erroneous belief that a portion of the iron charged for had not been received by them, and informed the plaintiff company of the ground of their refusal to accept the draft:—Held, affirming the judgment of the Q. B. D. O. R. I, that this refusal to accept was not, under the circumstances, such an act as to warrant the plaintiffs in treating it as a repudiation of the contract, or such as would release the plaintiffs from a further performance of it. What would amount to such a repudiation considered. *Midland Railway Co. v. Ontario Rolling Mills*, 10 A. R. 677.

H., doing business at Halifax, N. S., was accustomed to sell hides to J. L. of Pictou. Their usual course of business was for H. to ship a lot of goods consigned to J. L., and send a note for the price according to his own estimate of weight, etc., which was subject to a future rebate if there was found to be any deficiency. On 14th July, 1884, a shipment was made by H. in the usual course and a note was given by J. L., which H., caused to be discounted. The goods came from Pictou Landing and remained there until August 5th, when J. L. sent his lighterman for some other goods and he finding the goods shipped by H. brought them up in his lighter. The next day J. L. was informed of their arrival and he caused them to be stored in the warehouse of D. L. where he had other goods, with instructions to keep them for the parties who had sent them. The same day he sent a telegram to H. as follows: "In trouble. Have stored hides. Appoint some one to take care of them." H., immediately came to Pictou and having learned what was done, expressed himself satisfied. He asked if he would take them away, but was assured by J. L. that they were all right and left them in the warehouse. On 6th August, a levy was made, under an execution of the Pictou Bank against J. L., on all his property that the sheriff could find, but the goods in question were not included in the levy. On 12th August J. L. gave to the bank a bill of sale of all his hides in the warehouse of D. L., and the bank indemnified D. L. and took possession under such bill of sale of the hides so shipped by H. and stored in said warehouse. In a suit by H. against the bank and D. L. for the wrongful detention of such goods:—Held, affirming the judgment of the court below, that the contract of sale between J. L. and H. was rescinded by the action of J. L. in refusing to take possession of the goods when they arrived at his place of business and handing them over to D. L. with direction to hold them for the consignor, and in notifying the consignor who acquiesced and adopted the act of J. L., whereby the property in and possession of the goods became revested in H.; and there was, consequently, no title to the goods in J. L. on the 12th August when the bill of sale was made to the bank. *Pictou Bank v. Harvey*, 14 S. C. R. 617.

The plaintiff with the intention of parting with the possession and property in certain flour

purchase a quantity of goods from a certain company, were delivered. On the 1st of 1,300 or the amount of the draft the defendant, the erroneous charge for had informed the of their refusal making the judgment that this refusal instances, such as in treating it et, or such as a further per amount to such a and Railway Co. 3, 677.

ax, N. S., was L. of Pictou, as for H. to ship and send a note own estimate of to a future deficiency. On made by H. in given by J. L., ted. The goods remained there at his lighterman putting the goods in his lighter, formed of their be stored in the had other goods, for the parties day he sent a trouble. Have to take care of to Pictou and alone, expressed he would take J. L. that they the warehouse. made, under an against J. L., on could find, but included in the have to the bank the warehouse of D. L. and took e of the hides so warehouse. In D. L. for the :—Held, affirm- below, that the and H. was res- refusing to take they arrived at ding them over them for the con- signor who ac- J. L., whereby of the goods be- were was, conse- in J. L. on the le was made to rrey, 14 S. C.

tion of parting in certain flour

made an absolute sale of the same on apparent- ly short terms of credit to the defendant who withheld from plaintiff his intention to pay for the flour by setting up a claim he had acquired against the plaintiff:—Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour. *Baker v. Fisher*, 19 O. R. 650.—C. P. D.

See *Brassart v. McKinnon*, 10 O. R. 179, p. 1871.

## V. PROCEEDINGS ON CONTRACT.

### 1. Party Liable.

Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover:—Held, also, that it was open to the defendants to show that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessities did not make the registered owner liable. *Nelson v. Wyle*, 8 O. R. 82.—Boyle.

See *Friendly v. Canada Transit Co.*, 10 O. R. 756, p. 1859; *Miller v. Stephenson*, 16 S. C. R. 722.

### 2. For Non-Delivery or Non-Acceptance.

#### (a) Damages.

On the 7th May, 1874, the appellant sold to the respondent 500 tons of hay. The writing, which was signed by the appellant alone, was in following terms: "Sold to G. A. C. 500 tons of timothy hay of best quality, at the price of \$21 per ton of f. o. b. propellers in canal, Montreal, at such times and in such quantities as the said G. A. C. shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot by order or draft on self, at the Bank of Montreal, the same to be consigned to order of Dominion Bank, Toronto." In execution of this contract, the appellant delivered 147 tons and thirty-three pounds of hay, after which the respondent refused to receive any more. The appellant having several times notified the respondent, both verbally and in writing, by formal protest on the 28th July, 1874, requested him to take delivery of the remaining 354 tons of hay. On the 11th of November following, the appellant brought an action of damages for breach of contract, by which he claimed \$3,417.77, to wit, \$2,471 difference between the actual value of the hay at the date of the protest and the contract price, and \$943.77 for extra expenses which the appellant incurred, owing to the refusal of the respondent to fulfil his contract:—Held, that such a contract was to be executed within a reasonable time, and that, from the evidence of the usage of trade, the delivery, under the circumstances, was to be made before the new crop of hay, and that the respondent, being in default to receive the hay when required, was bound to pay the

damages which the appellant had sustained, to wit, the difference at the place of delivery between the value when the acceptance was refused and the contract price, and other necessary expenses, the amount of which, being a matter of evidence, was properly within the province of the court below to determine. *Chapman v. Larin*, 4 S. C. R. 349.

On the 9th of July, 1885, the plaintiff, a cattle dealer, bought from defendant forty-two head of cattle for \$2,772, and paid \$200 on account, the defendant to retain the animals on his pasture until in a condition fit for the English market, for which they were to the knowledge of the defendant purchased by the plaintiff. The defendant insisting that he was bound to retain the cattle until the 20th of August only, on the 18th September, wrote to the plaintiff, requiring him to "settle for the cattle and take them away before the 27th instant, or I will sell the cattle again to get my money out of them." The plaintiff, not having acted upon this notice, the defendant on the 5th of October sold forty of the cattle at a loss, and refused to refund the deposit. In an action brought by the plaintiff, the evidence, as to the exact terms of the contract, was contradictory, but the jury found in favour of the plaintiff's version, and gave a verdict for the full amount of deposit, which on a motion made in term, the judge of the County Court refused to disturb. On appeal, this court being of opinion that the plaintiff could waive the breach of contract and simply sue for recovery of the money paid, affirmed the judgment of the court below, with costs. *Murray v. Hutchinson*, 14 A. R. 489.

See *McClure v. Krentzeiger*, 6 O. R. 480, p. 863; *Dymott v. Thomson*, 9 O. R. 566, 12 A. R. 659; 13 S. C. R. 303, p. 1862; *Bertram v. Munsey Manufacturing Co.*, 15 O. R. 516, p. 1865.

#### (b) Other Cases.

Held that to an action by an assignee of an account for the price of lumber and staves delivered by the assignor to the defendant under two certain contracts therefor, the defendant under R. S. O. (1877), c. 116, ss. 7, 10 and the Judicature Act, ss. 12, 16, and Rule 127, (Con. Rule 373) can set up as a defence a claim for damage for the non-delivery by the assignor to the defendant of certain other timber and staves specified in the contracts, and for the inferior quality of those delivered. Per Osler, J., his right to do so depended wholly upon R. S. O. (1877) c. 116, s. 10. In this case the judge, at the trial, having refused to entertain the former defence, a new trial was ordered. *Exchange Bank v. Stinson*, 32 C. P. 158.—C. P. D.

See *Midland R. W. Co. v. Ontario Rolling Mills Co.*, 2 O. R. 1; 10 A. R. 677, p. 1868.

## VI. STOPPAGE IN TRANSITU.

The plaintiffs, merchants in Boston, sold and consigned goods to J. C. & Son, in Toronto. While the goods were held by the railway company in T., J. C. & Son assigned to the defendant as trustee for the benefit of creditors. The



defendant, immediately after the assignment, passed and entered the goods, and paid the duty thereon, and the railway company removed the goods from the customs warehouse to their freight sheds, where they remained, and delivery was refused to the defendant for non-production by him of a bill of lading, and the freight was not paid or tendered. The plaintiffs having stopped the goods:—Held, that the transitus was not at an end, for that the railway company continued to hold the goods as carriers, and not as agents for the defendant. The plaintiffs had, before they stopped the goods in transitu, proved their claim for the goods on the estate of J. C. & Son:—Held, that this did not deprive them of their rights as lien holders, or affect their right to stop the goods in transitu. *Morgan Envelope Co. v. Bonstead*, 7 O. R. 697.—Q. B. D.

Per Cameron, C. J., stoppage in transitu does not rescind a contract on the sale of goods, but merely gives the vendor a lien on the goods for their price. *Brusart v. McEwen*, 10 O. R. 179.

H., of Souris P. E. I., carried on the business of lobster packing, sending his goods to M., of Halifax N. S., who supplied him with tin plates, etc. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef via Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou to the freight agent of the I. C. R. or his assigns, the freight to be payable in Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptance. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax for the goods, and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent:—Held, affirming the judgment of the court below, Henry, J. dissenting, that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them:—Held, also, that whether or not a legal title to the goods passed to McM. the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them. *McDonald v. McPherson*, 12 S. C. R. 416.

The plaintiff sold to G. a quantity of leather, which was to be sent to the purchaser at P. by railway. The shipping bill contained, amongst others, the following conditions: "In all cases \* \* \* the delivery of goods will be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse, \* \* \* when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk," who was to be liable for any charges for storing them otherwise than in the warehouse of the

company. "Storage will be charged on all freight remaining in the depots over forty-eight hours after its arrival." While the leather remained in the warehouse of the railway company at P., the purchaser requested the station agent that it might be kept for him by the company until he could find time to remove it, and asked him not to charge storage, but the agent made no promise; and subsequently the sheriff paid the charges thereon, seized the leather under a writ of attachment sued out by the defendants, and removed the same from the stores of the railway company to the shop of G.:—Held, that this did not deprive the vendor of his right to stop the goods in transitu. *McLean v. Breithaupt*, 12 A. R. 383.

The defendants, unpaid vendors of goods, shipped them over the Grand Trunk Railway to the vendee at W. When the goods arrived the railway company's agent at W. sent an advice notice to the vendee, who refused to take it. After this the vendee assigned to the plaintiff for the benefit of his creditors, and the plaintiff as soon as the assignment was delivered to him produced it to the railway company's agent and claimed the goods, offering to pay the freight, but producing no advice notice. The agent did not refuse to deliver the goods, but stated that, according to the rules of the company, when the person claiming the goods was an assignee for the benefit of creditors, his duty was to telegraph to the company's solicitor for instructions; he did so telegraph, but before he received an answer and on the same day the defendants notified him not to deliver the goods to the vendee or his assignee, assuming a right to stop them in transitu:—Held (Falconbridge, J. dissenting), that the action of the railway company's agent in delaying till he received instructions was not wrongful; that the transitus was not at an end when the defendants intervened, and the right of stoppage was well exercised. *Anderson v. Fish*, 16 O. R. 476.—Q. B. D. Affirmed on appeal, 17 A. R. 28.

## SALE OF LAND.

### I. STATUTE OF FRAUDS.

1. *Note or Memorandum*, 1874.
2. *Part Performance*, 1876.

### II. CONTRACT OF SALE.

1. *By Letters or Telegrams*—See CONTRACT.
2. *Construction*, 1878.
3. *When Time is of the Essence of the Contract*, 1882.
4. *Delivery of Possession*, 1883.
5. *Sale According to Plan*, 1883.
6. *Description of Land*.
  - (a) *Unknown Quantity*, 1884.
  - (b) *Other Cases*—See DEED.
7. *Compensation*.
  - (a) *For Breaches in Carrying out Contract*, 1884.
  - (b) *For Misrepresentation in Advertisement of Sale by Auction*, 1885.

charged on all over forty-eight the leather railway company the station agent by the company over it, and asked the agent made the sheriff paid leather under a the defendants, the stores of the G.:—Held, that of his right to *McLean v. Brith*.

ndors of goods, Prunk Railway to goods arrived the sent an advice used to take it. l to the plaintiff and the plaintiff delivered to him pany's agent and pay the freight. The agent did but stated that, company, when was an assignee his duty was to citor for instruc- it before he re- same day the de- liver the goods to taining a right to Falconbridge, J., who railway com- received instruc- the transitus was ants intervened, well exercised. 476.—Q. B. D.

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8. *Interest and Taxes, 1885.*
9. *Deed*—See DEED.
10. *Mortgage or Sale*—See MORTGAGE.
11. *Covenants on Sale*—See COVENANT—COVENANTS FOR TITLE.
12. *Fraud and Misrepresentation*—See FRAUD AND MISREPRESENTATION.
13. *Specific Performance*—See SPECIFIC PERFORMANCE.
14. *Purchase of Trust Property by Trustees*—See TRUSTS AND TRUSTEES.
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### III. TITLE.

1. *Good Title, 1886.*
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  - (c) *Discharge of by Vendor, 1890.*
4. *Evidence of Title, 1890.*
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8. *Compensation for Improvements under Mistake of Title*—See IMPROVEMENTS ON LAND.
9. *Covenants for Title*—See COVENANTS FOR TITLE.
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11. *Applications under R. S. O. c. 109—See VENDORS AND PURCHASERS' ACT.*
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### IV. PREPARATION AND TENDER OF DEED, 1894.

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#### VI. RESCINDING SALE.

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#### VII. SALES FOR TAXES—See ASSESSMENT AND TAXES.

#### VIII. SALE OF CROPS—See CROPS.

#### IX. CROWN LANDS—See CROWN LANDS.

#### X. DOWER—See DOWER.

#### XI. EXCHANGE OF LANDS—See EXCHANGE.

#### XII. SALE UNDER EXECUTION—See EXECUTION.

#### XIII. SALE BY EXECUTORS AND ADMINISTRATORS—See EXECUTORS AND ADMINISTRATORS.

#### XIV. FIXTURES—See FIXTURES.

#### XV. MARRIED WOMEN'S PROPERTY—See HUSBAND AND WIFE.

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#### XVII. LANDLORD GIVING FALSE NOTICE OF SALE—See LANDLORD AND TENANT.

#### XVIII. SALE UNDER POWERS IN MORTGAGE—See MORTGAGE.

#### XIX. SALE IN PARTITION PROCEEDINGS—See PARTITION.

#### XX. SALE UNDER ORDER OF THE COURT—See SALE OF LAND BY ORDER OF THE COURT.

#### XXI. SALE TO OR BY RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

#### XXII. SALE OF TIMBER—See TIMBER.

#### XXIII. SALE BY TRUSTEES—See TRUSTS AND TRUSTEES.

### I. STATUTE OF FRAUDS.

#### 1. Note or Memorandum.

Where a written agreement for the sale of land contained the following condition of sale, "The vendor shall have the option of a reserved bid which is now placed in the hands of the auctioneer," and the reserve bid was worded as follows, "Re sale of Allan Wilnot's farm, reserved bid, \$105 per acre:"—Held, that the above words, even though read together as they should be, did not so identify the vendor as to satisfy the Statute of Frauds. "Vendor" is not a sufficient description of the party selling to satisfy the requirements of the said statute. *Wilnot v. Stalker*, 2 O. R. 78.—Boyd.

A., whose wife owned a certain freehold property on St. George street, wrote to B. the owner of a certain leasehold property on King street, with reference to the said properties as follows: "If you will assume my mortgage, and pay me in cash \$3,700, I will assume your mortgage of \$5,000 on the leasehold:" and B. replied, "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms:"—Held, affirming the judgment of Ferguson, J. (2 O. R. 609) not a sufficient memorandum of the contract to satisfy the Statute of Frauds. (Armour, J., doubting.) *McClung v. McCracken*, 3 O. R. 596.—Q. B. D.

Per Proudfoot, J.—It being proved that the former will in this case was made pursuant to an alleged agreement that will might be considered as evidence of the agreement, and was evidence in writing sufficient to satisfy the Statute of Frauds. *Campbell v. McKerricher*, 6 O. R. 85.

At a tax sale of land, J. R. R. and T. A. K., finding there would be a contest between them for lots 1118 and 1119, signed an agreement, with their initials in the margin at the bottom of the page of the Gazette, containing the list of lands to be sold as follows:

Mr. J. R. R.  $\frac{1}{2}$  } We buy on joint acc't { J. R. R.  
of 1118, and 1119 sh- {  
Mr. T. A. K.  $\frac{1}{2}$  } riff's Nos. above. { T. A. K.

The sheriff's numbers had not been printed in the Gazette, but T. A. K. had prefixed them in ink to most of the parcels on that page of the Gazette, including Nos. 1118 and 1119. It was not stated anywhere in that list that these num-

bers were sheriff's numbers. J. R. R. having bid for the lots, and afterwards caused them to be conveyed to B., T. A. K. now brought this action against J. R. R. and B., claiming specific performance of the above agreement, and a declaration that J. R. R. and B. were trustees for him of an undivided moiety of the lands:—Held, affirming the decision of Proudfoot, J., that the above constituted a sufficient memorandum of the agreement within the Statute of Frauds. The manner of paying the amount of taxes, or by whom payment was to be made, was not one of the essentials of the contract as between the parties. The implication of law would be that whoever paid so as to complete the sale should have contribution of a moiety from the other:—Held, further, that the defendant appealing not having pleaded the defence of the statute, could not claim the benefit of it:—Held, also, that the above agreement was not illegal, nor did it make any difference that it was a tax sale. *Keefer v. Roaf*, 8 O. R. 69.—Chy. D.

The plaintiff who was mortgagee of certain lands, alleged that L., the present holder of the mortgage, purchased it from C. with knowledge of the fact that C. had purchased it from the original mortgagee as trustee for the plaintiff, who was to be allowed to redeem on paying whatever C. should pay for the mortgage, and a certain additional sum for C.'s services; and sought to redeem on payment of what was due under the said agreement with C.:—Held, that the above agreement fell within the Statute of Frauds, and should be evidenced in writing:—Held, also, that even if this were not so, L. could not be affected by such agreement, having purchased without notice of it. *Wright v. Leys*, 8 O. R. 88.—Chy. D.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote, "Re S.'s purchase, we would like to close this." And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. \* \* \* Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and on a subsequent occasion: "Re S.'s purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote, "I shall take immediate steps to enforce the contract":—Held, affirming the judgment of the courts below (28 Chy. 207; 8 A. R. 161), that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds. *O'Donohoe v. Stammers*, 11 S. C. R. 353.

C. verbally agreed with an agent of W. at Toronto to buy land in Manitoba, paying the agent ten per cent. of the purchase money, and taking his receipt therefor. C. signed the receipt as a witness, made an affidavit of execution, and registered it, in order, as he swore, to bind the bargain. The vendor's name did not

appear in the receipt, but there was a reference in it to a telegram sent to the vendor, which was produced and shown to be addressed to W. The plaintiff was the owner of the land, W. being merely his agent, but W. subsequently executed in his own name a conveyance of it to C., who also signed it:—Held, that the affidavit made by C., the receipt and the telegram could be read together, and when so read constituted evidence of a contract sufficient to satisfy the Statute of Frauds; and that the receipt could not be objected to as evidence because of a mistake in it as to the price, which was subsequently corrected in the deed:—Held, also, affirming the decision of Ferguson, J., (8 O. R. 316) that the deed executed by W. was sufficient to satisfy the statute, although ineffectual as a conveyance. *McCarthy v. Cooper*, 12 A. R. 284.

An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents who were authorized by the plaintiff to sell the land, and was verbally accepted by the agents. The offer was not addressed to any one, but the book was marked on the back with the initials of the agents. Previous to this offer letters had been written between the defendant and the agents, in which an offer at a lower price was made and refused for the same land. After the second offer was accepted, the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents:—Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these, with the correspondence, constituted a sufficient agreement within the Statute of Frauds to bind the defendant. *Kennedy v. Oldham*, 15 O. R. 433.—Q. B. D.

Held, per Galt, C. J., in this case that the agreements were void under the Statute of Frauds as when they were made the plaintiffs had no lands, and there was nothing in the agreements to shew what lands the defendant was entitled to, or the plaintiffs were bound to convey. *Temperance Colonization Co. v. Fairfield*, 16 O. R. 544. See also, S. C. in appeal, 17 A. R. 205.

Although extrinsic parol evidence may be given to identify one of the parties, it cannot be given to supply information as to the person to whom an offer in a memorandum required to be in writing by the Statute of Frauds was made or for whom it was intended. And where an offer, signed by the defendant, to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance:—Held, also, that an acceptance of the offer beneath the defendant's signature, signed by the plaintiff's assignor, did not cure the defect. *White v. Tomalin*, 19 O. R. 513.—Chy. D. See also *McIntosh v. Moynihan*, 18 A. R. 237.

## 2. Part Performance.

C. C., the plaintiff, alleged that A. C., his father, being the owner of certain land, induced

was a reference to the vendor, which was addressed to W. of the land, W. subsequently conveyed it to that the affidavit in the telegram could read constituted out to satisfy the receipt could because of a mis- which was subse- d:—Held, also, son, J., (8 O. R. W. was sufficient ineffectual as a er, 12 A. R. 284.

was written and offer book kept by authorized by the verbally accept- not addressed to ked on the back

Previous to this between the defen- offer at a lower in the same land. epted, the defen- with the agents of referring in their e defendant had e—Held, that the ad into the offer r, and that these, e constituted a sufficient of fids to bind tham, 15 O. R.

his case that the Statute of Frauds plaintiffs had no n the agreements ant was entitled ound to convey. Fairfield, 16 O. eal, 17 A. R. 205.

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t, to exchange a in any way desig- as supposed to be ended, and such l without extrin- e memorandum: t in writing with- e plaintiff to so that an accept- defendant's signa- main, 19 O. R. osh v. Moghian,

nce.

that A. C., his ain land, induced

him to abstain from enforcing a certain claim, and also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; and A. C. being dead, C. C. now claimed the land as against one to whom A. C. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged:—Held, reversing the decision of Proudfoot, J., that this was not such part performance as to take the case out of the Statute of Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, and not of the person seeking to enforce the contract, and, moreover, did not import a contract, but only indicated a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature:—Quere, whether if it had been proved, which it had not, that A. C. had, by his representations that he had devised the land to C. C., induced him to forego his claim, and to work on the land as alleged, this would have entitled C. C. to succeed. *Campbell v. McKerricher*, 6 O. R. 85.—Chy. D.

To take a case of alleged contract concerning land out of the Statute of Frauds the acts of part performance must be done by the party seeking to enforce the contract, and must be such as to manifest from their nature that there is some contract between the parties touching the land in question, and the proper order of marshalling the evidence in such cases is first to prove the part performance, and so let in parol evidence of the agreement sought to be enforced. *Madison v. Alderson*, 8 App. Cas. 467, followed. *Id.*

Where a person came into possession of real estate as tenant, and it was shewn unequivocally viz., by part payment of the purchase money evidenced by the receipt in terms thereof, that his tenancy was afterwards relinquished, and that his possession, being changed in character by parol contract to purchase, was continued as that of a vendee.—Held, that the possession thus changed was such part performance as took the contract for sale out of the Statute of Frauds. *McGee v. Kane*, 9 O. R. 475.—Chy. D.

A. brought an action against B. for the rents and profits of certain lands, which had belonged to their father who had died intestate, which lands B. had taken and held possession of for several years. On the action being entered for trial an agreement of settlement was arrived at, by which the action was to be stayed upon B.'s granting and releasing to A. his interest in the land, and on B. undertaking to obtain certain releases, etc. B.'s counsel appeared in court when the case was called for trial, and stated that it was settled, and an entry was made in the court minute book, that the case was settled out of court. Subsequently B. required A. to procure certain releases, and although these had not formed part of the settlement, A. agreed to do so, and at great trouble and expense procured the execution of the same ready to be delivered to B. Certain of the releases to be procured by B. were to be executed by married women and infants which he was unable to procure. In an action to compel B. to carry out the settlement, B. set up as a defence the Statute of Frauds; and his inability to obtain the re-

leases:—Held (affirming the judgment of Proudfoot, J.), that the staying of the action was a sufficient part performance to take the case out of the Statute of Frauds. An option was given to A. to take a judgment for specific performance, with a reference as to compensation, if B. was unable to procure all the grants and releases he agreed to procure; or a judgment for an account of the rents and profits, the subject of the former action. *Coates v. Coates*, 14 O. R. 195.—C. P. D.

B., a resident of British Columbia, wrote to his sister, in England, that he would like one of her children to come out to him, and in a second letter he said "I want to get some relation here for what property I have, in case of sudden death, would be eat up by outsiders and my relations would get nothing." On hearing the contents of these letters T., a son of B.'s sister, and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not, and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours, answer immediately. (Sgd.) B." Under these circumstances T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death:—Held, affirming the judgment of the court below, that as there was no agreement in writing for the transfer of the property to T., and the facts shewn were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with, and no performance of the contract could be decreed. *Turner v. Perrott*, 17 S. C. R. 283.

## II. CONTRACT OF SALE.

### 2. Construction.

An agreement for the purchase of certain land, after providing for the payment of a certain portion of the purchase money, continued as follows: "The remaining \$1,900 (after deducting the amount due to the Crown), payable in instalments of \$100 each, without interest, on 1st April in each year, during nineteen years," and the purchaser to secure by mortgage "the residue or sum of \$1,900 (less the amount due to the Crown) payable as aforesaid." It was not then known exactly how much was due to the Crown, but it was soon after ascertained to be \$364:—Held, the true meaning of the above agreement was that the amount due to the Crown was to be subtracted from the \$1,900, and the balance paid in instalments of \$100 each on 1st April in each year until the whole of such balance should

be paid. *Wolfe v. Hughes*, 1 O. R. 322.—Ferguson.

On the 7th December, 1874, T. G., by a promise of sale, agreed to sell a farm to D. M., then a minor, for \$1,200—of which \$500 were paid at the time, balance payable in seven yearly instalments of \$100 each, with interest at seven per cent. D. M. was to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed of sale if instalments were paid as they became due, "but if, on the contrary, D. M. fails, neglects, or refuses to make such payments when they come due, then said D. M. will forfeit all right he has by these presents to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all moneys already paid, and which hereafter may be paid, which said moneys will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee." After D. M. became of age he left the country without ratifying the promise of sale, he paid none of the instalments which became due, and in 1879 T. G. regained possession of the farm. In October, 1880, D. M. returned and tendered the balance of the price, and claimed the farm:—Held, reversing the judgment of the court below, (Strong and Taschereau, JJ., dissenting), that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately, on the failure of the performance of the condition, ipso facto changed the relation of the parties from vendor and vendee to lessor and lessee. *Grange v. McLennan*, 9 S. C. R. 385.

By an agreement for the sale of land for \$60,000, \$4,000 was to be paid on execution of the agreement, \$40,795 within sixty days thereafter and the balance to remain on mortgage. The purchasers paid the \$4,000 but refused to pay the \$40,794, to recover which this action was brought:—After the expiration of the sixty days the vendor instituted proceedings to recover the amount agreed to be then paid, and at the trial, Cameron J., directed judgment to be entered for the defendants with liberty to the plaintiff to bring a fresh action which, by an order of the Divisional Court, was set aside (2 O. R. 573). On appeal, this court, (Hagarty, C. J. O., dissenting), discharged that order with costs. Per Burton and Patterson, JJ. A.—The agreement to convey the lands, and that to pay the money at the expiration of sixty days were not mutual but dependent, so that the vendor before being entitled to recover the purchase money must shew that he was ready, willing and able to convey, and that the purchaser, until he did so, could not be called on to pay his money and rely on the ability of the vendor to convey the estate, or in the event of his being unable to do so, look to him for repayment. Per Rose, J.—Without determining that point expressly, the neglect and delay of the vendor to take the necessary steps to show his title to the lands, part of which the vendor admitted was vested in one Y., were such as dis-

entitled him to call for payment, and therefore that the finding of the judge at the trial was correct:—Held, by the Common Pleas Division, that the provision as to the mortgage not stating when it was to be payable did not render the agreement void for uncertainty. *McDonald v. Murray*, 11 A. R. 101. See *Armstrong v. Auger*, 21 O. R. 98.

On 2nd May, 1882, the plaintiff by agreement under seal sold certain land to defendant for \$836, \$156 to be paid on the execution of the agreement and the balance without interest on 1st January, 1883, the defendant covenanting to pay accordingly; and in consideration thereof the plaintiff covenanted to convey or cause the land to be conveyed in fee simple to defendant, free from incumbrances, and to permit defendant to occupy same until default. By the agreement defendant also might assume possession, and might collect the rent then due from M., the tenant of the premises, and make arrangements with him for giving up possession. Defendant took possession, but was turned out by M., who claimed the land and registered a lis pendens against it. Defendant in April, 1883, recovered judgment in ejectment against M., when M.'s solicitors undertook to, and on 17th October, 1883, did remove the lis pendens. In an action brought by plaintiff on 12th October, 1883, for the recovery of the purchase money:—Held (per Cameron, C. J.), following *McDonald v. Murray*, 2 O. R. 573 (but see S. C. 11 A. R. 101, supra), that shewing a good title was not a condition precedent to the recovery of the purchase money; and moreover the plaintiff's covenant was to convey or cause to be conveyed. Per Rose, J., that apart from *McDonald v. Murray*, the plaintiff was entitled to recover, for as the judgment in the ejectment action disposed of the lis pendens, which could be removed for \$5 or \$10, was no answer to the plaintiff's claim. The defendant also counter-claimed, setting up an agreement by plaintiff to pay the ejectment costs; and also claiming damages for being kept out of possession:—Held, that to entitle the defendant to recover these costs an unqualified promise to pay should be shewn, which the evidence failed to do; but as plaintiff admitted he intended to pay a portion of them he was charged with half the costs; and he was disallowed interest for the time defendant was kept out of possession. *McCrae v. Backer*, 9 O. R. 1.—C. P. D.

B. sold to C. land mortgaged to a loan society. The consideration in the deed was \$1,400 and the sum of \$104 was paid to B. C. afterwards paid \$1,081 and obtained a discharge of the mortgage. B. brought an action to recover the balance of the difference between the amount paid the society and said sum of \$1,400, and on the trial he testified that he intended to sell the land for a fixed price; that he had been informed by W., father-in-law of C., that there would be about \$300 coming to him; that he had demurred to the acceptance of the sum offered, \$104, but was informed by C. and the lawyer's clerk, who drew the deed, that they had figured it out and that was all that would be due him after paying the mortgage; that he was incapable of figuring it himself and accepted it on this representation. C. claimed that the transaction was only a purchase by him of the



and therefore a trial was cor- Division, that stating when the agreement v. Murray, 11 r, 21 O. R. 98.

by agreement defendant for ceution of the at interest on covenanting to ration thereof y or cause the to defendant, permit defend- ult. By the assume posses- hen due from and make ar- up possession. as turned out registered a lis n April, 1883, t against M., and on 17th pendens. In 12th October, ase money:— ing McDonald S. C. 11 A. R. title was not recovery of the the plaintiff's be conveyed. Donald v. Mur- recover, for as ion disposed of the existence of moved for \$5 plaintiff's claim. setting up an the ejectment for being kept to entitle the an unqualified n, which the ntiff admitted then he was l he was dis- dant was kept ecker, 9 O. R.

a loan society. us \$1,400 and C. afterwards charge of the to recover the n the amount \$1,400, and on ended to sell he had been C., that there him; that he of the sum y C. and the ed, that they all that would age; that he and accepted med that the y him of the

equity of redemption, and that B. had accepted \$104 in full for the same:—Held, reversing the judgment of the Court of Appeal, Taschereau and Gwynne, JJ., dissenting, that the weight of evidence was in favour of the claim made by B., that the transaction was an absolute sale of the land for \$1,400; and independently of that, the deed itself would be sufficient evidence to support such claim in the absence of satisfactory proof of fraud or mistake. *Burgess v. Conway*, 14 S. C. R. 90.

On the 5th June the plaintiff executed an agreement whereby he agreed to purchase from defendant a lot in Winnipeg, at and for the sum that might be placed thereon by D., provided, that if the price exceeded \$6,000, the excess should be secured by the plaintiff by mortgage on the property. The sum so fixed to be paid by plaintiff "deeding" to the defendant his interest in certain lots in Toronto. On the same day defendant executed an agreement whereby he agreed to purchase the plaintiff's interest in the Toronto lots for \$6,000, the defendant to pay the interest and taxes to date, but to deduct same out of the \$6,000. The Toronto property was conveyed to the defendant who entered into possession and paid off the mortgages on it. The defendant refused to convey the Winnipeg property except for \$8,000, at which sum he contended D. had valued same, but the evidence shewed that D. had declined to make any valuation. The defendant also refused to appoint another valuator. In an action to recover from defendant the sum of \$6,000, the plaintiff intimated he would accept a conveyance of the Winnipeg property in settlement of his claim on defendant paying the costs:—Held, that unless the defendant accepted the offer, then there should be judgment for the plaintiff for the \$6,000, less \$838.28 paid for interest and taxes:—Semble, that the two agreements must be deemed to be independent:—Held, also, that this was not a case for specific performance nor for rescission. *Proctor v. Mulligan*, 13 O. R. 683.—C. P. D.

McM., in building a house, by mistake built part of it on the land of the adjoining owner B. On discovering this he applied to B. with a view of purchasing a portion of B.'s lot, and B. on 29th July, 1880, wrote: "I hereby offer to sell you twenty five feet frontage for the sum of \$250, to be paid six months from date, otherwise this offer to be null" \* \* and B. accepted such offer at the foot in the words, "I hereby accept the above offer." McM. seven days after registered a plan as No. 327, alleged to be of his own property, but which included the twenty-five feet as part of lot M., and the next day executed a mortgage on lot M., with a description, which included the twenty-five feet, and which was assigned to the defendants the O. S. Co. B.'s offer to sell to McM. was not acted on within the six months limited, and B. afterwards, in January, 1883, sold and conveyed the twenty-five feet (which was called lot 40 on his [B.'s] plan No 306, registered 26th January, 1883), to McM. for \$400, payable \$100 cash and mortgage for \$300, and which mortgage was at the inst. uice of B. taken to his daughter N., the plaintiff. The O. S. Co. subsequently sold under the power of sale in their mortgage to the defendant W. In an action by N. to realize her mortgage, it

was:—Held, (reversing the judgment of Proul-foot, J.), that the original dealing between B. and McM. created no binding contract on the latter, it being merely an option given him; and he not having completed the purchase within six months the subsequent sale and conveyance by B. to McM. was upon a new and distinct contract. No interest in the twenty-five feet (lot 40) passed to the O. S. Co. under McM.'s mortgage, and the subsequent conveyance to him "fed the estoppel" created by his prior mortgage to the extent only of McM.'s interest which was that of owner of the equity of redemption, or owner of the twenty-five feet (lot 40) charged with \$300, and it made no difference that the \$300 mortgage was taken to the plaintiff instead of to B., the effect of the whole transaction being that W. was the owner of lot 40 subject to a first mortgage of \$300 in favour of the plaintiff, and a second mortgage of the O. S. Co. B. having by his dealing with McM. created in him the status of owner, and in the plaintiff that of mortgagee, was not, nor was the plaintiff in a position to complain of the registration of plan 327. *Doe Irvine v. Webster*, 2 Q. B. 234; *Doe Hennessey v. Meyers*, 2 O. S. 424, observed upon. *Necutt v. McMurray*, 14 A. R. 126.

In an agreement for the sale of land it was provided that the cash payment should be made and the mortgage for the balance given "so soon as the solicitors for the purchaser shall be satisfied with the title":—Held, that the meaning of the contract was that payment was not to be required, until such title was shown as would justify the purchaser in taking possession, and following *Wells v. Maxwell*, 32 Beav. 552, that no satisfaction being given as to a prior mortgage affecting the land until two years after the agreement, the purchaser could not prudently take possession until then, and interest on the purchase money should only be allowed from that time. *Re McLean and Walker*, 19 O. R. 161.—Boyd.

See *Van Koughnet v. Denison*, 1 O. R. 349; 11 A. R. 699, p. 421; *McKenzie v. Dwight*, 2 O. R. 366, p. 772; *Kefer v. Rouf*, 8 O. R. 60, p. 1875.

### 3. When Time is of the Essence of the Contract.

Time may be of the essence of a contract even without any express stipulation if it appear that such was the intention. Defendant wrote his agent on 25th March: "If O. (plaintiff) still wants that farm \* \* he can have it for \$350 net, provided it can be arranged at once. Kindly advise me \* \* if he accepts, and when he will pay the money over." On 6th April, the agent telegraphed defendant "O. will take the farm, will pay the money in two weeks," and on 11th April the defendant telegraphed "your offer of 6th comes too late:—Held, that an arrangement between defendant and his agent as to the latter's commission would not affect the net price as between plaintiff and defendant. Held, also, that the enquiry "when will he pay over the money" shewed an intention to give a reasonable time for such purpose, and that under the circumstances two weeks was not an unreasonable time. But:—Held, also, that the acceptance of defendant's offer was not in time. *Oldfield v. Dickson*, 18 O. R. 188.—Rose.

See *Crossfield v. Gould*, 9 A. R. 218, p. 000; *Dainty v. Vidal*, 13 A. R. 47, p. 337.

#### 4. Delivery of Possession.

The delivery to a purchaser of a house of the key thereof is not of itself delivery of possession; it is but a symbolical delivery, and may be evidence of possession if given or received with that view. *Peoples' Loan and Deposit Co. v. Baron*, 27 Chy. 204.—Proudfoot.

Merely obtaining the keys of a building in order to view the premises, so as to estimate alterations intended to be made, and to perform other acts to preserve the premises from deterioration, is not such a taking possession under a contract for sale as will bind the purchaser and render him liable to pay interest on the purchase money. What will be a sufficient taking of possession of a purchased house considered and treated of. *Ib.*

By one of the conditions of sale the purchaser was required to pay a deposit of ten per cent. at the time of sale and the remainder within one month thereafter, and upon such payment the purchaser was to be entitled to a conveyance and to be let into possession of the property purchased.—Held, that under this condition the payment of the purchase money by the purchaser and the delivery to him by the vendor of possession were concurrent acts, and unless the vendor was in a position to put the purchaser in possession he could not be called upon to pay interest on the unpaid purchase money. Neither was he bound in such a case to pay ground rent accruing due upon the property whilst he was so kept out of possession. In such a case, letting a purchaser into receipt of rents and profits is not a compliance with the condition to give the purchaser possession. Under such circumstances the purchaser was held entitled to make a deduction of a proportionate share of the taxes assessed on the premises for the year in which the sale was effected. *Ib.*

See *McCrae v. Backer*, 9 O. R. 1, p. 1880; *Keays v. Enard*, 10 O. R. 314, p. 651; *Manson v. Manson*, 10 P. R. 155, p. 1897; *Barber v. Barber*, 11 P. R. 137, p. 1897.

#### 5. Sale According to Plan.

The city of Toronto offered land for sale, according to a plan showing one block consisting of five lots each, about 200 feet in length running from east to west bounded north and south by a lane of the same length, and east by a lane running along the whole depth of the block, and connecting the other two lanes. South of this block was a similar block of smaller lots, ten in number, running north and south 120 feet each. The lane at the east of the first block was a continuation, after crossing the long lane between the blocks, of lot No. 10 in the second block. The advertisement of sale stated that "lanes run in rear of the several lots." M. became the purchaser of the first block and C. of lot 10 in the second. Before registry of the plan M. applied to the city council to have the lane at the east of the block closed up and included in his lease, which was granted. C. then objected to taking a lease of his lot with the lane closed, but afterwards accepted a lease which described the land

as leased according to plan 380 (the plan exhibited at the sale) and plan 352 (which showed the lane closed; and he brought an action against the city and M. to have the lane reopened:—Held, affirming the judgment of the court below, 11 A. R. 416, which reversed the judgment of Ferguson, J., 7 O. R. 194, that C. having accepted a lease after the lane was closed, in which reference was made to said plan 352, was bound by its terms and had no claim to a right of way over land thereby shown to be included in the lease to M. Held, also, per Gwynne, J., that under the contract evidenced by the advertisement and public sale C. acquired no right to the use of the lane afterwards closed. *Carey v. City of Toronto*, 14 S. C. R. 172.

See *Attrill v. Platt*, 10 S. C. R. 425, p. 487; *Smith v. Millions*, 16 A. R. 140, p. 486; *Carter v. Grassell*, 10 S. C. R. 105, p. 486.

#### 6. Description of Land.

##### (a) Unknown Quantity.

In proceeding to a sale of lands under a decree of the Court of Chancery in 1876, one parcel was advertised as containing 100 acres, and was bid off by one A. at \$31 per acre, which in the agreement to purchase signed by A., as well as in the conveyance to him, was described as "100 acres more or less, composed of the east part of lot 9," etc.: he paying or securing according to the conditions of sale, the sum of \$3,100. In reality the portion so sold contained 124 acres and sixty-eight one-hundredths of an acre, a fact neither party to the transaction was aware of. There was no provision in the conditions of sale for compensation. The purchaser became aware that there was an excess on the same day, immediately after the sale, but the vendors not until long afterwards, though before the execution of the conveyance. In the report on sale several of the sales were referred to as at so much per acre, while the one in question was mentioned as a sale at a bulk sum of \$3,100. After the conveyance to A. he had been obliged to take proceedings against G. T., the person who had conveyed the land in question to the father of the vendors, to obtain possession of the portion in dispute and which he succeeded in obtaining. The vendors, however, refused to interpose in such proceedings, or to assist A. in any way in such litigation:—Held (reversing the judgment of Ferguson, J., 5 O. R. 704), that the sum of \$3,100 was bid for the whole parcel; that the sale being in bulk, and there being no provision in the conditions of sale for compensation, there could be no rectification after the execution of the conveyance, nor could there have been, under the circumstances of the case, a rescission of the contract, had such relief been asked for. There was no mistake as to what was intended to be sold, or in the price intended to be paid for it. *Patterson, J. A., dissenting. Cottingham v. Cottingham*, 11 A. R. 624.

See *Sea v. McLean*, 14 S. C. R. 632.

#### 7. Compensation.

##### (a) For Breaches in Carrying out Contract.

Held, upon the evidence in this case, that the purchasers were not entitled to a conveyance of

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or compensation for a small part of the land con-  
tracted for, to which the vendors were not able  
to make title. *Re Bobier and Ontario Invest-  
ment Association*, 16 O. R. 259.—Armour.

See *Imperial Bank of Canada, v. Metcalfe*, 11  
O. R. 467; *Manson v. Manson*, 10 P. R. 155,  
p. 1897; *Barber v. Barber*, 11 P. R. 137, p. 1897;  
*People's Loan and Deposit Co. v. Bacon*, 27  
Chy. 294, p. 1883.

#### (b) For Misrepresentation in Advertisement of Sale by Auction.

K. purchased certain property at auction  
which had been advertised. Among the repre-  
sentations made in the advertisement, was one  
that it "at present rents for \$1,160." After  
the sale the purchaser applied for compensation  
on two grounds: (1) That the landlord was  
bound to heat the building for the tenants, the  
cost of which was not included in the \$1,160;  
and (2), That the \$1,160 did not include the  
taxes which the landlord had to pay:—Held,  
that he was entitled to compensation on both  
grounds, and a reference was ordered to ascer-  
tain the amounts. *Re Murray and Kerr*, 13 O.  
R. 414.—Ferguson.

See *Stamm v. O'Donoghue*, 28 Chy. 207;  
S A. R. 161; 11 S. C. R. 358.

#### 8. Interest and Taxes.

Where in a sale under a decree no undue de-  
lay in investigating the title is attributed to  
either party, interest upon purchase money is  
payable only from the date of the acceptance of  
the title, and not from the time named in the  
conditions of sale. *Harrison v. Joseph*, 8 P. R.  
293.—Stephens, *Refere*.

A purchaser becomes liable to pay interest,  
when no time is fixed by the contract, from the  
time when he could prudently take possession,  
and in the case of the purchase of several prop-  
erties under an indivisible contract he cannot  
prudently take possession until the title to the  
whole is made. *Laird v. Paton*, 7 O. R. 137.—  
Proudfoot.

Where in the contract for the sale and pur-  
chase of land, the parties fix the time for pay-  
ment of the purchase money and the period from  
which interest thereon is to be computed, ir-  
respective of the time fixed for completion,  
interest must, in the absence of default or breach  
of contract or of actual misconduct in relation  
thereto on the part of the vendor, be paid from  
the period named, notwithstanding the existence  
of difficulties as to title justifying the purchaser  
in refusing to complete until they are removed.  
Judgment of Boyd, C., reversed. *De Visme v.*  
*DeVisme*, 1 Mac. & G. 352, observed upon as  
being no longer an authority. *In re Dingman*  
*and Hall's Contract*, 17 A. R. 398.

See *The People's Loan and Deposit Co. v.*  
*Bacon*, 27 Chy. 294, p. 1883; *Windor Hotel*  
*Co. of Montreal v. Cross*, 12 S. C. R. 624,  
p. 495; *Re McLean and Walker*, 19 O. R. 161,  
p. 1882.

### III. TITLE.

#### 1. Good Title.

Held, that the purchase under a tax sale by  
the township clerk was a voidable transaction;  
and per Wilson, C. J., the plaintiff, on the evi-  
dence had, or must be assumed to have had,  
notice of the infirmity of his vendor's title; but,  
per Osler, J., there was no sufficient evidence  
of notice. *Berkett v. Johnston*, 32 C. P. 301.—  
C. P. D.

On a reference as to title under a judgment  
which contained this clause: "And in case a  
good title can be made an enquiry when it was  
first shewn that such good title could be made."  
It was:—Held, that these words meant when  
was a good title first shown upon the abstract.  
*Laird v. Paton*, 7 O. R. 137.—Proudfoot.

Held, also, that a vendor does not complete  
his title until his deed is registered; i.e., that  
registration is essential to the title. *Id.*

In an action for specific performance of a  
contract for the sale of land it was contended  
by the plaintiff that the title could not now  
be objected to by the defendant, as by the  
terms of the contract all objections to the title  
were to be notified by the 26th December, 1887,  
and this was not taken until a week later:—  
Held, following Ward v. Stallbrass, L. R. 8 Ex.  
175, that such a condition did not apply to the  
case of the vendor being unable to give a good  
title, but only to objections and requisitions  
which might have been properly enforced against  
a vendor who had a valid title; and the objec-  
tion here might go to the root of the plaintiff's  
title. *Brown v. Pears*, 12 P. R. 396.—Dalton,  
*Master*.

By written agreement for the purchase of land  
it was provided that "no title deeds, abstracts,  
or evidences of title to be required other than  
those in the vendor's possession, nor shall the  
vendor be required to give a covenant for the  
production of the same."—Held that under this  
condition the vendor was relieved from the ab-  
solute obligation of making a good title to the  
land; while if the evidence of title coupled with  
the abstract and it may be the public register  
did not disclose and prove a good title, the pur-  
chaser was not bound to complete, but in that  
event the vendor would not be liable for dam-  
ages because of the above condition. *McIntosh*  
*v. Rogers*, 14 O. R. 97.—Boyd.

On a reference as to title to land, it appeared  
that one A. entrusted certain money to a loan  
association to invest for her on mortgage, under  
an agreement that the association should guar-  
antee to her payment of interest at seven per  
cent. and in consideration thereof should retain  
to their own use all interest over that rate. The  
mortgage which recited the said agreement was  
taken to the trustees appointed by the associa-  
tion, and was made in 1861. By 32 Vict. c.  
62, s. 5 (Ont.), all lands, mortgages, etc., held  
by trustees of the association were to be deemed  
vested in the C. S. Co., so that the same might  
be sold, assigned, etc., by the latter. Subse-  
quently the mortgagor released his equity of re-  
demption to the C. S. Co. in full satisfaction of  
the mortgage moneys, but not so as to merge the  
mortgage. By 36 Vict. c. 121, s. 5 (Ont.), all  
lands, mortgages, etc., held by the C. S. Co.,

were to be deemed vested in the C. T. Co., so that the same might be sold, assigned, etc., by the C. T. Co. Afterwards the latter company conveyed the lands to the vendor:—Held, that, inasmuch as the above acts made no mention of H., the vendor could not make a good title free from her claim, who, unless the moneys advanced by her had been repaid, was in equity substantially the owner of the mortgage, and if she chose to adopt the act of the trustees in taking a conveyance of the equity, then of the land. *Macklin v. Dowling*, 19 O. R. 441.—Ferguson.

See *McDonald v. Murray*, 2 O. R. 573; 11 A. R. 101, p. 1880; *McCrae v. Backer*, 9 O. R. 1, p. 1880; *McLean and Walker*, 19 O. R. 161, p. 1882.

## 2. Abstract.

B. agreed to sell certain land to W., and in the agreement it was provided that "the examination of title to be at the expense of the purchaser who is to call for only those deeds and papers in my possession or under my control." W. demanded a solicitor's abstract which B. declined to furnish; and on the examination of the title it was discovered that a deed was missing which had not been registered, so that a clear paper title could not be made out. B. then offered evidence of a title by possession by declarations under 37 Viet. c. 37 (Dom.), which W. declined to accept:—Held, on an application under the Vendors and Purchasers' Act, R. S. O. (1877), c. 109, s. 3, that B. was bound to furnish an abstract, and that W. was not bound to accept declaration evidence of the title by possession, and the vendor was directed to obtain affidavits from the declarants, when the purchaser could cross-examine the deponents, and if not satisfied with that, although he might be thought unreasonable, the purchaser was entitled to have the evidence taken viva voce, and have his title sanctioned by a decree, in which case, and for that purpose leave was given to him to institute a suit for specific performance, all costs of which were reserved until the hearing. *Re Boustead and Warwick*, 12 O. R. 488.—Proudfoot.

See *McIntosh v. Rogers*, 14 O. R. 97, p. 1886; *Dame v. Slater*, 21 O. R. 375.

## 3. Incumbrances.

### (a) How far a Defence in Actions for the Purchase Money.

Where on the sale and conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances; and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the court will restrain an action to enforce payment of such mortgage, brought at the instance of the mortgagee—or the voluntary transferee—unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. The principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor, himself. *Lovelace v. Harrington*, 27 Chy. 178.—Spragge.

Cain agreed to sell lands to Carter for \$1,400, payable in yearly instalments of \$100 each, with interest, and covenanted that on payment he would convey to Carter in fee simple, free from incumbrances. There was, at the time of this agreement, a mortgage on the property still in force, payable some years before the last instalment of purchase money. C. & C., to whom Cain had assigned the agreement, now sued Carter for certain instalments overdue:—Held, reversing the decision of Proudfoot, J., that C. & C. were bound to ensure the defendant, in making the intermediate payments, that he, the defendant, would have a good title, clear of incumbrances, when the period of completion of the contract had arrived. *Cameron v. Carter*, 9 O. R. 426.—Chy. D.

Held, as to the alleged misrepresentation, that it was not such as would avoid the contract, but it would cast it upon the vendor to make good his representation before he could compel the payment of the purchase money. But, in any event, a purchaser of land has a right to assume that the title is good, and that it is free from incumbrance, and to require this to be shown before he can be compelled to pay any part of his purchase money. *Gamble v. Gummerson*, 9 Chy. 199, approved of. *Ib.*

### (b) Purchase Subject to Mortgage.

Where a purchaser of a portion of an estate subject to a mortgage gave a covenant to pay a proportion of the mortgage money, on a bill filed by the vendor's assignee to compel payment by the purchaser, the court refused to give such relief except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the court refused to include a direction that the payment by the purchasers of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due. In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceeding against such defaulting purchasers, upon indemnifying him against costs. *Clenow v. Booth*, 27 Chy. 15.—Spragge.

A vendor of lands, which were subject to incumbrances created by himself, covenanted with his vendee to pay off the incumbrances, and discharge the lands sold from them. The vendee subsequently mortgaged the lands to the plaintiffs, with the usual mortgagor's covenants. In a suit by plaintiffs seeking (amongst other things) to have the lands relieved of the incumbrances:—Held, that the plaintiffs were entitled to the benefit of the vendor's covenant, and he was ordered to discharge the incumbrance, and pay the costs of the incumbrancers. *Clark v. Bogart*, 27 Chy. 450.—Blake.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the

to Carter for \$1,400. of \$100 each, with that on payment he simple, free from at the time of this property still in C. & C., to whom ant, now sued Carter ne:—Held, reverse, J., that C. & C., fendant, in making hat he, the defende, clear of incum- completion of the on v. Carter, 9 O.

representation, that did the contract, but andor to make good could compel the money. But, in any as a right to assume at it is free from in- is to be shown before ny part of his pur- ummerson, 9 Chy.

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re embraced in one e mortgagor further e plaintiffs with ts. He afterwards S., who, when he aware of the plain- gistered against the gh not against the

other parcels:—Held, (1) That the plaintiffs were entitled to require as between them and S. that the parcel conveyed to the latter should be resorted to for satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2) That the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Ib.*

The plaintiff purchased a house and lot from defendant for \$2,000, paying \$1,000 in cash, and assuming a mortgage to a building society "on which \$664 is yet unpaid," and giving a mortgage to the defendant for the balance. The defendant covenanted that he had not incumbered, save as aforesaid. Subsequent inquiries shewed that there were due the society seventy-one monthly instalments of \$16.75, in all \$1,189.25, and the plaintiff insisted that she was entitled to credit from the defendant for the difference between \$664 and the latter sum. But:—Held, that the plaintiff was entitled to retain in his hands only the cash value of the mortgage at the date of his purchase, if the society would accept it, if not then such a sum as, with interest on it, would meet the accruing payments. The defendant by his answer admitted an error in the computation of the amount due the society, and offered to pay the difference between the \$664 and what he alleged was the cash value and costs up to that time:—Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer. *Stark v. Shepherd*, 29 Chy. 316.—Proudfoot.

M. conveyed land to the plaintiff subject to a mortgage to the T. & L. Co. for \$2,000, and one to C. for \$500, which the plaintiff covenanted to pay and save M. harmless therefrom. The plaintiff then conveyed to the defendant in consideration of "\$1,050 and assuming the payment of the mortgages" aforesaid. The defendant gave back a mortgage for the balance of the purchase money. He went into possession and paid some interest on the T. & L. Co. mortgage. Subsequently a new arrangement was made, and the defendant's mortgage was discharged, and a mortgage for \$1,850 was given by the defendant to the plaintiff, which included the amount of three promissory notes for \$350 and other items, besides the balance of the purchase money. There was no covenant for payment therein. The T. & L. Co. mortgage fell due and was not paid, and the plaintiff paid C.'s mortgage of \$500:—Held, that the defendant was bound to pay off the T. & L. Co. mortgage and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon. *Canavan v. Meek*, 2 O. R. 636.—Q. B. D.

M., who was the owner of Whiteacre and Blackacre, both subject to incumbrance of \$1,600 and \$500, sold Whiteacre to C. subject to the \$1,600 mortgage, with covenants for title, save as to that mortgage, the mortgage debt in reality being the consideration or purchase money therefor. M., afterwards sold Blackacre to N., subject to the \$500 mortgage, which conveyance also contained absolute covenants for title, the

payment of the \$500 being taken as part of the consideration. Default having been made in payment of the \$1,600 mortgage, the mortgagee proceeded to a sale under the power, and N. became the purchaser of both parcels with a view of protecting himself, and thereupon took proceedings to compel M. and the representatives of C. to pay the amount due on the \$1,600 mortgage:—Held, affirming the judgment of the court below (28 Chy. 334), that there was not any privity between the plaintiff and C.'s representatives, and that the demand remained with M., the original vendor, against C.'s estate. *Norris v. Meadows*, 7 A. R. 237.

Although where land is sold subject to an outstanding mortgage, there arises a presumption or supposed intention in equity on the part of the purchaser, to indemnify the vendor against the mortgage (that is, if under the actual circumstances, the parties are to be considered to have really occupied the relation of vendor and purchaser), yet this presumption may be rebutted by parol evidence; and it was held to have been so rebutted in this case, in which it appeared to be contrary to the real intention of the parties to the transaction in question, who, moreover, were not strictly in the relation of vendor and purchaser. Parol evidence, however, could not have been given in support of or to strengthen the presumption or equity in the first place, though such evidence could be given in answer to the evidence advanced to rebut such presumption or equity. *Corby v. Gray*, 15 O. R. 1.—Ferguson.

See *Kempt v. Macauley*, 9 P. R. 582, p. 1081.

#### (c) Discharge of, by Vendor.

A vendor agreed to pay off a mortgage existing on the property, and the decree directed a good and sufficient conveyance "according to said agreement." The defendant, the vendor, neglected to pay off the mortgage, and the plaintiff thereupon moved upon petition to amend the decree by ordering the defendant to obtain a discharge of such incumbrance; but the court (Boyd, C.), directed that the vendor pay off the mortgage within a limited time, or in default, that the purchaser should be at liberty to do so, procure an assignment, and have his remedy against the vendor, whose conveyance he was not bound to accept till this mortgage was paid off; the purchase money in court to be applied pro tanto thereto:—Held, also, that as the matter had been referred to the master by the decree, which was for specific performance, it should have been disposed of in his office under G. O. 226. (Con. Rule 62). *Stammers v. O'Donohoe*, 29 Chy. 64.

#### 4. Evidence of Title.

Held, that the certificate of the municipal treasurer that the land was not redeemed from sale for taxes is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty. More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton and Lot No. 6 on Plan No. 580 in the County of York*, 7 O. R. 59.—Proudfoot.



Upon a sale of land the abstract of title set out a mortgage given to a building society in 1850, the mortgagor being a shareholder by subscription. The proviso was for repayment at the times appointed in the company's rules, by monthly subscriptions, to be continued until the objects of the society should be attained. The mortgage was produced, and had endorsed upon it a memorandum, without date, purporting to be signed by the secretary-treasurer of the society, that it was paid and settled in full, but the signature was not proved. In conveyances made in 1856 and 1874 this mortgage was treated as a subsisting incumbrance:—Held, that this mortgage should not, in favour of the vendor, be presumed to have been satisfied; nor, having regard to the provisions of Chy. G. O. 394 and 396, (Con. Rules 112, 114) should the question be disposed of upon a presumption of law. The vendor should shew that some portion of the purchase money did not become payable under the rules of the society within the period of ten years before the contract, or that this could not be ascertained; or that the records of the society could not be referred to; or that there was difficulty in proving the fact set forth in the indorsement on the mortgage, that it had been paid in full. *McIntosh v. Rogers*, 12 P. R. 389.—Street.

It appeared that the vendor, although by the contract he had limited himself to certain proofs, had elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it:—Held, that the purchaser was entitled to have the title made out as strictly and completely as if the vendor had not in any way guarded himself by the terms of the contract. *Id.*

The abstract of title set out a registered conveyance from L. G. et al. to S. G.:—Held, that the purchaser was entitled at the vendor's expense to the production of the conveyance with the usual registrar's certificate of registration of the duplicate indorsed upon it or to the production of a registrar's certified copy. *Re Charles*, 4 Chy. Chamb. R. 19, commented upon. If the vendor relies upon a possessory title the purchaser is entitled to cross-examine persons making affidavits in support of it, for the reasons given in *Re Boustead and Warwick*, 12 O. R. at p. 491. *Id.*

Upon a petition under the Vendors' and Purchasers' Act:—Held, (1) that the purchasers were entitled to certified copies of registered deeds or memorials of deeds in the chain of title which the vendors were unable to produce. *McIntosh v. Rogers*, 12 P. R. 389, followed; *Cooper v. Emery*, 1 Phil. 390, distinguished. *Re Bohier and Ontario Investment Association*, 16 O. R. 259.—Armour.

A contract of sale of land provided that the vendors should not be bound to produce any deeds or evidence of title except such as they might have in their possession, but should show a good title, etc. It appeared that A. P., by an indenture of 16th January, 1858, conveyed the lands in question to trustees on certain trusts, which deed was registered by memorial not containing the trusts. By deed of appointment dated 4th July, 1862, made in pursuance of the deed of 1858, also registered by memorial, which purported to contain a full copy of the deed in

which were recitals which set out what purported to be the trusts of the former deed and showed a life estate in A. P., with a power of appointment in him, A. P. duly appointed to trustees who were represented by the vendors, with directions to sell after his death, which had recently occurred; neither of these deeds was in the possession or power of the vendors, the trustees. On an application under the Vendors' and Purchasers' Act:—Held, that the vendors were not bound to produce these two deeds, and that the production of the memorial of the deed of appointment twenty years old, reciting the trusts of the trust deed, was sufficient evidence of what those trusts were; and as there was an absolute trust for sale the purchaser should take the title. A. P. in 1873 assumed to mortgage the lands in fee, and died in 1887:—Held, that the mortgage only bound his life estate, and that the vendors were not bound to procure a discharge thereof. *Re Ponton and Swanton*, 16 O. R. 669.—Boyd.

On a sale of lands the purchaser objected to the title on the grounds (1) that there was no evidence that a certain mortgage had been discharged; and (2) that title being deduced through the devisee of a person who had died since the coming into force of the "Devolution of Estates Act," R. S. O. (1887), c. 108, the legal estate was outstanding in the executor of such person. It appeared that all debts of the testator had been paid:—Held, that both matters were matters of conveyancing, and not of title. *Martin v. Mayce*, 19 O. R. 705.—Chy. D.

#### 5. Cloud on Title.

A bill alleged that a mortgage was executed by W. to the defendant in consideration of \$450 that defendant advanced only \$150 thereon, and W. being entitled to receive the balance assigned such right and conveyed his equity of redemption to the plaintiff. That the defendant refused to pay the balance and claimed to hold the mortgage as security for \$450. The prayer was for specific performance or, in the alternative, a declaration of the above facts, and for general relief. At the hearing, the judge allowed a demurrer *ore tenus*, on the ground that an agreement to lend money could not be specifically performed:—Held, reversing this judgment, that upon the facts alleged in the bill, namely, that the mortgage was being held for more than had been advanced thereon and therefore to that extent had formed a cloud on the title, the plaintiff would be entitled to a declaration to that effect, and appropriate relief; and as the demurrer admitted the truth of the allegation it should have been overruled. *Calvert v. Burnham*, 6 A. R. 620.

The plaintiff was owner in fee of certain lands which were conveyed to him by deed of 27th July, 1868, registered 11th August, 1868. Subsequently, by mistake, the lands were sold for taxes, although no taxes were actually in arrear; and by deed of 11th March, 1880, were conveyed to A. McL., the tax purchaser, which deed was registered 18th May, 1880. On 29th November, 1881, A. McL. conveyed the said lands to J. W. by deed absolute in form, but intended as security for money advanced by J. W., which deed was registered 1st December, 1881. The plaintiff found out that this sale for

set out what purchaser of the former deed and with a power of attorney appointed to be by the vendors, his death, which of these deeds of the vendors, on under the Venfield, that the vendor these two deeds, e memorial of the years old, reciting was sufficient evidence: and as there the purchaser in 1873 assumed and died in 1887: only bound his life were not bound to

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The purchaser objected to that there was no that had been disallowed being deducted person who had died the "Devolution (1887), c. 108, the in the executor of at all debts of the field, that both mat- rancing, and not of . R. 705.—Chy. D.

title.  
The mortgage was executed consideration of \$450 y \$150 thereon, and the balance assigned as equity of redemption. The defendant refused to hold the mort- The prayer was for the alternative, a de- for general relief. The agreement to lend ally performed:— ment, that upon the rely, that the mort- e than had been ad- to that extent had the plaintiff would to that effect, and demurrer admitted t should have been am, 6 A. R. 620.

fee of certain lands n by deed of 27th August, 1868. Sub- lands were sold for ere actually in ar- March, 1880, were x purchaser, which ay, 1880. On 29th conveyed the said ute in form, but in- ey advanced by J. ered 1st December, ut that this sale for

taxes had taken place shortly before bringing this action, in which he sought the cancellation of the deeds to McL. and J. W. :—Held, that the plaintiff was entitled to have the deeds cancelled, and J. W. was entitled to judgment against A. McL. for the moneys advanced by him. *Charlton v. Watson*, 4 O. R. 480.—Ferguson.

The registration of any instrument which casts doubt or suspicion on the title, or which embarrasses the owner in maintaining his estate, or in disposing of his property, is a cloud upon the title against which the courts will relieve. And in such case it is sufficient if there is a registered instrument apparently valid on its face, accompanied by a chain of title, although an intruder on the chain of title, which is likely to work mischief to the real owner. A purchaser at a sale of lands held under an order of court objected to the title on the ground that four deeds had been registered against half of the lot by parties who apparently had no title, but one of whom had notified the purchaser that he claimed some interest in the lands:—Held, that such registered deeds were clouds upon the title, and that the purchaser could not be compelled to take it. *Keefer v. McKay*, 10 P. R. 345.—Hodgins, *Master in Ordinary*.

Upon a petition under the Vendors' and Purchasers' Act:—Held, that the purchasers were entitled to have removed from the registry as clouds upon the title: (a) A certain certificate of his pendens in an action upon a mortgage which appeared by the registry to be discharged; because it could not be ascertained from the registry itself that the action was in respect of the discharged mortgage; (b) A second certificate of his pendens in an action to set aside as fraudulent a deed in the chain of title under which the vendors claimed, the vendors not being parties to it, because the vendors, and, if the title passed, the purchasers, might be added as parties; (c) A power of attorney to sell the lands in question, although registered after the mortgage under which the vendors were selling; because the vendors might be affected with notice of the interest claimed by the donor of the power, such interest having accrued, if at all before the vendors obtained title. *Re Bobier and Ontario Investment Assn.*, 16 O. R. 259.—Armour.

See *Ontario Industrial Loan and Investment Co. v. Lindsey*, 3 O. R. 66, p. 1825; *Hamilton Provident Loan Society v. Gilbert*, 6 O. R. 434, p. 756.

#### 6. Costs.

The ordinary rule in a vendor's suit, is, that the costs are given against him up to the time when he has first shown a good title; but where the question as to title is not the chief matter in dispute the costs will follow the result. *Laird v. Paton*, 7 O. R. 137.—Proudfoot.

Where a purchaser's objections to the title have caused the litigation and have been overruled, he will be liable for costs, notwithstanding any decision in his favour on particular points in dispute. *Id.*

#### 7. Other Cases.

When the price is payable by instalments, the purchaser of land has a right to have a

reference as to title, and to have the title manifested before he makes a single payment. *Cameron v. Carter*, 9 O. R. 426.—Chy. D.

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds or evidences of title other than those in the vendor's possession. Subsequently on a reference in a suit by the vendor for specific performances, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the master leave to file other objections. On appeal, Proudfoot, J.:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the court he gave the leave required on terms. *Clarke v. Loufley*, 10 P. R. 208.

Plaintiff was a purchaser under a power of sale in a mortgage for \$200 taken by a solicitor for costs only \$30 of which had been incurred at the date of the mortgage. The power was exercised to collect the full amount of the mortgage and interest. Before the purchase was completed the mortgagee's right to sell was raised as a question of title by the plaintiff who had become aware of these facts. Before these objections were removed, the property was sold again under a prior mortgage:—Held, that the mortgage was a valid security for no more than \$30; that the plaintiff having become aware of the vexatious user of the power, was justified in refusing to complete the purchase, and was entitled to recover back the deposit paid by him. *Locking v. Halsted*, 16 O. R. 32.—Boyd.

In one of the conveyances in the chain of title the grant was to the party of the third part, whereas there were only two parties to the conveyance, and the party of the second part did not execute it:—Held, that this was a valid objection, though the instrument would be at once corrected or reformed as against the grantors; or could be cured by another conveyance drawn with proper certainty. *Re Clarke and Chamberlain*, 18 O. R. 270.—Boyd.

See *McCrae v. Backer*, 9 O. R. 1, p. 1880; *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467, p. 657; *McDonald v. Murray*, 11 A. R. 101, p. 1880; *Cameron v. Cameron*, 14 O. R. 561, p. 1896; *London and Canadian Loan and Agency Co. v. Graham*, 16 O. R. 329, p. 273; *Brown v. Pears*, 12 P. R. 396, p. 1886; *Re McLean and Walker*, 19 O. R. 161, p. 1882.

#### IV. PREPARATION AND TENDER OF DEED.

The general scope of the Judicature Act, and especially section 16, sub-section 8 requires that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters avoided; so that, whenever a subject of controversy arises in an action, the court should, if possible, determine it so as to prevent further and useless litigation. In an action for the specific performance of an agreement to convey land, the defendant set up as a defence that there was no tender of a deed for execution

before action commenced; but at the same time indicated that if there had been a tender it would have been refused:—Held, that though, in strictness, there should have been a tender, yet, under the circumstances, it should be dispensed with, and judgment was entered for the plaintiffs. *McDougall v. Hall*, 13 O. R. 166.—O'Connor.

See *McDonald v. Murray*, 2 O. R. 573; 11 A. R. 101, p. 1880.

#### V. VENDOR'S LIEN.

On the occasion of the defendant effecting a purchase of land from one H., against whom the plaintiff had a claim for money advanced to effect the original purchase jointly by H. and himself, and in the conveyance of a portion of which he refused to join until assured by his solicitor, with defendant's assent, that part of the purchase money would be paid to the solicitor, out of which the solicitor agreed to pay the amount due the plaintiff, whereupon the plaintiff joined in the conveyance to the defendant, which was duly registered. The defendant and H. however made other arrangements for discharging all the purchase money, no portion of which was paid to the solicitor or the plaintiff:—Held, affirming the judgment of Proudfoot, J., that under the circumstances an equitable assignment had been made of so much of the purchase money as the plaintiff's demand amounted to, and for which purchase money H. had a vendor's lien; and that the defendant was bound to pay the same to the plaintiff. (*Burton, J. A.*, dissenting.) *Armstrong v. Farr*, 11 A. R. 186.

For compensation for lands taken by railway company. See *Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447, p. 1760.

W. S., being indebted to R. & Co., who held a saw mill and timber license, etc., belonging to W. S. in their own name, as security therefor, wrote to them that he had arranged with his son W. A. S. for the transfer to him of his business, and upon his arranging with R. & Co. the liability of W. S. that W. A. S. was entitled to be placed in the position of W. S. with respect to the property held by R. & Co., and that on settling that liability they were to convey to W. A. S. By a subsequent agreement W. S. agreed with W. A. S. that the latter was to pay off the liabilities of W. S. in two years, upon which W. S. was to transfer to him other lands than those held by R. & Co. Subsequent advances were made by R. & Co. to W. A. S. The defendant B. afterwards paid off R. & Co., and R. & Co. and W. A. S. joined in conveying the property in question to the defendant B., who subsequently made advances to W. A. S. and to his assignee, on his becoming insolvent. To some of these advances the plaintiffs, the executors of W. S., agreed by instrument under seal, stipulating that it should not affect their lien as against any one but the defendant B. They then claimed a lien on the lands for the amount of the liabilities of their testator W. S., which W. A. S. had agreed to pay as the consideration for the transfer to him of the business:—Held, affirming the judgment of Galt, J. (*Cameron, J.*, dissenting), that no such lien existed, even if

the defendants had had notice of the transaction between W. S. and W. A. S.:—Held, by the Supreme Court, that even if such lien existed B. could not be said to be affected with notice of it. *Scott v. Benedict*, 14 S. C. R. 735; 5 O. R. 1.—Q. B. D.

#### VI. RESCINDING SALE.

##### 1. Generally.

H. D. C. agreed in writing with C. C. on 17th January, 1882, to sell to him lots 37 and 39 for \$5,450, payable \$1,791 on the delivery of the deed, and upon the title to lot 37 being found satisfactory to C. C. or his solicitor, and upon a quit claim deed of lot 39 being delivered; the balance to be secured by mortgage; said sale to be completed within thirty days, otherwise the deposit of \$25 to be forfeited. H. D. C., bona fide believing such to be the case, represented to C. C. at the time of the sale that a patent from the Crown had issued for lot 37, and relying on this representation C. C. entered into the agreement and afterwards verbally agreed to sell lot 37 at a large advance to one R. On 10th February, 1882, the conveyance was executed, the bulk of the purchase money \$4,025 having been paid prior thereto in cash, a promissory note being taken for the balance in lieu of a mortgage. It afterwards appeared that no patent had ever issued for lot 37, and notwithstanding the efforts of H. D. C., it was not till 25th April, 1883, that the department at length issued a patent, and then only for four chains of the lot, leaving ninety links outstanding. In February, 1883 C. C. had told H. D. C. that he would not keep the property, that by reason of no patent having issued, R. had withdrawn from his offer, and he demanded his money back with his actual expenses incurred. H. D. C. refused to cancel the sale, and C. C. now took these proceedings to have the sale rescinded, and the deed delivered up to be cancelled:—Held, that there having been no actual fraud, and the deed of conveyance having been executed, the plaintiff could not have the relief sought for. *Wilde v. Gibson*, 1 H. L. Cas. 605; *Brownlee v. Campbell*, 5 App. Cas. 925; and *Hart v. Swaine*, 7 Ch. D. 42 distinguished. *Cameron v. Cameron*, 14 O. R. 561.—Chy. D.

See *Cottingham v. Cottingham*, 11 A. R. 624, p. 1884; *Proctor v. Multigan*, 13 O. R. 683, p. 1881.

#### SALE OF LAND BY ORDER OF THE COURT.

##### I. DECREE FOR SALE, 1897.

##### II. ADVERTISEMENT AND CONDITIONS OF SALE, 1897.

##### III. BIDDINGS, 1898.

##### IV. TENDERS, 1898.

##### V. PURCHASE MONEY.

###### 1. Payment into Court, 1898.

###### 2. Interest, 1898.

###### 3. Abatement of, 1899.

###### 4. Payment of Incumbrances, 1899.

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SALE.

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- VI. WHEN PROPERTY VESTS IN PURCHASER, 1899.
- VII. VESTING ORDER, 1899.
- VIII. GIVING UP PURCHASE, 1899.
- IX. TITLE, 1900.
- X. TAXES, 1900.
- XI. SETTING ASIDE SALE, 1900.
- XII. APPLICATIONS UNDER CON. RULE 1007 ET SEQ.—See FRAUDULENT CONVEYANCES I. 2, p. 819.
- XIII. INFANT'S ESTATE—See INFANT.

#### I. DECREE FOR SALE.

Where a decree directed a sale of certain property at the expiration of a year from the date of a master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed under special circumstances, on the ground that the decree was in effect equivalent to a judgment at law. *Porte v. Irwin*, 8 P. R. 40.—Blake.

See *Ricker v. Ricker*, 27 Chy. 576, p. 1900.

#### II. ADVERTISEMENT AND CONDITIONS OF SALE.

At a judicial sale of a farm, the conditions of sale were the usual conditions of the court, providing for the delivery of possession to the purchaser upon payment of the balance of the purchase money one month after the sale. The purchaser lived upon a part of the lot which was not sold, and was aware that the farm sold was occupied by a tenant, but swore that he did not know the terms of the tenancy, that he relied upon the conditions of sale, and that he bid more for the land because there were growing crops thereon. The purchaser paid the balance into court at the proper time, but did not get possession then, nor had he got possession at the time of this application, 7th January, 1884:—Held, that the vendors were bound by the terms of the printed and published conditions of sale, and that it was not the business of the purchaser to acquaint himself with the terms of the tenancy, and by enquiry to ascertain whose were the crops. Order made for possession, with a reference as to compensation. *Manson v. Manson*, 10 P. R. 155.—Boyd.

The advertisement of a judicial sale stated that the property was in possession of a tenant, who would permit the purchaser to obtain possession on the 1st of November. The purchaser, however was prevented by the tenant from taking possession till the month of January following. About the middle of November the purchaser obtained a vesting order:—Held, that the purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order. The failure to give possession was a breach of the representation in the advertisement, a representation on account of which it was to be assumed that the purchase money was greater than it would otherwise have been. *Barber v. Barber*, 11 P. R. 137.—Ferguson.

#### III. BIDDINGS.

A master has no power to give leave to bid to a party conducting a sale. Application must be made to the court. *Re Laycock—McGillivray v. Johnson*, 8 P. R. 548.—Blake.

Liberty of trustee to bid at sale. See *Ricker v. Ricker*, 7 A. R. 282.

#### IV. TENDERS.

On the reference under the decree in a mortgage suit, the plaintiff put in several affidavits as to the value of the property, \$3,500 being the highest price named in them. The defendant did not file any affidavits in reply. The plaintiffs then tendered \$3,500 for the property, which the master declined to accept without an order directing him to do so. The referee on application refused such order, and on appeal, Spragge, C., upheld his judgment. *Ramsay v. McDonald*, 8 P. R. 283.

#### V. PURCHASE MONEY.

##### 1. Payment into Court.

On a sale under a decree, the purchaser, except under special circumstances, will not be compelled to pay his purchase money into court until he has accepted or approved of the title or the master has reported that the vendor can make a good title. *McDermid v. McDermid*, 8 P. R. 28.—Blake.

One of the defendants in a suit purchased the lands in question upon a sale under the usual decree for partition or sale. The appellant, the plaintiff, was first mortgagee, and the purchaser was second mortgagee of the interest of one S., the owner of an undivided sixth interest in the lands:—Held, that the purchaser was entitled to a conveyance from S. with the usual covenants for title as to his interest, and was not bound to accept a vesting order. Cameron, J., doubting, whether the question was not one of conveyance rather than one of title, and whether therefore the purchaser should not be ordered to pay his purchase money into court. Quere, whether the appellant, whose only interest was that of mortgagee of S.'s interest, had any locus standi to bring a suit for partition, or to appeal without his co-plaintiff. *Laplante v. Scemen*, 8 A. R. 557.

Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins v. Clarke*, 11 P. R. 350. Proudfoot.

See also Sub-head V. 4, p. 1899.

##### 2. Interest.

Where in a sale under a decree, no undue delay in investigating the title is attributed to either party, interest upon purchase money is payable only from the date of the acceptance of the title, and not from the time named in the conditions of sale. *Harrison v. Joseph*, 8 P. R. 293.—Stephens.

3. *Abatement of.*

Where land was advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession, by his son, of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was completed, and a subsequent incumbrancer offered to give the same price for them as the purchaser:—Held, that the petitioner should be put to his election either to take the land without abatement of the purchase money, or to let it go to the subsequent incumbrancer. *Carmichael v. Ferris*, 8 P. R. 289.—Stephens, *Referee*.—Blake.

4. *Payment of Incumbrances.*

The bill was filed by a second mortgagee, the first mortgagee not being made a party. At a sale under the decree, M. purchased the land, and afterwards paid the purchase money into court; he then mortgaged the land, then conveyed his equity of redemption, and then took out a vesting order. A subsequent mortgagee, claimed payment of his claim out of the moneys in court. On the 19th November, on the application of M., the referee made an order, directing payment to the assignee of the first mortgagee of his claim out of the purchase money in court. It appeared that M. thought he was purchasing free from incumbrances, and was ignorant of the first mortgage. On appeal, Proudfoot, V. C., upheld the referee's order. *Fleming v. McDougall*, 8 P. R. 200.

See *Hyde v. Barton*, 8 P. R. 205, p. 560.

## VI. WHEN PROPERTY VESTS IN PURCHASER.

A purchaser at a sale under decree signed the usual contract to purchase, and paid the deposit. The next day the buildings on the property were burned down:—Held, by Proudfoot, V.C., on appeal, reversing the decision of Stephens, referee, (8 P. R. 166), that the loss would not fall on the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed. *Stephenson v. Bain*, 8 P. R. 258.

## VII. VESTING ORDER.

See *Fleming v. McDougall*, 8 P. R. 200, p. 560; *Hyde v. Barton*, 8 P. R. 205, p. 560; *Laplane v. Scamen*, 8 A. R. 557, p. 1898.

## VIII. GIVING UP PURCHASE.

At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April, one H. purchased and took an assignment of the dower of one S. in the land. On the 16th February, 1880, A. applied to be released from the contract to purchase on the ground of the outstanding dower. The evidence showed that S. had agreed with the heir-at-law to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that

this application though in A.'s name, was really made by W.:—Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out. *Fraser v. Gunn*, 8 P. R. 278.—Spragge.

At a sale under the standing conditions of sale of the court the purchaser paid ten per cent. of his purchase money, but made default in paying the balance, and on a resale the property brought \$25 more than at the first sale. Boyd, C., refused an application by the purchaser to have his deposit repaid to him, but as it appeared that the deposit would cover the expenses and costs incurred by the resale, he directed that the purchaser should not be required to pay them in addition. *Tilt v. Kuapp*, 9 P. R. 314.

## IX. TITLE.

In a sale under a decree:—Held, that the purchaser had no right to certified copies of registered and other documents procured at the expense of the vendor. *Harrison v. Joseph*, 8 P. R. 293.—Stephens, *Referee*.

Where a bill was served on a defendant personally, and about a year afterwards a final order of foreclosure was granted in the suit:—Held, that a purchaser was not entitled to insist on the plaintiff (the vendor) proving that the defendant was alive when the final order was made. *Henderson v. Spencer*, 8 P. R. 402.—Spragge.

Cloud on title. See *Keefe v. McKay*, 10 P. R. 345, p. 1893.

See *McDermid v. McDermid*, 8 P. R. 23, p. 1898; *Laplane v. Scamen*, 8 A. R. 557, p. 1898.

## X. TAXES.

The purchasers claimed that the vendors should pay a proportion of the taxes for the year 1880 up to 6th of March, when the title was accepted and possession given. The by-law for the collection of taxes in Toronto for 1888, was passed on the 2nd April, 1880, and provided that the taxes should be due and payable on 4th June, 1880, but that if an instalment was then paid, further payment by instalments might be made on the 15th July and 3rd September:—Held, that under R. S. O. (1877), c. 174, s. 347, and the terms of the city by-law, no taxes were due so as to form a charge on the land until 4th June, the date when the first instalment of taxes was due, and that the vendors therefore were not bound to pay any part of the taxes for that year. *Harrison v. Joseph*, 8 P. R. 293.—Stephens, *Referee*.

## XI. SETTING ASIDE SALE.

Although a decree for sale should direct the same to take place with the approbation of the master, the omission of such direction is no ground for moving to set aside the sale under the decree where the same really took place with such approbation, even in a case where infants are interested. *Ricker v. Ricker*, 27 Chy. 576.—Proudfoot.

See *Campion v. Brackenridge*, 28 Chy. 201, p. 95.



name, was really relief could be created; the plaintiff sought to prevent *Fraser v. Gunn*,

conditions of sale ten per cent. of the property in default in paying the property at the first sale. *Boyd*, the purchaser to put as it appeared the expenses and he directed that required to pay *pp*, 9 P. R. 314.

Held, that the copies of records procured at the *Simon v. Joseph*, 8

a defendant perverts a final order the suit:—Held, entitled to insist on that the defendant's order was made. 402.—*Spragge*.

*v. McKay*, 10 P.

*id.*, 8 P. R. 28, p. 557, p. 1898.

the vendor should for the year 1880 title was accepted law for the collection, was passed on 14th June, 1880, but paid, further payment made on the 15th Held, that under and the terms of due so as to form 14th June, the date taxes was due, and not bound to pay year. *Harrison v. s. Referee*.

SALE.

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, 28 Chy. 201, p.

## SALE OF LAND FOR TAXES.

See ASSESSMENT AND TAXES.

## SALOONS.

See INTOXICATING LIQUORS.

## SALVAGE.

See INSURANCE—SHIP.

## SAMPLE.

See SALE OF GOODS.

## SATISFACTION.

See ACCORD AND SATISFACTION.

## SCHOOLS.

See PUBLIC SCHOOLS.

## SCIRE FACIAS AND REVIVOR.

### I. TO REVIVE ACTIONS, 1901.

### II. TO REVIVE JUDGMENTS, 1901.

### III. ON DEATH, 1902.

#### I. TO REVIVE ACTIONS.

An order of revivor was obtained in this cause on the ground that the sole plaintiff had assigned all his interest, etc., to one Close. The plaintiff applied to the court by petition to set aside the order, disputing the assignment on the allegation of which the order was obtained. Proudfoot, V. C., discharged the order of revivor with costs. *Fisken v. Ince*, 8 P. R. 147.

See *Ross v. Pomeroy*, 28 Chy. 435, p. 1188; *Merchants' Bank v. Monteith*, 10 P. R. 467, p. 1089; *Grasett v. Carter*, 6 O. R. 584, p. 929.

#### II. TO REVIVE JUDGMENTS.

Held, that since the passing of 35 Vict. c. 12, s. 1 (Ont.) (R. S. O. 1877, c. 116) the assignee of a judgment is entitled to revive the same in his own name by entering a suggestion on the roll. *Philips v. Fox*, 8 P. R. 51.—*Dalton*, Q. C.

The plaintiff recovered judgment against the defendants on the 3rd of November, 1863, and the last execution issued thereon was returned in September, 1865. More than twenty years afterwards the plaintiff moved for leave to issue execution against the surviving defendant, but no evidence was given of any part payment on account of the judgment or acknowledgment of liability thereon within that period:—Held,

that if the motion was necessary it had been rightly refused:—*Quare*, whether it was necessary to obtain leave to issue execution upon, or to revive the judgment, execution having been in fact issued and returned within six years from its recovery. *Allan v. McTavish*, 2 A. R. 278; *Boice v. O'Loane*, 3 A. R. 167, commented on. *McMahon v. Spencer*, 13 A. R. 430.

Judgment was recovered in 1856. On the 23rd of October, 1869, an order was made by a judge in chambers to revive by entering a suggestion on the roll under the C. L. P. Act, and the suggestion was entered on the 22nd January, 1870, but no execution issued after that date. On the 6th December, 1884, an order was made under Rule 356, O. F. Act (Con. Rule 886), for leave to the plaintiff to issue execution:—Held, that the entry of a suggestion under the C. L. P. Act was a judgment of the court and gave a new starting point for the statute of Limitations to run from, and that the period of limitation in the case of judgments in personal actions is twenty years under R. S. O. (1877) c. 61, and not ten years under R. S. O. (1877) c. 128, which relates to judgments as liens on land. *Allan v. McTavish*, 2 A. R. 278, and *Boice v. O'Loane*, 3 A. R. 167, commented on and followed:—*Quare*, per Rose, J., whether there is any period fixed by the statute beyond which the court may not have power to allow execution to be issued. *McIntosh v. Sykes*, 11 P. R. 337.—*Dalton*, *Master*.—*Rose*.

### III. ON DEATH.

A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant:—Held, that the plaintiff must proceed against the devisee by scire facias, and not by suggestion or revivor. *Davis v. Dennison*, 8 P. R. 7.—*Hugarty*.

The original defendant dying pendente lite, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May, at Cornwall. The defendant moved to set aside the notice of trial as irregular:—Held, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th May was regular. *New York Piano Co. v. Stevenson*, 10 P. R. 270.—*Dalton*, *Master*.

S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order was now sought to be set aside on the ground that the right of action did not survive to her:—Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued since his death, for which—*Semble*, the heir, or devisee, might bring an action. In the case of such covenants running with the land where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death, passes to

the heir or devisee; but where not only the breach took place, but damages accrued in the lifetime of the ancestor, the remedy for these damages passes to the personal representative. *Platt v. Grand Trunk R. W. Co.*, 11 O. R. 246.—Proudfoot.

See *White v. Parker*, 16 S. C. R. 699, p. 1393.

### SCRUTINY OF VOTES.

See INTOXICATING LIQUORS.—PARLIAMENTARY ELECTIONS.

### SEAL.

I. CONTRACTS WITH CORPORATIONS.—See COMPANY.

II. TO DEED.—See DEED.

III. TO BY-LAWS.—See MUNICIPAL CORPORATIONS.

### SEARCH WARRANT.

See INTOXICATING LIQUORS.—JUSTICE OF THE PEACE.

Held, that an action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause. *Young v. Nichol*, 9 O. R. 347—C. P. D.

See *Hoover v. Craig*, 12 A. R. 72 p. 1839.

### SEAWORTHINESS.

See INSURANCE.

### SECOND APPLICATIONS.

See PRACTICE.

### SECURITY.

I. COLLATERAL.—See COLLATERAL SECURITY.

II. FOR COSTS.

1. Generally.—See COSTS.

2. Solicitor Taking Security for Costs.—See SOLICITOR.

### SEDUCTION.

I. INDICTMENT FOR, 1904.

II. RIGHT OF ACTION, 1904.

III. EVIDENCE, 1905.

IV. DAMAGES, 1906.

V. COSTS, 1906.

VI. OTHER CASES, 1906.

#### I. INDICTMENT FOR.

See *Regina v. Smith*, 19 O. R. 714.—C. P. D.; p. 1721.

#### II. RIGHT OF ACTION.

Where an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete, and cannot be divested by the subsequent marriage of his daughter before birth of a child. The facts of seduction, pregnancy, and illness might be proved by the daughter, but she might refuse to answer as to who was the cause of her pregnancy if she asserted that the child she bore was born in wedlock. *Eraus v. Watt*, 2 O. R. 166.—Q. B. D.

Where the daughter was married during her pregnancy consequent upon her seduction by the defendant, and her child was born in wedlock, and the action was brought at the instigation of the husband, he and his wife being the only witnesses, and no proof of sickness or inability to serve was given:—Held, (Armour, J., dissenting), that a nonsuit was properly entered. Per Armour, J. If loss of service was necessary to be proved, a new trial should be granted for that purpose; and it cannot be said that under such circumstances a father sustains no damages apart from the loss of service. *Ib.*

In an action for seduction of the grandniece of the plaintiff, it appeared that on her father's and mother's death, when she was about twelve years old, she went to live with the plaintiff, and from thence went out to service to various persons, and at the time of the seduction, and for three years previously, was in the service of one C. retaining her wages for her own use. She was seduced by the defendant in the month of April, being then about nineteen years old. In June following she went to Detroit for a couple of weeks, and from thence to the plaintiff's, where she resided until she was sick, when she went to the hospital, where she was confined. While at the plaintiff's she worked, and did whatever was required of her, the plaintiff treating her as if she were at home, as her guardian:—Held, that the plaintiff could not recover, for that the right of action for the alleged wrong was not vested in the plaintiff, but in the person who was master of the girl at the time of her seduction. *McKersie v. McLean*, 6 O. R. 428.—C. P. D.

In an action for seduction brought by the mother and stepfather of the daughter, it appeared that at the time of the seduction the daughter was not living at home with the plaintiffs, but was out at service:—Held (affirming the judgment of Galt, J.), that the plaintiffs had the right to maintain the action. Quere, as to the mother's right to sue alone. *Meyer v. Bell*, 13 O. R. 35.—Chy. D.

In an action for seduction it appeared that the plaintiff was the brother of the girl seduced; and that the girl, though in the service of another person, yet (by agreement with her mistress, entered into at the time of her engagement) was at liberty to perform, and did perform certain services at home for the plaintiff, under contract with him for which she received compensation:—Held, that the plaintiff was en-

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R. 714.—C. P. D.;

TION.

is seduced and which weakens work or serve, the plete, and cannot marriage of his id. The facts of is might be proved t refuse to answer pregnancy if she was born in wed- 166.—Q. B. D.

carried during her seduction by her born in wedlock, the instigation of e being the only kness or inability Armour, J., dis- properly entered. Service was neces- should be granted not be said that father sustains no service. *Id.*

of the grandniece at on her father's was about twelve the plaintiff, and ce to various per- seduction, and for the service of one er own use. She in the mouth of en years old. In troit for a couple o the plaintiff's, us sick, when she he was confined. worked, and did the plaintiff treat- her guardian:— r not recover, for he alleged wrong but in the person the time of her an, 6 O. R. 428.—

brought by the daughter, it ap- the seduction the ne with the plain- —Held (affirming the plaintiffs had on. Quere, as to e. *Myer v. Bell*,

it appeared that the girl seduced; the service of an- ant with her mis- of her engage- rm, and did per- for the plaintiff, which she received e plaintiff was en-

titled to maintain the action. *Rist v. Faux*, 4 B. & S. 409, specially referred to; *Thompson v. Ross*, 5 H. & N. 16, distinguished; *Straghan v. Smith*, 19 O. R. 558.—Chy. D.

It appeared that the defendant was not quite of age, and that no guardian had ever been appointed, but that the fact of infancy was well-known to the defendant's parents and to the solicitor and counsel who appeared for him at the trial, and no objection on this ground was taken till this motion before the Divisional Court:—Held, that under Con. Rules 261, 313, the appointment of a guardian was not imperative: the court had a discretion; and in this case the judgment obtained against the defendant at the trial should not be interfered with. *Furnival v. Brooke*, 49 L. T. N. S. 134, followed. *Id.*

See *Beninger v. Thrasher*, 1 O. R. 313, p. 1906; *Udy v. Stewart*, 10 O. R. 591, *infra*.

### III. EVIDENCE.

Held, following *Hodsdoll v. Taylor*, L. R. 9 Q. B. 79, that in an action for seduction evidence as to defendant's means is inadmissible; and that evidence of the kind having been received, defendant was not to be prejudiced in his application for a new trial because his counsel had, after having done his best to exclude the evidence, examined defendant on the same subject with a view to disproving the estimate placed on his means. *Ferguson v. Veitch*, 45 Q. B. 160.—Q. B. D.

In an action of seduction the plaintiff obtained a verdict, and judgment was directed to be entered in his favour. In the following sittings of the Divisional Court an order nisi was obtained to set aside the verdict and judgment, and to enter judgment for the defendant, on the ground of the improper admission of the evidence of the seduced girl by reason of her incompetency to give evidence. The order was set down, and on its coming on for judgment, it appeared that after the order had been served the plaintiff had died:—Semble, that under O. J. Act, Rule 383 (Con. Rule 620), the action abated by reason of the plaintiff's death:—Held, that the girl's evidence was improperly received, as it clearly appeared that she was not capable of understanding or appreciating the nature of an oath or the obligation she assumed in swearing to tell the truth, and was therefore incompetent to give evidence; and without her evidence the verdict could not be supported. An order was granted staying further proceedings in the action. *Udy v. Stewart*, 10 O. R. 591.—C. P. D.

In an action of seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant, the girl having died shortly after the birth of the child. The plaintiff stated that the defendant had admitted that he had seduced the girl, and asked what the case could be settled for. The defendant denied that he was the father of the child, or that he had made any such admission; that he had heard L. spoken of as the father of the child. He admitted having asked what the case could be settled for, but that he did so because he heard the plaintiff was asking \$1,000, and

he wished to know what it could be settled for; that he did not do so with a view to any one but merely out of curiosity. The jury found for the plaintiff with \$750:—Held, that there was sufficient evidence to go to the jury in support of the plaintiff's case; and that the damages, under the circumstances, were not excessive. *Palmby v. McCleary*, 12 O. R. 192.—C. P. D.

See *Erans v. Watt*, 2 O. R. 166, p. 1904.

### IV. DAMAGES.

Assessment of damages by judge without jury. See *Adair v. Wade*, 9 O. R. 15, p. 682.

See *Palmby v. McCleary*, 12 O. R. 192, *supra*.

### V. COSTS.

In an action for seduction it appeared that the wrong complained of was partly attributable to the culpable conduct of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get the costs, whereupon judgment was directed to be entered for him without costs:—Held, that good cause was shewn why costs should not be given to the defendant within Rule 428 (Con. Rule 1170), which declares that where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the judge or court shall otherwise order. *Wamsley v. Mitchell*, 5 O. R. 427.—C. P. D.

### VI. OTHER CASES.

Held, affirming the judgment of *Cameron, J.* (9 P. R. 206), that under the Insolvent Act, 1864, s. 9 sub-s. 5, a discharge in insolvency would form no answer to proceedings upon a judgment against defendant for seduction. *Beninger v. Thrasher*, 1 O. R. 313.—Q. B. D.

Arrest under Ch. Re.—See *Wheatly v. Sharp*, 8 P. R. 189, p. 903.

In an action of seduction brought against an infant, the defendant was served personally, and entered an appearance in person:—Held, that the common law practice referred to in Con. Rule 261 means the practice by which a real guardian and not a fictitious one was appointed; and an order was made requiring the defendant to appear by guardian within six days, and in default that the plaintiff should be at liberty to appoint a guardian for him, the consent of such guardian being shewn, as also that he had no interest adverse to the defendant. *Hyne v. Brown*, 13 P. R. 17.—Street.

### SEIZURE.

See EXECUTION—SHERIFF.

### SEPARATE SCHOOLS.

See PUBLIC SCHOOLS.

**SEPARATION.**

DEED OF—See HUSBAND AND WIFE.

**SEQUESTRATION.**

See EXECUTION.

**SERVANT.**

See MASTER AND SERVANT.

**SERVICE.****I. OF PROCESS AND PROCEEDINGS.**

1. *In High Court*—See PRACTICE.
2. *In Division Courts*—See DIVISION COURTS.
3. *In Ejectment*—See EJECTMENT.
4. *Other Proceedings*—See THE SEVERAL TITLES.

**SESSIONS.****I. WHO TO PRESIDE, 1907.****II. CONVICTIONS.**

1. *Amendment of*, 1907.
2. *Appeals from*.
  - (a) *To Sessions*, 1908.
  - (b) *From Sessions*—See CERTIORARI.

**III. MANDAMUS TO—See MANDAMUS.****I. WHO TO PRESIDE.**

Held, per Armour and O'Connor, JJ., that the county judge of the county of Lanark had no power to preside at the sessions in the county of Renfrew, the provincial statute authorizing him to do so being ultra vires. Wilson, C. J., upon this point gave no positive opinion but inclined to the opposite view. *Gibson v. McDonald*, 7 O. R. 401.—Q. B. D.

**II. CONVICTIONS.****1. Amendment of.**

Where an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour"—Held (Cameron, J., dissenting), that their assuming so to amend the conviction was not a quashing of the conviction, and therefore trespass would not lie against the justices. *McLellan v. McKinnon*, 10 O. R. 219.—Q. B. D.

Per Armour, J., the general sessions of the peace have no power under 32-33 Vict. c. 31 (Dom.), to amend the sentence in a conviction as by striking out the part imposing hard labour,

but can hear and determine an appeal on the adjudication of guilt only. Hagarty, C. J., inclined to agree, but gave no express decision on this point. *Ib.*

See *In re Ryer and Ploves*, 46 Q. B. 206, *infra*.

**2. Appeals from.****(a) To Sessions.**

A conviction may be returned and proved at any time during the hearing of an appeal therefrom to the general sessions, or, in the discretion of the chairman, even during an adjournment for judgment. *In re Ryer and Ploves*, 46 Q. B. 206.—Osler.

A minute of conviction signed by the justice, but not sealed, was returned to the sessions, upon the entering of an appeal therefrom by the defendants. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The chairman reserved judgment until a day named, and during the adjournment the justices returned and filed a conviction under seal. The chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard:—Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the chairman's discretion, which could not be reviewed. *Ib.*

On an appeal to the sessions from a conviction by a magistrate for breach of a municipal by-law, it is in the discretion of the chairman to grant or refuse a request for a jury, under 36 Vict. c. 58, s. 2 (Dom.), which is declaratory of the meaning of section 66 of the 32-33 Vict. c. 31 (Dom.), and is not confined to cases under the Acts mentioned in the preamble and title, which relate only to the desertion of seamen. *Regina v. Washington*, 46 Q. B. 221.—Osler.

On the appeal the appellant tendered evidence and witnesses not heard on the trial before the magistrate which the chairman rejected, relying on 32-33 Vict. c. 31, s. 66 (Dom.), which, however, had been repealed by 42 Vict. c. 44, s. 10 (Dom.). The conviction was amended and affirmed, as and for a breach of a municipal by-law:—Held, that the appellant had the right under either the Dominion Act, or R. S. O. (1877), c. 74, s. 4, which governed the case, to have such witnesses examined, and having been deprived of this right, the order of sessions should be quashed. *Ib.*

Held, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint; as by R. S. O. (1877), c. 74, s. 4, the practice of appealing in such a case is assimilated to that under Dom. Stat. 33 Vict. c. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.—Osler.

Two justices appointed in 1880 for the temporary judicial district of Nipissing, made a conviction in the said district of one M. for an

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Q. B. 206, *infra*.

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R. 420.—Osler.

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assault committed there:—Held, that no appeal  
would lie under 9 Vict. c. 41, now Consol. Stat.  
C. c. 101, s. 4, to the general sessions of the  
county of Renfrew, being the nearest to the  
place of conviction, for the justices were not ap-  
pointed under that Act, but under the R. S. O.  
(1877) c. 71, and the place of conviction was not  
within any part of Canada defined and declared  
by proclamation under that Act. *Gibson v.*  
*McDonald*, 7 O. R. 401.—Q. B. D.

On the conviction of the prisoner herein she  
was committed to custody under a warrant issued  
by the convicting magistrate. She gave bail  
and was discharged from custody under 33 Vict.  
c. 27, s. 1. On the appeal being heard, the  
prisoner was found guilty and the conviction  
affirmed, and the prisoner directed to be pun-  
ished according to the conviction. No process  
was issued by the sessions for enforcing the  
judgment of the court, but a new warrant was  
issued by the convicting magistrate, under which  
the prisoner was retaken. Writs of habeas corpus  
and certiorari were issued, and on the return  
thereof a motion was made for the discharge of  
the prisoner. In the margin of the writ of  
habeas corpus, it was marked "per" 33 Car. 2,  
which was signed by the judge issuing it:—  
Held, that the prisoner was not in custody or  
confined under the judgment of the sessions,  
but under the warrant of the convicting magis-  
trate: and—Sembly, under the circumstances,  
the convicting magistrate was functus officio, and  
therefore could not issue the warrant in question,  
which should have been issued by the sessions;  
and possibly they could have directed punish-  
ment for the unexpired term; but that if no bail  
had been given, and the prisoner had remained  
in custody, no further order of commitment  
would have been necessary, or if no warrant of  
commitment had been issued prior to appeal, the  
magistrate could have issued one thereafter:—  
Held, also, that under a certiorari the conviction  
might be quashed; and, as the judgment of the  
sessions confirmed the conviction, it would prob-  
ably fall with it. *Regina v. Arscott*, 9 O. R.  
541.—Rose. See *Arscott v. Lilley*, 11 O. R. 153;  
14 A. R. 283, p. 1124.

An appeal from a conviction for malicious  
injury to property came on for hearing at the  
general sessions. No order of adjournment  
was endorsed on the conviction, the clerk merely  
entering a minute of the order in his book. At  
the following sessions the appeal was heard and  
the conviction quashed:—Held, that the pro-  
vision in section 77 R. S. C. c. 178, as to  
endorsing the order of adjournment on the con-  
viction was not imperative, but directory merely,  
and therefore the omission to make the endorse-  
ment did not affect the validity of the order to  
quash. *Regina v. Read*, 17 O. R. 185.—C. P. D.

See *McLellan v. McKinnon*, 1 O. R. 219, p.  
1907; *Regina v. Ramsay*, 11 O. R. 210, p. 1048;  
*Regina v. Dunning*, 14 O. R. 52, p. 218; *Regina*  
*v. McGauley*, 12 P. R. 259, p. 1061.

## SET-OFF.

### I. SUBJECT MATTER OF SET-OFF, 1910.

### II. OF COSTS—See COSTS.

### III. IN INSOLVENCY PROCEEDINGS—See BANKRUPTCY AND INSOLVENCY.

### IV. COUNTER CLAIM OR SET-OFF.

#### 1. Pleading—See PLEADING.

#### 2. Costs of—See COSTS.

#### 3. In Distress—See DISTRESS.

### V. OF JUDGMENTS—See JUDGMENT.

### I. SUBJECT MATTER OF SET-OFF.

The plaintiff had recovered a verdict for \$600  
against defendant for malicious prosecution, but  
judgment had not been signed thereon. At the  
same assizes the defendant recovered a verdict  
against the plaintiff for \$380 on promissory notes,  
and signed judgment. The plaintiff almost im-  
mediately after its recovery assigned his verdict  
to his brother, but the court held this to be a  
device to prevent a set-off:—Held, that the  
defendant was entitled to have the plaintiff's  
verdict set-off pro tanto by entering satisfaction  
upon his judgment to the extent of the verdict,  
and paying the costs of suit; and it made no  
difference that the judgment had not been enter-  
ed by the plaintiff. *Grant v. McAlpine*, 46 Q.  
B. 284.—Osler.

A mortgagor and mortgagee dealt together for  
some years without having had any settlement  
of accounts, and the former became insolvent.  
At the date of the insolvency there existed a  
right of set-off, in favour of the mortgagor for  
the balance due him on their general dealings:—  
Held, affirming the finding of the master, that  
such right of set-off passed to the official assignee  
of the mortgagor, and that a transferee of the  
security took it subject to the equity. *Court v.*  
*Holland*, 29 Chy. 19.—Boyd.

After plaintiff had commenced an action  
against the defendant to recover from him in  
respect of his unpaid stock in a joint stock com-  
pany the sum of \$442.29, being the amount of an  
unsatisfied judgment recovered by the plaintiff  
against the company, one B. recovered a judg-  
ment against the company, for \$1,333.08, and  
assigned it to one G., who assigned part of the  
money recovered to the extent of \$500, the  
amount of the defendant's unpaid stock to the  
defendant. The object of the assignment to the  
defendant was to give him priority over the plain-  
tiff's claim:—Held, that the procuring of such  
assignment by defendant being for such purpose,  
and being a voluntary act on defendant's part,  
and with notice of plaintiff's claim, did not con-  
stitute a defence to it; but—Sembly, if the set-off  
had accrued to the defendant in his own right,  
although after action brought, it would have  
been otherwise. *Field v. Galloway*, 5 O. R.  
502.—C. P. D.

In an action of trespass for entering the  
warehouse of a deceased person (of whom the  
plaintiff was the administrator) after his death  
and taking and converting the goods therein, the  
defendant set-off a debt due by deceased to him.  
An administration order had been made of which  
the defendant had notice before defence. The  
set-off was held bad under 27 Vict. c. 28, s. 28,  
(Ont.), and also because of the administration  
order. *Monteith v. Walsh*, 10 P. R. 162.—Dal-  
ton, Master.



A solicitor's bill of costs will be allowed as a set-off and as a debt, though no bill has been delivered. *Macpherson v. Tisdale*, 11 P. R. 261.—Boyd.

J. I., the appellant, gave to one Q. his note for \$6,000 which was endorsed to the Bank of P. E. I.; the Union Bank of P. E. I. at the time held a cheque or draft, made by the Bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than \$200 less than its face value; being sued on the note he set-off the amount of such cheque or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set-off and another party could succeed in a similar transaction, the Union Bank would get their claim against the Bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set-off he could not do so, because he was a contributory within the meaning of the 76th section of the Canada Winding-up Act, and that the Act which came into force on the 12th May, 1882, was retrospective as regards the endorsements made before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury, under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the court below, that appellant having purchased the draft in question for value and in good faith prior to 26th May, 1882, the Canada Winding-up Act, 45 Vict. c. 23 (Dom.), was not applicable, and therefore the appellant was entitled to the benefit of his set-off, and that the Winding-up Act was not retrospective as to this endorsement. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265.

Y., in making a deposit on a government contract, gave a marked cheque on the Central Bank, in which he was a shareholder, and which cheque was subsequently cancelled and a deposit receipt issued by the bank substituted therefor. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation 3rd December, 1887, and on 20th January, 1888, Y. having been required by the government to take up the deposit receipt and replace it with other security, took an assignment of the receipt and notified the bank. On being threatened with a suit on the note, he filed a petition asking for leave to set up the deposit receipt against the note as a set-off:—Held, following *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, that Y. as maker of the note to the bank was a mere debtor and not a contributory and that although also a shareholder, and so liable as a contributory, he was not a contributory quoad the debt which arose out of an independent transaction and for that reason section 73 of R. S. C. c. 129 did not apply:—Held, also that the prohibition in the Act against acquiring debts for the purpose of set-off is limited to the case of contributories; as to debtors the law of set-off as administered by the courts is

applicable as if the company was a going concern and following *Re the Moseley etc. Coke Co.*, *Barrett's Case*, 4 D. G. J. & S. 756, that the right of set-off virtually arose not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, because the engagement was to give security to the satisfaction of the government and in taking up the deposit receipt and supplying better security Y. was only fulfilling that which he was obliged to do by a prior bona fide engagement.—*In re the Central Bank of Canada and the Winding-up Act*, Ch. 129, R. S. C.—*Yorke's Case*, 15 O. R. 625.—Boyd.

It appeared that during S. P.'s ownership the government constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action:—Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration showed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set-off the money recovered from the government against their liability for damages for their breach of contract. *Platt v. Grand Trunk R. W. Co.*, 12 O. R. 119.—Proudfoot.

The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over \$1,000, and claimed a balance of \$169.72 and interest from the 1st January, 1888. The defendant by his statement of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of \$1,325.75, for which he counter-claimed:—Held, that the matter of the counter-claim was really a set-off, and even if it were not improper to call it a counter-claim, having regard to Con. Rule 373, this could not change its real character. *Cutler v. Morse*, 12 P. R. 594, referred to. *Bennett v. White*, 13 P. R. 149.—Ferguson.

L. having improperly withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services:—Held, that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, under the special provisions of R. S. C. c. 129, and as to which no set-off was permissible against any debt or dividend due from the company to L. *Re Bolt and Iron Co.*—*Livingstone's Case*, 14 O. R. 211. Boyd: 16 A. R. 397.

Held, that a married woman, though married before 4th May, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns as a lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire beneficial interest,

was a going concern  
Coke Co.,  
& S. 756, that the  
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—In re the Central  
inding-up Act, Ch.  
50. R. 625.—Boyd.

P.'s ownership the  
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—Held, that as the  
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et. *Platt v. Grant*  
19.—Proudfoot.

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ase, 14 O. R. 211.

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the lessee was to  
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es for her, in such  
beneficial interest,

and though the covenant ran with the land:—  
Held, also (affirming the decision of Ferguson,  
2 O. R. 459), that a claim on behalf of the said  
trustees for rent in arrear, and for damages for  
non-repair, was not a matter of set-off against  
damages recovered against W. F. for breach of  
said covenant, though he was one of the trustees,  
they not being matters arising in the same  
right. Per Boyd, C.—Sembie, if the amount to  
be paid for the malthouse had formed a lien on  
this particular land out of which the rent issued,  
it may be that the claim for set-off in respect of  
rent in arrear and damages for non-repair would  
have prevailed. *Ambrose v. Fraser*, 14 O. R.  
551.—Chy. D.

On 15th November, 1887, the day before the  
suspension of the Central Bank, one D., having  
sufficient funds to his credit, drew a cheque upon  
it payable to C., who deposited the same in the  
Dominion Bank, and obtained an advance upon  
it, and the Dominion Bank claimed upon it in  
the winding up proceedings, having presented it  
for payment on November 17th, when, however,  
the Central Bank had suspended payment. On  
23rd November, 1887, the Central Bank marked  
the cheque good, debiting D.'s account and  
crediting the Dominion Bank with the amount  
thereof. Afterwards, however, the liquidators  
claiming the right to set off certain subsequently  
accurring liabilities of D. against the cheque, the  
Dominion Bank withdrew their claim upon it,  
and the Master in Ordinary disallowed it. Sub-  
sequently, and after the first dividend had been  
paid, C. heard of this, and filed a claim on the  
cheque, on 13th September, 1888. The master,  
however, held that the time for filing claims  
having elapsed, he had a discretion as to allowing  
the claim, and allowed it only subject to the said  
set-off:—Held, that there was no right to set-off  
as claimed, and that the allowance of the claim  
was ex debito justitiae, and not discretionary.  
The fact of the Central Bank having accepted  
the cheque, and credited the amount to the  
Dominion Bank, and charged the amount to  
Donovan, shewed conclusively that at that time  
the Central Bank was not a creditor of Donovan:  
nor did the case come within the meaning of  
any of the clauses in the Winding-up Act relat-  
ing to fraudulent preferences. *Re Central Bank*,  
—*Cayley's Case*, 17 O. R. 122.—Robertson.

A landowner had an old account for bread  
against the contractor for the erection of certain  
stores supplied, which account, with interest,  
he charged against the sums due to the con-  
tractor under the contract:—Held, upon the  
evidence, that the account and interest should  
be treated, not as a matter of set-off, but as a  
payment of so much of the contract price. *Truax*  
*v. Dixon*, 17 O. R. 366.—Q. R. D.

The defendant having distrained for rent in  
arrear, the plaintiff claimed that the defendant  
was indebted to him in damages for breach of  
the covenants in the lease to repair, and to lease  
to plaintiff an adjoining piece of land, and ob-  
tained ex parte an interim injunction restraining  
proceedings under the distress which was dis-  
solved on the ground of concealment of facts:  
Held, that the damages claimed by the plaintiff  
were not a "debt" within section 3 of 50 Vict.  
ch. 23 (Ont.), so as to constitute a set-off against  
the rent; and although under the O. J. Act  
they might be the subject of counter-claim they

would not justify an injunction as against a dis-  
tress levied as here. *Walton v. Henry*, 18 O. R.  
620.—MacMahon.

See *Culverwell v. Campton*, 31 C. P. 342, p.  
1690; *Dawson v. Moffatt*, 10 P. R. 366, p. 652.  
p. 1960; *Sharr v. Badenach*, 10 O. R. 131; *Can-*  
*adiana Pacific R. W. Co. v. Grant*, 11 P. R. 208,  
p. 1078; *Windsor Hotel Co. of Montreal v. Cross*,  
12 S. C. R. 624, p. 495.

## SETTLED ESTATES ACT.

Upon a petition under the Settled Estates Act,  
Boyd, C., dispensed with the examination re-  
quired by the Act of a married woman interest-  
ed who lived out of the jurisdiction, but not of one  
who lived within the jurisdiction. The Married  
Woman's Property Act 1884 (Ont.), does not  
apply to cases under the Settled Estates Act,  
where the woman has acquired the property be-  
fore the passing of the former Act. *Re English*,  
11 P. R. 198.

See *Re Smith's Trusts*, 4 O. R. 518, p. 895; 18  
O. R. 327, p. 1569.

## SETTLEMENTS.

MARRIAGE SETTLEMENTS.—See FRAUDULENT  
CONVEYANCES—HUSBAND AND WIFE.

## SEWERS.

See MUNICIPAL CORPORATIONS—WATER AND  
WATERCOURSES.

## SHADE TREES.

See WAY.

## SHARES AND SHAREHOLDERS IN COMPANIES.

See COMPANY.

## SHEEP.

The owner of sheep killed or injured by a dog  
can, under R. S. O. (1857), c. 214, s. 15, recover  
the damage occasioned thereby without proving  
that the dog had a propensity to kill or injure  
sheep; and the Act applies to a case where the  
dog has been set upon the sheep. It did not  
appear upon the face of the conviction in ques-  
tion that the offence was committed within the  
territorial jurisdiction of the convicting justices  
of the peace, but upon the depositions it was  
clear that it was so committed:—Held, that the  
saving provision of section 87 of R. S. C. c. 178,  
should be applied; and the order nisi to quash  
the conviction was discharged. *Regina v.*  
*Perrin*, 16 O. R. 446.—Armour.

## SHELLEY'S CASE.

See ESTATE—WILL.

## SHERIFF.

## I. DUTIES AND LIABILITIES.

1. *On Writs of Execution.*(a) *Landlord's Claim for Rent*, 1915.(b) *Abandonment*—See EXECUTION.2. *In Interpleader*—See INTERPLEADER.3. *In Replevin*—See REPLEVIN.

## II. FEES.

1. *When Office of Sheriff is Vacant*, 1916.2. *Poundage*, 1916.3. *Taxation of*, 1917.

## III. VENUE IN ACTIONS BY OR AGAINST SHERIFF, 1918.

## IV. UNDERTAKING GIVEN TO SHERIFF BY ATTORNEY, 1918.

## V. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 1918.

## VI. SALE OF LAND FOR TAXES—See ASSESSMENT AND TAXES.

## I. DUTIES AND LIABILITIES.

1. *On Writs of Execution.*(a) *Landlord's Claim for Rent.*

Goods having been seized by the sheriff under execution, and claims having been made thereto by third persons, namely, chattel mortgagees, an interpleader summons was obtained by the sheriff. Notice was then given to the sheriff by the landlord of rent due, but no distress was issued or anything further done on his behalf. An interpleader order was made, and the claimants having failed to give the security required thereby, the goods were sold pursuant to the terms of the order, the landlord becoming the purchaser. They were never removed from the demised premises. The claimants were successful.—Held, that the statute 8 Anne c. 14, s. 1, only applies to the goods of the execution debtor, and not to those of third persons, against whom there must be a distress, notice to the sheriff not being sufficient; and that the sheriff selling incurred no liability, as he was secured under the interpleader order.—Held, also, that the sheriff is not liable when the goods have not been removed from the demised premises. The proceeds of the sale were therefore ordered to be paid out of court to the claimants. *Clarke v. Farrell*, 31 C. P. 584.—C. P. D.

Under an execution in *Maclean v. Anthony*, the sheriff, on the 19th April, 1883, having seized the defendant's goods, sold them to one Ferguson, there being at the time rent overdue to the landlord. Ferguson did not remove the goods from the premises. By agreement between the landlord, the sheriff, and Ferguson, the latter retained sufficient of the purchase money to pay the claim for rent. Subsequently Ferguson sold

the goods to one English, when it was arranged that English should pay the old claim for rent, and a further instalment which had meanwhile fallen due. The defendant then surrendered his term, and English became tenant. On the 23rd of April, an execution in *Slater v. Anthony* was placed in the sheriff's hands, and he seized the same goods some time between 21st May and 23rd June. English having claimed the goods, the sheriff interpleaded, and an issue was directed which resulted in favour of Slater. Pending the interpleader issue the sheriff allowed the landlord's bailiff, who also claimed the goods for arrears of taxes, to sell them and pay the rent and taxes in arrears. At the conclusion of the interpleader issue it appeared that the sheriff had taken no security for the goods, and that English, the claimant, was worthless.—Held, that there being no claim either for rent or taxes which the sheriff was justified in acknowledging, he was liable to an attachment, on motion of the execution creditor, for disobedience of the interpleader order. *Maclean v. Anthony—Slater v. Anthony*, 6 O. R. 330.—Rose.

Writs of execution had been placed in the hands of the sheriff of Hastings, under which he made a levy on goods in Belleville and Madoc, leaving them on the premises in which he found them. After the service, which was on the 12th of February, and while the goods were in the debtor's premises, two instalments of rent fell due, on the 1st of March and June, which were paid by the sheriff.—Held, that this payment should not be allowed, because the goods might have been removed by him before the rent fell due, and being under seizure, they were not liable to distress, and there was nothing in the debtor's lease to accelerate payment of rent on seizure of his goods. *Grant v. Grant*, 10 P. R. 40.—Wilson.

See *Baker v. Atkinson*, 11 O. R. 735, 14 A. R. 409, p. 1262; *Trust and Loan Co. of Canada v. Laurason*, 6 A. R. 286; 10 S. C. R. 679, p. 524; *Adams v. Bucknell*, 10 P. R. 168, p. 1015.

## II. FEES.

1. *When Office of Sheriff is Vacant.*

The fees earned by a deputy sheriff while the office is vacant by reason of the death, resignation, or removal of the sheriff, of right belong to the deputy himself, and neither the representatives of the late nor the newly appointed sheriff have any right or claim thereto. *McKellar v. Henderson*, 27 Chy. 181.—Blake.

In such a case where fees had been received by the deputy, and which the bill alleged he had in error paid over to the executors of the late sheriff, and the deputy subsequently voluntarily assigned all his right and claim to such fees to the newly appointed sheriff, who filed a bill to compel repayment of the amounts to him, the court allowed a demurrer for want of equity. *Id.*

2. *Poundage.*

The poundage of a sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains, and sells goods

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Grant, 10 P. R. 40.—

on, 11 O. R. 735, 14 A.  
and Loan Co. of Canada  
286; 10 S. C. R. 679,  
McKewell, 10 P. R. 168,

FEES.

*Sheriff is Vacant.*

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and from this levy returns the money. If the  
sheriff's action be intercepted, so that he does  
not make this money, it is for the court to say  
what allowance shall be made to him in lieu of  
poundage. *Wadsworth v. Bell*, 8 P. R. 478.—  
Blake.

Held, Wilson, C. J., dissenting, that a sheriff  
has no right to poundage upon an execution  
against lands, unless there has been an actual  
sale. *Merchants' Bank v. Campbell*, 32 C. P.  
170.—C. P. D.

Held, that the usual mode of computing sher-  
riff's poundage is correct, namely, to allow six  
per cent. on the first \$1,000, and in addition  
thereto three per cent. on the amount over  
\$1,000, and under \$4,000; and in addition thereto  
one and a half per cent. on the amount over  
4,000. *Fleming v. Hall*, 9 P. R. 310.—Dalton,  
Master.—Cameron.

Held, under the facts stated in the report, that  
this case came within the provisions of R. S.  
O. (1877) c. 66, s. 45, and that therefore the  
sheriff was entitled to poundage. *Morrison v.*  
*Taylor*, 9 P. R. 390.—Cameron.

Held, that the sheriff was entitled to charge  
poundage upon each of several writs though all  
were issued by the same solicitor and were placed  
in his hands at the same time. *Grant v. Grant*,  
10 P. R. 40.—Wilson.

A sheriff upon arresting a judgment debtor  
upon a ca. sa. thereby becomes at once entitled  
as against the execution creditor to full pound-  
age on the amount of the execution. *McNab v.*  
*Oppenheimer*, 11 P. R. 348.—Galt.

### 3. Taxation of.

Where a sheriff's fees have been taxed before  
a deputy clerk of the Crown under R. S. O. (1877)  
c. 60, s. 48, a revision of such taxation cannot  
take place before the principal clerk of the  
Crown, but the court may refer the bill back to  
the same deputy clerk for a revision of the taxa-  
tion, where it appears that items have been im-  
properly allowed. *Hay v. Drake*, 8 P. R. 120.  
—Osler.

Held, that a sheriff's bill of fees may be taxed  
on notice under section 48 of the Execution Act,  
R. S. O. (1877) c. 66, either at Toronto or in the  
sheriff's own county, as the party taxing may  
elect. *Dominion Type Founding Co. v. Nagle*,  
8 P. R. 174.—Armour.

An execution and the judgment under which  
it issued were set aside on the ground of irregu-  
larity in obtaining the judgment:—Held, that  
the plaintiff was not entitled to have the sheriff's  
bill against him taxed under R. S. O. (1877) c.  
66, s. 48, as the setting aside of the execution was  
not a "settlement by payment, levy, or other-  
wise," within the meaning of the Act, or under  
section 47, as the plaintiff was not a "pers a  
liable on any execution:—Held, however, that  
a sheriff, as an officer of the court claiming fees  
by virtue of its process, is so far within its juris-  
diction that his bill may be taxed under Rule 447,  
O. J. Act (Con. Rule 1230). The item of \$6 for  
taking stock was improperly allowed, not being  
incurred in the care and removal of the property

within the tariff. *Morrison v. Taylor*, 9 P. R.  
390.—Cameron.

The sheriff paid persons at Belleville and at  
Madoc for "taking stock" after the levy:—  
Held, that these payments should be disallowed,  
as they do not appear in the tariff, and the local  
master was precluded by R. S. O. (1877) c. 66,  
s. 51, from allowing anything to the sheriff which  
was not correct and legal. *Grant v. Grant*, 10  
P. R. 40.—Wilson.

It appeared that the deputy sheriff kept the  
keys of the store in Belleville, and went himself  
twice a day to see that the goods were safe:—  
Held, that the payment to him of \$2 per day as  
possession money, should have been allowed only  
if the master were satisfied that it was necessa-  
rily and actually paid, and the item was referred  
back for reconsideration, it being alleged that  
the only possession was locking up the store and  
keeping the key. *Id.*

Held, also, that the plaintiff properly applied  
to a judge in chambers to review the taxation  
pursuant to R. S. O. (1877) c. 66 s. 52, as Rule  
447 (Con. Rule 1230) applied only to the Toronto  
taxing officers appointed under Rule 438, O. J.  
Act (Con. Rules 194, 197). *Id.*

### III. VENUE IN ACTIONS BY OR AGAINST SHERIFF.

In an action wherein a sheriff is plaintiff or  
defendant, the opposite party, if he so desire,  
may have the action tried in the county adjoin-  
ing that in which the sheriff resides. *Brannen*  
*v. Jarvis*, 8 P. R. 322.—Galt.

### IV. UNDERTAKING GIVEN TO SHERIFF BY ATTORNEY.

Held, affirming the Supreme Court of New  
Brunswick (25 N. B. Rep. 196) that a promise  
of indemnity to the sheriff by an attorney is  
binding on his client where the attorney had the  
conduct of the suit in the course of which such  
promise was made, and the subsequent acts of  
the client shewed that he had adopted the at-  
torney's proceedings. *Muirhead v. Shirreff*, 14  
S. C. R. 735.

### V. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS TO SHERIFF.

An assignment for the benefit of creditors  
made to a sheriff under R. S. O. (1887) c. 124,  
is made to him as a public functionary, and on  
his death the care and administration of the  
estate assigned devolves upon his deputy, and  
thereafter upon his successor in office. It is not  
competent to the sheriff to disclaim or decline  
to act as such assignee. *Brown v. Grove*, 18 O.  
R. 311.—Chy. D.

Where an assignment under the statute had  
been made to a sheriff, who died shortly after,  
and proceedings were subsequently taken in  
their own names by judgment creditors of the  
assignor to set aside a transfer of property as  
fraudulent:—Held, that the plaintiffs, suing  
alone, had no locus standi to maintain the ac-  
tion. *Id.*

## SHIP.

## I. APPLICATION OF IMPERIAL STATUTES, 1919.

## II. SALE OF.

1. *Warranty as to Class*, 1920.

## III. OWNERS.

1. *Part Owners*, 1920.2. *Liability of*.(a) *For Supplies*, 1921.(b) *Fire from Steamboats*, 1921.

## IV. MORTGAGEES OF SHIPS, 1921.

## V. CARRIAGE OF PASSENGERS, 1922.

## VI. CARRIAGE OF GOODS.

1. *Charterparty*, 1922.2. *Contract to Carry*, 1923.3. *Bill of Lading*, 1924.4. *Stowage*, 1925.5. *Shipment*, 1925.6. *Actions for Loss, Detention and Non-delivery*.(a) *Right of Action*, 1926.(b) *Evidence*, 1926.(c) *Damages*, 1927.

## VII. MASTER, 1928.

## VIII. FREIGHT, 1928.

## IX. DEMURRAGE, 1929.

## X. TOWAGE, 1930.

## XI. COLLISION, 1930.

## XII. SALVAGE, 1931.

## XIII. AVERAGE, 1932.

## XIV. BARRATRY—See INSURANCE.

## XV. ASSESSMENT OF SHIPS, 1932.

## XVI. SEIZURE OF SHARES IN SHIPS, 1932.

## XVII. FERRY—See FERRY.

## XVIII. MARINE INSURANCE—See INSURANCE.

## XIX. MARITIME COURT — See MARITIME COURT.

## I. APPLICATION OF IMPERIAL STATUTES.

The defendant as administratrix of her husband, who lost his life by the foundering of a steamer called the *Waubuno*, belonging to the plaintiffs, on which he was a passenger, sued the plaintiffs to recover damages under R. S. O. (1877), c. 128. The plaintiffs, who claimed limited liability under section 54 of 25 & 26 Vict. c. 63, (Imp.) filed a bill under the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 514, (Imp.), to restrain the action, and prayed that it might be determined by the court whether they were liable for loss of life or merchandise, and, if so, for what amount, and the persons entitled thereto:—Held, reversing the decree of Spragge, C. (27 Chy. 346), that the *Waubuno*, not having been registered under 17-18 Vict. c. 104 (Imp.), was not a British ship within the meaning of that Act, by virtue of the Statute of Canada 36 Vict. c. 128, and therefore not entitled to take

advantage of the limitation clause; and that even if she were, the plaintiffs were not entitled to an injunction, as they did not admit their liability for damages to the extent mentioned in the Act, and bring into court or offer to secure the amount. *Georgian Bay Transportation Co. v. Fisher*, 5 A. R. 383.

Held, that as the tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 25 & 26 Vict. c. 63 (Imp.). That the limited liability under section 12 of 31 Vict. c. 58 (Dom.), does not apply to cases other than those of collision. *Swell v. British Columbia Towing and Transportation Co.*, 9 S. C. R. 527.

Held, in this case that the provisions of the Imperial "Merchants' Shipping Act" did not prevent the property in the ship passing to the assignee under the "Insolvent Act, 1876." *Jones v. Kinney*, 11 S. C. R. 708.

The mortgagee of a British ship is not an owner within the meaning of Imperial Statute 17 & 18 Vict. c. 104, and there is no provision in that statute to prevent an alien being a mortgagee. *Comstock v. Harris*, 13 O. R. 407.—*Proudfoot*.

## II. SALE OF

1. *Warranty as to Class*.

The defendants bought a vessel from the plaintiff, who, as the jury found, warranted her to class B. 1, and promised to get her insured in a company, of which he was agent, for \$1,400. She would not class as B. 1, and no insurance could be effected under that class; but defendants sailed her uninsured until she foundered and was totally lost. In an action for the purchase money:—Held, that the measure of damages to which defendants were entitled for breach of the warranty was not the \$1,400 for which she might have been insured, but the sum which it would have taken to make her class B. 1, which it was for defendants to shew. *La Roche v. O'Hagan*, 1 O. R. 300.—Q. B. D.

## III. OWNERS.

1. *Part Owners*.

Quare, whether co-owners of a vessel have a right to share in the profits thereof earned in ventures to which they did not assent, as a majority of the owners can employ the vessel against the will of the minority, who, however, can compel the majority to give a bond to restore the vessel in safety or pay the value of their shares. In such cases the minority do not share the hazard, neither are they entitled to the benefit of the voyage. *Merchants' Bank v. Graham*, 27 Chy. 524.—*Proudfoot*.

Where certain persons, including G., advanced money to complete the building of a yacht at Cobourg, to sail for prizes at New York and Philadelphia, and scrip under seal was executed declaring that G. was to hold the yacht in trust as security for the advances; and G. incurred certain running expenses in taking the yacht to the race:—Held, that G. was entitled to a first



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*Co. v. Fisher*, 5

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for these expenses, as they had been incurred in  
prosecuting the enterprise for which the trust  
was created. *Burn v. Gifford*, 8 P. R. 44.—  
*Taylor, Master*.—Proudfoot.

See *Weldon v. Vaughan*, 5 S. C. R. 35, p. 334.

## 2. Liability of.

### (a) For Supplies.

Where one brought action against the regis-  
tered owners of a certain vessel for the value of  
goods supplied before they became such owners,  
not on the order of the defendants but on the  
order of one G. C., between whom and the de-  
fendants no relation of agency was proved:—  
Held, that the plaintiff could not recover:—  
Held, also, that it was open to the defendants  
to show that their real interest was that of  
mortgagees, though ostensibly registered owners.  
The fact that the vessel got the benefit of the  
supplies and necessities did not make the regis-  
tered owner liable. *Nelson v. Wagle*, 8 O. R.  
82.—Boyd.

### (b) Fire from Steamboats.

Held (affirming the judgment of Proudfoot,  
J.), that the evidence which appears in the re-  
port of this case, was sufficient to go to a jury  
to establish negligence in the management of  
the defendant's steamboat. *Hilliard v. Thurston*,  
9 A. R. 514.

Per Burton and Patterson, JJ.A., the owner  
of a steamboat navigating the inland waters of  
Ontario without legislative authority, is liable  
for loss occasioned to property by fire commu-  
nicated thereto by the steamer without any proof  
of actual negligence. *Ib.*

Per Burton, J. A., the fact that a steamboat  
has been granted a licence by the Inspector  
under the authority of the Act for the Inspec-  
tion of Steamboats, 31 Vict. c. 65 (Dom.), does  
not remove, neither was it intended to remove,  
the common law liability of the owner of such  
steamboat to a person whose property is injured.  
*Ib.*

See *Brown v. McRae*, 17 O. R. 712, p. 1397.

## IV. MORTGAGEES OF SHIPS.

Semble, a mortgagee of a vessel until he takes  
possession or does something equivalent thereto,  
is not entitled to an account of the money earned  
by the vessel for freight, etc.; but, where in a  
suit by the mortgagees of a part owner of a  
vessel the defendant, the owner of the other  
shares, admitted that he was sailing the vessel  
for the joint benefit of himself and the other  
owners, other than the plaintiffs, though pre-  
vious to the institution of the suit he had only  
asked for evidence that the agent of the plain-  
tiffs really held the shares for them:—Held,  
that the fair inference was, that the defendant  
was sailing for whomsoever might be the owners  
or entitled to the earnings; and that having had  
sufficient information to acquaint him with the  
fact that the plaintiffs had acquired the shares  
either as mortgagees or owners he had thus re-  
cognized their right to demand an account.

*Merchants' Bank v. Graham*, 27 Chy. 524.—  
Proudfoot.

The plaintiffs who were mortgagees of a vessel,  
in exercise of a power of sale contained in their  
security, on default of payment sold the interest  
of their debtor by auction, when the same was  
bought by one who held it in trust for the mort-  
gagees:—Held, that the effect of such sale and  
purchase was, that the plaintiffs remained mort-  
gagees only of the interest so sold. *Ib.*

Plaintiff was mortgagee of sixty-four shares  
in a vessel belonging to defendant, and on the  
defendant's insolvency was allowed by the cre-  
ditors and the assignee to take her as she stood  
at a valuation. Defendant had previously re-  
moved from the vessel a piano and several other  
articles, and had substituted stoves for steam  
heaters:—Held, that in the absence of fraud,  
the plaintiff was concluded by the settlement  
with the assignee by which he took the vessel as  
she then stood, and could not recover these  
articles; and that the mortgagor being in posses-  
sion, was entitled to manage the vessel as he  
thought best, and to remove such articles upon  
substituting others for them:—Semble, that a  
piano on board of a vessel would not pass to a  
mortgagee under the words "with her boats, guns,  
ammunition, small arms, and appurtenances."  
*St. John v. Bullivant*, 45 Q. B. 614.—Q. B. D.

See *La Roche v. O'Hagan*, 1 O. R. 300, p. 658;  
*Nelson v. Wagle*, 8 O. R. 82, p. 1921; *Constock*  
*v. Harris*, 13 O. R. 407, p. 1920; *Jones v. Kinney*,  
11 S. C. R. 708, p. 126.

## V. CARRIAGE OF PASSENGERS.

Liability of shipowner for assault and im-  
prisonment of passenger by purser. See *Emvrou*  
*v. Niagara Navigation Co.*, 2 O. R. 528, p. 1696.

Conveying travellers on Sunday. See *Regina v.*  
*Daggett*; *Regina v. Fortier*, 1 O. R. 537.

Liability for luggage. See *Dixon v. Richelieu*  
*Navigation Co.*, 15 A. R. 647, p. 213.

## VI. CARRIAGE OF GOODS.

### 1. Charterparty.

In September, 1882, a vessel sailed from Liver-  
pool, G.B., for Bathurst, N.B., to load lumber  
under charter. Having sustained damages on  
the voyage she was taken to St. John, N.B., for  
repairs, and when such repairs were completed  
it was too late in the season to proceed to Bath-  
urst. In an action against the owner for breach  
of charter party the jury found that the repairs  
could have been made at Sidney, C.B., in time  
to enable the ship to go to Bathurst:—Held,  
that the jury having pronounced on the ques-  
tions of fact, and their verdict having been  
affirmed by the Supreme Court of New Bruns-  
wick, this court would not interfere with the find-  
ing:—Held, also, that under such finding taking  
the vessel to St. John was such an unnecessary  
deviation from the voyage as to entitle the  
charterer to recover. *Cassels v. Burns*, 14 S. C.  
R. 256.

See *Carrill v. Schofield*, 9 S. C. R. 370, p. 1926;  
*Lord v. Davidson*, 13 S. C. R. 166, p. 1930;  
*McEwan v. McLeod*, 9 A. R. 239, p. 1927.

## 2. Contract to Carry.

One C. entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and C., that the contracts had not been made in behalf of and as agent for the defendant, freight being *prima facie* payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid; although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Merchants' Bank v. Graham*, 27 Chy. 524.—Proudfoot.

The bill of lading containing the contract in question provided *inter alia*, "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order \* \* freight \* \* to be paid by the consignees." "That the goods are to be delivered from the ship's deck, when the shipowner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereafter." "That any loss, damage or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred";—Held, that the bill of lading showed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa; nor any contract, the breach of which was made in Ontario, because, if there was such a contract in the bill, force and effect could not be given to the stipulation in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck. And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, etc., arising beyond their line, no damage for a breach in this province would result to the plaintiff. *Perkins v. Mississippi and Dominion Steamship Co. (Limited)*, 10 P. R. 198.—Rose.

The plaintiffs ordered goods from K., L. & Co., to be shipped to plaintiffs at Flat Creek, Manitoba, via the C. M., etc., Ry. Co., by which line plaintiffs had an arrangement for a special rate of freight, of which they informed K., L. & Co., but did not notify them of the terms thereof. K., L. & Co. delivered the goods to C. & M. at Montreal as agents of the defendant's line of boats consigned to the plaintiffs, to be sent by the said line of boats to M., and thence by the C. M., etc., Ry., and informed C. & M.

of the fact of plaintiffs having a special rate. The bill of lading which C. & M. gave for the goods was prepared by a clerk of K., L. & Co., who stated that he attached thereto a ticket marked "Ship our freight by C. M., etc., Ry.; great bonded fast line; low rates." The goods were carried by defendant's vessel, not to M., but to D., and thence by railway to their destination, and were accepted by plaintiffs, but plaintiffs had to pay higher freight than if carried as directed. The goods were carried from D. as quickly, or more quickly, than they would have been from M., and the freight would have been less had it not been for plaintiffs' special agreement with the C. M., etc., Ry. Co. The defendants' conduct in sending the goods by D. was proved to have been wilful.—Held, that there was a valid contract to carry via M., and that plaintiffs were entitled to recover for the breach thereof in not carrying therefrom; but Held, (reversing the judgment of Wilson, C. J., at the trial), that the plaintiffs could only recover nominal damages:—Held, also, following *Friendly v. Canada Transit Co.*, 10 O. R. 756, that the plaintiffs were the owners of the goods, and entitled to maintain the action:—Held, also, that the contract for the low rate could not be assumed to be illegal, as being contrary to public policy, because lower than the ordinary local rates; for even if it could not be enforced by plaintiffs against the company this would be no defence to the defendant. *Langton v. Robertson*, 13 O. R. 497.—C. P. D.

Held, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. (1877), c. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario; and in the absence of proof it would be assumed to be the same. *Ib.*

## 3. Bill of Lading.

The N. & N. W. Railway Co. and the G. W. Railway Co., shipped on the plaintiff's vessel a quantity of wheat from Hamilton to Kingston, consigned to the Molson's Bank in care of the defendants. The bills of lading contained the following provision: "All deficiency in cargo to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 10-60ths bushels, while the actual quantity shipped was 15,338 10-60ths bushels and the discrepancy was shewn to have occurred by the omission by mistake to include a draft of 500 bushels, in making up the statement of the quantity shipped. The plaintiff, the carrier, claimed that he was entitled, for his own use, to the 500 bushels so shipped in excess:—Held, that the provision in the bill of lading did not give it to him, and that no custom or usage was proved, giving it such meaning. The defendants who had accounted for such excess to the shipper were therefore held not liable to the plaintiff. *Murton v. Kingston and Montreal Forwarding Co.*, 32 C. P. 366.—C. P. D.

See *Perkins v. Mississippi and Dominion Steamship Co. (Limited)*, 10 P. R. 198, p. 1923; *Merchants' Despatch Transportation Co. v. Hale-*

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214; *Langdon v. Robertson*, 13 O. R. 497, p. 1924.

#### 4. Stowage.

A bill of lading acknowledged the receipt on board a steamer of the defendants, in good order and condition, of goods shipped by T. (fresh meat) and contracted to deliver the same in like good order and condition \* \* \*  
loss or damage resulting from sweating \* \* \*  
decay, stowage, \* \* \*  
or from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners or other persons in the service of the ship, or for whose acts the shipowner is liable (or otherwise howsoever) always excepted, namely (setting them out):—Held, affirming the judgment of the court below, Sir W. J. Ritchie C. J. and Fournier J. dissenting, that the clause "whether arising from the negligence, default or error in judgment of the master," etc., covered as well the preceding exceptions as those which followed and was not limited in its application by the words "from any of the following perils," and the defendants were, therefore, not liable for damage to the goods shipped resulting from improper stowage, which was one of the excepted perils. *Trainor v. Black Diamond Steamship Co. of Montreal*, 16 S. C. R. 156.

#### 5. Shipment.

By a charter party of 11th December, 1878, it was agreed that plaintiff's vessel then on her way to Shelburne, N.S., should proceed with all possible despatch after her arrival at Shelburne, to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before 1st of January, 1879, the charterers were to be at liberty to cancel the charter party. The vessel arrived at Shelburne in December and sailed at once for St. John. At the entrance of the harbour of St. John she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st of April following, prior to which time, on 26th March, the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the shipowners and charterers, they should find for the defendants. The verdict being for the defendants, the court below made absolute a rule for a new trial. On appeal

to the Supreme Court of Canada, it was:—Held affirming the judgment of the court below, that as there was no condition precedent in the charter that the ship should be at St. John at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract. *Carroll v. Schofield*, 9 S. C. R. 370.

#### 6. Actions for Loss, Detention and Nondelivery.

##### (a) Right of Action.

Three cases of goods exceeding \$40 in value were verbally ordered by L. at M. from plaintiff at T., through plaintiff's traveller, and were shipped, consigned to L., and carried by railway, and then by defendant's steamer to M. Two of the cases were received by L., one of which was in a damaged condition. The third case remained on board the vessel, as the purser refused to deliver it up until the freight on these cases as well as on a variety of other goods consigned to L. was paid, which L. refused to do until he had first an opportunity of checking over the goods. Before the dispute was settled the vessel left, and was subsequently wrecked and this case lost. An arrangement was made between plaintiff and L. whereby plaintiff allowed L. twenty-five per cent. on the value of the two cases received by L. The plaintiff then brought an action against the defendants to recover the twenty-five per cent. so allowed, and the value of the case lost:—Held (Galt, J. dissenting), that there was an acceptance and receipt of the goods by L. so as to pass the property therein to him; and therefore the action should, under the Mercantile Amendment Act, R. S. O. (1877) c. 116, s. 5, subs. 1, have been maintained by him and not by plaintiff. Per Galt, J., the action was properly brought by plaintiff, as the property in the goods had not passed from him; and he was entitled to recover the twenty-five per cent. so allowed by him, as also the price of the case lost; for although the loss thereof was occasioned by the dangers of navigation, the defendants were not protected under 37 Vict. c. 25 (Dom.), the evidence shewing that the loss was by the fault or neglect of the defendants. *Friendly v. Canada Transit Company*, 10 O. R. 756.—C. P. D.

##### (b) Evidence.

The plaintiffs alleged and proved an agreement with the defendants that the defendants' vessel should proceed to B. and carry thence to C., a cargo of lumber; that the vessel did not go to B. as agreed; and that in consequence the plaintiffs had to procure another vessel and pay a larger price than that agreed upon by the defendants. The defendants alleged that the reason they did not go for the lumber was, because the plaintiffs did not give them or send to the master of the vessel the necessary orders. The judge who tried the action in the County Court, of Lambton, found this allegation untrue, and gave judgment for the plaintiffs:—Held, that this court could not reverse the finding in the court below upon this question, as the view of the facts presented by the appellants, derived no support from the documents in evidence, and the

#### Lading.

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court did not see its way to taking a different view of the evidence from that taken by the judge at the trial:—Held, also, that it was sufficiently proved that the plaintiffs were ready and willing to ship the lumber; but, per Burton, J. A. (dissenting), the plaintiffs should have averred, and the onus was upon them to shew, and they did not shew their readiness and willingness to ship the lumber on the defendants' vessel. The case, however, was disposed of in the court below on an immaterial issue; and as the appellants chose to rest their case upon a point which the judge found against them, the appeal should be dismissed. *McKenzie v. Dancey*, 12 A. R. 317.

#### (c) Damages.

On the 3rd October the plaintiff chartered "The Erie Belle," a vessel owned by the defendants, to carry salt from Goderich to Milwaukee at seventy-five cents a ton. On the 11th November the defendants telegraphed informing the plaintiff that this vessel could not go, and requesting him to accept the services of another. Thereupon some correspondence ensued between the parties, the plaintiff insisting upon the defendants performing their contract, and they finally agreeing to do so. During all this time the plaintiff could have had the salt conveyed by other vessels at \$1 per ton, but did not, preferring to wait for the defendant's vessel which was loaded on the 25th November. Owing, however, to the apprehensions of the captain as to the weather, which deterred him from going out, the vessel was frozen up in Goderich harbour, and it was then impossible to forward the salt otherwise than by rail; and for the purpose of endeavouring to carry out a sale which the plaintiff had made, he did send several tons by rail, and paid his consignee the difference in price for salt which he had to buy in Milwaukee and that agreed to be paid to the plaintiff. The difference in expense in sending by rail and that agreed to be paid to the defendants, amounted to \$3.25 per ton:—Held, affirming the judgment of the court below, 46 Q. B. 235, that the plaintiff was not bound at the peril of losing all claim against the defendants for any additional loss, to have chartered another vessel at \$1 per ton, on receipt of the telegram of the 11th October; and that, under the circumstances, the plaintiff was entitled to recover the difference paid to his consignee as also the excess of freight. Cameron, J., dissenting, who thought that the sum of twenty-five cents per bushel, allowed by the arbitrator, the advance in freight for which the salt could have been carried, was all that the plaintiff was entitled to recover. *McEwan v. McLeod*, 9 A. R. 239.

The plaintiff, a dealer in grains, etc., in Canada, consigned to his correspondent in Liverpool, England, a quantity of clover seed, and delivered the same to the agent of the defendant company at Waterford in Ontario, for the purpose of being carried to Liverpool, receiving from such agent the usual bill of lading. Before the seed had left the American frontier for the seaboard the plaintiff desired to change the consignee, and applied to one B., an agent of the company, resident in Toronto, for that purpose who, on payment of the additional freight, granted a fresh bill of

lading, agreeing to carry the seed to London. The change of destination was duly communicated by B. to the agent of the company at Black Rock, whose duty it was to have made the necessary changes in the instrument securing the passage of the goods duty free through the United States, but this he omitted to do, in consequence of which the seed went to Liverpool, so that instead of being delivered in London on the 12th February, it did not reach there until the 23rd of March, too late for the sowing trade, so that the seed had to be sold at a heavy loss:—Held, (affirming the judgment of the court below, 1 O. R. 47.) (1) That the Toronto agent was authorized to make the change in the destination of the seed, and (2) that the defendants were bound to indemnify the plaintiff against the loss sustained by reason of the fall in the market value of the seed, together with the additional sum paid for the freight from Liverpool to London:—Sembler, that the same rule applies where the goods are not intended for immediate sale at their place of destination. *Monteith v. Merchants' Dispatch and Transportation Co.*, 9 A. R. 282.

See *Friendly v. Canada Transit Co.*, 10 O. R. 756, p. 1926; *Lord v. Davidson*, 13 S. C. R. 166, p. 1930; *Canadian Locomotive Co. v. Copland*, 16 A. R. 322, p. 1920.

#### VII. MASTER.

Action for work and services.—Employment of master "for the season." Loss of vessel. See *Ellis v. Midland R. W. Co.*, 7 A. R. 464, p. 1237.

Dismissal of master for disobedience, etc., he being a large shareholder in the company. See *Guildford v. Anglo-French Steamship Co.*, 9 S. C. R. 303, p. 1238.

See *Merchants' Bank v. Graham*, 27 Chy. 524, p. 1923; *International Wrecking and Transportation Co. v. Lohb*, 11 O. R. 408, p. 1932.

#### VIII. FREIGHT.

A schooner, carrying coal late in the autumn of 1883, from S. to K. was damaged by stress of weather. The cargo was unloaded to repair the vessel and the coal could not be delivered before the spring of 1884. The bill of lading stated the rate of freight to be \$1.50 per ton, but if the coal were not delivered in the season of 1883 the freight was to be at the going rates when the coal was delivered, "the dangers of navigation, fire, and collision excepted." On the arrival of the schooner at K. the master tendered the coal to the consignees who refused to accept it, disclaiming all title thereto, and contending that the consignor or insurers must take it. The master, too, refused to deliver unless upon payment of a larger rate of freight than that then prevailing. After ten days delay the coal was, by consent of parties, unloaded on the consignees' wharf, they receiving it as wharfingers. It was afterwards sold by consent of parties and was purchased on behalf of the consignees:—Held reversing the decision of the Q. B. D. 14 O. R. 170 (Hagarty, C.J.O., dissenting), agreeing with the court below that freight was payable only at the reduced rate, but holding that it was the duty of the defendants to tender the

seed to London. The company at as to have made the ment securing the through the United do, in consequence verpool, so that in- London on the 12th ere until the 23rd ring trade, so that enny loss :—Held, e court below, 1 O. agent was author- e destination of the ants were bound to t the loss sustained market value of the ional sum paid for London :—Sembler, here the goods are ale at their place of *Merchants' Despatch* t. 282.

*Transit Co.*, 10 O. R. on, 13 S. C. R. 166, *ve Co. v. Copland*,

ER. —Employment Loss of vessel. See *Co.*, 7 A. R. 464, p.

obedience, etc., he the company. See *Steamship Co.*, 9 S.

*aham*, 27 Chy. 524, *ing and Transporta-* 08, p. 1932.

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coal to the plaintiffs with a demand for payment of freight at the reduced rate, and that not having done so, the sale was unauthorized, and the expenses in connection therewith could not be charged against the plaintiffs. The court also held, that, for the same reason, the allowance of damages in the nature of demurrage could not be sustained, but that the defendants were entitled to some compensation (fixed at \$100) for the delay of the plaintiffs in unloading the vessel, after the duty of unloading was actually undertaken by them. *Canadian Locomotive Co. v. Copeland*, 16 A. R. 322.

See *Lord v. Davidson*, 138. C. R. 166, p. 1930.

#### IX. DEMURRAGE.

Held, reversing the judgment of Armour J., at the trial (Armour J., dissenting), that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed. *Gibson v. Michael's Bay Lumber Co., (Limited)*, 7 O. R. 746.—Q. B. D.

By charter party the appellants agreed to load the respondent's ship at Montreal, with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days demurrage were agreed on over and above laying days at forty pounds per day. Penalty for non-performance of the agreement, was estimated amount of freight. Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit. The ship was ready to receive cargo on the 15th November, 1880, at eleven a.m., and the appellants began loading at two p.m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the forward hold. No other cargo was ready, and as the appellants would not put the rye anywhere except in the forward hold, the loading stopped. At eight a.m. on the 19th the loading recommenced and continued night and day until six a.m., Sunday, the 21st, at which time the vessel sailed, in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. If the ice in the canal had not detained the barges having grain to be loaded, the vessel would have been loaded on the night of the 19th. The respondent sued appellants because ship had not received full cargo, and claimed two-and-a-half days, 15th, 16th and 17th of November, and freight on 214½ tons of cargo not shipped. The appellants contended delay was not due to them but to the ship in not supplying baggers and sewers to bag the grain. That the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight. The Superior Court gave judgment for the respondent for the dead freight but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal to the Supreme Court of Canada:—Held, affirming the judgment of

the Court below, Henry, J., dissenting, that as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left, had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages and that the proper measure of the respondent's claim was the amount of agreed freight which they would have earned upon the deficient cargo. That the demurrage days mentioned in the charter were over and above the laying days and had no reference to the loading of the ship. *Lord v. Davidson*, 13 S. C. R. 166.

See *Canadian Locomotive Co. v. Copeland*, 14 O. R. 170; 16 A. R. 322, p. 1929.

#### X. TOWAGE.

The B. C. T. Co. entered into a contract of towage with S. to tow the ship *Thrasher* from Royal Road to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangement between the B. C. T. Co., and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat, *Etta White*, and the B. C. T. Co.'s tug, *Beaver*, proceeded to tow the *Thrasher* out of Nanaimo on her way to sea, the *Etta White* being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering, upwards of ten miles open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were strangers to the coast. In an action for damages for negligently towing the ship, and so causing her destruction :—Held, 1. That as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable (Taschereau, J., dissenting as to the liability of the M. S. Co., and holding that the B. C. T. Co. were alone liable). 2. That under the British Columbia Judicature Act the action was maintainable in its present form by joining both companies as defendants. 3. That as there was nothing in the M. S. Co.'s charter or Act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used for in the present case. *Swell v. British Columbia Towing and Transportation Co.*, 9 S. C. R. 527.

#### XI. COLLISION.

On the 27th April, 1880, at port K. on lake Erie, where vessels go to load timber, staves, etc., and where the *Erie Belle*, the respondent's vessel, was in the habit of landing and taking passengers, the M. C. Upper, the appellant's



vessel, was moored at the west side of the dock, and had her anchor dropped some distance out in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform incoming vessels where it was. The *Erie Belle* came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the *M. C. Upper*, making a large hole in her bottom. On a petition filed by the owner of the *Erie Belle*, in the Maritime Court of Ontario to recover damages done to his vessel by the schooner *M. C. Upper*, the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one-half of the damage sustained by the *Erie Belle*. On appeal by the owner of the *M. C. Upper* and cross appeal by the owner of the *Erie Belle* to the Supreme Court of Canada:—Held, per Ritchie, C. J., and Fournier and Taschereau, J.J., that as the *Erie Belle*, being managed with care and skill, went to the wharf in the usual way, and as the *M. C. Upper* had wrongfully and negligently placed her anchor (as much a part of the vessel as her masts) where it ought not to have been, and without indicating, by a buoy or otherwise, its position to the *Erie Belle*, the owner of the *Erie Belle* was entitled to full compensation, and the *M. C. Upper* should pay the whole of the damage. Per Strong, Henry, and Gwynne, J.J., that the *M. C. Upper* had a right to have her anchor where it was, and that it was not in the line by which the *Erie Belle* entered and by which she could have backed out; that the strain on the anchor chain, when the crew of the *M. C. Upper* were hauling on it all the time the *Erie Belle* was at K., sufficiently indicated the position of the anchor, and therefore that the accident happened through no fault or negligence on the part of the *M. C. Upper*. The court being equally divided, the appeal and cross appeal were dismissed without costs. *McCallum v. Odette, In re The "M. C. Upper,"* 7 S. C. R. 36.

The owners of the tug "B. H." sued the owners of the steam propeller "St. M." for damages occasioned by the tug being run down by the propeller in the river Detroit:—Held, reversing the judgment of the Maritime Court of Ontario that as the evidence showed the master of the tug to have misunderstood the signals of the propeller, and to have directed his vessel on the wrong course when the two were in proximity, the owners of the propeller were not liable and the petition in the Maritime Court should be dismissed. *Robertson v. Wyle—The St. Magnus*, 16 S. C. R. 720.

See *Sewell v. British Columbia Towing and Transportation Co.*, 9 S. C. R. 527, p. 1930.

## XII. SALVAGE.

A vessel being stranded on the northern shore of Lake Erie, the master telegraphed to the manager of a wrecking company at Detroit, for tugs and wrecking apparatus, to which the manager answered agreeing to furnish the same. They were accordingly sent and the vessel rescued and saved. The plaintiffs claimed to recover an amount exceeding the value of the

vessel, made up of per diem charges for the tugs and apparatus:—Held, that in actions in the High Court, salvors, in the absence of a specific or express agreement to the contrary, must be taken to render their services under and subject to the rule of the Admiralty Court, limiting the maximum amount of salvage to a moiety of the value of the saved vessel, and cargo, if any, which rule is equally applicable to wrecking companies as to ordinary vessel owners: that the agreement must define a specific amount as to the salvage to be paid or a rule whereby it may be determined; and that there was no agreement here, but merely a request to perform the services:—Sembly, that the master of a vessel cannot by express agreement bind the owners to pay salvage beyond the value of the vessel. *International Wrecking and Transportation Co. v. Lobb*, 11 O. R. 408.—C. P. D.

## XIII. AVERAGE.

Where a vessel was disabled by a gale near a lee shore, so that she could not work off, and after the anchors had dragged until she began to pound on the bottom, the master, with the view not of saving the cargo, but of enabling the crew to escape, headed her round to the shore, where she was stranded and abandoned by the crew, and the defendant, the owner of the cargo, afterwards got it out at his own expense:—Held, that the stranding was not voluntary, and that the cargo was not liable to general average. *Dancey v. Burns*, 31 C. P. 313.—Osler.

Right of insurance company to average. See *Phoenix Ins. Co. v. Anchor Ins. Co.*, 4 O. R. 524, p. 991; *Western Assurance Co. v. Ontario Coal Co.*, 19 O. R. 462; 20 O. R. 295, p. 990.

## XV. ASSESSMENT OF SHIPS.

K. resided and did business in the city of Halifax, and was owner of ships which were not registered at the city of Halifax, and which had never visited the port of Halifax. Under the authority of 37 Vict. c. 30, s. 1, and 27 Vict. c. 81, ss. 340, 347, 361, Rev. Stat. N. S., the assessors of the city of Halifax valued the property of K., and included therein the value of said vessels:—Held, that vessels owned by a resident, but never registered at Halifax, and always sailing abroad, did not come within the meaning of the words "whether such ships or vessels be at home or abroad at the time of assessment," and therefore were not liable to be assessed for city taxes. *City of Halifax v. Kenny*, 3 S. C. R. 497.

## XVI. SEIZURE OF SHARES IN SHIPS.

See *Trerice v. Burkett*, 1 O. R. 80, p. 1708.

## SHOPS.

See INTOXICATING LIQUORS.

Closing shops under the Shops Regulation Act, 51 Vict. c. 33 (Ont.). See *Regina v. Flory*, 17 O. R. 715, p. 1351.

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*Co. v. Ontario Coal*  
295, p. 990.

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See *Regina v. Flory*,

## SHORT FORMS.

See DEED—LANDLORD AND TENANT—MORTGAGE.

## SIDEWALKS.

See WAY.

## SIMILITER.

See PLEADING.

## SLANDER.

See DEFAMATION.

## SNOW.

See WAY.

## SOCIETY.

See BENEVOLENT SOCIETIES—COMPANY.

## SOCIETY OF FRIENDS.

See *Dorland v. Jones*, 12 A. R. 543; 14 S. C. R. 39, p. 232.

## SOLICITOR.

I. PRIVILEGE OF, 1934.

II. PRIVILEGED COMMUNICATIONS—See EVIDENCE.

III. PRACTISING WITHOUT CERTIFICATE, 1934.

IV. AGENT OF SOLICITOR, 1935.

V. PROCEEDINGS AGAINST AND LIABILITY OF.

1. *For Negligence.*

(a) *Conducting Legal Proceedings*, 1936.

(b) *Investment of Money*, 1937.

2. *To Summary Jurisdiction.*

(a) *To Enforce Undertaking*, 1938.

(b) *Contempt of Court*, 1938.

(c) *For not Paying over Monies*, 1938.

(d) *Striking off the Rolls*, 1939.

(e) *Proceedings Initiated by the Court*, 1940.

VI. AUTHORITY.

1. *With reference to Actions and other Legal Proceedings*, 1940.

2. *To Receive Money*, 1942.

VII. DUTIES.

1. *Retainer and Appointment*, 1943.

2. *Dealing with Client.*

(a) *Taking Security for Costs*, 1945.

(b) *Other Cases*, 1946.

VIII. COSTS.

1. *Agreements as to Costs*, 1946.

2. *Offer to Reduce Amount of Bill*, 1947.

3. *Unnecessary Proceedings*, 1948.

4. *Substituting Bill of Costs for Commission*, 1948.

5. *Moderation of Costs*, 1949.

6. *Reference to Taxation or Revision.*

(a) *Who may Apply*, 1949.

(b) *Order for Delivery and Taxation*, 1949.

(c) *Before Whom*, 1950.

(d) *What may be Referred*, 1951.

(e) *Special Circumstances*, 1951.

(f) *What Recoverable*, 1954.

(g) *Interest on Costs*, 1955.

(h) *Practice*, 1955.

(i) *Costs of Taxation*, 1956.

(j) *Appeal from Taxation*, 1956.

7. *Recovery by Action*, 1957.

8. *Liability to Refund*, 1957.

9. *Other Cases*, 1958.

IX. LIEN FOR COSTS, 1959.

X. MISCELLANEOUS CASES, 1961.

XI. ATTORNEY-GENERAL—See ATTORNEY-GENERAL.

XII. BARRISTER—See BARRISTER-AT-LAW.

XIII. COUNTY CROWN ATTORNEY—See COUNTY CROWN ATTORNEY.

XIV. LAW SOCIETY—See LAW SOCIETY OF UPPER CANADA.

I. PRIVILEGE OF.

Ordering attorney out of court in trial of contested election. See *South Oxford Election—Hopkins v. Oliver*, H. E. C. 243, p. 1516.

III. PRACTISING WITHOUT CERTIFICATE.

M., a solicitor, who had not taken out the certificate entitling him to practise in the Ontario courts, allowed his name to appear in newspaper advertisements as a professional card and letter heads as a member of a firm in active practice; he was not, in fact, a member of the firm, receiving none of its profits and paying none of its expenses, and the firm did not appear as solicitors of record in any of the proceedings in their professional business. The Law Society took proceedings against M. to recover the penalties imposed on solicitors practising without certificate, in which it was shown that the name of the firm was indorsed on certain papers filed of record in suits carried on by the firm:—Held, reversing the judgment of the Court of Appeal, 15 A. R. 100 and the Q. B. D., 13 O. R. 104, that M. did not "practise as a solicitor" within the meaning of the Act impos-

ing the penalties (R. S. O. (1877) c. 140) and that he was not estopped, by permitting his name to appear as a member of a firm of practising solicitors, from showing that he was not such a member in fact. *MacDougall v. Law Society of Upper Canada*, 18 S. C. R. 203.

#### IV. AGENT OF SOLICITOR.

W. & Co., attorneys in the province of Quebec for B. & Co., there, requested the defendant, an attorney in the province of Ontario, to sue a company there on a promissory note made by them, of which B. & Co. were the holders. Defendant issued the writ in the name of B. & Co., and indorsed his own name as attorney. He, however, never had any communication with them, treating only with W. & Co., who had sent him many similar claims to collect, and crediting them with the amount of the note when collected:—Held, affirming the judgment of the County Court, that the plaintiff, who was the assignee of B. & Co., was entitled to recover from defendant the amount so collected; the rule that the town agent of a country principal is not accountable to a client of the latter not being applicable, as W. & Co., were merely the agents of B. & Co. to retain the defendant to act as their attorney, between whom and W. & Co., a direct privity of contract therefore existed. *Ross v. Fitch*, 6 A. R. 7.

In a certain suit D. acted generally as solicitor for H. who had been appointed administrator pendente lite. In certain matters, however, in connection with the proceedings, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect to these matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges of which he rendered D. an account. D. made up one bill of costs and rendered it to H. which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill with these charges to D.:—Held, that the master on taking H.'s accounts with respect to the estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction. *Beatty v. Haldan*, 10 O. R. 278.—Ferguson.

Lien of agent for unpaid agency charges. See *Re Ryan*, 11 P. R. 127, p. 1961.

Service of papers on Toronto agent. See *Prittie v. Lindner*, 11 P. R. 313, p. 1670; *Robinson v. Robinson*, 13 P. R. 51, p. 1670.

Where a solicitor has not entered the name of his agent in a county town, service of papers in an action where the proceedings are being carried on in such county town cannot be effected upon him by posting up copies in the office of the local registrar there, if he has the name of a Toronto agent duly entered. Con. Rules 203, 204, and 461 considered. *Esery v. Grand Trunk R. W. Co.*, 13 P. R. 221.—Dalton, Master.

See *Re Idington v. Mickle*, 8 P. R. 566, p. 1951; *Agnew v. Plunkett*, 9 P. R. 456, p. 386; *King v. Moyer*, 9 P. R. 514, p. 1954.

#### V. PROCEEDINGS AGAINST AND LIABILITY OF.

##### 1. For Negligence.

##### (a) Conducting Legal Proceedings.

C. who was in active practice as lawyer, and the author of several useful legal treatises, had obtained a mortgage on a valuable leasehold estate and having taken such proceedings as resulted in a forfeiture of the mortgagor's term, procured from the owner of the property a renewal of the lease to himself. The mortgagors instituted proceedings to redeem, but C. asserting that he was absolute owner of the interest, instructed solicitors to defend the suit. They expressed to C. some doubt as to his right to resist the claim of the mortgagors, whereupon he with one of the solicitors, went to a counsel of note, who, without having time to give the case full consideration, verbally advised them that the suit should be defended. C. drafted his answer his solicitor adding one clause. Counsel retained for the hearing told C. he would undoubtedly fail in the litigation, and subsequently the usual decree for redemption was pronounced, C. being ordered to pay such costs as had been occasioned by his resisting redemption. It was alleged against the solicitors that they had advised C. that he would be entitled to costs in any event; that they had refused to consider or submit to him an offer to pay the mortgage money and costs on the ground as they alleged that C. claimed about three times the sum offered; that they had colluded with the mortgagor's solicitor in having proceedings instituted, which they had wrongly advised him to defend; and that he had a good defence, but the same had been negligently managed. There was a written retainer which did not express any special arrangement as to costs or the terms on which the defence was to be conducted. The court being of opinion that C. had failed to make good his charges against the solicitors, affirmed the order made by Spragge, C., reversing the finding of the taxing officer that the solicitors were not entitled to recover the costs of the litigation. *Re Kerr, Akers and Bull, Solicitors*, 29 Chy. 188.—Chy. D.

Although in a simple case of a distinct assertion and a distinct denial of a fact at the time of a client retaining a solicitor, which thus forms a part of a contract it may be a proper rule to say that in such a case the solicitors has himself to blame when any difficulty arises, as he might have protected himself by having his retainer in writing, there is not any authority for extending that rule to facts arising after the retainer and during the progress of the litigation. In any event the rule applies only where it is simply oath against oath, not where there is other evidence direct or circumstantial in support of the solicitor's. *Id.*

Where F., a solicitor on behalf of his client, served a notice of sale under a mortgage made pursuant to the Act respecting short forms (R. S. O. (1877), c. 104) upon what he believed, after diligent enquiry, was the last place of residence of the mortgagor in this province, and did so on the instructions of his client, who was fully advised as to the said enquiries and their result, and bona fide deeming such services sufficient:—Held, that F. was entitled, as against his client, to tax the costs of the proceedings under the

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as lawyer, and legal treatises, had valuable leasehold proceedings as mortgagor's term, the property a re-

The mortgagors' term, but C. asserted of the interest, of the suit. They as to his right to mortgagors, whereupon went to a counsel time to give the fully advised them. C. drafted his clause. Counsel C. he would un-

and subsequently was pronounced, costs as had been remission. It was that they had added to costs in any to consider or sub-mortgage money they alleged that C. sum offered: that mortgagor's solicitor d, which they had end; and that he same had been was a written press any special e terms on which acted. The court failed to make good tions, affirmed the versing the finding solicitors were not of the litigation. solicitors, 29 Chy.

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power of sale, although it appeared the mortgagor really was at the time of such service, with in this province. *O'Donohue v. Whitty*, 20 O. R. 424.—Chy. D. Affirmed on appeal. See 20 C. L. J. 146.

R. S. O. (1877) c. 104, permits substitutional service at the residence though the mortgagor may be within the jurisdiction. But even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who bona fide acted on that view of the statute should not lose his costs of so effecting service. *Ib.*

Where services are rendered by a solicitor at the instance of a client, possessing the like knowledge of the matters of fact as the solicitor, the onus is on the client to establish negligence, ignorance, or want of skill, by reason of which alone and entirely the services have been utterly worthless, if he resist the taxation of costs incurred by such services. *Ib.*

See *Gall & Co. v. Collins*, 12 P. R. 413, p. 1954.

## (b) Investment of Money.

A solicitor entrusted with moneys to invest, did so on property of insufficient value, and his client, shortly after the loan, desired him to realize the amount advanced, which the solicitor endeavoured to do by getting the owner to effect another loan from a building society. He desired his client to release his mortgage for that purpose, undertaking to obtain security on chattel property for any deficiency before acting on the release. The society refused to advance more than \$800, which it was stipulated should be paid to the client, thus leaving a balance due him of about \$150. The solicitor procured from the mortgagor a chattel mortgage on cattle, etc., variously valued at from \$100 to \$130: such security being made out in the name of the client, and only requiring his affidavit of bona fides to have it registered. This the client refused to accept, and instituted proceedings against his solicitor for the surplus of his claim; and the judge of the County Court gave a verdict and judgment for \$177 against the latter. On appeal, this court (Barton, J. A., dissenting) being of opinion that the plaintiff had of his own wrong lost the benefit of the chattel mortgage, reduced the judgment by \$117, thus limiting the verdict to \$60, with Division Court costs, but refused to either party costs of the appeal. *O'Callaghan v. Bergin*, 11 A. R. 594.

R., a practising solicitor, was retained by the plaintiff to manage her business affairs, and he obtained from her and invested large sums of money in mortgage securities. A year afterwards R. entered into partnership with the defendant W., and the firm carried on business as solicitors and conveyancers and had in their hands several estates to manage. It was agreed when this partnership was formed that W. should have no interest in the plaintiff's business which continued to be managed entirely by R., but the entries in connection therewith were made in the books of the firm, moneys received on the plaintiff's account were deposited with the firm's moneys, and from time to time re-invested by the firm, or paid to the plaintiff or to R. by cheques of the firm, and charges paid by borrowers went into the profits of the firm.

Losses occurred owing to the insufficient value of some of the mortgaged properties:—Held (Barton, J. A., dissenting), affirming the judgment of the Queen's Bench Division (15 O. R. 662), and that of Boyd, C. at the trial, that under the circumstances, particularly because of the money having been actually received by the firm, and again paid out by them to the borrowers, both partners were liable for the negligence complained of. Per Huxarty, C. J. O. The business being *prima facie* within the scope of the partnership business, W. was liable and to escape liability he should, when the partnership was formed, have given notice to the plaintiff that he was not to be liable. Per Barton, J. A., R. alone was retained by the plaintiff, and as it was a term of the partnership that W. was to have no interest in the plaintiff's business, there was no duty cast upon him to give notice to her. Any liability to her could arise only by estoppel, and there was nothing amounting to estoppel in this case. *Thompson v. Robinson*, 16 A. R. 175.

During the partnership, the plaintiff, acting on R's advice, allowed him to invest moneys in the purchase of lands in Dakota, it being agreed that he was to pay her interest on the moneys so invested, and that any profits were to be divided between the plaintiff and R. W. had no knowledge of this transaction. The moneys so invested were lost:—Held, reversing the judgment of the Queen's Bench Division (15 O. R. 662), and affirming that of Boyd, C. at the trial, that this was a transaction clearly outside the scope of the partnership business, and that W. was not liable. *Ib.*

See *Taylor v. Magrath*, 10 O. R. 669.

## 2. To Summary Jurisdiction.

## (a) To Enforce Undertaking.

The court will not summarily compel a solicitor to perform an agreement or undertaking, merely because he is a solicitor; if it was not given by him in his professional connection with the suit or matter, the party to whom it is given will be left to his action. *Wilson v. Betty—Re Donoran and Morphy*, 12 A. R. 252.

Where M., a solicitor, unsuccessfully prosecuted a petition against the applicant at his own expense, in the name of one H., agreeing to indemnify H. against costs, M.'s interest being merely as surety on a bond for H., a summary application to make M. pay the costs of the petition was refused. *Ib.*

## (b) Contempt of Court.

See *In re O'Brien—Regina ex rel Felitz v. Howland*, 16 S. C. R. 197; 14 A. R. 184; 11 O. R. 633, p. 329; *Pritchard v. Pritchard*, 18 O. R. 173, p. 1939.

## (c) For Not Paying Over Moneys.

The fact as to whether moneys collected by an attorney had been afterwards loaned to him by the client was disputed; but an undertaking was produced, signed by the attorney to the effect that he held the moneys for investment:—Held, that if the transaction was afterwards

turned into a loan to the attorney, he must be prepared with the clearest evidence of the change in the relation, otherwise the usual order against the attorney must be made; and in this case the evidence was held to be insufficient:—Held, that where an order directing a reference to the master has been made in chambers, in such a case, and the reference completed under it, an application for relief therefrom must be made to the court. *In re an Attorney*, 8 P. R. 102.—Osler.—C. P. D.

A solicitor in an action had obtained an order for the payment out to him of certain moneys in court, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal:—Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the court; and that Con. Rule 867 had no application. *Pritchard v. Pritchard*, 18 O. R. 173, 178.—MacMahon.—C. P. D.

See *Re Fletcher*, 28 Chy. 413, *infra*; *Wilson v. Beatty*, *In re Donovan*, 9 A. R. 149, 1957.

#### (d) Striking off the Rolls.

Upon the taxation of solicitors' costs against their client, it was shewn that large sums of money belonging to their client had reached their hands, and after deducting the amount of the costs a considerable balance remained due to the client, for which he had, under the order of taxation, issued an execution, but the sheriff had been able to realise only a small portion of the debt; and thereupon a motion was made to strike the solicitors off the roll in default of payment of the amount remaining due. The court (Blake, V. C.), however, in view of the fact that the client had treated the claim as a debt from the solicitors to himself, and proceeded to a sale of all that he could seize under execution, was of opinion that he could not fall back on a right which he had had and might have exercised, unless, in addition to the nonpayment of the money, misconduct on the part of the solicitors could be shewn that would warrant the interference of the court; and refused the application, with costs. *Re Fletcher*, 28 Chy. 413.

To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough to shew that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. The court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partner's acts. *St. Aubyn v. Smart*, L. R. 3 Chy. 646 distinguished. *Re McCaughey and Walsh, Solicitors*, 3 O. R. 425.—Proudfoot.

On the presentation of a petition to restore a solicitor to the rolls, who had been struck off by an order of 1st September, 1874, for nonpayment over a client's money, evidence was required as to his good conduct since the making

of the order, and notice to the Law Society of the application, and on this being complied with he was restored, but the order was not rescinded. *Re Macnamara, a Solicitor*, 9 P. R. 497.—Proudfoot.

It was charged against T. a solicitor, that one W. being about to be tried for a criminal offence, was induced by T., as her solicitor, to pay him \$200 for the purpose of influencing the jury. The court, upon the facts stated in the report being satisfied that the charge was proved, an order was made striking him off the rolls. The petitioner having made a *prima facie* case, and being unable from want of means to proceed with the application, a solicitor was appointed by the court to take the matter up. *Re Titus, a Solicitor*, 5 O. R. 87.—Boyd.

See *Wilson v. Beatty—In re Donovan*, 9 A. R. 149, p. 1957; *Hands v. Law Society of Upper Canada*, 16 O. R. 625; 17 O. R. 300; 17 A. R. 41, p. 1160.

#### (e) Proceedings Initiated by the Court.

Where at the hearing matters are brought to the notice of the court which affect the character of one of the parties, a solicitor, the court will, of its own motion, and without being applied to by any other party, call upon such solicitor to shew cause why he should not be called upon to answer these matters. *In re a Solicitor*, 27 Chy. 77.—Spragge.

### VI. AUTHORITY.

#### 1. With Reference to Actions and Other Legal Proceedings.

A Montreal firm of solicitors brought an action for one C. against H., the now plaintiff, which was settled for \$3,700, of which H. paid \$3,000, and gave the solicitors a note for \$5,500 made and endorsed respectively by the defendants Griffith and Gimson, and held by H. as endorsee, out of which they were to take the \$700 and their costs. They sent a clerk to Toronto, where defendants lived, to effect a settlement, but being unable to do so, he left the note for collection with M. & Co., a Toronto firm of solicitors. After legal proceedings had been instituted, plaintiff paid C. the \$700. A settlement was discussed between the solicitors, which M. & Co. agreed to, provided their costs and the charges for the clerk's expenses to Toronto were paid. Negotiation for a settlement had been going on between the parties themselves, and on the 2nd December an agreement was entered into, that defendants should pay \$5,000 clear of everything, to the plaintiff. On the 4th December defendants' solicitors were informed by M. & Co. of other parties, besides the plaintiff, being interested in the note. On 6th December the parties met and effected a settlement, by plaintiff accepting \$5,000 in full of all claims under the action. The note which was held by M. & Co. was never delivered up to the defendants:—Held, that the action was not the plaintiff's, but that of C., or for his benefit, and that M. & Co. could proceed therewith, as C.'s solicitors, to enforce payment of their costs, and the Montreal solicitors charges: that the settlement of a claim under a negotiable security without the security being delivered up, subjected the defendants to



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such charges as were a specific lien thereon, of which they had notice; or:—Semble, even without notice: that the effect of the agreement of the 2nd December was that the defendants should pay M. & Co.'s costs, and defendants afterwards on the settlement made not providing therefor, and leaving the note outstanding, was some evidence of collusion to deprive M. & Co. of their costs, and that the notice given not to settle without providing for M. & Co.'s costs, etc., gave M. & Co. an equitable claim to the interposition of the court. *Hall v. Griffith*, 5 O. R. 478.—C. P. D.

Per Wilson, C. J. C. P.—If parties to an action authorize their solicitors to enter into negotiations for a settlement, and while the negotiations are proceeding, one party unknown to his own or to the opposite solicitors, writes to the other party personally withdrawing from the negotiations, and the respective solicitors, not knowing what has taken place between their clients meanwhile, conclude the terms of a settlement, such settlement will not be binding on the party who had thus withdrawn from the negotiations, because the other party had direct notice of his withdrawal:—Semble, that if the principals had, between themselves, entered into an agreement, and the solicitors in ignorance of what the clients were doing, had previously concluded a different agreement, the agreement made by the solicitors would bind because prior in time. On the same reasoning where the two principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals. In this case, upon the letters and evidence set out in the report, it was:—Held, that the defendant had not withdrawn his prior proposals and abandoned the negotiations before a final arrangement had been come to by the respective solicitors. *Vardon v. Vardon*, 6 O. R. 719.—Chy. D.

A settlement of an alimony action after judgment for permanent alimony, upon which writs of execution were in the sheriff's hands, was effected between the parties without the intervention of the solicitors on the record. To carry out the settlement a third solicitor was instructed to withdraw the writs from the sheriff's hands, which he did without paying the costs of the plaintiff's solicitor, which he knew were unpaid. There was no collusion or actual fraud against the plaintiff's solicitor proved:—Held, per Ferguson, J. that the plaintiff's solicitor had control of the writs in the sheriff's hands to the extent of his unpaid taxable costs, and that he was entitled to have the writs replaced, or new writs placed in the sheriff's hands at the expense of the solicitor who withdrew them and the plaintiff, or to an order directly against the defendant for payment of his unpaid taxable costs, and for the costs of the motion against the plaintiff and the solicitor who withdrew the writs; but that he was not entitled to an order for payment of his unpaid costs by the solicitor or the sheriff. This judgment was affirmed by the Chy. D. with this variation, that the solicitor who withdrew the writs was relieved from the payment of costs. *Friedrich v. Friedrich*, 10 P. R. 308, 546.

The order of the master in chambers (9 P. R. 220) staying proceedings on the ground that the action had been settled by the plaintiff's solicitor, was reversed because the evidence shewed that the settlement was a provisional one, and that the plaintiff himself had not adopted it. *McDonald v. Field*, 12 P. R. 213.—C. P. D.

After the trial of an action had been postponed at the assizes and the defendant had left the assize town, his solicitor and counsel effected a settlement with the plaintiff, which was given effect to by the entry of a verdict and judgment by consent. The solicitor admitted that he was not instructed, but relied on his client adopting the settlement, which was in the solicitor's opinion a favourable one. The client said that he had instructed the solicitor not to settle in the way he did:—Held, that the defendant was entitled to have the verdict and judgment set aside and a new trial, on payment of costs. *Watt v. Clark*, 12 P. R. 359.—Chy. D.

Where solicitors properly representing the claimant and the execution creditors in an interpleader made an arrangement by which \$441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both the solicitors, in good faith distributed \$441 among the creditors entitled, and paid only the balance into court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended:—Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting upon it; and it made no difference that the interpleader order was a consent order, for it was an interlocutory order, and the variation did not affect third parties. *Hackett v. Bible*, 19 P. R. 482.—Boyd.

Held, affirming the judgment of the Supreme Court of New Brunswick that a promise of indemnity to the sheriff by an attorney is binding on his client where the attorney had the conduct of the suit in the course of which such promise was made and the subsequent acts of the client showed that he had adopted the attorney's proceedings. *Muirhead v. Shirreff*, 14 S. C. R. 735.

See *Johnston v. Johnston*, 9 P. R. 259, p. 1309; *Wilkinson v. Harrey*, 15 O. R. 346, p. 694.

## 2. To Receive Money.

Authority to receive payment of mortgage money. See *Gillen v. Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada*, 7 O. R. 146, p. 1269. In *re Flint and Jellett Attorneys*, 8 P. R. 361, p. 1270.

M. applied to McM., a solicitor, for a loan of \$6,200 on his land. McM. got P. to advance the money. He then drew the mortgage, which was executed by M. and wife and left with him till P. came to pay the money. P. subsequently called on McM. and upon his registering and delivering over the mortgage paid him the money. McM., after this told M., on his calling on 6th March, that P. had not as yet been able to get the money, and on M. stating he required \$400 at once, McM. gave him his own cheque for that amount. M. swore this was a

loan and was subsequently repaid. On 2nd April McM. absconded without having accounted for the \$6,000. After his departure, two receipts were found among his papers, signed by M., and dated 6th March, for \$400 and \$89.36, respectively, as money received from McM. on account of the P. mortgage, and a memo. from which it appeared that \$205.55 had been paid out of the mortgage money by McM. to discharge execution debts of M.'s which he had instructed McM. to settle:—Held (in this affirming the judgment of Proudfoot, J.), (12 O. R. 702), that it must be shewn that either express or implied authority had been given McM. by M. to receive the money to justify P.'s paying it to him; that his possession of the mortgage with an indorsed receipt did not give such authority (but, in this reversing the judgment of Proudfoot, J.), that there was evidence of authority to receive to his own use, out of the mortgage money when paid, the above three sums sufficient to entitle P. to hold the mortgage as a security to that extent. *McMullen v. Polley*, 130 O. R. 299.—Q. B. D.

## VII. DUTIES.

### 1. Retainer and Appointment.

The defendant's testator was a sheriff and official assignee under the Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one B., upon whose petition one G. F. was placed in insolvency. The official assignee became creditors' assignee. At the first meeting of creditors, B. being chairman, the plaintiff, representing the City Bank, whose claim amounted to nearly the whole indebtedness, moved a resolution to sell certain goods of the insolvent, that the assignee should take the necessary proceedings to realize the assets, and recover certain property alleged to belong to the insolvent, and for that purpose to retain counsel, if necessary. B. became inspector of the estate, and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in an action brought against him to recover goods wrongfully taken by him; and he also paid the plaintiff some costs, whereby the assets of the estate were exhausted, and a small sum in addition paid by the assignee out of his own funds. The defendant's testator was subsequently removed from the office of assignee, and a new assignee appointed, whereupon he presented a petition to the Insolvent Court, in which he alleged that he had retained the plaintiff, and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in his lifetime. After the death of the testator the plaintiff wrote a letter to one of his sons about the costs, in which, in relating the facts, he stated that he was attorney for the bank. The plaintiff now sued the personal representative for his unpaid costs of the proceedings carried on by him. *Senkler, Co. J.*, who tried the case, found that the retainer was not a personal one by the assignee, but that the plaintiff had acted for the benefit of the creditors, and was in fact their

solicitor:—Held, *Armour, J.*, dissenting, affirming the judgment of *Senkler, Co. J.*, it was a question to be determined on the evidence whether the retainer was a personal one by the assignee, or whether he was acting merely on the instructions of creditors; that upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally; and, notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs. *Butterfield v. Wells*, 4 O. R. 168.—Q. B. D.

Per *Armour, J.*—The presumption is, that when a solicitor is retained, the person retaining him is liable for the costs, and to avoid liability he must shew some special agreement to the contrary; and the evidence here not only did not displace the presumption, but shewed that the testator had always considered himself liable for the costs. *Ib.*

Per *Hagarty, C. J.* It is the duty of a solicitor to inform his client, when a trustee, as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of the trust fund or estate. *Ib.*

Where a solicitor had instructions to defend a suit, which was discontinued and a new one for the same cause of action was commenced:—Held, that the original retainer to defend continued in the new suit. *Clarke v. Union Fire Ins. Co.—Caston's Case*, 10 P. R. 339.—*Hodgins, Master in Ordinary*.

The general manager of a company had authority to do acts which occasionally required legal advice:—Held, that he had implied authority to retain a solicitor whenever, in his judgment, it was prudent to do so, but that such authority ceased on the suspension of the company. *Ib.*

During a reference in an administration suit the master appointed the solicitor for one of the unsecured creditors of the estate in question to represent the general body of unsecured creditors. The Imperial Bank were unsecured creditors of the estate; they sent in a claim to the administrator in answer to the statutory advertisement for creditors, but did not prove their claim before the master. The nomination of the one solicitor for the unsecured creditors was an *ex parte* proceeding, of which the bank were not notified till a year afterwards:—Held, that, in the absence of contract or of an order of the master made under conditions contemplated by G. O. Chy. 218 (See Con. Rules 49, 1188), the solicitor could not recover from the Imperial Bank any portion of the costs incurred on behalf of the unsecured creditors:—Held, also, that the doctrine of ratification by silence or inaction did not apply to a case like this. *Hall v. Laver*, 1 Ha. 571, followed. *Re Monteith—Merchants' Bank v. Monteith*, 12 P. R. 288.—*Dalton, Master*.—*Boyd*.

A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained he has the ordinary rights of solicitors as in other contested cases. *Hackett v. Bible*, 12 P. R. 482.—*Boyd*.

dissenting, affirming, Co. J., it was a question on the evidence whether the personal one by the defendant acting merely on the basis of the evidence given by the creditors and not by the plaintiff; and, notwithstanding the assumption in the case, incurred any personal liability, *Butterfield v. Wells*,

the assumption is, that the person retaining the mortgage had to avoid liability by agreement to the plaintiff, here not only did the plaintiff, but shewed that he had rendered himself liable

the duty of a solicitor as a trustee, as to the mortgage and incurring a question whether the plaintiff out of his private property or estate. *Id.*

the plaintiff's duty to defend a mortgage and a new one for the mortgage commenced:—Held, the plaintiff continued in the mortgage, *London Fire Ins. Co. v. Hodgins, Master*

a company had a financial statement required had implied authority, never, in his judgment, so, but that such a statement of the company

an administration suit against a solicitor for one of the defendants in question in the mortgage of unsecured creditors. The mortgage of unsecured creditors of the plaintiff to the administration of the mortgage advertisement gave their claim by the mortgage of the one of the mortgage was an ex parte bank were not the mortgage:—Held, that, in the mortgage of an order of the mortgage contemplated by the mortgage of 1888, the mortgage from the Imperial mortgage incurred on behalf of the mortgage:—Held, also, that the mortgage by silence or inaction like this. *Hall v. Board, Re Monteith & Co., 12 P. R. 288.*

collect a debt is not a further retainer so retained he has no authority as in other contracts, 12 P. R. 482.—

See *Re Kerr, Akers and Bull*, 29 Chy. 188, p. 1936; *Millar v. Cline, Re Millar a Solicitor*, 12 P. R. 155, p. 1959; *Fraser a Solicitor*, 13 P. R. 409, p. 1947.

## 2. Dealing with Client.

### (a) Taking Security for Costs.

D., being indebted to the plaintiff for costs in some suits and other matters, by an instrument not under seal assigned to him a lease of certain premises made by D. to the defendant, together with all rent in respect of said lease and the term thereby created. In an action to recover from the defendant the rent which accrued due after the making of the assignment, the judge charged the jury that while plaintiff remained D.'s solicitor he could not take any security for his benefit, and that he should have discovered the connection between them, and let D. have independent legal advice:—Held, misdirection, for that the assignment, if not invalid in other respects, was valid so far as it was a security for costs already incurred:—Held, also, that D. was not a necessary party. *Galbraith v. Irving*, 8 O. R. 751.—C. P. D.

Plaintiff was a purchaser under a power of sale in a mortgage for \$200 taken by a solicitor for costs, only \$30 of which had been incurred at the date of the mortgage. The power was exercised to collect the full amount of the mortgage and interest. Before the purchase was completed the mortgagee's right to sell was raised as a question of title by the plaintiff who had become aware of these facts. Before the objections were removed, the property was sold again under a prior mortgage:—Held, that the mortgage was a valid security for no more than \$30; that the plaintiff having become aware of the vexatious user of the power, was justified in refusing to complete the purchase, and was entitled to recover back the deposit paid by him. *Locking v. Hulsford*, 16 O. R. 32.—Boyd.

Actions were brought by one G. against two insurance companies to recover losses occasioned by a fire. The actions were tried together, and in one the plaintiff recovered judgment, but the other was dismissed with costs. The defendants acted as G.'s solicitors in each action. By a special agreement, upon the faith of which each action was carried on, the solicitors were to have a lien upon the amount recovered in each action for the costs of that action and of the other. The insurance company against whom the unsuccessful action had been brought, attached the monies due to G. by the company against whom G. had succeeded, and the defendants claimed a lien on the judgment which had been thus attached for all their costs in both actions:—Held, reversing the decision of *Armour, C. J.*, that so far as the lien claimed by the defendants depended upon the agreement it must fail, because that agreement was nothing more than an agreement to secure costs to be incurred in the future, and the general proposition that a solicitor will not be permitted to take a security for costs to be incurred, is established beyond controversy:—Held, also, that the solicitors had no lien for the costs of the unsuccessful action upon the fund recovered in the other, that fund not having been recovered or preserved by means of the costs incurred in

the action which was lost, and the two actions not being so intimately connected as to be regarded as one. *London Mutual Fire Ins. Co. v. Jacob*, 16 A. R. 392.

### (b) Other Cases.

In a foreclosure suit the defendant alleged that the plaintiff, a solicitor, had been employed by him in April, 1878, to procure a loan of \$1,400, which he required to pay off a mortgage for \$2,000, on which there was due \$2,120, and that taking advantage of the information so acquired, the plaintiff had purchased the mortgage for himself at the price of \$1,400. It appeared that the defendant had, in the spring of 1877, obtained a loan of \$600 on a portion of the land in question, through the plaintiff acting as agent and legal adviser of a loan company: that in January following, the defendant had applied to the plaintiff, acting in the same capacity, to procure a small loan from the company on the land in question, which the plaintiff told him he could not recommend to the company: that afterwards one B., who held the \$2,000 mortgage, tried to sell it to the company through the plaintiff, who, finding that the land comprised in it did not come up to the value required by the company, wrote B. to that effect, and subsequently the plaintiff, who denied that the defendant had ever requested him to obtain the \$1,400 loan, purchased the mortgage for himself for \$1,625:—Held, reversing the decree of *Blake, V. C.*, (27 Chy. 429), that the evidence, which is fully set out in the report of the case, shewed that the defendant had not applied to the plaintiff for the \$1,400 loan, and that there was no confidential or fiduciary relationship existing between the parties which precluded the plaintiff from purchasing the mortgage. *Kilbourn v. Arnold*, 6 A. R. 158.

Action for breach of duty as trustees in management of estate. See *Taylor v. McGrath*, 10 O. R. 669.

## VIII. COSTS.

### 1. Agreements as to Costs.

Under an agreement between the defendants and their solicitor, he was to be paid a fixed salary, to cover all his professional services to the city, exclusive of counsel fees and other disbursements paid by him, but he was to have the right to costs from parties against whom the corporation should succeed, and be entitled only to disbursements when they should fail. In a case in which the defendants succeeded, judgment was entered against the plaintiff and the usual costs taxed. On motion for revision:—Held, *Wilson, C. J.*, dissenting, following *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280, that as under their agreement the defendants were not liable to pay the attorney the costs taxed except disbursements, all costs except disbursements must be disallowed. *Wilson, C. J.*, thought *Jarvis v. Great Western R. W. Co.* not a satisfactory decision, and opposed to the later case of *Galloway v. Corporation of London*, L. R. 4 Eq. 90. *Stevenson v. City of Kingston*, 31 C. P. 333.

The agreement to pay a solicitor a fixed sum as a yearly salary in lieu of paying items in

detail, is neither illegal or unusual, whether it provides for the past or the future. *Falkner v. Grand Junction R. W. Co.*, 4 O. R. 350.—Boyd.

The solicitor acted for a client in defending him upon a charge of arson, and in prosecuting actions against two insurance companies to recover for a loss by fire. At the time the solicitor's services were required the client had no money and had no prospect of getting any, and, in consequence of the risk the solicitor ran of getting nothing and losing a considerable sum for disbursements, the client offered him a retaining fee to be paid out of the insurance moneys when recovered, and it was agreed between them that such fee should be \$150 for the two actions, the amount claimed therein being about \$1,250. Subsequently, and when some costs had been incurred, the client made an assignment to a third party of the moneys due to him from the insurance companies, in trust, to pay the solicitor his costs, including the retaining fees agreed upon, and to pay the balance to creditors. The client at a later date made a general assignment for the benefit of creditors:—Held, upon appeal by the assignee from the taxation of the solicitor's costs, that the first assignment in trust was a security for costs already incurred, a confirmation of the original agreement, and a quasi appropriation of the money; and as it appeared that the client understood that the payment of retaining fees was voluntary, and that they could not be recovered from the opposite party, the retaining fees were properly allowed to the solicitor by the taxing officer; and under the exceptional circumstances of the case the amount was not unreasonable. *Re Fraser, a Solicitor*, 13 P. R. 409.—Falconbridge.

See *Re Malcolmson and Wade*, 9 P. R. 242, p. 44; *Arnoldi v. O'Donohoe*, 2 O. R. 322 p. 45.

## 2. Offer to Reduce Amount of Bill.

Where a solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding upon him, then and not otherwise he is to be allowed the benefit of the offer upon taxation if the client reject it and proceed to tax the bill. *Re Freeman et al.*, 1 Chy. Chamb. R. 102, and *Re Carthew and Re Paull*, 27 Ch. D. 485, considered and explained. *Re Allison Solicitors*, 12 P. R. 6.—Ferguson.

Where the offer to make a reduction in the bill was not upon the face of it nor in any letter accompanying it, but was made verbally and in the course of a conversation on the subject after the delivery of the bill:—Held, that the offer was not of an unequivocal character made so as to be binding upon the solicitor, but left him free when it was not accepted to claim all he could get upon a taxation, and he was therefore not entitled to the benefit of it. *Ib.*

The solicitors rendered to a client ten bills of costs, amounting in all to \$428.83. The client obtained an order for taxation, reserving his right to dispute his liability to pay the bills, and reserving also the costs of the order and taxation. The bills were taxed at \$329.76, more than one-sixth being taxed off; but the solicitors

contended that they were not liable for the costs of the taxation under R. S. O. (1887), c. 147, s. 35, because of an offer made by them before the order but after service of the notice of motion therefor, to take \$250 in full of all the bills, and a subsequent offer to take \$200 in full of all but one. These were not offers to reduce the bills to the sums named, but were offers to take such sums if the bills were paid without dispute as to the client's liability upon them. The offers were rejected and the taxation proceeded with the above result. When the question of the liability upon the bills was still undetermined, the client applied for costs of the order and taxation:—Held, that the solicitors when their offers were rejected remained in a position to claim the full amount at which their bills might be taxed; and, therefore, such offers could not avail them; and they must pay the costs of the order and taxation. *Re Allison*, 12 P. R. 6, approved and followed. *Re Cameron Solicitors*, 13 P. R. 173.—Q.B.D.

## 3. Unnecessary Proceedings.

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, and that the costs of them should be disallowed under Con. Rule 1215 unless it is shown that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket, and without regard to the interests of his client. *Re O'Donohoe, a Solicitor*, 12 P. R. 612.—Armour.—C. P. D.; 14 P. R. 317.

## 4. Substituting Bill of Costs for Commission.

In an administration suit the estate was insolvent, the total assets being \$72,000, the liabilities \$138,475, and the creditors 180 in number. The commission of the solicitor, who acted for all parties, was allowed by the master, under G. O. Chy. 643, (Con. Rule 1187) at \$995. Eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive:—Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling. *In re Stuebing, Anthes v. Dewar*, 10 P. R. 236.—Boyd.

The scope of the G. O. Chy. 643 (Con. Rule 1187), is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation. *Ib.*

A very liberal compensation in such cases is not per se a reason for reducing the commission, or directing the taxation of a bill in its stead, nor per contra, is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill. *Ib.*

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Semble, in cases affected by G. O. Chy. 643  
(Con. Rule 1187), any party interested in the  
estate, who may desire that a solicitor should be  
paid in the particular matter or suit on the scale  
of a taxed bill instead of by commission, should  
give notice to the solicitor to that effect, and have  
the master note it in his book, at the earliest stage  
possible in the proceedings, but there is no prac-  
tice authorizing the substitution of a bill of costs  
for commission at the option of any party. *Ib.*

### 5. Moderation of Costs.

On an appeal from a certificate of the master  
in which he held that under an order which di-  
rected him to "ascertain and state what amount,  
(if any), is properly chargeable by J. H. against  
the estate of T. W. deceased in respect of legal  
proceedings taken by the said J. H. as adminis-  
trator pendente lite of the said estate in the courts  
or otherwise," the bills of costs of the solicitor of  
the administrator should be taxed in order to  
ascertain the amount due. It was:—Held, that  
the master was wrong; that the bills should, if  
necessary, be subjected to moderation, and not  
taxation; that moderation is a well understood  
term, and is more liberal than taxation even as  
between solicitor and client. *Bentley v. Haldan*,  
6 O. R. 715.—Proudfoot.

Bills of costs for services rendered to an estate  
after a testator's death, down to the date of an  
order for the administration of the estate, were  
paid by the executor after the order and pending  
administration proceedings:—Held, that there  
could be no taxation of the bills as against the  
executor at the instance of creditors, but that  
the bills should be moderated. So far as the  
solicitors were concerned the payment by the  
executor was to be regarded as payment of the  
bills, and to obtain a taxation after payment a  
case would have to be made against the solicitors.  
Practically the moderation might be so  
conducted, if warranted by special circumstances,  
as to differ but little from a taxation. *Re*  
*Hayne, Traders' Bank v. Murray*, 12 P. R. 119.  
—Boyd.

### 6. Reference to Taxation or Revision.

#### (a) Who May Apply.

Residuary legatees may apply for taxation of  
bills of costs rendered to executors for services  
to the estate; for they come within section 42  
of the Solicitors' Act, R. S. O. (1887) c. 147, as  
being "liable to pay," i. e., by the lessening  
of the amount of the residuary estate. *Re*  
*Skinner, a Solicitor*, 13 P. R. 276.—Street.

Any one cestui que trust may in the discre-  
tion of the court obtain an order under the  
third party clauses of the Solicitors' Act for the  
taxation of a bill of costs for business connected  
with the trust estate of a solicitor employed by  
a trustee. *Sandford v. Porter*, 16 A. R. 565.

#### (b) Order for Delivery and Taxation.

Upon a motion in chambers for an order for  
the delivery and taxation of a solicitor's bill of  
costs relating to certain proceedings under a mort-  
gage:—Held, that the chancery practice of ob-

taining such orders on præcipe is the more con-  
venient one, and should prevail in all divisions  
of the High Court of Justice. Order made with  
costs as of a præcipe order. *Re Fitzgerald, a*  
*Solicitor*, 10 P. R. 279.—Dalton, Master.

Solicitors retained out of moneys in their hands  
belonging to their client, sufficient to pay their  
costs, and handed the client a cheque for the  
balance. The client took the cheque but did not  
cash it until she had written to the solicitors  
stipulating that the cashing should be without  
prejudice to her right to recover a larger sum, if  
such was due her. After the lapse of a year from  
the receipt of the cheque, the client applied for  
an order for the delivery of a bill of costs:—  
Held, that the circumstances did not amount to  
payment of the costs, and the order for delivery  
was made. *Re Suttan*, 11 Q. B. D. 377, distin-  
guished. *Schragg v. Schragg*, 11 P. R. 218.—  
Boyd.

Upon the application of a mortgagor the mort-  
gagor's solicitor was ordered, by a county judge,  
to deliver to the applicant a copy of the bill of  
costs of a sale under the power in the mortgage;  
and the bill was delivered pursuant to the order:—  
Held, that although the delivery was, under  
section 45 of the Attorneys' Act, to be regarded  
as for the purposes of a reference to taxation,  
yet the person so obtaining the copy of the bill  
had not necessarily the right to tax the bill;  
and a præcipe order for taxation was set aside,  
where at the time of making it there were two  
matters in dispute, viz., whether payment as  
such had been made by the mortgagees to the  
solicitor, and whether the mortgagees had pre-  
cluded themselves from the right to tax the bill.  
*Re Moffett, a Solicitor*, 12 P. R. 240.—Ferguson.

#### (c) Before Whom.

Bills of costs between solicitor and client  
should prima facie be referred for taxation to the  
master of the county in which the work was  
done. *Re Idington and Mickle*, 8 P. R. 563.—  
Boyd.

R. S. O. (1887) c. 147, s. 32, provides that a  
bill of costs may be referred for taxation to the  
proper officer of any of the courts in the county  
in which any of the business charged for was  
done:—Held, that "Courts" here does not  
mean "Divisions of the High Court;" and  
where the business charged for was done in the  
office of the local registrar and master at Belle-  
ville, the reference for taxation was properly  
made to the deputy clerk of the crown at Belle-  
ville, both being officers of the same court. *Re*  
*Clute and Williams*, 13 P. R. 110.—Boyd.

Held, affirming the decision of Street, J.  
(13 P. R. 276), that a reference for taxation of  
bills of costs between solicitor and client may  
properly be directed to one of the taxing officers  
at Toronto, even where the business charged for  
in the bills, with the exception of agency work  
done at Toronto, was all done in an outer county.  
The words of section 32 of the Solicitors' Act,  
R. S. O. (1887) c. 147, "any of the business  
charged for in the bill," include business per-  
formed at Toronto by the agent of the principal  
solicitor. *Armour, C. J.*, inclined to the  
contrary opinion, but deferred to that of the



other members of the court. *Re Skinner, a Solicitor*, 13 P. R. 447.—Q. B. D.

See *Re Solicitors*, 9 P. R. 90, p. 1955.

(d) *What May be Referred.*

Charges by a solicitor who acted as agent for the principal solicitor, are subject to taxation though the principal receives a commission. Upon such taxation a master should without special direction regard any settlement arrived at between the solicitors. *Re Idington and Mickle*, 8 P. R. 566.—Boyd.

Costs of sale under power of sale in a mortgage. See *Re Crerar and Muir*, 8 P. R. 56, p. 1299; *Re McDonald, McDonald & Marsh, Ibs.*, 88, p. 1299; *Re Cronyn, Kew & Betts, Attorneys, Ibs.* 372, p. 1299.

A solicitor sued his client in a Division Court for the amount of his bill of costs. While the action was standing for judgment the client obtained from the master in chambers an order for taxation. Pending an appeal from that order judgment was given, which shewed that all the items in the bill which were in dispute were considered and adjudicated upon:—Held, that considering the nature of the charges and the circumstances disclosed in the affidavits filed on the application, the order of the master was right. *Re Burdett, a Solicitor*, 9 P. R. 487.—Osler.

In proceeding under a judgment for the winding up of a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him, which the master referred to one of the taxing officers to tax:—Held, that the master had authority to direct such reference. On such a reference the taxing officer gives his opinion as to whether the fees and charges claimed should be allowed or not, and on that opinion the master makes his adjudication. *Clarke v. Union Fire Insurance Co.—Caston's Case*, 10 P. R. 332.—Hodgins, Master in Ordinary.

After payment of a bill of costs, the court will not disturb it on the ground of overcharge unless it appears to be a case of gross and exorbitant overcharge amounting to fraud. But before payment it is enough if the items are unusual or more than ordinarily large so as to require justification, and if no explanation is furnished by the solicitor, upon whom the onus to do so rests, then taxation will be ordered. *Re Walker—Walker v. Rochester*, 10 P. R. 400.—Boyd.

Held, that the conjunction of the following circumstances, viz., (1) That the relationship of solicitor and client was continued after delivery of the bills; (2) That there was an offer by the solicitor to make a substantial deduction from the bills sued on, and (3) That there were items of apparent overcharge as to which no explanation was offered by the solicitor, would justify an order for taxation. *Ib.*

(e) *Special Circumstances.*

Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should shew such special circumstances as would have justified a reasonable man

in not previously seeking a taxation, or that he was prevented by some unavoidable cause. Where judgment had been signed against the client in an action on the bill during the pendency of negotiations for a settlement, this was held a sufficient reason for directing a taxation after the year. *Pattullo v. Church*, 8 P. R. 363.—Cameron.

On a sale of property under a power in a mortgage, the solicitors more than a year before this application, with the approbation of the agent of the mortgagee (who was out of the country), retained out of the proceeds of the sale a lump sum for their costs, and delivered no bill:—Held, a special circumstance under R. S. O. (1877), c. 140, s. 44, entitling a subsequent incumbrancer to have a bill of costs in detail delivered to him upon payment of the costs of a copy. *Re Maholman and Wade, Solicitors*, 9 P. R. 242.—Boyd.

On 20th July, 1877, A. and B., a firm of solicitors, rendered their bill to C., also a solicitor, for professional services. On 30th May, 1878, C. wrote to A. and B. claiming a reduction of the bill, and alleging over-charge, and an agreement to do the work for half fees. No notice was taken of this letter, nor did C. take steps to have the bill taxed. On July 8th, 1882, A. and B. sued in the County Court on this bill, and judgment was entered therein on July 19th, 1882, for default of appearance, which judgment was, by consent, subsequently waived. On July 27th, 1882, a bill for services rendered subsequently to July, 1877, was delivered to C. by A. and B. In this bill was included the following item: "To amount of judgment entered July 19th, 1882, \$268.67 for previous accounts rendered." An action was then commenced in the Chancery Division for the amount of the two bills. On the trial of the action, judgment was given for the amount of the first bill, as rendered, and also for the amount of the second bill, subject to taxation:—Held, on appeal to the Divisional Court, that neither the existence of a controversy as to the terms on which the business was done, nor the continuance of the employment after the delivery of the first bill, were "special circumstances" within R. S. O. (1877), c. 140, s. 35, entitling C. to tax the first bill after the lapse of a year:—Held, also, that the reference in the second bill to the amount claimed in respect of the first bill did not amount to a rerendering of the first bill so as to entitle the client to a taxation. *Arnoldi v. O'Donohoe*, 2 O. R. 322.—Chy. D.

The rule requiring special circumstances to warrant the reopening or taxation of a bill of costs after twelve months, does not apply where the bill has been delivered after a company has been ordered to be wound up. *Clarke v. Union Fire Ins. Co.—Caston's Case*, 10 P. R. 339.—Hodgins, Master in Ordinary.

The following circumstances were held not to be special circumstances which would entitle the client to tax his solicitor's bills after a year from their delivery, because these circumstances could be as well considered at the trial of the action as on a reference to a taxing officer. (1) That the bills sued on contained certain items included in other bills paid by the client; (2) That some work was charged for which never

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was done; (3) That a payment of \$200 on account  
by the client was disputed. *Re Walker—Walker*  
*v. Rochester*, 10 P. R. 400.—Boyd.

The bill of costs in question was for profes-  
sional services rendered the defendant in an  
investigation of his conduct as a public official  
before a commissioner appointed by the Ontario  
Government. The special circumstance relied  
upon to enable the defendant to obtain the order  
for taxation after the lapse of more than a year  
from the delivery of the bill was, in the words  
of the defendant, that "there was a distinct  
understanding between me and the above named  
plaintiffs that the payment of the said bill of  
costs was to lie over to await the decision of the  
Ontario Government, who were by both me and  
the said plaintiffs, as they stated, expected to  
pay the said bill of costs, 1 being one of their  
officers, and the charges against me having fallen  
through"—Held, that the existence of the  
above understanding, if proved, was not a special  
circumstance within R. S. O. (1877), c. 140,  
s. 35, to justify an order for the taxation of the  
bill after the lapse of a year, from its delivery;  
but that the bill should have been taxed subject  
to such understanding. *Pletcher v. Field*, 10 P.  
R. 608.—Rose.

Rules 447-449 (Con. Rules 1230, 1231, and  
851) are not necessarily applicable to a tax-  
ation had under 48 Vict. c. 13, s. 22, (Ont.),  
and where upon a taxation by a local officer,  
these rules had not been complied with by the  
party objecting to the taxation, a revision was  
nevertheless ordered, the court thinking the  
bill so exorbitant as to show special circum-  
stances. *Snider v. Snider—Snider v. Orr*,  
11 P. R. 140.—Boyd.

A bill of costs rendered by a solicitor in  
October, 1888, was paid shortly afterwards, but  
upon the undertaking of the solicitor, contained  
in letters written by him, that the payment was  
to be subject to the taxation of the bill at any  
time. The solicitor died in May, 1889, and no  
application for taxation was made till the 2nd  
September, 1889, when an ex parte order was  
obtained from the master in chambers for tax-  
ation, the letters of the solicitor not being pro-  
duced nor any special circumstances shown.  
Upon the application of the executrix of the  
solicitor to the master to set aside his ex parte  
order, the letters were produced:—Held, that  
the master was not bound to vacate his first  
order, although it was wrong; but, there being  
no imputation of bad faith, he was right in giv-  
ing leave to amend the order so as to do sub-  
stantial justice; and, notwithstanding the death  
of the solicitor after being paid, there was juris-  
diction to order a taxation as against his repre-  
sentative, under the circumstances. The applica-  
tion, being within the year, came under section  
46 of R. S. O. (1887), c. 147, and "special cir-  
cumstances" to justify a taxation existed in the  
fact of the letters having been written by the soli-  
citor; but the delay of the applicants and the  
death of the solicitor were reasons for imposing  
terms; and it was ordered that upon the tax-  
ation the books of the solicitor should be prima  
facie evidence of the correctness of his charges, or  
if the books were not available that the bill  
should be so taxed as to throw the onus of im-  
peaching any charges on the applicants. *Re*  
*Baker—Re MacDonald*, 13 P. R. 227.—Boyd.

In this case the large amount of the bills, and  
the fact that retaining fees were charged by  
the solicitor, were looked upon as special cir-  
cumstances. *Re Skinner, a Solicitor*, 13 P. R.  
276.—Street.

See *Wilson v. Beatty—In re Donovan*, 9 A. R.  
149, p. 1957.

#### (f) What Recoverable.

Fraud having been charged against a defend-  
ant, who was a solicitor, and the charge being  
wholly unsupported:—Semble, that it would have  
been proper not merely to deprive the plaintiff  
of her costs, but to allow such defendant all his  
costs. *Freed v. Orr*, 6 A. R. 690.

The plaintiff, an attorney, was the official  
assignee of an insolvent estate. He brought an  
action on behalf of the estate, and used his own  
name as the attorney on the record. The plain-  
tiff obtained a verdict:—Held that under sec-  
tion 32 of the Insolvency Act, 1875, he was  
entitled to tax disbursements only against the  
defendant. *Agnew v. Ross*, 8 P. R. 67.—Osler.

A master or a single judge has no discretion  
to allow a solicitor more than \$1 per hour for  
attendance on the taxation of a bill of costs,  
either between solicitor and client, or party and  
party: the tariff being fixed at that rate by G.  
O. 608. *Re Totten*, 8 P. R. 385.—Proudfoot.

Where costs as between solicitor and client  
were to be paid by the plaintiff to the defendant,  
and where it appeared that the defendant's soli-  
citor had at the request of his client, made in  
good faith and on reasonable grounds travelled  
from Sarnia to Toronto, to attend on the exami-  
nation of the plaintiff on the bill:—Held, on  
appeal from the master, that the defendant  
could tax against the plaintiff a sum of \$60, paid  
to defendant's solicitor for two days services and  
travelling expenses. *Gough v. Park*, 8 P. R.  
492.—Proudfoot.

The plaintiff, a solicitor, obtained a verdict for  
damages and costs in an action for libel, in which,  
although another solicitor appeared as acting for  
him in all the pleadings and proceedings in the  
suit, he actually did the work, and carried on  
the suit himself:—Held, on appeal from the  
taxing officer, that full fees and disbursements  
except "instructions," had been properly al-  
lowed to him, and that his acting as agent for  
the solicitor whose name appeared in the pro-  
ceedings as his solicitor did not affect his right.  
*King v. Moyer*, 9 P. R. 514.—Hagarty.

The court refused to interfere with the dis-  
cretion of the taxing officer in allowing certain  
costs to the solicitor of proceedings which had  
been set aside as irregular, and as to which G.,  
alleged negligence and want of skill. *Gall &*  
*Co. v. Collins*, 12 P. R. 413.—Chy. D.

A taxing officer cannot charge a solicitor with  
interest upon moneys in his hands belonging to  
his client. *Re O'Donohoe, a Solicitor*, 12 P. R.  
612.—Armour. See *S. C.*, 14 P. R. 317.

The solicitors instituted an action on behalf  
of a young woman, one of two residuary legatees  
and devisees under a will, against the executors  
and trustees, for an account. Upon the plead-  
ings, charges of negligence in getting in rents,  
etc., and of refusal to account, were made

against the defendants, and it was stated that a release was obtained from the other residuary legatee in the absence of his solicitor, immediately after his coming of age, by taking advantage of his necessities. At the trial judgment was given in the usual terms of an administration order, reserving further directions and costs; and by the judgment on further directions the plaintiff was given the general costs of the action against the defendants, saving, however, costs incurred by the plaintiff proceeding by writ of summons instead of by summary application for an administration order, and the plaintiff was ordered to pay the extra costs occasioned to the defendants by such proceeding:—Held, that no question was raised by the plaintiff which could not have been disposed of in the master's office; and, under the circumstances, in the absence of any evidence to show that the client had, with knowledge of the practice of the court and the risk she ran, expressly instructed the solicitors to proceed in the way they did, they could not tax against her any more costs than they would be entitled to had they proceeded by notice of motion instead of by writ of summons. *Seanlan v. McDonough*, 10 C. P. 104, specially referred to. *Re Allenby and Weir, Solicitors*, 13 P. R. 403.—Robertson.

See *In re Flint and Jellott, Attorneys*, 8 P. R. 301, p. 1270; *In re McClive, Solicitors*, 9 P. R. 213, *infra*.

#### (g) Interest on Costs.

Interest may be allowed on a solicitor's bill of costs, if a demand in writing is made for it. *In re McClive, Solicitors*, 9 P. R. 213.—Wilson.

The taxing officer has no power to allow interest, unless the matter has been specially referred to him by the order for taxation. *Id.*

See *Archer v. S. & R.*, 2 P. R. 648, p. 392.

#### (h) Practice.

Where an order is made for taxation of an attorney's bill, as between attorney and client under the R. S. O. (1877) c. 140, s. 49, a common law court has no power here, as it has in England, under the 6 & 7 Vict. c. 73, s. 43, to make a summary order for payment of the amount found due from the client, except by consent. *In re A. B. and C. D., Attorneys*, 8 P. R. 126.—Osler.

On an application to tax a solicitor's bill more than a month having elapsed since its delivery, an order was issued in the long form in use before the O. J. Act instead of the form under Rule 143 (see Con. Rule 1226), as the master is mentioned in that order but the taxing officer is the proper officer to tax bills of costs under Rule 438 (Con. Rule 1231) of the Act. *Re Solicitors*, 9 P. R. 90.—Stephens, *Referee*.

An order for the taxation of a solicitor's bill at the instance of the client, should refer the bill simply for taxation. A clause in such order directing payment to the solicitor of the amount of the taxed bill was struck out. *Re Clarke*, 9 P. R. 197.—Dalton, *Master*.

Held, that by the O. J. Act, the former practice has been changed, and an order referring a

bill of costs to a taxing officer, should not direct the officer to do more than ascertain the proper amount of it. *Macdonald v. Piper*, 10 P. R. 586.—Dalton, *Master*.

A solicitor who has obtained an order for taxation of his bill of costs against his client, and taxed his bill under it, is not entitled to a summary order for payment of the amount found due. Where the client obtains the order for taxation, he thereby submits himself to the summary jurisdiction of the court, and should be ordered to pay the amount found to be due to the solicitor. *Re Washington, a Solicitor*, 12 P. R. 386.—Street.

Seemingly, that the order for taxation under Con. Rule 443 should, under the authority of subsection (d.) of that Rule, where it is made upon the client's application, contain an order for the payment by him of the amount to be found due upon the reference, but when it is made upon the solicitor's application, should contain no such order. The solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference. *Millar v. Cline*, 12 P. R. 155, distinguished, and *In re Harcourt*, 32 Sol. J. 92, followed. *Id.*

G., a judgment creditor of W. A. C., garnished a fund recovered by J. W. C., suing as the assignee of W. A. C. G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C., as to the portion of the fund which would remain after satisfying the claim of the solicitor of J. W. C. who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue:—Held, that G., had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C., and the other against G. if he succeeded in the issue. *Gall & Co. v. Collins*, 12 P. R. 413.—Chy. D.

#### (i) Costs of Taxation.

See *Re Allison Solicitors*, 12 P. R. 6, p. 1947; *Re Cameron, Solicitors*, 13 P. R. 173, p. 1948.

#### (j) Appeal from Taxation.

When an order is obtained by a client referring the taxation of a solicitor's bill to the master in the county where the work was done, any review of the master's conclusions must be obtained by way of appeal to a judge. *In re Bleeker and Henderson*, 9 P. R. 182.—Boyd.

Held, that the notice of appeal from a certificate of taxation of a solicitor's bill of costs by the local master at St. Thomas, must be seven days, as required by G. O. 642 (see Con. Rule 849.) Such a case is not within Rule 449 O. J. Act (Con Rule 851.) *Exchange Bank v. Newell*, 9 P. R. 528.—Proudfoot.

The time for appealing from a taxation of costs begins to run from the date of the certificate of taxation, not from the date of each ruling in the course of taxation. *Re O'Donohoe, a Solicitor*, 12 P. R. 612.—Armour.

should not direct certain the proper *Piper*, 10 P. R.

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taxation under Con. authority of sub- re it is made upon in an order for the nt to be found due n it is made upon uld contain no such be entitled to add his claim only in ing upon the refer- 155, distinguished, 92, followed. *Ib.*

W. A. C., garnished C., suing as the puted the validity A. C. to J. W. C., be tried between G. ortion of the fund isifying the claim of had a lien upon the a the recovery of it. tion of these costs, :—Held, that G., ted upon the tax- licitor's bill, and ions, one as against gainst G. if he suc- Co. v. *Collins*, 12 P.

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appeal from a certi- r's bill of costs by the must be seven days, (see Con. Rule 849.) Rule 449 O. J. Act e *Bank v. Newell*, 9

from a taxation of e date of the certi- e date of each ruling e. *Re O'Donohoe*, a mount.

### 7. Recovery by Action.

In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought, is not now, any more than before the Judicature Act, ground for demurrer, but only for defence. *Scane v. Duckett*, 3 O. R. 370.—Boyd.

Though under R. S. O. (1877), c. 140, s. 32, the right of action on a bill of costs may be suspended pending a month from delivery to the party to be charged therewith, nevertheless the solicitor is a creditor, and may as such, before the expiration of such month, bring an action to set aside a voluntary conveyance as fraudulent and void. *Ib.*

See *Duff v. Canadian Mutual Fire Ins. Co.*, 9 P. R. 262; 2 O. R. 500, p. 979; *Macdonald v. Piper*, 10 P. R. 586, p. 1956.

### 8. Liability to Refund.

In an action instituted by the widow of T. W. to set aside a will alleged to have been executed by him under undue influence, D. acted as her solicitor and obtained a decree as prayed. During the pendency of such action one H. was appointed by the court administrator with the view of getting in certain debts due the estate before being barred by lapse of time. Numerous actions were brought by D. in the name of H., in some of which moneys aggregating a large sum were recovered, whilst in many no benefit whatever resulted to the estate, and costs amounting in the whole to \$2,738.37 were incurred, which had been taxed as between solicitor and client, on H. passing his accounts before the master, and were paid to D. partly by H. out of moneys of the estate, and partly by funds coming into D.'s hands as such solicitor and retained by him. Subsequently a prior will of T. W. was duly proved by the executors named therein, who took proceedings to obtain an account of H.'s administration and a taxation of D.'s costs. These proceedings finally resulted in a dismissal thereof as against D., and an order on H. to pass his accounts, which he did, charging the estate with the amount of costs so paid to D., but on a re-taxation of D.'s bills the aggregate amount was reduced to \$725.56, several of the bills having been disallowed in toto, on the alleged ground that the actions had been brought without the leave of the court, and H. was ordered to pay in the difference. H. was unable to do so, and thereupon he, as also the executors, by their several petitions applied for and obtained an order upon D. to repay the amount with costs, or in default be struck off the roll of solicitors. (20 Chy. 280.) On appeal the order was reversed (Spragge, C. J. O., dissenting), the court being of opinion that the taxation and all the other proceedings in reference thereto having been had in a proceeding to which D. was not a party, he could not be bound thereby. Per Spragge, C. J. O. Under the circumstances appearing in the matter an order to strike D. off the rolls in case of nonpayment was not called for, and that there were special circumstances in the case for the opening of the taxation at the instance of the estate. *Wilson v. Beatty*—*In re Donovan*, 9 A. R. 149.

### 9. Other Cases.

A petition was presented by the husband of D. to declare his wife a lunatic which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dunbrill*, 10 P. R. 216.—Boyd.

On the reference in this case H. sought to use a certain bill of costs as a voucher of moneys properly expended by him in legal proceedings, and it was shown that the said bill had been properly brought into the master's office on a former reference, and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office:—Held, that the master should have admitted secondary evidence of its contents, and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it. *Beatty v. Haldan*, 10 O. R. 278.—Ferguson.

The taxing officer's allocatur is sufficient proof that the business charged for was done by the solicitor. *Clarke v. Union Fire Ins. Co.*—*Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager. *Ib.*

An order was made in an alimony suit directing the defendant to pay the plaintiff, before hearing of an appeal, a sum of \$40 for the purpose of paying the wife's counsel fee, notwithstanding that the solicitor for the plaintiff would be her counsel on the appeal:—*Quere*, whether owing to the altered status of married women, the reasons for such payment has not ceased. *Magurn v. Magurn*, 10 P. R. 570.—Osler. See also *Ingram v. Ingram*, *Ib.*, 569, p. 890; *Bradley v. Bradley*, *Ib.*, 571.

W. sold land to H., and covenanted to indemnify him against a mortgage thereon:—Held, that H. was not entitled to solicitor and client, but only to party and party, costs of an action on the covenant. *Hulton v. Wanser*, 11 P. R. 302.—Proudfoot.

An attorney's bill of costs will be allowed as a set-off and as a debt, though no bill has been delivered. *Macpherson v. Tisdale*, 11 P. R. 261.—Boyd.

Under the common order for taxation of a solicitor's bill of costs, Form 136, O. J. A., a taxing officer has power to investigate and dis-

pose of questions of carelessness, impropriety, and negligence in the conduct of the business to which the bill relates; and the officer's certificate is conclusive as to all matters within his jurisdiction. Where, therefore, after action brought upon a bill of costs there has been a taxation under such an order, there is an end to litigation, and it only remains to enforce payment of what has been found due, which may be done upon a subsequent application by the solicitor. The original order for taxation may reserve questions of retainer and negligence in a proper case, but if it does not the client should not be allowed a double chance of defeating the solicitor's claim, by proceeding to defend the action after the conclusion of the taxation. *Re Clark*, 9 P. R. 337, and *Macdonald v. Piper*, 10 P. R. 586, distinguished. *Millar v. Cline—Re Millar*, 12 P. R. 155.—Boyd.

Costs "as between solicitor and client" in an action include such costs as a solicitor can tax against a resisting client under the general retainer to prosecute or defend the action. *Considine v. City of London Fire Ins. Co.*, 12 P. R. 512.—Armour.

The defendant in this action was represented by a firm purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him:—Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if that proof had been given. *Reeder v. Bloom*, 3 Bing. 9; — *v. Sexton*, 1 Dowl. 180, followed. *Scott v. Daly*, 12 P. R. 610.—Armour.

See *Hall v. Griffith*, 5 O. R. 478, p. 1941; *Sandford v. Porter*, 16 A. R. 565, pp. 112, 1949.

#### IX. LIEN FOR COSTS.

A defendant's solicitor as well as a plaintiff's solicitor may have a lien for costs on a fund in court. *Wartell v. Trenouth*, 8 P. R. 142.—*Stephens, Referee*.

A bill was filed by a purchaser against the vendor for rescission or specific performance of a contract for sale of lands in the county of Simcoe, made the 12th day of October, 1870, and registered in July, 1875, and by the decree made in October, 1876, the plaintiffs were ordered to pay certain overdue purchase money. C., a creditor of the defendant, having placed a *fi. fa.* lands in the hands of the sheriff of Simcoe in December, 1878, obtained a stop order in January, 1879, against the purchase money in court. The defendant's solicitor claimed a prior lien for costs of this suit but had obtained no stop order:—Held, on the application of the defendant's solicitors for payment of the fund to them, that their lien had priority. Part of the fund in court was a balance of purchase money paid into court by the plaintiff in March, 1879, pursuant to the decree on further directions made in October, 1878, C. seeking to attach this balance, in addition to his stop order obtained in January, 1877, placed a *fi. fa.* goods in the hands of the sheriff of York in February, 1879:—

Held, that as to this balance the solicitors' lien had also priority. *Ib.*

In garnishee proceedings a court of law will, as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which or by which the debt attached has been recovered, where the garnishee has notice of the lien. *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437.—Osler.

A court of equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in equity, to the prejudice of the attorney's lien for costs in that suit. *Ib.*

The lien extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters. *Ib.*

By the terms of the judgment pronounced at the trial costs up to the hearing were to be paid to the plaintiff out of the fund in court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved. The report of the officer to whom the reference was directed found the plaintiff indebted to the estate in a considerable amount, and a motion was made by the defendant Moffatt (pending an appeal from the report) to stay payment out of court of the costs of the plaintiff up to the trial until after the hearing on further directions in order that the amount found due to the estate by the plaintiff might be set off *pro tanto* against the costs awarded to the plaintiff:—Held, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in court prior to the defendant's equity to ask a set-off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising. A solicitor's lien having been asserted at the bar during the argument, an affidavit proving it was allowed to be put in subsequently, following the suggestion of Strong, V. C., in *Webb v. McArthur*, 4 Chy. Chamb. R. 63. *Dawson v. Moffatt*, 10 P. R. 366.—Boyd.

Where judgments were recovered in the same action by the plaintiff on his claim with general costs of action, and the defendant on his counter-claim with costs thereof, such claim and counter-claim arising out of the same subject matter, the judgment for counter-claim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counter-claim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant, notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff:—*Quære*, when a judgment, as in this case has been framed without directing a set-off, whether a judge in chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the court. *Brown v. Nelson*, 11 P. R. 121.—Dalton. *Master—Osler*.

The Toronto agents of a deceased solicitor were held entitled to a lien on a sum of money in court to the credit of this matter, to which the solicitor was entitled for his costs, to the extent of their unpaid agency bill of charges in this



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a deceased solicitor on a sum of money in matter, to which the costs, to the extent ll of charges in this

matter, and it was ordered that their bill should be paid out of the fund in priority to the claims of the other creditors of the solicitor. *Re Ryan*, 11 P. R. 127.—Ferguson.

The plaintiffs sued for freight for the carriage of timber, and the defendants pleaded a counter-claim for neglect and delay in the carriage of the timber. The judgment at the trial was as follows: "The verdict will be for the plaintiffs for \$2,122, and for the defendants upon their counter-claim for \$1,420, and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions, and I direct that judgment be entered accordingly."—Held, (reversing the decision of the master in chambers), that the judgments recovered by the plaintiffs and defendants must be treated as judgments in separate actions, and therefore, that in setting off the judgments the claim for costs of the defendants' solicitors upon the judgment against the plaintiffs should be protected. *Canadian Pacific R. W. Co. v. Grant*, 11 P. R. 208.—C. P. D.

An assignment was made by the mortgagor to a creditor of a portion of a fund in court, as to which litigation was pending between mortgagor and mortgagee as to their respective shares:—Held, that to the extent to which the solicitors of the mortgagor incurred costs in resisting and prevailing against the accounts brought in on behalf of the mortgagee to that extent their lien should precede the assignment. *Yemen v. Johnston*, 11 P. R. 231.—Boyd.

See *Hall v. Griffith*, 5 O. R. 478, p. 1941; *London Mutual Fire Ins. Co. v. Jacob*, 16 A. R. 392, p. 1946.

#### X. MISCELLANEOUS CASES.

The plaintiff, knowing that the defendants were a firm of solicitors, advanced to one A. money upon a joint note signed by him and by one of the defendants in the firm's name, without the knowledge or consent of his partner. No usage or general mutual authority to sign notes in the name of the firm was proved, and it was admitted that the plaintiff had no knowledge of the transactions relied upon to shew such authority. A verdict was given for defendants in the County Court, and a rule nisi to set it aside refused:—Held, that the plaintiff could not recover against both defendants, but that the defendant who signed the note was liable. *Wilson v. Brown*, 6 A. R. 411.

Deposit of client's money by solicitor to his own credit. Liability of bank. See *Bailey v. Jellett*, 9 A. R. 187, p. 134.

Liability of solicitor for slander of title. See *Ontario Industrial Loan and Investment Co. v. Lindsey*, 4 O. R. 473; 3 O. R. 66, p. 1825.

Knowledge of solicitor—how far binding on client. See *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. R. 476, p. 1290; *Brown v. Sweet*, 7 A. R. 725, p. 805. *Johnston v. Johnston*, 9 O. R. 259, p. 1309.

Held, that it is the duty of a notary, when executing a deed, to explain to an illiterate grantor the legal and equitable obligations imposed by the deed and consequent on its execu-

tion. (Henry, J., dissenting.) *Ayotte v. Boucher*, 9 S. C. R. 460.

Where the directors of a company have power to appoint officers and agents and dismiss them at pleasure:—Held, that their appointment of a solicitor need not be under the corporate seal. *Clarke v. Union Fire Ins. Co.—Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

It is preferable to have the proceedings under an order for winding up a company under 45 Vict. c. 23 (Dom.), conducted by solicitors who are totally unconnected with the company to be wound up. *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485.—Boyd.

Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins v. Clark*, 11 P. R. 350.—Proudfoot.

The person to receive payment under an order for payment of costs only, is entitled to an order attaching debts due or accruing due to the person to pay. Any doubt existing upon the English cases and the O. J. Act Rules, is cleared up by R. S. O. (1877), c. 66, s. 72. *Re Irvine, a Solicitor*, 12 P. R. 297.—Dalton, *Master*.

The solicitor of a judgment debtor who had absconded transferred property of the judgment debtor to a purchaser under a power of attorney, and received the consideration money \$4,000:—Held, that the solicitor was a person to whom a transfer of the debtor's property and effects to the extent of \$4,000 had been made, for the possession of that sum had been transferred to him by the debtor, and the solicitor was liable to examination under 49 Vict. c. 16, s. 12 (Ont.). Per Armour, J.—The solicitor was also an employee of the judgment debtor within the meaning of the section. *Gorans v. Barnett*, 12 P. R. 330.—Dalton, *Master*.—Rose.—Q. B. D.

The rule that the solicitor for a party will not be accepted by the court as a bondsman for such party is still in force. The rule was applied to the case of the committee of the person and estate of a lunatic giving a bond for the due performance of her duties as such committee and offering her two solicitors as sureties. *Re Gibson*, 13 P. R. 359.—Robertson.

Seemable, that in this Province the business which is called "scrivener's business" is part of the ordinary business of a solicitor. *Thompson v. Robinson*, 15 O. R. 662.—Q. B. D.

Actions brought in the name of a road company against the present plaintiffs were dismissed with costs on the ground that the company had never been incorporated according to law. The present actions were brought against four of the incorporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefor against the company having been returned nulla bonâ:—Held, that in the absence of malice and want of reasonable

and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of the plaintiffs who had no legal existence. *Flatt v. Waddell—Townsend v. Waddell*, 18 O. R. 539.—Q. B. D.

In expropriation cases the costs should be taxed liberally in favour of the proprietor; but when in such cases the statute mentions "costs" only and not "full costs," costs as between solicitor and client, are not intended. *Re Bronson and Canada Atlantic R. W. Co.*, 13 P. R. 440.—Boyd.

Where a railway company in expropriating land under the Dominion R. W. Act agreed to pay to the landowners "all costs incidental to the arbitration," and to fix the compensation to be paid:—Held, that the words did not extend to costs between solicitor and client nor to costs preliminary to arbitration. *Ib.*

### SPECIAL BAIL.

See BAIL.

### SPECIAL CASE.

IN CONTOVERTED ELECTION TRIALS—See PARLIAMENTARY ELECTIONS.

Under the O. J. Act, section 28, sub-section 2, a judge sitting elsewhere than in a Divisional Court, is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of the Divisional Court. On the trial of an action, the pleadings were admitted to state the facts, and what was called "a special case on the pleadings," was reserved for the opinion of the judges of this court. On the case coming before the Common Pleas Divisional Court it was held that the special case as such could not be entertained; but the application was directed to be turned into a motion for judgment under Rule 323 (Con. Rule 757) or on the pleadings and admissions under Rules 315 (Con. Rule 748) and 321 (Con. Rule 755). *Till v. Till*, 15 O. R. 133.—C. P. D.

Held, per Armour, C. J., that, except by consent, affidavits cannot be received to alter or modify a special case stated by consent; the only relief open to a party complaining that a case has been misstated, is to apply to amend or vacate it; and quare, whether it could be amended after judgment. *Cousineau v. City of London Fire Ins. Co.*, 15 O. R. 329.

### SPECIAL CIRCUMSTANCES.

See SOLICITOR.

### SPECIAL ENDORSEMENT.

ON WRITS—See PRACTICE.

### SPECIAL EXAMINER.

The powers of the special examiner under G. O. Chy. 147 (Con. Rule 497), as to directing the production of documents, extend to examinations, under Rule 285, O. J. Act (Con. Rule 566). *Orpen v. Kerr*, 11 P. R. 128.—Boyd.

### SPECIFIC PERFORMANCE.

#### I. GENERALLY, 1964.

#### II. CONTRACTS FOR SALE OF OR RELATING TO LAND.

1. *Sales by Agents*, 1964.
2. *Statute of Frauds*, 1965.
3. *When Title is Imperfect*, 1966.
4. *When Contract is Conditional*, 1967.
5. *Absence of Common Intention*, 1968.
6. *Fraud or Misrepresentation*, 1968.
7. *Inadequate Consideration*, 1969.
8. *Delay in Carrying out Contract*, 1969.
9. *Compensation or Abatement of the Purchase Money*, 1970.
10. *Pleading and Practice*.
  - (a) *Parties*, 1970.
  - (b) *Demurrer*, 1971.
  - (c) *Costs*, 1971.
  - (d) *Other Cases*, 1972.
11. *Reference as to Damages*, 1972.
12. *Other Cases*, 1972.

#### III. ACTS OF PARLIAMENT, 1974.

#### IV. AWARDS, 1974.

#### V. AGREEMENTS TO BEQUEATH PROPERTY, 1974.

#### VI. OTHER AGREEMENTS, 1975.

##### 1. GENERALLY.

The court must see its way clearly before decreeing specific performance and it must be satisfied of the integrity and good faith of the parties seeking its special interference. Where incapacity and inadequacy go hand in hand, the court may refuse to enforce a contract, although the purchaser was guilty of no greater fault than making a hard and unconscientious bargain. *Gough v. Bench*, 6 O. R. 699.—Chy. D.

Per Strong, J.—According to the principles upon which a court of equity acts in enforcing such contracts and agreements as are properly the subject of its jurisdiction, it will always execute the whole or such parts of the agreement as remain executory; but if the parties have before action carried out any of the terms of the contract such executed portions will not be disturbed. *Peck v. Powell*, 11 S. C. R. 494.

#### II. CONTRACTS FOR SALE OF OR RELATING TO LAND.

##### 1. *Sales by Agents*.

See *Ryan v. Sing*, 7 O. R. 266, p. 1967; *Walmsley v. Griffith*, 10 A. R. 327, p. 1969; *McCarthy v. Cooper*, 12 A. R. 284, p. 1976.

## MINER.

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## PERFORMANCE.

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## OF OR RELATING TO

Agents.

266, p. 1967; Walms-  
p. 1969; McCarthy  
1876.

## 2. Statute of Frauds.

Although the 4th section of the Statute of Frauds requires any agreement for the purchase or sale of land to be evidenced by a note or memorandum thereof to be signed by the party sought to be charged, yet where lands were sold by a trading corporation, under a power of sale contained in a mortgage, and the purchaser at such sale signed an agreement to purchase, and afterwards filed a bill seeking specific performance with compensation for the loss of crops which were advertised with the land, but actually belonged to third parties, and the defendants, (the corporation), answered the bill admitting the fact of their being mortgagees, and proceeded with sundry statements such as, "when the plaintiff bid for and was declared the purchaser of the lands \* \* \* the sum bid by the plaintiff was a low price \* \* \* that the plaintiff was not in fact the real purchaser of the lands at the said sale \* \* \* that the company was not bound to put the plaintiff in possession, but never did any act to prevent her taking possession, and \* \* \* that possession was taken by the plaintiff," and the answer claimed no benefit from the statute, and did not deny having made the contract; neither did it raise any objection to the want of the corporate seal:—Held, that this sufficiently admitted the agreement to sell and no protection of the statute having been claimed, that the plaintiff was entitled to a decree, with compensation for the loss of the crops, with costs. *Clearer v. North of Scotland Canadian Mortgage Co.*, 27 Chy. 508.—Proudfoot.

The defendant in 1871 wrote to his son who had left home to work for himself, that if he would return he would give him fifty acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went to work for wages for himself. It was proved that the father had pointed out the fifty acres which he intended to give his son, and the son entered and erected a house thereon with his father's approval, and occupied it with his family, he having married in 1879:—Held, that the plaintiff was entitled to specific performance of this agreement. *Garson v. Garson*, 3 O. R. 439.—C. P. D.

A., whose wife owned a certain freehold property on St. George street, wrote to B., the owner of a certain leasehold property on King street, with reference to the said properties, as follows, "If you will assume my mortgage, and pay me in cash, \$3,700, I will assume your mortgage of \$5,000 on the leasehold," and B. replied, "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms:—Held, affirming the judgment of Ferguson, J., 2 O. R. 609, not a sufficient memorandum of the contract to satisfy the Statute of Frauds. Armour, J., doubting:—Held, also, in an action for specific performance of the above contract by B., correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting titles which passed between the soli-

citors, were inadmissible in evidence:—Held, further, that the fact that A.'s wife had signed a conveyance of the land in question to B., which conveyance had never been delivered, and did not, by recital or otherwise, set forth the contract relied on, could not assist B. in the action for specific performance. *McClung v. McCracken* 3 O. R. 596.—Q. B. D.

An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents who were authorized by the plaintiff to sell the land, and was verbally accepted by the agents. The offer was not addressed to any one, but the book was marked on the back with the initials of the agents. Previous to this offer letters had been written between the defendant and the agents, in which an offer at a lower price was made and refused for the same land. After the second offer was accepted, the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents:—Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these, with the correspondence, constituted a sufficient agreement within the Statute of Frauds to bind the defendant. *Kennedy v. Oldham*, 15 O. R. 433.—Q. B. D.

Where an offer, signed by the defendant, to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance:—Held, also, that an acceptance of the offer beneath the defendant's signature, signed by the plaintiff's assignor did not cure the defect. *White v. Tomalin*, 19 O. R. 513.—Chy. D. See *McIntosh v. Moynihan*, 18 A. R. 237.

See *Halloran v. Moon*, 28 Chy. 319, p. 1975; *Carroll v. Williams*, 10 R. 150, p. 1132; *Cox v. Coates*, 14 O. R. 195, p. 1973.

## 3. When Title is Imperfect.

In a suit at the instance of a vendor of land for the specific performance of an agreement to sell, the defence raised was, that the land was agreed to be conveyed free from incumbrances, but the same was subject to the dower of one M. and to a mortgage, and therefore that a good title could not be shewn. It was satisfactorily shewn that the dower had been sufficiently barred, and the report of the master stated that the price agreed to be paid for the land was \$3,500; that \$1,800 was due on the mortgage, and that the purchaser had paid only \$100 on account of his purchase, "and that the non-completion of the contract (was) attributable to the desire of the purchaser to recede from the contract." The defendant, down to the bringing of the decree into the master's office, had not demanded any abstract or made any objection to the title: the court, on further directions, made a decree ordering defendant to specifically carry out the agreement, and pay to the plaintiff the general costs of the cause. *Graham v. Stephens*, 27 Chy. 434.—Spragge.

Held, in an action for specific performance, that shewing title is the manifestation on the abstract of all matters essential to a good title, and that as the defendant had demanded no abstract before action, he could not complain that title was first shewn thereafter, and he was ordered to pay the costs thereof. *Bridges v. Longman*, 24 Beav. 27, cited and followed. *London and Canadian Loan and Agency Co. v. Graham*, 12 P. R. 657.—Boyd.

To an action for specific performance of an agreement for the exchange of lands the agreement was admitted, the only defence being fraud and a repudiation therefor. A month prior to the trial, the defendant ascertained that the plaintiff's wife and not the plaintiff, was the owner of the land, and that she had executed a deed thereof to be delivered to the defendant. No claim for repudiation was made on the ground of want of title. At the trial the defendant was allowed to amend by setting up that neither at the time of the agreement nor at the commencement of the action was the plaintiff the owner of the land, without any averment that on the discovery thereof the defendant repudiated on such ground:—Held, that the amended defence constituted no answer to the action, and that the defendant not having repudiated when he ascertained the plaintiff had no title, it was sufficient if the plaintiff made title on the reference therefor. *Paisley v. Wills*, 19 O. R. 303.—C. P. D., 18 A. R. 210.

See *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467, p. 1972; *Re Bowstead and Warwick*, 12 O. R. 488 p. 1887; *Brown v. Peers*, 12 P. R. 396, p. 1886.

#### 4. When Contract is Conditional.

C. R. S., being the owner of certain leasehold property, wrote E. E. K., a land agent, a letter in these words: "Please call on J. J. R. He keeps a small shop \* \* He resides in my house on P. street, and has been wanting to purchase it for some time. Tell him if he gives me \$235 cash at once I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following day E. E. K. wrote J. J. R. as follows: "Mr. S. of Meaford wishes me to say that if you desire to purchase some property he owns on P. street, that if you give him \$235 cash he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after an acceptance was endorsed on the latter letter in these words: "I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R. Upon an action for specific performance by J. J. R. against C. R. S. it was:—Held, that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property:—Held, also, that even if there had been no question as to the authority of E. E. K., the insertion of the words "on the understanding that I pay no expenses" in the acceptance prevented it from being considered an acceptance of the offer said to be contained in the letter of E. E. K. *Ryan v. Sing*, 7 O. R. 206.—Ferguson.

On the 26th January, 1882, McI. wrote to H. as follows: "A. McI. agrees to take \$35,000 for

property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday, 28th, noon." On the same day H. accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., Esq., 22 D block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance the Court of Queen's Bench (Man.) decreed that H. was entitled to have the agreement specifically performed:—Held, *Ritchie, C. J.*, and *Fournier, J.*, dissenting, that there was no binding unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties. *McIntyre v. Hood*, 9 S. C. R. 556.

See *Cameron v. Wellington, Grey and Bruce R. W. Co.*, 28 Chy. 327, p. 1752.

#### 5. Absence of Common Intention.

R. wrote to O., "I have considered the matter of our conversation, and offer you \$800 for the property." O. replied: "I have your favour offering \$800 for the property (describing it). I have concluded to accept your offer." The evidence shewed that at the prior conversation referred to in R.'s letter, R. was seeking to buy the property in question on terms of five or seven years' credit:—Held, that as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it. *Omnium Securities Co. v. Richardson*, 7 O. R. 182.—Boyd. Affirmed by the Court of Appeal. *Ib.* 185.

#### 6. Fraud or Misrepresentation.

The plaintiff negotiated with the defendants Griffith for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for \$20,000. Defendants Griffith set up that these negotiations were had with the plaintiff, as their agent, with a view of effecting through him a sale to the Independent Order of Odd Fellows at the same or a higher price to the defendants Griffith. After these options had been given to the plaintiff, he on the forenoon of the 17th February, 1882, agreed to sell to the Odd Fellows for \$25,000, and afterwards on the same day he went to the defendants Griffith and offered to purchase for \$19,500 in lieu of the \$20,000 previously named. He was asked by the Griffiths whether the sale to the Odd Fellows was off, to which he replied that it was, and in the same conversation informed the Griffiths that he could not sell the property for \$20,000, as a reason why he should get it for \$19,500, for if sold to another, he, the plaintiff, would be entitled to a commission of \$500; and the Griffiths thereupon agreed to sell to plaintiff for \$19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the Odd Fellows for \$25,000:—Held, that without reference to the question of agency to sell, the evidence shewed that a sale

k. Terms—one at eight per cent. day, 28th, noon." this offer in the except your offer the property on M. he-third cash on ce in one year at have papers and itor to N. F. H., sible, that I may age." On a bill Court of Queen's was entitled to ly performed:— rner, J., dissent- ing unconditional and therefore no ween the parties. 556.

*Grey and Bruce* 52.

#### Intention.

considered the mat- offer you \$800 for have your favour (describing it). I offer." The evi- r conversation re- as seeking to buy terms of five or at as the accept- r, while R. did not the contract could be parties differing *Omnium Securities*—Boyd. Affirmed 185.

#### Representation.

th the defendants he lands in ques- obtained from them on to purchase for set up that these e plaintiff, as their r through him a er of Odd Fellows to the defendants had been given to noon of the 17th to the Odd Fellows on the same day he and offered to pur- \$20,000 previously Griffiths whether off, to which he re- same conversation could not sell the on why he should to another, he, the o a commission of upon agreed to sell sequently on the to a contract in lows for \$25,000:— to the question of hewed that a sale

to the Odd Fellows was in contemplation of both parties and was the foundation of the transaction, and (reversing the judgment of Proudfoot, J.), that the misrepresentation of the plaintiff in regard to the sale to the Odd Fellows, was such as disentitled him to a decree for specific performance. *Burton, J. A., dissentiente. Walmsley v. Griffith, 10 A. R. 327.*

See *Stammers v. O'Donohoe*, 28 Chy. 207; 8 A. R. 161; 11 S. C. R. 358, p. 1970; *Gough v. Bench, 6 O. R. 699, infra.*

#### 7. Inadequate Consideration.

The plaintiff, an old woman of the age of eighty-six, sued for rescission of a contract for the sale of land, and the defendant by way of cross-relief asked for specific performance. The evidence shewed that at the time of contract there was inequality between the parties in that the plaintiff was not so well able to protect her own interests, as was the defendant to protect his; that she had capriciously and imprudently rejected the advice of her solicitor, who tried to persuade her to accept an offer more advantageous; that she was illiterate, and her capacity (weak at best) was affected by her extreme age, by her distress from want of money, and by drink; that the price offered by the defendant was clearly inadequate: that though it did not appear that the defendant was guilty of fraud, yet that probably the plaintiff did not clearly comprehend the terms of the bargain:—Held, that under these circumstances, though no sufficient reason existed for interfering with the decision of the judge below, in dismissing the plaintiff's bill, specific performance of the agreement should not have been decreed:—Held, also, that inasmuch as all the evidence that could throw light upon the case, had, admittedly, been given, the fact that the issue of improvidence was not raised on the pleadings was immaterial. In such a case it is a mere matter of form to adapt the pleadings to the matters proved. *Gough v. Bench, 6 O. R. 699.—Chy. D.*

#### 8. Delay in Carrying out Contract.

The defendant agreed to sell to the plaintiffs certain timber limits for \$25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently, and on the 20th of August, the plaintiffs wrote excusing themselves from not having carried out the purchase and asking for an extension of time for their accepting or refusing "your limits, one or two weeks if possible." In answer, G. suggested that it was not necessary to make any extension of time for the acceptance of the offer by the plaintiffs, and if they wrote stating they were satisfied with the timber, the quality and the price, and that they only wished the extension of time to make their financial arrangements, adding, "and if you do this you can consider this letter authority for the additional time." The plaintiffs were accordingly, and the further time asked for expired on the 10th of September, but they failed fully to complete the purchase at the time named, and G. sold to the other defendant Miller:—Held (affirming the judgment of Boyd,

C.), that looking at the nature of the property, the subject of the contract, time would, without any stipulation in respect thereof, be regarded as essential; and it was intended by the parties that it should be so, and understood by them that it was so; and the subsequent correspondence shewed it to have been expressly made so, and therefore, that the plaintiffs were not entitled to a specific performance of the contract. *Crossfield v. Gault, 9 A. R. 218.*

See *McArthur v. The Quern, 10 O. R. 191, p. 472.*

#### 9. Compensation or Abatement of the Purchase Money.

Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of land he is about to offer for sale, still he will not be permitted to make direct misstatements and misrepresentations as to matters of fact which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of property about to be sold described it as being "a farm of eighty-one and a quarter acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when in fact there was not any clearing or fencing made upon the premises, the court (Blake, V.C.), in pronouncing a decree for specific performance at the instance of the purchaser, directed a reference to the master to make an allowance in respect of the matters misrepresented, and ordered the vendor to pay the costs of the suit. *Stammers v. O'Donohoe, 28 Chy. 207; see S. C. 8 A. R. 161; 11 S. C. R. 358.*

An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal. See *Van Norman v. Beaupre, 5 Chy. 599. Loughhead v. Stubbs, 27 Chy. 587.—Proudfoot.*

The plaintiff agreed in writing to sell to the defendant certain lands for \$3,500, of which the defendant should pay \$500 on the date of the agreement, to be represented, however, by two horses and two organs which he was to deliver to the plaintiff. The defendant, however, sold the organs and parted with one of the horses. On the plaintiff subsequently bringing this action for specific performance, the court ordered the defendant to pay \$500 in lieu of the horses and organs. *Jones v. Dale, 16 O. R. 717.—Chy. D.*

See *Clearer v. North of Scotland Canadian Mortgage Co., 27 Chy. 508, p. 1965; Carroll v. Williams, 1 O. R. 150, p. 1132; Coates v. Coates, 14 O. R. 195, p. 1973.*

#### 10. Pleading and Practice.

##### (a) Parties.

When his wife joins with the owner of real estate in the contract of sale, and the purchaser institutes proceedings to compel specific performance thereof, the wife must be joined as a party defendant; and the fact that the bill alleges that her only interest is that of an inchoate doweress forms no ground for dispensing with her being



so joined. *Loughead v. Stubbs*, 27 Chy. 387.—Proudfoot.

Where the owners of the property in an action for the specific performance of a sale of land, were married women, and their husbands were joined as co-plaintiffs, and the defendant demurred *ore tenus*, on ground of misjoinder of parties, leave was given to amend by making the husbands defendants, or by adding next friends for the married women as co-plaintiffs. *Young v. Robertson*, 2 O. R. 434.—Boyd.

See *Cameron v. Wellington, Grey and Bruce R. W. Co.*, 27 Chy. 95, p. 1752; *In re Tyelven and Horner*, 28 Chy. 624; *Carroll v. Williams*, 1 O. R. 150, p. 1132; *Roberts v. Hall*, 1 O. R. 388, p. 1974.

#### (b) Demurrer.

Where a demurrer is raised to a statement of claim for specific performance on the ground of no sufficient agreement, it is enough if in any aspect of the case, the plaintiff may be entitled to some relief. In this case it was held, on the statement of claim set out in the report, that a concluded contract was shewn, and that defendant was liable. Misjoinder of parties is, since the Judicature Act, no longer a ground for demurrer. *Young v. Robertson*, 2 O. R. 434.—Boyd.

See *Fraser v. Johnston*, 12 P. R. 113, pp. 1976, 1977.

#### (c) Costs.

Whatever may be the rule in England, this court has maintained jurisdiction to make a defendant pay costs in a suit for specific performance, though the bill be dismissed, if the circumstances be such as to warrant doing this. Hence, in such a suit, brought by the purchasers of certain lands, against the vendors and a subsequent purchaser, where the judge of first instance dismissed the action without costs, but gave the subsequent purchaser his costs against his co-defendants, although no issue was raised between the defendants:—Held, that he had jurisdiction to make the order, in his discretion, and having exercised such discretion, this court would not interfere. *McMahon v. Barnes*, Order Book No. 9, fol. 730 (not reported), followed. *Church v. Fuller*, 3 O. R. 417.—Chy. D.

In a suit for specific performance, the defendant set up that the reason he had refused to complete the agreement was, that he had been induced to enter into it by certain misrepresentations of the plaintiff, but which he entirely failed in proving. Although the master reported that a good title was first shewn in his office, the decree on further directions ordered the costs to be paid by the defendant, notwithstanding that the bill contained certain statements which, it was alleged, were not true, and had not been proved, the court being of opinion that such statements had no any material bearing upon the case, and that a suit would have been necessary without reference to the question of title. *Platt v. Blizzard*, 29 Chy. 46.—Ferguson.

See *Graham v. Stephens*, 27 Chy. 434, p. 1960; *Stammers v. O'Donohoe*, 28 Chy. 207, p. 1970; *Rutherford v. Sing*, 29 Chy. 511, p. 1793; *London*

*and Canadian Loan and Agency Co. v. Graham*, 12 P. R. 651, p. 1967.

#### (d) Other Cases.

When on a sale of lands the contract provided that the purchaser should be allowed ten days to make requisitions on title, and time was made of the essence of the contract, and the purchaser made certain objections within the ten days, and the answers not being satisfactory refused to complete, whereupon the vendor sued for specific performance and obtained the usual judgment:—Held, that the purchaser could not raise in the master's office fresh objections not raised within the ten days mentioned in the contract. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds, or evidences of title other than those in the vendor's possession. Subsequently on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied for and obtained from the master leave to file other objections. On appeal Proudfoot, J.:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the court he gave the leave required on terms. *Clarke v. Langley*, 10 P. R. 268.

See *Stammers v. O'Donohoe*, 29 Chy. 64, p. 1890; *Town of Peterborough v. Millard R. W. Co.*, 12 P. R. 127, p. 1615.

#### 11. Reference as to Damages.

On a bill filed to rescind a contract for the sale of land, the defendants asked by way of cross relief to have the same specifically performed. On a rehearing the divisional court refused specific performance or rescission, but, having regard to the finding of the judge at the trial, that no actual fraud had been proved against the defendant the purchaser, though it appeared that to a certain extent he had overreached the plaintiff, an old woman, when making the contract, they ordered a reference, under *Casey v. Hanlon*, 22 Chy. 225, to ascertain the amount, if any, of the defendant's damages. The master at Orangeville found defendant entitled to \$11.05, his costs of investigating the title, but refused to allow him \$1,000, which was the difference between the contract price and the value of the land. On appeal, Boyd, C., confirmed the master's report. *Gough v. Beach*, 9 P. R. 431.

#### 12. Other Cases.

In a suit for specific performance it was shewn that the plaintiff had agreed to convey to the defendants certain lands in consideration of his being paid one-third of the sum for which defendants should be enabled to sell the same. This

*Key Co. v. Graham,*

*see.*

contract provided  
be allowed ten days  
and time was made  
and the purchaser  
within the ten days,  
satisfactory refused  
a vendor sued for  
obtained the usual  
purchaser could not  
fresh objections not  
mentioned in the  
*Canada v. Metcalfe,*

sale of certain land,  
and marketable title  
to satisfy himself at  
not to call for any ab-  
sence of title other  
possession. Subse-  
quent suit by the vendor  
the defendant filed  
having reference to  
which were answered  
reference was proceed-  
ed for and obtained  
the other objections.  
Held, that the mas-  
sachusetts to grant such  
application to the  
required on terms.  
208.

*see.* 29 Chy. 64, p.  
*see v. Midland R. W.*

#### Damages.

a contract for the  
asked by way of  
specifically per-  
the divisional court  
e or rescission, but,  
of the judge at the  
had been proved  
purchaser, though it  
extent he had over-  
woman, when mak-  
d a reference, under  
25, to ascertain the  
defendant's damages.  
found defendant en-  
of investigating the  
him \$1,000, which  
the contract price  
On appeal, Boyd,  
report. *Gough v.*

*see.*

formance it was shewn  
l to convey to the  
consideration of his  
sum for which defend-  
fell the same. This

agreement was subsequently cancelled on the  
defendants undertaking to pay plaintiff \$2,000,  
one-half by a note, the other half by the convey-  
ance of certain town lots at an ascertained valua-  
tion; and this second or substituted agreement  
the plaintiff sought to enforce. The defendants  
set up that in consequence of their ascertaining  
that plaintiff had not a title to the land conveyed  
to them a fresh agreement was entered into to  
the effect that the defendants should be at  
liberty to sell the land, and pay to plaintiff one-  
third of the net proceeds, and which they as-  
serted they had done. At the hearing the court  
(Sprague, C.), being satisfied that the defend-  
ants' account of the transaction was correct,  
refused the relief claimed, but offered the plain-  
tiff a reconveyance on payment of costs, which  
the defendants assented to, or a decree upon the  
footing of the third or last mentioned agreement  
upon payment of costs: on rehearing, this de-  
cree was affirmed with costs. *Rutherford v. Sing,*  
20 Chy. 511.—Chy. D.

A writ of arrest will not be granted against  
the purchaser in a suit for specific performance,  
unless it be shewn by affidavit that the vendor's  
lien is insufficient. *Nelson v. Dajoe,* 8 P. R.  
332.—Proudfoot.

A. brought an action against B. for the rents  
and profits of certain lands, which had belonged  
to their father who had died intestate, which  
lands B. had taken and held possession of for  
several years. On the action being entered for  
trial an agreement of settlement was arrived at,  
by which the action was to be stayed upon B.'s  
granting and releasing to A. his interest in the  
lands, and on B. undertaking to obtain certain  
releases, etc. B.'s counsel appeared in court  
when the case was called for trial, and stated  
that it was settled, and an entry was made in  
the court minute book, that the case was settled  
out of court. Subsequently B. required A. to  
procure certain releases, and although these had  
not formed part of the settlement, A. agreed to  
do so, and at great trouble and expense procured  
the execution of the same ready to be delivered  
to B. Certain of the releases to be procured by  
B. were to be executed by married women and  
infants which he was unable to procure. In an  
action to compel B. to carry out the settlement,  
B. set up as a defence the Statute of Frauds;  
and his inability to obtain the releases:—Held,  
(affirming the judgment of Proudfoot, J.), that  
the staying of the action was a sufficient part  
performance to take the case out of the Statute  
of Frauds. An option was given to A. to take  
a judgment for specific performance, with a  
reference as to compensation, if B. was unable  
to procure the releases; or a judgment for an  
account of the rents and profits, the subject of  
the former action. *Coates v. Coates,* 14 O. R.  
195.—C. P. D.

If under R. S. O. (1877), c. 109, the court  
adjudicates upon a question of title between  
vendor and purchaser and directs the purchaser  
to carry out the contract, and the purchaser  
then fails to carry out the contract, it is unneces-  
sary to bring an action for specific performance  
of the contract and the requisite relief may be  
had on notice of motion for payment of the pur-  
chase money or in default a re-sale. *Re Craig,*  
10 P. R. 33.—Ferguson.

In an action for specific performance of an  
agreement for the sale of lands, it appeared that  
the parties intentionally omitted from the writ-  
ing a part of the agreement, as to the tenor of  
which both parties agreed; and the defendant  
asked to have this inserted in the judgment for  
specific performance, but the plaintiff objected:  
—Held, that on the principle that he who comes  
into equity must do equity, it was proper that  
the omitted portion of the agreement should be  
inserted as claimed. *Jones v. Dale,* 16 O. R.  
717.—Chy. D.

*See Vardon v. Varlow,* 6 O. R. 719, p. 1976;  
*Bingham v. Warner,* 10 P. R. 621, p. 1976;  
*Robertson v. Patterson,* 10 O. R. 267, p. 1976;  
*McCaskill v. McCaskill,* 12 O. R. 783, p. 422;  
*Sea v. McLean,* 148 C. R. 632, p. 2073; *Re Bon-  
stead and Warwick,* 12 O. R. 488, p. 1887; *McDon-  
gall v. Hall,* 13 O. R. 166, p. 1895; *Proctor  
v. Mulligan,* 13 O. R. 683, p. 1881.

### III. ACTS OF PARLIAMENT.

*See Attorney-General v. International Bridge  
Co.,* 6 A. R. 537, p. 1010.

### IV. AWARDS.

Held, affirming the decree of Proudfoot, V. C.,  
that the plaintiff was entitled to specific perfor-  
mance of an award giving him damages for his  
lands taken by the defendants; that the sum  
awarded was not so excessive as to shew any  
fraudulent or improper conduct on the part of  
the arbitrators; and Quare, whether if shewn  
it would be a defence in such a proceeding. *Nor-  
vall v. Canada Southern R. W. Co.,* 5 A. R. 13.

### V. AGREEMENTS TO BEQUEATH PROPERTY.

When a father enters into a contract whereby  
he parts with the custody and control of his  
child with the bona fide intention of advancing  
the welfare of the child there is nothing in such  
a contract illegal or contrary to public policy,  
and although where such a contract is executory  
on both sides the court cannot decree specific  
performance by reason of the want of mutuality,  
yet where the contract has been faithfully per-  
formed, so far as the father and child are con-  
cerned, so that their status has become altered,  
the court will if possible enforce in specie the  
performance of the contract by the other party  
to it. *Roberts v. Hall,* 1 O. R. 388.—Chy. D.

Where the parents of the plaintiff agreed with  
H. and his wife to give up to them their  
daughter, the plaintiff, then six years old, to  
bring up as their own, and make her sole heiress  
of their property at their death, and when it  
appeared that the agreement was bona fide in-  
tended by the father for the ultimate benefit of  
the plaintiff, and that the plaintiff had remained  
with H. and his wife for twenty years, rendering  
them efficient service, and it appeared H. in-  
tended her to have his property, and regarded  
the agreement as binding, so that he considered  
it unnecessary to make a will:—Held (reversing  
the judgment of Ferguson, J.), that the agree-  
ment could be enforced against H.'s representa-  
tive, and that it must be decreed accordingly:—  
Held also, (affirming the judgment of Ferguson,

J.), that inasmuch as if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered they would be trustees for the proceeds for her, the plaintiff might maintain the suit in her own name. *Ib.*

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. *Walker v. Boughner*, 18 O. R. 448.—Q. B. D.

But where the testator, the grandfather of the plaintiff, promising that if she would remain with him until his death or her marriage whichever event should first happen, he would provide for her during that time, and would make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule; the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of special contract, whilst they form part of the household. Decision of Proudfoot, J., varied. *Ib.*

See *Halleran v. Moon*, 28 Chy. 319, p. 2158; *Campbell v. McKerricher*, 6 O. R. 85, p. 1877; *Turner v. Prevost*, 17 S. C. R. 283, p. 1878.

#### VI. OTHER AGREEMENTS.

The court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement where the consideration therefor has been executed. *Halleran v. Moon*, 28 Chy. 319.—Spragge.

Held, that the votes of registered bondholders of a railway having been rejected, the arrangement made in this case though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute, and an action to compel specific performance of the agreement was dismissed. *Hendrie v. Grand Trunk R. W. of Canada—Grand Trunk R. W. of Canada v. Toronto Grey, and Bruce R. W. Co.*, 2 O. R. 441.—Chy. D.

Held, by the Common Pleas Division (affirming the decision of Wilson, C. J. C. P.), a married woman can not only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend.

And so in the present case where, by way of compromise of such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys:—Held, that the plaintiff was entitled to specific performance of this agreement: that it was not the separation which was being enforced, but the performance by the defendant of his contract. *Vardon v. Vardon*, 6 O. R. 719.

In consideration of a bonus granted by the plaintiffs to the defendants the latter agreed (1) to bring their railway from Ingersoll to some point on the line of the Canada Southern Railway not more than half a mile east of the present passenger station of the Canada Southern Railway at St. Thomas, and (2) to run all their passenger trains to and from a small station on Church street. The defendants performed the first part of the agreement, and also the second, so long as the Canada Southern R. W. Co. permitted the use of their line from the point of junction to the small station on Church street; but on the refusal of the other company to continue this privilege, the defendants discontinued the performance of this part of their agreement:—Held, affirming the judgment of Ferguson, J., (7 O. R. 332), distinguishing *Lytton v. Great Western R. W. Co.*, 2 K. & J. 394, and *Wallace v. Great Western R. W. Co.*, 2 A. R. 44, that this was not a case in which the defendants should be directed specifically to perform their contract as to the Church street station, but that the plaintiffs were entitled to a reference as to damages for breach thereof. *City of St. Thomas v. Credit Valley R. W. Co.*, 12 A. R. 273.

In an agreement for the sale of land from R. to P., the terms were inserted in these words: "Price \$1,000, \$200 cash, and balance in five yearly payments, interest at the rate of seven per cent., and covenant of P. to build house worth not less than \$4,000, to be commenced in a year from date and finally completed in two years \* \*." The \$200 was paid down, and R.'s solicitor prepared and tendered the deed (in which was inserted a covenant to build) and the mortgage to P. for execution. P. refused to execute them and R. brought an action for specific performance, which P. defended on the ground that the covenant to build was too vague and would not be enforced by the court:—Held, that the plaintiff was clearly entitled to the performance of the defendant's agreement to give a covenant to build a house of certain value within a specified time. *Wood v. Silcock*, 50 L. T. N. S. 251, distinguished. *Robertson v. Patterson*, 10 O. R. 267.—Proudfoot.

The action was brought in the Chancery Division to obtain specific performance of a covenant to repair, or for damages:—Held, that it was really a Common Law action for specific performance of such a covenant could not be decreed. *Bingham v. Warner*, 10 P. R. 621.—Ferguson.

Where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms, and in the alternative damages, and the defendant asked for rectification of the contract, a jury notice was struck out. *Fraser v. Johnston*, 12 P. R. 113.—Boyd.

where, by way of the parties to it and execute a proper certain covenants defendant should in lands and pay the plaintiff was en- of this agreement: which was being en- by the defendant of don, 6 O. R. 719.

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a the Chancery Divi- —of a covenant —Held, that it was for specific perfor- ould not be decreed. R. 621.—Ferguson.

ned specific perform- them with milk for in terms, and in the defendant asked tract, a jury notice Johnston, 12 P. R.

Held, that where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury. Bingham v. Warner, 10 P. R. 621, commented on. *Id.*

P. being the owner of certain lands was served by a railway company with notice of expropriation and tendered a sum of money for right of way and damage, which he refused. Subsequently on the application of the company and with the consent of P.'s solicitor the county judge made an order fixing the amount of security to be given for damages, and the price of the land, and giving the company possession upon their paying the amount of security into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid for the value of the land taken, and the damage to the remainder, was fixed by the award in separate sums. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will, by which he devised all his real estate to a trustee, and appointed the plaintiff executor. The defendants were appointed trustees in place of the trustee named in the will. Upon a special case for the opinion of the court as to whether the plaintiff as executor of the personal estate or the defendants as trustees of the testator's land, was or were entitled to the sums awarded or any part thereof. It was:—Held, that notice to treat having been given, and a claim made by the landowner, and refused by the company, and the money having been paid into court and possession taken by the company, these circumstances under the authority of *Nash v. The Worcester Improvement Commissioners*, 1 Jur. N. S. 973, would entitle the landowner to have specific performance against the company, and that therefore the land was converted into money and the plaintiff as executor was entitled to the sums awarded. *Hoskin v. Toronto General Trusts Co.*, 12 O. R. 480.—Proudfoot.

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract; and the defence of "not guilty" irrespective of statutory authority is not admissible under the Judicature Act. *Town of Peterborough v. Midland R. W. Co.*, 12 P. R. 127.—Dalton, Master.

The plaintiff, a bookkeeper and accountant, entered into the following agreement with the firm of R. & Co. in the form of a letter addressed to himself: "In consideration of you advancing us the sum of \$3,000, we agree to give you collateral security, and to pay you interest on the same at the rate of eight per cent. per annum." The plaintiff advanced money for the benefit of the firm of R. & Co., but before he had received any security the firm made an assignment for the benefit of creditors. The plaintiff now sought to have it declared that he had a lien on the assets and effects of the firm, real and personal, and to have them assigned to him:—Held, that the agreement was incapable of specific performance by the court, for the reason that the terms were too vague and uncertain to be entertained. No kind of security was spec-

fied in the agreement, and parol evidence could not be given to supply the deficiency. The plaintiff was, however, entitled to have judgment at law against the firm of R. & Co. for \$1,900 and interest and costs of action. *DeGear v. Smith*, 11 Chy. 570, followed. *Foster v. Russell*, 12 O. R. 136.—Proudfoot.

See *Cameron v. Wellington, Grey and Bruce R. W. Co.*, 28 Chy. 327, p. 1752; *Calvert v. Burnham*, 6 A. R. 620, p. 1892; *Bickford v. Town of Chatham*, 16 S. C. R. 235; 14 A. R. 32; 10 O. R. 257, pp. 1810, 1811; *Hughes v. Moore*, 11 A. R. 569, p. 654; *Brundage v. Howard*, 13 A. R. 337, p. 248.

## SPEEDING CAUSE.

See PRACTICE.

## SPIRITUOUS LIQUORS.

See INTOXICATING LIQUORS.

## SPLITTING CAUSES OF ACTION.

See DIVISION COURTS.

## STAKEHOLDER.

See GAMING.

See *Hutton v. Federal Bank*, 9 P. R. 568, p. 134.

## STAMPS.

I. ON BILLS OR NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. LAW STAMPS—See LAW STAMPS.

Duties payable in stamps. Powers of Provincial Legislature. See *Attorney-General for Quebec v. Reed*, 10 App. Cas. 141, p. 303.

## STATEMENT OF CLAIM.

See EJECTMENT—PLEADING.

## STATEMENT OF DEFENCE.

See PLEADING.

## STATUTE LABOUR.

See ASSESSMENT AND TAXES.

## STATUTES.

- I. CONSTRUCTION OF, GENERALLY, 1979.
- II. INTERPRETATION ACT, 1980.
- III. PRIVATE ACTS.
  1. Generally, 1980.
  2. *Railway Acts*—See RAILWAYS AND RAILWAY COMPANIES.
- IV. PROSPECTIVE OR RETROSPECTIVE, 1981.
- V. IMPERATIVE OR DIRECTORY, 1982.
- VI. REPEALING STATUTES, 1983.
- VII. IMPERIAL ENACTMENTS—See BANKRUPTCY AND INSOLVENCY—CONSTITUTIONAL LAW—SHIP.
- VIII. OTHER PARTICULAR ACTS—See THE SEVERAL TITLES.
- IX. PARTICULAR WORDS—See WORDS AND TERMS.
- X. SPECIALLY PLEADING A STATUTE—See PLEADING.

## I. CONSTRUCTION OF GENERALLY.

Per Armour, J.—The Act disqualifying a licensee for the sale of liquor from holding municipal office should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name. *Regina ex rel. Brine v. Booth*, 3 O. R. 144.—Q. B. D.; 9 P. R. 452. See *Regina ex rel. Clancy v. Conway*, 46 Q. B. 85, p. 1326.

In penal statutes questions of doubt are to be construed favourably to the accused. *North Ontario Election (Ont.)—McCaskill v. Paxton*, H. E. C. 304.—C. of A.

Held, following Eastern Counties, etc., R. [W. Co. v. Marriage, 9 H. L. Ca. 32; Lang v. Kerr, 3 App. Cas. 529; and Van Norman v. Grant, 27 Chy. 498, that both sections 10 and 11 of R. S. O. (1877), c. 49, are to be governed by the heading immediately preceding section 10; so that where the interest sought to be reached by the creditor has not been concealed by a fraudulent conveyance, the Judge has no authority to give summary relief under section 11. *Wood v. Hurt*, 28 Chy. 146.—Proudfoot. See 50 V. c. 2, s. 1. *Peters v. Stoness*, 13 P. R. 235, p. 819.

Remarks as to embracing in one Act several subjects which are not expressed in the title; and as to the effect of the title and preamble of a statute as guides to the construction. *Regina v. Washington*, 46 Q. B. 221.—Osler.

General remarks on forms prescribed in various cases by Acts of Parliament. *Gemmell v. Garland*, 12 O. R. 139.—Boyd.

The court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy and no possible prejudices resulting from literal inaccuracy in the frame of a warrant to sell for arrears of taxes. *Fitzgerald v. Wilson*, 8 O. R. 559.—Chy. D.

Error in transcribing Act. See *In re Central Bank of Canada—Yorke's Case*, 15 O. R. at p. 629.

The sections of R. S. O. (1877), c. 111, relating to registrars' fees being in derogation of the rights of registrars as they previously existed under the common law must be construed strictly. *Re Ingersoll—Gray v. Ingersoll*, 16 O. R. 194.—Robertson.

R. S. O. (1887), c. 104, s. 122, which imposes a liability in certain eventualities on innkeepers who give liquor to persons who thereby become intoxicated, is a remedial measure, and should receive a liberal construction. *Trice v. Robinson*, 16 O. R. 433.—Chy. D.

It is the duty of the court where it finds legislation intended to legalize the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation. *Butland v. Gillespie*, 16 O. R. 486.—Boyd.

The question of the authority of schedules in Acts of parliament discussed. *Truax v. Dixon*, 17 O. R. 366.—Q. B. D.

Construction of revenue laws. See *Griuell v. The Queen*, 16 S. C. R. 119, p. 1844.

The plaintiff's property was destroyed by fire the day the Ontario Insurance Act, 1887, came in force:—Held, that R. S. O. (1877), c. 161, in force at the time insurance was effected applied to the policy. *McIntyre v. East Williams Mutual Fire Ins. Co.*, 18 O. R. 79.—Chy. D.

## II. INTERPRETATION ACT.

Words importing the singular number. See *Re Harding*, 13 P. R. 112, p. 912.

## III. PRIVATE ACTS.

## 1. Generally.

As regards the character and construction of a private Act and the effect of a recital therein. —See *City of Quebec v. Quebec Central R. W. Co.*, 10 S. C. R. 563, at p. 580 et seq.

Where a company is incorporated by a special Act, and there are provisions in the special Act as well as in a general Act on the same subject which are inconsistent; if the special Act gives in itself a complete rule on the subject, the expression of that rule amounts to an exception of the subject matter of the rule out of the general Act. *Ontario and Sault Ste. Marie R. W. Co. v. Canadian Pacific R. W. Co.*, 14 O. R. 432.—Ferguson.

When the rule given by the special Act applies only to a portion of the subject, the special Act may apply to one portion and the general Act to the other. The probable intention of the legislature is important in considering a matter of such a character. *Ib.*

By the General Railway Act R. S. O. (1877), c. 165, which was by the plaintiffs special Act incorporated therein except as varied by the latter, ten per cent. of the capital of the railway was by sub-section 5 of section 36 required to be expended within three years, and the railway was to be completed within ten years of the passing of the special Act, in default of which the corporate existence of the company ceased,



(1877), c. 111, relating to the derogation of the law previously existing in the Province, and to be construed strictly. *Ingersoll*, 16 O. R.

122, which imposes liabilities on innkeepers who thereby become measure, and should be. *Trice v. Robinson*,

where it finds legislative purposes, to construe rather than limit its scope, 16 O. R. 486.—

priority of schedules in *Truax v. Dixon*,

laws. See *Grimmell*, 119, p. 1844.

was destroyed by fire in 1887, came in O. (1877), c. 161, in which was effected applied *v. East Williams Mts.*, 79.—Chy. D.

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incorporated by a special provisions in the special Act *on the same subject* the special Act gives on the subject, the exemptions to an exception of rule out of the general *Ste. Marie R. W. Co. v. Co.*, 14 O. R. 432.—

by the special Act applying to the subject, the special provision and the general intention of the law considering a matter

by Act R. S. O. (1877), plaintiffs special Act except as varied by the capital of the railway section 36 required to be years, and the railway within ten years of the Act, in default of which the company ceased,

and by section 4 of the general Act, sections 4 to 36 thereof inclusive were to apply to all railways authorized to be constructed by any special Act of the Province, and to be construed therewith as forming one Act:—Held, that section 4 of the general Act did not apply to the plaintiffs, and that section 23 of their special Act must be read in substitution for sub-section 5 of section 36 requiring the expenditure of ten per cent. of the capital within the three years. *Id.*

The Act incorporating the railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act:—Held, that such special Act was not restrictive of the Municipal Act and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. *Bickford v. Town of Chatham*, 16 S. C. R. 235; 14 A. R. 32; 10 O. R. 257.

See *Macklin v. Dowling*, 19 O. R. 441, p. 1887.

#### IV. PROSPECTIVE OR RETROSPECTIVE.

*Prospective*—Held, that the statute 42 Vict. c. 22, (Ont.) "An Act to amend the law of dower," does not apply to mortgages made before it was passed. *Martindale v. Clarkson*, 6 A. R. 1.

Held, that the "Married Woman's Property Act, 1884," 47 Vict. c. 19 (Ont.), is not retrospective. *Scott v. Wye*, 11 P. R. 93.—O'Connor.

One Chamberlain being in insolvent circumstances, and indebted to K. in \$120, was pressed by him for payment when he agreed to sell K. a horse for \$110, in part payment; and about the 15th of August, 1885, delivered the horse in pursuance of such an agreement. K. kept possession of and worked the horse for one day, and then he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On the 31st of October, Chamberlain executed an assignment to the plaintiff in pursuance of the Act 48 Vict. c. 26 (Ont.) respecting assignments for the benefit of creditors, which came into force on the 1st September, 1885. In an action against K. to recover the horse on the ground of fraudulent preference:—Held, affirming the judgment of the court below, that the sale having been made before the Act came into force, the provisions thereof did not apply. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, followed. *Coats v. Kelly*, 15 A. R. 81.

The defendant who was employed as financial manager of a firm advanced to them a large sum of money to be repaid on his giving six months' notice demanding payment, in default of which the firm covenanted to assign certain securities. This notice was given on 15th January, 1885, but although repeated demands for payment were made by defendant nothing was done until 19th December, 1885, when a transfer to him of certain securities was made by the firm who within two months made an assignment under 48 Vict. c. 26 (Ont.), which came into force on 1st September, 1885. In an action by the assignee under that statute to recover back the amount realised from the securities, it was—

Held, that whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made as this was in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law. Whether the effect of the statute is to alter the law in this respect, *Quare. Clarkson v. Sterling*, 15 A. R. 234.

See *McLachlin v. Usborne*, 7 O. R. 207.

*Retrospective*.—Semble, that R. S. O. (1877) c. 109, s. 2 is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary even though the transaction took place prior to that enactment. *Sanders v. Malbury*, 1 O. R. 178.—Boyd.

42 Vict. c. 20, s. 11 (Ont.), authorizing the taxation of a mortgagee's costs by any party interested, without any order to tax applies to mortgages executed before the passing of the Act. *Ferguson v. English and Scottish Investment Co.*, 8 P. R. 404.—Taylor, Master.

Held, that though not expressly so enacted, 49 Vict. c. 49 (Dom.), is retrospective in its operation and applies to convictions whether made before or after the passing of the Act, and that under section 7 the right to certiorari is taken away upon service of notice of appeal to the sessions, that being the first proceeding on an appeal from the conviction. *Regina v. Lynch*, 12 O. R. 372.—Wilson.

Held, following *Broddy v. Stuart*, 7 C. L. T. 6, that 48 Vict. c. 26 (Ont.) is *intra vires* the provincial legislature. Where the plaintiff sought to invalidate certain payments of money made by an insolvent debtor within thirty days prior to his making an assignment under the said Act, but before it came into force:—Held, that the claim could not be sustained either upon the ground that the statute was retrospective, or upon the ground that what the plaintiff sought to obtain was defined and given by sec. 3, sub-a. 3 of the statute. *Clarkson v. Ontario Bank*, 13 O. R. 666.—Ferguson; 15 A. R. 166.

See *City of Quebec v. Quebec Central R. W. Co.*, 10 S. C. R. 563, p. 1805; *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 365, p. 284.

#### V. IMPERATIVE OR DIRECTORY.

Semble, that the provisions of section 46 of 32-33 Vict. c. 31 (Dom.), that no adjournment shall be "for more than one week" are directory merely. *Regina v. French*—*Regina v. Robertson*, 13 O. R. 80, distinguished and not followed. *Regina v. Heffernan*, 13 O. R. 616.—Robertson.

The duties of an assessor and a township clerk under R. S. O. (1877), c. 180, ss. 109, 110 and 111 are imperative not directory merely and their performance is conditional to the validity of a tax sale. (*Burton, J. A., dissenting.*) *Donovan v. Hogan*, 15 A. R. 432.

Held, that the provisions of section 115 of the Canada Temperance Act are directory only. *Regina v. Brown*, 16 O. R. 41.—Q. B. D.

R. S. O. c. 145, s. 36, giving power to the benchers of the law society to examine witnesses under oath is not imperative. See *Hault v. Law Society of Upper Canada*, 16 O. R. 625.—Boyd; 17 A. R. 41, p. 1160.

Held, that section 351 of R. S. O. (1887), c. 184, which requires a by-law creating a debt by the issuing of debentures for a longer term than one year to be registered within a fortnight from the final passing thereof, is merely directory. *Re Farlinger and the Village of Morrisburg*, 16 O. R. 722.—Street.

Section 120 of the Assessment Act, R. S. O. (1887) c. 193, provides that the clerk shall deliver the roll to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about 1st January, 1887:—Held, that the provisions of section 120 are directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid. *Lewis v. Brady*, 17 O. R. 377.—Q. B. D.

The New Brunswick Liquor License Act, 1887, provides that "all applications for license, other than in cities and incorporated towns, shall be presented at the annual meeting of the council of the municipality and shall then be taken into consideration, and in cities and incorporated towns, at a meeting to be held not later than the first day of April, in each and every year." The interpretation clause provides that in the city of St. John the expression "council" means the mayor who has the powers given to a municipal council. It is also provided that when anything is required to be done at, on or before a meeting of council, and no other date is fixed therefor, the mayor may fix the date for doing the same in the city of St. John:—Held, affirming the judgment of the court below, that the provision requiring licenses to be taken into consideration not later than the first day of April is directory only, and licenses granted in St. John are not invalid by reason of the same being granted after that date:—Held, per Gwynne J., that this provision does not apply to the city of St. John. *Danaher v. Peters; O'Regan v. Peters*, 17 S. C. R. 44.

#### VI. REPEALING STATUTES.

Section 464, sub-section 2 of 36 Vict. c. 48 (Ont.), enacts that the council of every city, town, and incorporated village, shall have power to pass by-laws for assessing upon the real property to be immediately benefited by the making, etc., of any common sewer, etc., "on the petition of at least two-thirds in number and one-half in value of the owners of such real property, a special rate," etc. The sub-section is amended, so far as the same relates to the city of Toronto, by 40 Vict. c. 39, s. 2, by inserting after the words "owners of such real property" the words "or where the same is in the opinion of the said council necessary for sanitary or drainage purposes." 40 Vict. c. 6, respecting the revised

statutes, passed in the same session, repealed 36 Vict. c. 48; and R. S. O. (1877), c. 174, s. 551, sub-s. 2, corresponds with the repealed section 464, sub-section 2:—Held, *Armour, J.*, doubting, and *Cameron, J.*, dissenting. 1. That under 40 Vict. c. 6, s. 10, the R. S. O. (1877), was substituted for the repealed Acts and the amending Act applied to the R. S. O. (1877), c. 174, s. 2. The amendment in 40 Vict. c. 39, was a reference in a former Act remaining in force to an enactment repealed, and so a reference to the enactment in the revised statutes, corresponding to the section 464, sub-section 2, within section 11 of 40 Vict. c. 6. 3. That the city of Toronto, therefore, could pass a by-law in 1879 to construct a sewer, when necessary in their opinion for sanitary or drainage purposes, without any petition therefor. *In re Bruck v. City of Toronto*, 45 Q. B. 53.—Q. B. D.

Section 217 of 29-30 Vict. c. 51 has not been repealed though marked effete in the schedule prefixed to and not re-enacted in 36 Vict. c. 48 (Ont.). *Scottish American Investment Co. v. Village of Elora*, 6 A. R. 628.

Effect of repeal of Stamp Act. See *Caughill v. Clarke*, 9 P. R. 471, p. 155.

Semble, section 34 of C. L. P. Act, R. S. O. (1877), c. 50, s. 30 (see Con. Rule 1067), has not been repealed by Rule 5, Ontario Judicature Act (see Con. Rule 224). *Cochrane Manufacturing Co. v. Lanon*, 11 P. R. 162.—Rose.—Q. B. D.

The effect of the revision of the Statutes of Canada, brought into force by royal proclamation, 1st March, 1887, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity, and the adoption of the Canada Temperance Act by municipalities prior to that revision, has not been changed or interfered with by it. The alterations made in the phraseology of the Act by the revision are not vital, and do not materially change its character or effect. *License Commissioners for Frontenac v. County of Frontenac*, 14 O. R. 741.—Boyd. See also *Regina v. Durison*, *ib.* 672, p. 1028.

The authority to proceed by rule or order nisi in quashing a by-law conferred by R. S. O. (1887), c. 184, s. 332, is inconsistent with Con. Rule 526 and must therefore be taken to be repealed, for by 51 Vict. c. 2, s. 4 (Ont.), it is declared that all enactments in the revised statutes inconsistent with the rules are repealed. It is therefore not proper now to proceed by order nisi. *Re Peck and Ameliasburg*, 12 P. R. 664, followed; *Hewison v. Pembroke*, 6 O. R. 170, distinguished. *Re Colenutt v. Township of Colchester North*, 13 P. R. 253.—Street.

See *Robertson v. Larocque*, 18 O. R. 469, p. 580.

See also BANKRUPTCY AND INSOLVENCY, IV. 13, p. 131.

#### STATUTORY CONDITIONS.

See INSURANCE.

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R. 102.—Rose.—

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18 O. R. 469, p.

D INSOLVENCY, IV.

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## STAYING PROCEEDINGS.

See ARBITRATION AND AWARD—PRACTICE.

## STEAMBOAT.

See SHIP.

## STIPENDIARY MAGISTRATE.

Jurisdiction of stipendiary magistrate for judicial district of Parry Sound. See *Regina v. Monteith*, 15 O. R. 290, p. 1033.

Held, that 38 Vict. c. 47 giving power to police and stipendiary magistrates to try in a summary manner felonies and misdemeanour, was intra vires the Dominion Parliament. *In re Boucher, Cassels' Dig.* 180.

## STOCK.

See BROKER—COMPANY—RAILWAYS AND RAILWAY COMPANIES.

Calls on insurance company stock after suspension of license. See *Union Fire Insurance Co. v. Fitzsimmons*, 32 C. P. 602, p. 933; *Union Fire Insurance Co. v. Lyman*, 46 Q. B. 471, p. 933.

Assessment of. See *Ex parte James D. Lewin*, 11 S. C. R. 484, p. 60.

Locus of bank stock. See *Hughes v. Rees*, 5 O. R. 654, p. 1012.

Sale of stock under execution. See *Connecticut and Passumpsic River R. W. Co. v. Morris*, 14 S. C. R. 318, p. 693.

Gambling in. See *Regina v. Murphy*, 17 O. R. 201, p. 833.

Purchase of, on margin. See BROKER.

## STOLEN GOODS (RECEIVING).

See CRIMINAL LAW.

## STOP ORDER.

See PAYMENT.

## STOPPAGE IN TRANSITU.

See SALE OF GOODS.

## STOWAGE.

See SHIP.

## STREAMS.

See WATER AND WATER COURSE.

## STREET.

See WAY.

Remarks on the serious consequences likely to arise from the constant changes in the names of streets in the city of Toronto. *VanKoughnet v. Denison*, 11 A. R. 609.

## STREET RAILWAY.

Action for damages to property and loss of fares through the unlawful and negligent removal of a house over a highway occupied by a street railway company. See *Toronto Street R. W. Co. v. Dollery*, 12 A. R. 679.

The Quebec Street Railway Company were authorized under a by-law passed by the city of Quebec and an agreement executed in pursuance thereof to construct and operate in certain streets of the city a street railway for a period of forty years, and it was also provided that at the expiration of twenty years from the 9th February, 1865, the corporation might, after a notice of six months to the company, to be given within twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment, etc., of its value, to be determined by arbitration together with ten per cent. additional:—Held, reversing the judgments of the courts below (Fournier, J., dissenting), that the company were entitled to a full six months' notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and therefore a notice given in November, 1884, to the company that the corporation would take possession of the railway in six months thereafter was bad. *Quebec Street Railway Co. v. City of Quebec*, 15 S. C. R. 164.

Per Strong and Henry, JJ., that the court had no power to appoint an arbitrator or valuator to make the valuation provided for by the agreement after refusal by the company to appoint their arbitrator. *Fournier, J., contra. Ib.*

In 1801 an agreement was entered into between the plaintiffs and certain parties for the construction and operation of street railways in the city of Toronto, in which they agreed to construct the lines of road specified from time to time, and that they would at all times employ careful, sober and civil agents, conductors and drivers to take charge of the cars upon the said railways, and that they and their agents, conductors, drivers and servants would at all times \* \* \* operate the said railway, and cause the same to be worked under such regulations as the common council of the city of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privileges granted by the agreement. Subsequently the privileges so conferred upon those persons were assigned to

the defendants who continued to work several railways, and after some years introduced for use thereon smaller cars, drawn by one instead of two horses as had been done previously, and with only one man in charge instead of two as on the larger cars. In 1882 the council of the city passed a by-law (No. 1264), prohibiting the operation of any cars within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel them to do so, the agreement of 1861 being relied on as warranting that relief:—Held (reversing the judgment of the court below), Osler, J. A., dissenting. (1). That the by-law in question was not within the terms of the agreement, and that it was therefore ultra vires. (2) That the by-law was also invalid as it was an invasion of the domestic concerns of the company. *City of Toronto v. Toronto Street Railway Co.*, 15 A. R. 30.

By 36 Vict. c. 99 (Ont.), the London Street Railway Company was incorporated, by section 13 of which, the city of London were authorized to enter into an agreement for the construction of the railway on such of the streets as might be agreed on, and for the paving, repairing, etc. of the same. By section 14 the city was also empowered to pass by-laws to carry such agreement into effect, and containing all necessary provisions, etc., for the conduct of all parties concerned, including the company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the streets by the street railway company who were to be liable for all damages occasioned to any person by reason of the construction, repair or operation of the railway, or any part thereof, or by reason of the default in repairing the said portions of the streets, and that the city should be indemnified by the company for all liability in respect of such damage. An accident having happened to plaintiff by reason of said portions of said streets being out of repair, an action was brought by plaintiff against the city of London therefor. After action brought, and more than six months after the occurrence of the accident, on the application of the city of London the street railway company were made parties defendant:—Held, that notwithstanding, the said legislation, by-law, and agreement, the city was liable under section 531 of the Municipal Act, R. S. O. (1887) c. 184 to the plaintiff for the damage he had sustained; but that they had a remedy over against the street railway company:—Held, also, following *Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747, that the six months' limitation clause in the Railway Act did not apply, the right of the city against the street railway company being one of contract. *Carty v. City of London* 18 O. R. 122.—C. P. D.

The defendants, by letters patent issued under the Street Railway Act, R. S. O. (1887), c. 171, were authorized to build and operate (on all days except Sundays) a street railway, etc. On an information laid to restrain the operating of the railway on Sunday:—Held, per Galt, C. J., that an information would not lie for the Act did not prohibit running cars on Sunday:—Per Ross, J., that the information would lie, for the authority to operate the railway "on all days except Sun-

days" implied a prohibition against working it on Sunday:—Per MacMahon, J., that the information would not lie, for no private right or right of property was involved nor any injury of a public nature done, and the interference of the court will not be exercised merely to enforce performance of a moral duty. *Attorney-General ex rel. Hobbs v. Niagara Falls, Wesley Park and Clifton Tramway Co.*, 19 O. R. 624.—C. P. D.; affirmed by the Court of Appeal, 18 A. R. 453.

*See County of York v. Toronto Gravel Road and Concrete Co.*, 11 A. R. 785, p. 332.

## SUBPENA.

*See COSTS—EVIDENCE.*

## SUBROGATION.

*See INSURANCE.*

As a general rule the doctrine of subrogation does not apply in favour of a party who has not paid money or given something in satisfaction or extinguishment of a security, claim, or demand, or partly so, or who has not paid something by way of getting in a security, or the like. *Courcelles v. Fookes*, 16 O. R. 691.—Ferguson.

The plaintiff, an execution creditor against lands, brought an action to set aside as fraudulent, two mortgages of real estate made by his execution debtor and succeeded as to the first, the action being dismissed as to the second mortgage. The lands were sold but did not realize enough to pay the plaintiff and the second mortgagee. The plaintiff then claimed to be entitled by his diligence to priority for his execution over the second mortgage to the extent of the mortgage so set aside as fraudulent:—Held, that he was not entitled to any such priority as to his execution, but that as his costs as between solicitor and client over and above his costs as between party and party, and such of the latter costs as might not be realized from the defendants (other than the second mortgagee) were a first charge on the fund as in the nature of salvage. *Id.*

The plaintiff advanced money to the owner of real estate to pay off existing mortgages thereon, and took and registered a mortgage on the property for the amount, paid off the prior mortgages and registered discharges of them, the defendant having all the time an execution against the lands of the mortgagor in the hands of the sheriff of the county in which the lands were situate, of which the plaintiff was ignorant, his solicitors having neglected to search:—Held, that the plaintiff was entitled to be subrogated to the rights of the original mortgagees, and to priority over the defendant's execution, to the amount paid to discharge the prior mortgages, upon the ground of mistake, he having done so under the belief that he was obtaining a first charge; and that he was not disentitled to relief, because by using ordinary care he might have discovered the mistake, the defendant not having been prejudiced thereby. *Brown v. McLenn*, 18 O. R. 533.—Street.

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*Brown v. McLean,*

The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry and found only two incumbrances registered against the property. Shortly after the defendant completed his purchase, and having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but as he did not make a further search, he did not discover the plaintiff's lien :—Held, affirming the decision of Falconbridge, J., that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien. The Registry Act does not preclude inquiry as to whether there was knowledge in fact ; and the court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake. *Brown v. McLean, 18 O. R. 533, specially considered. Abel v. Morrison, 19 O. R. 669.—Chy. D.*

See *Jack v. Jack, 12 A. R. 476, p. 756 ; Purdom v. Nichol, 16 O. R. 699 ; 15 A. R. 244 ; 15 S. C. R. 610, p. 1262 ; Maclellan v. Gray, 16 O. R. 321 ; 16 A. R. 224, p. 1254.*

### SUBSCRIBING WITNESS.

See EVIDENCE.

### SUBSTITUTIONAL SERVICE.

See PRACTICE.

### SUMMARY CONVICTIONS.

See JUSTICES OF THE PEACE.

### SUMMARY TRIALS.

- I. BEFORE MAGISTRATES—See POLICE MAGISTRATES.
- II. FOR ILLEGAL ACTS AT ELECTIONS—See PARLIAMENTARY ELECTIONS.
- III. BEFORE COUNTY JUDGE—See CRIMINAL LAW.

### SUMMONS.

- I. WRIT OF—See EJECTMENT—PRACTICE.
- II. IN CHAMBERS—See PRACTICE.
- III. MAGISTRATES—See INTOXICATING LIQUORS ;—JUSTICE OF THE PEACE.

### SUNDAY.

- I. SALE OF LIQUOR—See INTOXICATING LIQUORS.
- II. IN COMPUTATION OF TIME—See TIME.

The Imp. Act 21 Geo. III. c. 48, prohibiting amusements and entertainments on the Lord's Day, is in force in Ontario, and an application to quash a conviction thereunder for keeping a disorderly house known as the "Royal Opera House," opened and used for public entertainment and amusement on the Lord's Day, was therefore refused. *Regina v. Barnes, 45 Q. B. 276.—Q. B. D.*

The defendants, owner and captain respectively of a steamboat, advertised that they would carry excursions on Sundays. A number of passengers left Buffalo, in the State of New York, on a Sunday morning, and proceeded by rail to Niagara, whence they were carried by the defendants' steamboat to Toronto and back the same day. The defendants having been convicted therefor for an offence under R. S. O. (1877) c. 189 :—Held, that the passengers were "travellers" within the meaning of the exception in sec. 1 of the Act ; that there is no distinction in such a case between travellers for pleasure and for business ; and that the convictions were therefore bad. *Regina v. Daygett ; Regina v. Fortier, 1 O. R. 537.—Q. B. D.*

Held that R. S. O. (1877) c. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and therefore a conviction of a government locktender on the Welland canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superiors, was quashed. *Regina v. Berriman, 4 O. R. 282.—Q. B. D.*

In an action upon a contract for the purchase of a horse, the statement of defence alleged that on Sunday the 19th of April the defendant drove out to the plaintiff's place for the purpose of exchanging a horse, and that on that occasion it was agreed, etc. (stating the defendant's version of the bargain) :—Held, that this statement was not sufficient to raise the defence of illegality under the Lord's Day Act, but as it was treated at the trial as tendering the proper issue, and as the jury found that a contract was made on a Sunday, the judgment for the plaintiff was set aside and a new trial granted, without costs, with leave to both parties to amend. *Crosson v. Bigley, 12 A. R. 94.*

Application for injunction to restrain the operating of street cars on Sunday. See *Attorney-General ex rel. Hobbs v. Niagara Falls, Wesley Park and Clifton Tramway Co., 10 O. R. 624 ; 18 A. R. 453, p. 1988.*

### SUPERSEDEAS.

The plaintiff, on the sale of certain land to the defendant R., left in her hands a sum of \$200 of the purchase money as security against an execution in another action then in the hands of a sheriff against the plaintiff's lands. Subsequently the plaintiff appealed in that action and on doing so gave a bond with sureties conditioned to pay the debt and costs :—Held, reversing the judgment of the court below, that the perfecting and allowance of such security operated as a writ of supersedeas of the writ of



execution, not as a stay thereof merely; and that the plaintiff was therefore entitled to recover the balance of the purchase money from R. O'Donohoe v. Robinson, 10 A. R. 822.

## SUPPLEMENTAL ANSWER

See PLEADING

## SUPREME COURT OF CANADA.

### I. AUTHORITY TO ISSUE HABEAS CORPUS.

#### II. APPEALS TO.

1. *Bond and Security*, 1991.
2. *Factum*, 1992.
3. *Leave to Appeal per Saltem*, 1992
4. *From what Courts*, 1994.
5. *Appeals from Quebec*, 1995.
6. *Amount in Controversy*, 1995.
7. *Final Judgments*, 1997.
8. *Future Rights*, 2000.
9. *New Trials*, 2002.
10. *Criminal Proceedings*, 2002.
11. *Mandamus*—See MANDAMUS.
12. *Habeas Corpus*—See HABEAS CORPUS.
13. *Election Petitions*—See PARLIAMENTARY ELECTIONS.
14. *Cross Appeals*, 2002.
15. *Appeals on Questions of Fact*, 2003.
16. *Other Cases*, 2003.
17. *Practice*.
  - (a) *Time for Appealing*, 2005.
  - (b) *Amendment of Pleadings*, 2007.
  - (c) *Other Cases*, 2007.
18. *Costs*, 2009.
19. *Right to take Grounds of Appeal not taken Below*—See APPEAL.
20. *Cases Relating to Appeal Generally*—See APPEAL.

### I. AUTHORITY TO ISSUE HABEAS CORPUS.

See *In re Médina Trepanier*, 12 S. C. R. 111, p. 846; *In re Sproule*, 12 S. C. R. 140, p. 846; *In re Boucher Casels' Dig*, 180, p. 848.

#### II. APPEALS TO.

##### 1. *Bond and Security*.

There having been no delay in applying for leave to appeal and the delay being caused by the act of the court:—Held, that the time for filing the bond must count from the granting of leave to appeal. *Metrae v. White*, 9 P. R. 288.—Patterson.

The following certificate was filed with the printed case, as complying with Rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do

hereby certify that the said defendant has deposited in our office, on the twentieth day of November, last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section thirty-first of the Supreme Court Act, passed in the thirty-eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878, Signed, Hubert, Honey & Gendron, P. S. C."—Held, on motion to quash appeal, that the deposit of the sum of \$500, in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of appeal. Per Taschereau, J., the case should be sent back to the court below in order that a proper certificate might be obtained. *Macdonald v. Abbott*, 3 S. C. R. 278.

The Court has no discretion to increase the amount of security on appeal to the Supreme Court of Canada, fixed by R. S. C. c. 135, s. 46, at \$500, because of the number of respondents. *Archer v. Severn*, 12 P. R. 472.—Osler.

If objection is made to the form of a bond for security for costs on appeal to the Supreme Court it should be by application in chambers to dismiss, and if not so made the objection will be held to be waived. *Whitman v. Union Bank of Halifax*, 16 S. C. R. 410.

S. brought an action against J. and issued a writ of *capias*. Bail was given and special bail entered in due course, but the bail-piece was not filed, nor judgment entered against J., for some months after. On application to a judge in chambers, an order was made for the discharge of the bail on account of delay in entering up judgment, and the full court refused to set aside such an order. An appeal was brought to the Supreme Court of Canada, entitled in the suit against J., from the judgment of the full court, and the bond for security for costs was given to J.:—Held, that as the bail, the only parties really interested in the appeal, were not before the court and not entitled to the benefit of the bond, the appeal must be quashed for want of proper security:—Held, also, that the appeal would not lie as the matter was simply one of practice, in the discretion of the court below. *Seammell v. James*, 16 S. C. R. 593.

See *Citizens' Ins. Co. v. Parsons*, 32 C. P. 492, p. 412; *Burgess v. Conway*, 11 P. R. 514, p. 151, p. 412.

##### 2. *Factum*.

The plaintiff's *factum*, containing reflections on the judge in equity and the full court of New Brunswick, was ordered to be taken off the files of the court as scandalous and impertinent. *Vernon v. Oliver*, 11 S. C. R. 156.

See *O'Sullivan v. Lake*, 16 S. C. R. 636.

##### 3. *Leave to Appeal per Saltem*.

The Chief Justice of the Supreme Court, under section 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being known that there were then only two judges on the bench in Manitoba,

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the plaintiff (Chief Justice), and Dubuc, J., from  
whose decree the appeal was brought. *Schultz*  
*v. Wood*, 6 S. C. R. 585.

A suit brought by respondents against D, as  
rector of St. James' Cathedral, Toronto, to have  
certain lands declared to be held by him not only  
for himself but also for the benefit of the other  
rectories in the city of Toronto, was decided by  
Ferguson, J., in favour of the respondents, a  
decision which, on appeal to the Chancery Division  
of the H. C. J., was upheld. Up to the  
time of the judgment rendered by the latter  
court the proceedings had been carried on  
in the name of D. by arrangement between him  
and the churchwardens of St. James' Cathedral,  
who contended that they had an interest separate  
from that of D. in the disposition of the lands  
and the revenues therefrom, and who had in-  
demnified D. against costs. But upon the  
churchwardens proposing to appeal to the Court  
of Appeal, D. refused to allow his name to be  
further used in the proceedings. The Court of  
Appeal, upon an application being made by the  
churchwardens for leave to appeal, refused to  
grant such appeal, holding that the church-  
wardens had no interest in the lands or revenues.  
The churchwardens thereupon applied to Strong,  
J., in chambers, for leave to appeal per saltum  
to the Supreme Court of Canada under section 6  
of the S. C. C. Act, 1879, from the judgment of  
the Chancery Division. The judge held that the  
churchwardens had an interest at least which  
justified them in appealing. He would not  
however, as a judge in chambers, overrule the  
decision of the Court of Appeal, but granted  
leave to renew the application to the full  
court. On the motion coming before the full  
court it was held that the appeal should be  
allowed upon a proper indemnity being given  
by the churchwardens to D. against all possible  
costs, the court expressing no opinion on the  
merits of the case itself. Henry, J., dissenting,  
on the ground that it was impossible to decide  
the right to appeal without entering into the  
merits, and on the merits the churchwardens had  
no interest in the lands or revenues. *DuMontin*  
*v. Langtry*, 13 S. C. R. 258. Leave to appeal  
to Privy Council refused 57 L. T. N. S. 317.

An appeal came before the Supreme Court, by  
consent, from a decision of the judge in equity  
of New Brunswick without an intermediate  
appeal to the Supreme Court of the province  
and, after argument, was dismissed. (9 S. C.  
R. 617.) The judgment of the Supreme Court  
was subsequently reversed by the privy council  
and the case sent back to the judge in equity  
to make a decree. The plaintiffs being dissatisfied  
with the decree pronounced by the judge in  
equity applied, under R. S. C. c. 135, s. 26, for  
leave to appeal direct therefrom:—Held, Tas-  
chereau and Gwynne, JJ., dissenting, that under  
the circumstances of the case such leave should  
be granted. *Lerou v. Hore*, 14 S. C. R. 722.

It is not a sufficient ground for allowing an  
appeal direct from the decision of the trial judge  
on further consideration or of a Divisional Court  
of the High Court of Justice of Ontario, that the  
Court of Appeal of that province had already, in  
a similar case before it, given a decision on the  
abstract question of law involved in the case in  
which the appeal was sought, though it might  
be sufficient if such decision had been given on

the same state of facts and the same evidence.  
*Kyle v. Canada Co.*; *Histop v. Township of*  
*McGillivray*, 15 S. C. R. 188.

#### 4. From What Courts.

Per Strong and Taschereau, JJ., that an ap-  
peal does not lie from the Court of Revision (P.Q.)  
to the Supreme Court of Canada, (Henry, J.,  
contra). *Macdonald v. Abbott*, 3 S. C. R. 278.

Held, on a motion to quash, that an appeal  
will not lie to the Supreme Court of Canada in  
cases in which the court of original jurisdiction  
is not a superior court, and that the Court of  
Wills and Probate for the county of Lunenburg,  
Nova Scotia, is not a superior court within the  
meaning of the 17th section of the Supreme and  
Exchequer Court Act. *Beunish v. Kaulbach*,  
3 S. C. R. 704.

In an action instituted in the Superior Court of  
the Province of Quebec by the appellant against  
M. A. C. and nine other defendants, the respon-  
dents, three of the defendants, severally demur-  
red to the appellant's action, except as regarded  
two lots of land, in which they acknowledged the  
appellant had an undivided share. The Superior  
Court sustained the demurrer, and, on appeal,  
the Court of Queen's Bench for Lower Canada  
(appeal side) affirmed the judgment. The ap-  
pellant thereupon appealed to the Supreme Court,  
and respondents moved to quash the appeal on  
the ground that the Supreme Court had no juris-  
diction:—Held, that as the judgment of the  
Court of Queen's Bench (the highest court of last  
resort having jurisdiction in the Province) finally  
determined to put an end to the appeal, which  
was a judicial proceeding within the meaning of  
section 9 of the Supreme Court Amendment Act  
of 1879, such judgment was one from which an  
appeal would lie to the Supreme Court of Canada;  
and though an appeal cannot be taken from  
a court of first instance directly to the Supreme  
Court until there is a final judgment, yet, when-  
ever a provincial Court of Appeal has jurisdic-  
tion, this court can entertain an appeal from its  
judgment finally disposing of the appeal, the  
case being in other respects a proper subject of  
appeal. *Cherrier v. Cucillier*, 4 S. C. R. 605.

The College of Ste. Thérèse having petitioned  
for an order for payment to them of a sum of  
\$4,000 deposited by the appellants as security  
for land taken for railway purposes, a judge of  
the Superior Court in chambers after formal  
answer and hearing of the parties granted the  
order under the Railway Act, R. S. C. c. 109,  
s. 8, sub-s. 31. The railway company appealed  
against this order to the Court of Queen's Bench  
for Lower Canada (appeal side) and that court  
affirmed the decision of the judge of the Superior  
Court:—Held, that the order in question hav-  
ing been made by a judge sitting in chambers,  
and, further, acting under the statute as a  
persona designata, the proceedings had not  
originated in a Superior Court within the mean-  
ing of section 28 of the Supreme and Exchequer  
Courts Act, and the case was therefore not  
appealable. *Canadian Pacific R. W. Co. v.*  
*Little Seminary of Ste. Thérèse*, 16 S. C. R. 606.

By an ordinance of the North-West Ter-  
ritories an appeal lies from the decision of the  
Court of Revision for adjudicating upon assess-

ments for school rates to the district court of the school district; on such appeal being brought the clerk of the court issues a summons, making the ratepayer plaintiff and the school trustees defendants, which summons is returnable at the next sitting of the court when the appeal is heard. The district is now merged in the Supreme Court of the Territories:—Held, that an appeal will not lie from the judgment of the Supreme Court affirming a decision of the Court of Revision in such case, as the proceedings do not originate in a Superior Court. *R. S. C. c. 135, s. 24*. An appeal in such case will lie since the passing of 51 Vict. c. 37, s. 5, which allows an appeal from the decision of the Supreme Court of the Territories although the matter may not have originated in a superior court. *Augus v. Calgary School Trustees*, 16 S. C. R. 716.

See *Danjou v. Marquis*, 38 S. C. R. 251, p. 1231.

#### 5. Appeals from Quebec.

A churchrate payable in two instalments of \$165 each was assessed on a certain property in the Parish of the Nativity. The Bank of Toronto subsequently became proprietor of this land, and in an hypothecary action brought by respondents against them to enforce the payment of the first instalment of said churchrate, the Superior Court at Montreal held the Bank of Toronto were liable; the Court of Queen's Bench (appeal side) confirmed the judgment:—Held, on appeal to the Supreme Court of Canada, that the case did not come within any of the classes of cases mentioned in sec. 8 of 42 Vict. c. 39 (Supreme Court Amendment Act, 1879), providing for appeals from the Province of Quebec, and was not appealable. *The Bank of Toronto v. Le Curé etc., de la Paroisse de la Nativité de la Sainte Vierge*, 12 S. C. R. 25.

The provisions of the Supreme and Exchequer Courts Acts relating to appeals from Quebec, apply to cases arising under the Petition of Right Act of that Province, 46 Vict. c. 27 (Que.). *McGreary v. The Queen*, 14 S. C. R. 735.

An appeal from a decision of the Court of Queen's Bench for Lower Canada, appeal side (*M. L. R. 2 Q. B. 482*) was quashed on motion for want of jurisdiction, the proceedings being by quo warranto as to which there is no appeal by the statute. *Walsh v. Heffernan*, 14 S. C. R. 738.

See *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse*, 16 S. C. R. 606, p. 1994; *Ontario and Quebec R. W. Co. v. Marchette*, 17 S. C. R. 141, p. 2000.

See also Subheads II. 6, 7, 8, pp. 1995, 1997, 2000.

#### 6. Amount in Controversy.

L., appellant, sued R., the respondent, before the Superior Court at Arthabaska, in an action of damages (laid at \$10,000) for slander. The judgment of the Superior Court awarded to the appellant a sum of \$1,000 for special and vindictive damages. R. appealed to the Court of Queen's Bench (appeal side), and L., the present appellant, did not ask, by way of cross appeal, for an increase of damages, but contended that

the judgment for \$1,000 should be confirmed. The Court of Queen's Bench partly concurred in the judgment of the Superior Court but differed as to the amount, because L. had not proved special damages, and the amount awarded was reduced to \$500, and costs of appeal were given against the present appellant. L. thereupon appealed to the Supreme Court:—Held, Taschereau J., dissenting, that L. the plaintiff, although respondent in the court below, and not seeking in that court by way of cross appeal an increase of damages beyond the \$1,000, was entitled to appeal, for in determining the amount of the matter in controversy between the parties, the proper course was to look to the amount for which the declaration concluded, and not at the amount of the judgment. *Joyce v. Hart*, 1 S. C. R. 321, reviewed and approved. *Levi v. Reed*, 6 S. C. R. 482. But see next case.

Where the plaintiff has acquiesced in the judgment of the court of first instance by not appealing from the same, the measure of value for determining his right of appeal under section 29 of the Supreme and Exchequer Courts Act, is the amount awarded by the said judgment of the court of first instance, and not the amount claimed by his declaration. (*Levi v. Reed*, 6 S. C. R. 482, overruled; *Allan v. Platt*, 13 App. Cas. 780, referred to as overruling *Joyce v. Hart*, 1 S. C. R. 321.) *Monette v. Lefebvre*, 16 S. C. R. 387.

Held, that although the amount claimed in this case by the declaration was made to exceed \$2,000, by including interest which had been barred by prescription, the appeal would lie. *Ayotte v. Boucher*, 9 S. C. R. 460.

A life insurance company deposited with the prothonotary of the Superior Court, under the Judicial Deposit Act of Quebec, the sum of \$3,000, being the amount of a life policy issued by the company to one E. L. which by its terms had become payable to those entitled to the same, but to one half of which sum rival claims were put in. The appellants, as collateral heirs of the deceased, by a petition claimed the whole of the three thousand dollars, and the respondent (mise-en-cause petitioner), the widow of the deceased, by a counter petition claimed as commune en biens one half; and, in her answer to the appellants' petition, prayed that in so far as it claimed any greater sum than one half, it should be dismissed. After issue joined the Superior Court awarded one half to the appellants, and the other half to the respondent. From this judgment the appellants appealed to the Court of Queen's Bench (appeal side) and that court confirmed the judgment of the Superior Court. On appeal to the Supreme Court of Canada:—Held, that the sum or value of the matter in controversy between the parties being only \$1,500, the case was not appealable. *R. S. C. c. 135, s. 29*. (*Fournier, J., dubitante*). *Labbe v. Barbant*, 16 S. C. R. 390.

Where the matter in controversy is bank shares, their actual value at the time of the institution of the action and not their par value will determine the right of appeal under section 29 Supreme and Exchequer Courts Act, and the actual value of such shares may be shown by affidavit. *Muir v. Carter—Holmes v. Carter*, 16 S. C. R. 473.



ceeding within the meaning of section 28, c. 135 R. S. C., and therefore appealable. *Taschereau, J.*, dissenting. *Stanton v. Canada Atlantic R. W. Co.* Cassels' Dig. 249 reviewed. *MacKinnon v. Keroack*, 15 S. C. R. 111.

By a rule nisi of the Supreme Court of New Brunswick, E. was called upon to show cause why an attachment should not issue against him, or he be committed for contempt of court, in publishing certain articles in a newspaper. On the return of the rule it was made absolute, and a writ of attachment was issued commanding the sheriff to have the body of E. before the court on a day named. By the practice in such cases in the said court it appeared that the attachment was issued merely in order to bring the party into court, where he might be ordered to answer interrogatories and by his answers purge if he could his contempt. If unable to do this the court would pronounce sentence. E. appealed from the judgment making the rule absolute. On motion to quash said appeal:—Held, that the judgment appealed from was not a final judgment from which an appeal would lie under section 24 (a) of the Supreme and Exchequer Courts Act, R. S. C. c. 135. *Ellis v. Baird*, 16 S. C. R. 147.

The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited by section 27 of the Supreme and Exchequer Courts Act. *Taschereau, J.*, dubitante. The Supreme Court has jurisdiction to entertain such an appeal from the judgment of the Court of Appeal of the Province, not only under section 24, sub-section (a) of the Supreme and Exchequer Courts Act as a final judgment in an action or suit, but also under sub-section (1) of section 26 of the same Act, as a final judgment "in a matter or other judicial proceeding" within the meaning of said section 26. The adjudication that the appellant, a solicitor and officer of the court and moved against in that quality, has been guilty of a contempt is by itself an appealable judgment, although no sentence for the contempt has been pronounced by the court. When the party in contempt has been ordered to pay the costs of the application to commit the court in effect inflicts a fine for the contempt. *In re Henry O'Brien—Regina ex rel. Felitz v. Howland*, 16 S. C. R. 197.

The judgment of a provincial court allowing a demurrer to the plaintiff's replication to one of several pleas by the defendants, which does not operate to put an end to the whole or any part of the action or defence, is not a final judgment from which an appeal will lie to the Supreme Court of Canada. *Shon v. Canadian Pacific R. W. Co.*, 16 S. C. R. 703.

Judgment was recovered in the suit of *Virtue v. Hayes*, brought to realize mechanics' liens, and C. the owner of the land on which the mechanic's work was done, applied by petition in the Chancery Division to have such judgment set aside as a cloud upon his title. On this petition an order was made allowing C. to come in and defend the action for lien on terms, which not being complied with the petition was dismissed, and the judgment dismissing it was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of

Canada:—Held, that the judgment appealed from was not a final judgment within the meaning of section 24 (a) of the S. & E. C. Act, or, if it was, it was a matter in the judicial discretion of the court, from which by section 27 no appeal lies to this court. *Virtue v. Hayes—In re Clarke*, 16 S. C. R. 721.

A judgment of the Court of Queen's Bench for Lower Canada (appeal side), quashing a writ of appeal on the ground that such writ had been issued contrary to the provisions of Art. 1116 C.C.P. is not "a final judgment" within the meaning of section 28 of the Supreme and Exchequer Courts Act. (*Shaw v. St. Louis*, 8 S. C. R. 387 distinguished). *Ontario and Quebec R. W. Co. v. Marcheterre*, 17 S. C. R. 141.

#### 8. Future Rights.

By a procès verbal by the municipal council of Ste. Anne du Bout de L'Isle a portion of the road fronting the land of one R., was ordered to be improved by raising and widening it. Upon R.'s refusal to do the work the council had it performed, paid \$200 for it, and subsequently sued R. for the said \$200. The Court of Queen's Bench, (Que.), on appeal affirmed a judgment in favour of the municipal council for that amount. On appeal to the Supreme Court it was:—Held, per Fournier, Henry and Gwynne, JJ. (*Strong and Taschereau, JJ.*, dissenting, and Ritchie, C. J., expressing no opinion on the point) that although the matter in controversy did not amount to \$2,000, yet, as it related to a charge on the appellant's land whereby his rights in future might be bound, the case was appealable. R. S. C. c. 135, s. 29. *Reburn v. La Paissée de Ste. Anne du Bout de L'Isle*, 15 S. C. R. 92.

In an action for \$1,333.36, a balance of one of several money payments of \$2,000 each, one whereof the defendants agreed to pay to the plaintiff every year so long as certain security given by the plaintiff for the defendants remained in the hands of the government, the defendants contended that the security had been released by the action of the government and they were therefore not liable to pay the amount sued for, or any further instalments. The Court of Queen's Bench (appeal side) held that the security had not been released and gave judgment for the amount claimed. The defendants applied to one of the judges of that court and obtained leave to appeal on the ground that if the judgment was well founded then future rights would be bound and they had become liable for two other instalments of \$2,000 each for which actions were pending:—Held, that the appeal would not lie, because even if the future rights of the defendants were bound by the judgment such future rights had no relation to any of the matters or things enumerated in sub-section (b) of section 29 of the S. & E. C. Act. The words "where the rights in future might be bound" in this sub-section are governed and qualified by the preceding words, and to make a case appealable when the amount in controversy is less than \$2,000, not only must future rights be bound by the judgment, but the future rights so bound must relate to some one of the matters or things specified in the subsection in question, viz:



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to a fee of office, duty, rent, revenue, or sum  
of money payable to Her Majesty, or to some  
title to lands or tenements, or to annual rents out  
of lands or tenements, or to some like matters  
and things. *Gilbert v. Gilman*, 16 S. C. R. 189.

On an appeal from a judgment of the Court of  
Queen's Bench for Lower Canada (appeal side)  
in an action brought to recover \$361.90, the  
amount of a special assessment for a drain along  
the property of the defendants, the respondent  
moved to quash for want of jurisdiction on the  
ground that the matter in controversy was  
under \$2,000, and did not come within any of  
the exceptions in section 29 of the Supreme and  
Exchequer Courts Act:—Held, that the case  
came within the words "such like matters or  
things where the rights in future might be  
bound," in paragraph 6 of section 29, and was  
therefore appealable. *Les Ecclesiastiques de St.*  
*Sulpice de Montreal v. City of Montreal*, 16 S. C.  
R. 399.

By 38 Vict. c. 97, the plaintiffs were authorized  
to build and maintain a toll bridge on the River  
L'Assomption at a place called "Portage," and  
if the said bridge should by accident or other-  
wise be destroyed, become unsafe or impassable,  
the said plaintiffs were bound to rebuild the said  
bridge within fifteen months next following the  
giving way of said bridge, under penalty of for-  
feiture of the advantages to them by this Act  
granted; and during any time that the said  
bridge should be unsafe or impassable they were  
bound to maintain a ferry across the said river,  
for which they might recover the tolls. The  
bridge was accidentally carried away by ice, but  
rebuilt and opened for traffic within fifteen  
months. During the reconstruction, although  
plaintiffs maintained a ferry across the river, the  
defendant built a temporary bridge within the  
limits of the plaintiffs' franchise and allowed it  
to be used by parties crossing the river. In an  
action brought by the plaintiffs, claiming \$1,000  
damages, and praying that defendant be con-  
demned to demolish the temporary bridge, on an  
appeal to the Supreme Court it was:—Held, (1)  
that as the rights in future might be bound the  
case was appealable under R. S. C. c. 135, s. 29 (b).  
(2) Reversing the judgment of the court below  
Ritchie, C. J., and Patterson, J., dissenting, that  
the exclusive statutory privilege extended to the  
ferry, and while maintained by the plaintiffs the  
defendant had no right to build the temporary  
bridge, but as the bridge had since been dem-  
olished the court would merely award nominal  
damages and costs. *Galarneau v. Guilbault*, 16  
S. C. R. 579.

To give the Supreme Court jurisdiction to  
hear an appeal in a case from the Province of  
Quebec by virtue of section 29 (b) of the Sup-  
reme and Exchequer Courts Act (R. S. C. c.  
135), the matter relating to a fee of office where  
the rights in future might be bound, must be  
the matter really in controversy in the suit in  
which the appeal is sought and not something  
merely collateral thereto. This clause will not  
give jurisdiction in a case in which the action was  
brought to recover penalties for bribery under  
the Quebec Election Act, (R. S. O., Art. 429),  
even assuming that the effect of the judgment  
may be to disqualify the appellant from holding  
office under the crown for seven years. *Chapman*  
*v. Normand*, 16 S. C. R. 661.

### 9. New Trials.

Under 38 Vict. c. 11 (Dom.), the Supreme  
Court has power to make any order or to give  
any judgment which the court below might or  
ought to have given, and amongst other things  
to order a new trial on the ground either of  
misdirection or the verdict being against the  
weight of evidence; and that power is not taken  
away by section 22 in this case, in which the  
court below did not exercise any discretion as to  
the question of a new trial, and where the appeal  
from their judgment did not relate to that sub-  
ject. *Connecticut Mutual Life Ins. Co. of*  
*Hartford v. Moore*, 6 App. Cas. 644; 6 S. C.  
R. 634.

The court will not hear an appeal where the  
court below in the exercise of its discretion has  
ordered a new trial on the ground that the ver-  
dict is against the weight of evidence. *Eureka*  
*Woolen Mills Co. (Limited) v. Moss*, 11 S. C. R.  
91.

The defendant in an action against whom a  
verdict had passed at the trial moved for a new  
trial before the Divisional Court on the grounds  
of misdirection, surprise and the discovery of  
further evidence, and the motion was granted  
on the ground of misdirection (15 O. R. 544).  
The plaintiff appealed and the Court of Appeal  
held that there was no misdirection, but that  
the order of the Divisional Court directing the  
case to be submitted to another jury had better  
not be interfered with, the circumstances of the  
case being peculiar:—Held, that as the judgment  
of the Court of Appeal did not proceed upon the  
ground that the trial judge had not ruled  
according to law, no appeal would lie to the  
Supreme Court of Canada from its decision.  
In the factum of the respondents no objection  
was made to the jurisdiction of the Supreme  
Court, but it was urged that the appeal should  
not be entertained and that the court should  
not interfere with the discretion in favour of a  
new trial exercised by the two lower courts, the  
circumstances, it was contended, being stronger  
than those in the *Eureka Woolen Mills Co. v.*  
*Moss* 11 Can. S. C. R. 91. *O'Sullivan v. Lak-*  
*er*, 16 S. C. R. 636.

Section 24 (d) of the Supreme Court Act (R.  
S. C. c. 135) allowing an appeal "from the judg-  
ment on a motion for a new trial upon the ground  
that the judge has not ruled according to law,"  
is applicable to jury cases only. *Gwynne, J.,*  
*dubitante. Halifax Street R. W. Co. v. Joyce*,  
17 S. C. R. 709.

See *Scoll v. British Columbia Towing and*  
*Transportation Co. (Limited)*, 9 S. C. R. 527, p.  
2008; *Miller v. Stephenson*, 16 S. C. R. 722, p.  
2052; *Vaughan v. Richardson*, 17 S. C. R. 703,  
p. 2006; *Routlands v. Canada Southern R. W.*  
*Co.*, 13 P. R. 93, p. 2007.

### 10. Criminal Proceedings.

See *In re Melina Trepanier*, 12 S. C. R. 111,  
p. 454.

### 14. Cross Appeals.

An appellant in the Court of Queen's Bench,  
Quebec, who had partly succeeded, appealed to

the Supreme Court on the ground that the judgment was yet excessive. At the same time the respondent appealed on the ground that the judgment of the Superior Court ought to have been affirmed. This second appeal was treated by the court as a cross-appeal under the Supreme Court rules, and the respondents on the second appeal having succeeded in getting the judgment reversed on the second point and confirmed on the first point, were allowed costs of a cross-appeal. *Pilon v. Brunet*, 5 S. C. R. 318.

#### 15. Appeals on Questions of Fact.

Held, where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not reverse the decree of the judge of the court below, merely upon a balance of testimony. "*The Pictou*"—*McCaig v. Keith*, 4 S. C. R. 648.

Held, that the Supreme Court on appeal will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous. *Montcalm Election—Magan v. Dugas*, 9 S. C. R. 93. See also *Berthier Election—Généreux v. Cuthbert*, 9 S. C. R. 102.

A Jury having pronounced on the question of fact, and their verdict having been affirmed by the Supreme Court of New Brunswick, the Supreme Court declined to interfere with the finding. *Cassels v. Burns*, 14 S. C. R. 256.

Where a judgment appealed from is founded wholly upon questions of fact the Supreme Court of Canada will not reverse it unless convinced beyond all reasonable doubt, that such judgment is clearly erroneous. Judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirmed. *Arpin v. The Queen*, 14 S. C. R. 736.

#### 16. Other Cases.

Held, that the order appealed from in this case being a decision on an application by a third party to the court was appealable under the 11th section of 38 Vict. c. 11 (Fournier, J., dissenting, and Taschereau, J., doubting). *Wilkins v. Geddes*, 3 S. C. R. 203.

Held, that an appeal from the Supreme Court of Nova Scotia, ordering rank and precedence at the bar to one R. would lie to the Supreme Court of Canada (Fournier, J., dissenting). *Lenoir v. Ritchie*, 3 S. C. R. 575.

Per Strong, J.—The Supreme Court ought not to interfere to reverse a decision upon a mere question of practice regulated by the rules peculiar to the court appealed from. See *Jones v. Tuck*, 11 S. C. R. 197, 203.

Per Strong, J.—An extremely strong case should be shown to induce the court to allow an appeal from the judgment of the court below on preliminary objections. *Shelburne Election (Dom.)*, *Robertson v. Laurie*, 14 S. C. R. 258.

It is a substantial objection to a winding up order appointing a liquidator to the estate of an

insolvent company under 45 Vict. c. 23 (Dom.), that such order has been made without notice to the creditors, contributories, shareholders, or members of the company as required by section 24 of the said Act, and an order so made was set aside and the petition therefor referred back to the judge to be dealt with anew. Per Gwynne, J., dissenting, that such an objection is purely technical and unsubstantial and should not be allowed to form the subject of an appeal to this court. *Shoolbred v. Union Fire Ins. Co.*, 14 S. C. R. 624.

On a reference being made to the official arbitrators of certain claims made by one H. against the government for damages arising out of the enlargement of the Lachine canal to land situated on said canal, the arbitrators awarded H. \$9,216 in full and final settlement of all claims. On an appeal taken to the Exchequer Court by H. (Taschereau, J., presiding) this amount was increased to \$15,990, including \$5,600 for damages caused to the land from 1877 to 1884, by leakage from the canal since its enlargement, and the judge reserved the right to H. to claim for future damages from that date. On an appeal taken to the Supreme Court of Canada, it was:—Held, reversing the judgment of the Exchequer Court and confirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present, and future damages, and that the evidence did not justify an increase of the amount awarded. Gwynne, J., was of opinion that under 42 Vict. c. 8, s. 38, the Supreme Court had power (although the crown did not appeal to the Exchequer Court) to review the award of the arbitrators, and that in this case \$1,000 would be ample compensation for any injury that the claimant's land can be said to have sustained, which upon the evidence can be attributed to the work of the enlargement of the canal. *Regina v. Hubert*, 14 S. C. R. 737.

A decision of the Supreme Court of Nova Scotia (19 N. S. Rep. 341), confirming the report of a master on a reference, reversed on the ground that the master had exceeded his authority and reported on matters not referred to him. *Doull v. McBreith*, 14 S. C. R. 739.

On an appeal to the Supreme Court from a judgment of the Exchequer Court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the Intercolonial Railway:—Held, reversing the judgment of the Exchequer Court and restoring the award of the official arbitrators, that to warrant an interference with an award of value necessarily largely speculative, an appellate court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on or something overlooked which ought to have been considered by the official arbitrators, and upon the evidence in this case this court refused to interfere with the amount of compensation awarded by the official arbitrators. *Regina v. Paradis: Regina v. Beaulieu*, 16 S. C. R. 716.

See *In re Henry O'Brien, Regina ex rel. Felitz v. Horland*, 16 S. C. R. 197, p. 1999; *Scammell v. James*, 16 S. C. R. 593, p. 1992.

## 17. Practice.

## (a) Time for Appealing.

Time for filing bond on appeal to Supreme Court. See *McCrue v. White*, 9 P. R. 288, p. 1091.

The thirty days' time allowed for appealing to the Supreme Court of Canada under section 25 of the Supreme and Exchequer Courts Act commences to run on the issuing of the certificate of the Court of Appeal. *Wadmsley v. Griffith*, 11 P. R. 147. - C. of A.

Where any substantial matter remains to be determined on the settlement of the minutes before the registrar, the time for appealing to the Supreme Court of Canada will run from the entry of the judgment, otherwise it will run from the date on which the judgment is pronounced. In the Province of Quebec the time runs in every case from the pronouncing of the judgment. *O'Sullivan v. Harty*, 13 S. C. R. 431.

Where the Court of Appeal for Ontario reversed the judgment of the vice-chancellor in favour of the plaintiff, and dismissed the action:—Held, that in such case no substantial question could remain to be settled before the entry of the judgment, and the time for appealing to the Supreme Court of Canada would therefore run from the pronouncing of the judgment. *O'Sullivan v. Harty*, 13 S. C. R. 431, distinguished. *Wadmsley v. Griffith*, 13 S. C. R. 434.

Where, after the minutes of a case decided by the Supreme Court of British Columbia were settled, the plaintiffs moved before the full court to have the minutes varied and they were varied by striking out certain declarations respecting the rights of the plaintiff C. and the defendant M. respectively, and also with respect to the costs payable by the plaintiff E.:—Held, that there being substantial questions to be decided before the judgment could be entered the time for appealing to the Supreme Court of Canada would run from the date of the entry of the judgment. *O'Sullivan v. Harty*, 13 S. C. R. 431, followed. *Martley v. Carson*, 13 S. C. R. 439.

Rule 269 of the rules of the Maritime Court of Ontario requires notice of appeal from a decision of that court to the Supreme Court of Canada to be given within fifteen days from the pronouncing of such decision. A judgment of the Maritime Court was handed by the surrogate to the registrar, but not in open court, on 31st August, and was not drawn up and entered by the registrar for some time after:—Held, *Taschereau, J.*, dubitante, that notice of appeal within fifteen days from the entry of such judgment was sufficient under the said rule:—*Quere*—Is such rule intra vires of the Maritime Court? *Robertson v. Wigle*, 15 S. C. R. 214.

The judgment of the Court of Appeal was delivered on the 5th March, 1889. On the 16th March the solicitors for the defendants wrote to their clients suggesting an appeal, but they received no instructions until the 2nd April, and took no step till the 3rd April. No explanation was offered of the delay or neglect except the production of a telegram to the solicitors from an officer of the defendants giving

instructions to appeal, and suggesting that the matter had been overlooked by another officer. The judges in the Divisional Court and Court of Appeal were unanimous in deciding against the defendants:—Held, that, under these circumstances, the time for giving the required notice should not be extended. *Rowlands v. Canada Southern R. W. Co.*, 13 P. R. 93.—C. of A.

In habeas corpus proceedings. *In re Smart*, 16 S. C. R. 396, p. 849.

The Supreme Court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the judge has not ruled according to law," unless the notice required by section 41 of the Supreme Court Act has been given. An order made by a judge of the court appealed from giving defendants "leave to appeal to the Supreme Court of Canada leaving it to plaintiffs to dispute the right of appeal in the Supreme Court," even if considered as an enlargement of the time for giving notice, will not give the court jurisdiction if no notice is given pursuant to such enlargement. The time for giving notice under section 41 can be extended as well after as before the twenty days have elapsed:—Held, *per Strong, J.*—In section 42 of the Act, providing that under special circumstances the court appealed from or a judge thereof may "allow an appeal" although the time limited thereby by previous sections has expired, the expression "allow an appeal" means only that the court or judge may settle the case and approve the security. *Vaughan v. Richardson*, 17 S. C. R. 703.

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the registrar of the court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Courts Act:—Held, that this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal; that the appellant having failed to comply with the statute, the court could not grant relief under Rules 56 or 69; and that, therefore, the appeal could not be then heard, but must be struck off the list of appeals, with costs of the motion. Subsequent to this judgment, the appellant applied to the judge who tried the petition, to extend the time for giving the notice, whereupon the said judge granted the application and made an order, "extending the time for giving the prescribed notice till the 10th day of December then next." The case was again set down for hearing at the February session following, being the nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session, and that the judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case

let. c. 23 (Dom.), without notice to shareholders, or as required by section 24 so made was set referred back to w. Per Gwynne, objection is purely and should not be an appeal to this *re Ins. Co.*, 14 S.

to the official arbit. by one H. against arising out of the annual to land situ rators awarded H. ment of all claims, Exchequer Court by this amount was ing \$5,000 for dam- n 1877 to 1884, by its enlargement, ight to H. to claim t date. On an ap- t of Canada, it dgment of the Ex- the award of the ken that the arbit- of H.'s claim dled in their award damages, and that an increase of the J., was of opinion s. 38, the Supreme the crown did not ert) to review the t that in this case nsation for any land can be said to i the evidence can of the enlargement *Hubert*, 14 S. C. R.

me Court of Nova e, confirming the re- nce, reversed on the xceeded his author- not referred to him. R. 739.

ore Court from a Court increasing the ial arbitrators to the f land for the Inter- versing the judg- and restoring the rors, that to warrant rd of value neces- an appellate court all reasonable doubt has been acted on or ought to have been rbitrators, and upon his court refused to t of compensation rbitrators. *Regina* *aulien*, 16 S. C. R.

, *Regina ex rel. Feliz* 7, p. 1999; *Scammell* p. 1992.

for hearing by the registrar of this court:—Held, that the power of the judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the judge having made such an order in this case, the appeal came properly before the court for hearing. (Taschereau, J., dissenting.) *North Ontario Election (Dom.)—Wheeler v. Giblin*, 3 S. C. R. 374.

The defendants appealed to the Court of Appeal from an order of a Divisional Court discharging an order nisi to enter judgment for the defendants or for a new trial, on the ground, among others, that the trial judge should have withdrawn the case from the jury, or should have directed them otherwise than he did. The Court of Appeal dismissed the defendants' appeal, and the defendants sought to appeal from such dismissal to the Supreme Court of Canada:—Held, that the judgment of the Court of Appeal came within section 24 (d) of the Supreme and Exchequer Courts Act, R. S. C. c. 135, as "a judgment upon a motion for a new trial upon the ground that the judge has not ruled according to law;" and that the proposed appeal was governed by the necessity for the notice of appeal within twenty days prescribed by section 41 of the Act. *Roulanda v. Canada Southern R. W. Co.*, 13 P. R. 93.—C. of A.

#### (b) Amendment of Pleadings.

D. McM. the respondent, sued the S. W. B. Co., the appellants to recover damages alleged to have been sustained by reason of the obstruction of the river Miramichi by appellants' boom. The pleas were not guilty, and leave and license. On the trial the counsel proposed to add a plea, that the wrong complained of was occasioned by the extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty. On appeal, the counsel for the appellant contended that the obstruction complained of was justified under the statute 17 Vict. c. 10 (N. B.), incorporating the South-west Boom Company:—Held, that the appellants, not having put in a plea of justification under the statute, or applied to the Supreme Court of New Brunswick in banco for leave to amend their pleas, could not rely on that ground before this court to reverse the decision of the court below. *South-west Boom Co. v. McMillan*, 3 S. C. R. 700.

See *Moore v. Connecticut Mutual Ins. Co. of Hartford*, 6 S. C. R. 634.

#### (c) Other Cases.

Held, that it is not necessary to serve a certificate of a judgment of the Supreme Court when the decree is not materially altered. See *Graselt v. Carter*, 6 O. R. 584.

This case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875, the court could give judgment

finally determining all questions in dispute although the jury may not have found on them all, but does not enable a court to dispose of a case contrary to the finding of a jury. In case the court considers particular findings to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40. The Supreme Court of Canada, giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for \$80,000 and costs. *Scwell v. British Columbia Towing and Transportation Co., (Limited)*, 9 S. C. R. 527.

As to appeals where the question involved is one of practice peculiar to the court appealed from. See *Jones v. Tuck*, 11 S. C. R. 197.

A party seeking an appeal obtained an extension of time for filing his case but failed to take advantage of the indulgence so granted, whereupon, on the application of the respondent, the appeal was dismissed by the judge in chambers. On motion to rescind the order dismissing the appeal:—Held (Strong and Gwynne, J.J., dissenting), that under the circumstances of the case the court would not interfere by rescinding the judge's order and restoring the appeal. *City of Winnipeg v. Wright*, 13 S. C. R. 441.

A document which has not been preserved or produced at the trial, cannot be relied on or made part of the case in appeal. *Lionais v. Molson's Bank*, 10 S. C. R. 526.

A document not proved at the trial but relied on in the Court of Queen's Bench for the first time cannot be relied on or made part of the case in appeal. *Montreal L. & M. Co. v. Fautoux* (3 S. C. R. 411, 433) and *Lionais v. Molson's Bank* (10 S. C. R. 527) followed. *Exchange Bank of Canada v. Gilmartin*, 17 S. C. R. 108.

Where the judgment of the Supreme Court of Canada has been reversed by the privy council, the proper manner of enforcing the judgment of the privy council is to obtain an order making it a rule of the Supreme Court of Canada. Where such judgment of the privy council was made a rule of court the court ordered the repayment by one of the parties of costs received pursuant to the judgment so reversed. *Levin v. Howe*, 14 S. C. R. 722.

After judgment application was made to vary or reverse the judgment on affidavits showing that the question which the judgment decided should have been submitted to the jury was submitted and answered:—Held, that the application was too late, as the court had to determine the appeal case transmitted, and the respondent had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended. *Providence Washington Ins. Co. v. Gerono*, 14 S. C. R. 731.

Abatement of action by death of plaintiff. See *White v. Parker*, 16 S. C. R. 699, p. 1393.

Notice of appeal—Extension of time for giving. See *Vaughan v. Richardson*, 17 S. C. R. 703, p. 2006.

as in dispute found on them to dispose of a jury. In case findings to be made is to award partially under similar to the Supreme Court that the court in this case in a the evidence at the jury inter- ing, and there- against both eta. *Scnell v. Transportation*

ion involved is court appealed C. R. 197.

ained an exten- at failed to take granted, where- respondent, the ge in chambers, d dismissing the ynne, J.J., dis- tances of the re by rescinding the appeal. *City R. 441.*

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e trial but relied each for the first le part of the case Co. v. Fauteux ionais v. Molson's wed. *Exchange S. C. R. 108.*

Supreme Court of he privy council, the judgment of an order making court of Canada. Privy council was ordered the re- of costs received reversed. *Lewis*

was made to vary affidavits showing judgment decided to the jury was ld, that the appli- art had to deter- mitted, and the eal to be argued t taking any steps *Providence Wash- C. R. 731.*

death of plaintiff. R. 699, p. 1393.

ion of time for *Richardson, 17 S. C.*

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to the cause. *Venner v. Sun Life Ins. Co., 17 S. C. R. 394.*

### 18. Costs.

Costs of cross appeal. See *Pilon v. Brunett 5 S. C. R. 318, p. 2003.*

On appeal to the Court of Appeal the judgments of the Court of Chancery in favour of the plaintiffs respectively, were affirmed with costs of appeal; and the defendants appealed to the Supreme Court. In the first case that court gave leave to the defendants (appellants) to amend their answer, saying nothing as to costs, and upon such amendment being made, declared that the award upon which the bill had been filed should be null and void, but said nothing about costs. In the second case the Supreme Court ordered a new trial to be had between the parties, without costs to either party. The plaintiffs having obtained orders of the Court of Chancery making the certificates of the Court of Appeal of the judgments in appeal orders of the Court of Chancery, issued executions thereon for the costs awarded in appeal:—Held, that the plaintiffs were not entitled to the costs of the appeal to the Court of Appeal, and the executions were set aside. *Norval v. Canada Southern R. W. Co.—Cunningham v. Canada Southern R. W. Co., 9 P. R. 339.—Proudfoot.—Chy. D.*

An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the Supreme Court of Canada where the appeal was advised by more than one counsel, and one of the judges of the Court of Appeal had dissented from the rest. *Cottingham v. Cottingham, 11 P. R. 13.—Ferguson.*

As the appeal was quashed for want of jurisdiction the costs imposed were only costs of a motion to quash. *O'Sullivan v. Lake, 10 S. C. R. 636.*

## SUPREME COURT OF JUDICATURE.

See HIGH COURT OF JUSTICE.

Per Armour and O'Connor, J.J. The Supreme Court of Judicature is not properly a court, and ought more properly to have been called the Supreme Council of Judicature. *Regina v. Bunting, 7 O. R. 118.*

## SURETY.

See PRINCIPAL AND SURETY.

## SURPRISE.

AT TRIAL—See NEW TRIAL.

## SURRENDER.

I. OF LEASE—See LANDLORD AND TENANT.

II. BY BAIL—See BAIL.

Of grant from the Crown. See *Moffatt v. Scratch, 6 O. R. 564; 8 O. R. 147; 12 A. R. 157, p. 66.*

Of insurance policy. See *Caldwell v. Standard Fire and Life Ins. Co., 11 S. C. R. 213, p. 965.*

## SURROGATE COURT.

PROBATE AND LETTERS OF ADMINISTRATION—See EXECUTORS AND ADMINISTRATORS.

Costs of an appeal from the Surrogate Court to the Court of Appeal should be taxed on the scale of the court appealed from, as provided by Rule 28 of the Court of Appeal, and not on the scale of the County Court appeals. *Regan v. Waters, 10 P. R. 364.—Osler.*

In the case of an action transferred from a Surrogate Court to the High Court of Justice, the costs of the proceedings in the Surrogate Court previous to the transfer should be taxed on the scale provided by the Rules of 1858, i. e., as nearly as possible on the County Court scale. *Re Harris, 24 Chy. 459, and Re Osler, 24 Chy. 529, explained and followed. Peel v. Peel, 11 P. R. 195.—Boyd.*

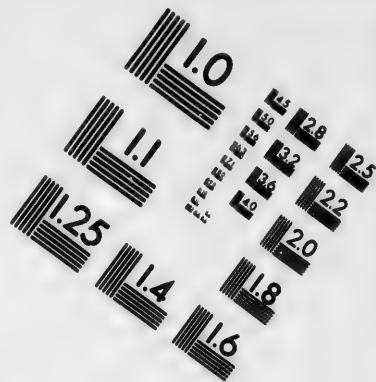
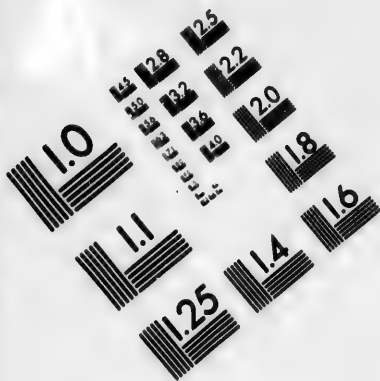
It is not intended by Con. Rule 311 that the business of the Surrogate Court should in a large measure be transferred to the High Court; the intention is, to provide for necessities arising in the progress of an action where representation of an estate is required in the action, and there has not been carelessness or negligence on the part of the party who may require the appointment made. Under the circumstances of this case an application for the appointment of an administrator ad litem was refused. *Re Chambliss, 12 P. R. 649, distinguished. Meir v. Wilson, 13 P. R. 33.—Ferguson.*

## SURVEY.

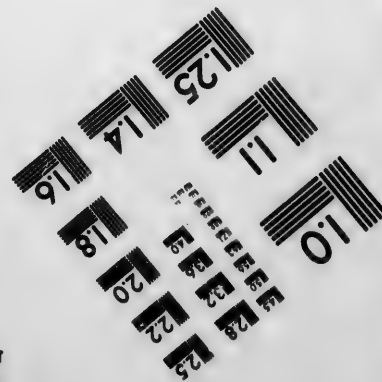
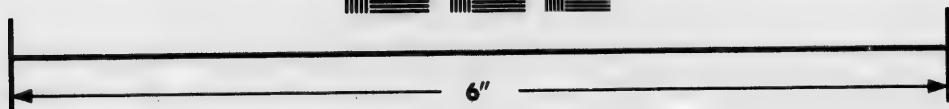
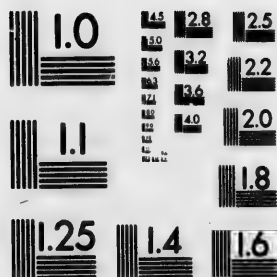
See DEED—LIMITATION OF ACTIONS.

In questions relating to boundaries and descriptions of lands, the well established rule is, that the work on the ground governs; and it is only where the site of a monument on the ground is incapable of ascertainment that a surveyor is authorized to apportion the quantities lying between two defined or known boundaries. Therefore, where an original monument or post was planted as indicating that the north-west angle of a lot was situated at a distance of half a chain south therefrom, and another surveyor had actually planted a post at the spot so indicated, and subsequently two surveyors, in total disregard of the two posts so planted, both of which were





**IMAGE EVALUATION  
TEST TARGET (MT-3)**



**Photographic  
Sciences  
Corporation**

23 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4503

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easy of ascertainment, made a survey of the locality and placed the post at a different spot:—The court (Spragge, C.) disregarded the survey, and declared the north-west angle of the lot to be as indicated by the first mentioned monument. *Arley v. Curry*, 29 Chy. 243.

A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract, and is liable only for damages caused by want of reasonable skill, or by gross negligence. *Township of Stafford v. Bell*, 6 A. R. 273.

The defendant, a provincial land surveyor, who was employed by the plaintiffs to run certain lines for road allowances, proceeded upon a wrong principle in making the survey, and the plaintiffs sued him for damages which they had paid to persons encroached upon by opening the road according to his survey:—Held, reversing the judgment of the Common Pleas (31 C. P. 77), that the plaintiffs could not recover, as although the survey was made by the defendant on an erroneous principle, the evidence failed to prove that the lines as run by him were not correct:—Quare, per Patterson, J.A., whether the fact that the plaintiffs knew that the correctness of the survey was questioned before the opening the road, did not make them guilty of contributory negligence. *Ib.*

Remarks upon the impropriety of receiving the opinions of surveyors as experts, as to the proper mode of making a survey under a statute. *Ib.*

Compensation for improvements in consequence of unskillful survey. See *Plumb v. Steinhoff*, 2 O. R. 614, p. 900.

Amendment of plan. See *In re Chisholm and the Town of Oakville*, 12 A. R. 225, p. 400; *In re the Hon. G. W. Allan*, 10 O. R. 110, p. 63.

Surveyors' field notes as evidence. See *McGregor v. Keiller*, 9 O. R. 677, p. 667.

R. who held a license from the government of New Brunswick to cut timber on certain crown lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and he issued a writ of replevin for some 800 logs alleged to be cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under said license (of R.) should be surveyed and established by (naming the surveyors) and the stumps counted, etc.:—Held, reversing the judgment of the Supreme Court of New Brunswick that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line. *Snowball v. Ritchie*, 14 S. C. R. 741.

In an action of ejectment the question to be decided was whether the locus was situate within the plaintiffs' lot No. 5, in concession 18, or within defendant's lot adjoining No. 24, in concession 17. The grant through which the plaintiffs title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost,

and this starting point could not be ascertained:—Held, affirming the judgment of the Court of Appeal for Ontario, 11 A. R. 788 (which reversed, 2 O. R. 614), *Strong and Taschereau JJ.*, dissenting, that such southern boundary could not be ascertained by measuring back exactly eighty-four chains from the river. *Plumb v. Steinhoff*, 14 S. C. R. 730.

J. McA. et al, (plaintiffs) auteurs having leased a certain portion of a lot of land for mining purposes described in the deed by metes and bounds with the following option: "Pourra le dit acquéreur changer la course des lignes et bornes du dit lopin de terre sans en augmenter les bornes, l'étendue ou superficie en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit, après que lui, le dit bailleur, aura prospecté le dit lopin de terre susbailé," adopted certain lines of a survey made by one Proulx, as containing the vein of quartz. B. et al, (defendants) auteurs leased another portion of the same lot. In an action *en bornage* between the parties the court appointed three surveyors to fix the boundaries. Each surveyor made a separate report, and the report and plan of the surveyor Legendre, adopting Proulx's lines, was adopted and homologated by the court:—Held, affirming the judgment of the court below, Gwynne, J., dissenting, that plaintiffs' auteurs having located their claim in accordance with the terms of their deed they were now estopped from claiming that their property should be bounded according to the true course of the vein of quartz, and that the judgment homologating the survey adopting Proulx's lines and survey was right and should be affirmed. *McArthur v. Brown*, 17 S. C. R. 61.

## SURVEYOR.

See SURVEY.

## SUSPENSION OF ACTION.

See ACTION.

## TAKING ACCOUNTS.

See MORTGAGE—PRACTICE.

## TAVERNS AND SHOPS.

See BOARDING HOUSE—INNKEEPER—INTOXICATING LIQUORS.

Powers of Provincial Legislature as to restricting the hours within which billiard rooms in taverns may be kept open. See *Regina v. Hodge*, 46 Q. B. 141; 7 A. R. 246; 9 App. Cas. 117, p. 311.

Closing shops under the Shops Regulation Act, 51 Vict. c. 33 (Ont.) See *Regina v. Flory*, 17 O. R. 715, p. 1351.

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*Plumb v. Steinhoff*,

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## TAXATION OF COSTS.

- I. GENERALLY—See COSTS.
- II. OF SOLICITOR—See SOLICITOR.
- III. OF SHERIFF—See SHERIFF.

## TAXES.

- I. MUNICIPAL—See ASSESSMENT AND TAXES.
- II. ON SALE OF LAND—See SALE OF LAND—  
SALE OF LAND BY ORDER OF THE COURT.
- III. AS BETWEEN LANDLORD AND TENANT—  
See LANDLORD AND TENANT.

## TEACHERS.

See PUBLIC SCHOOLS.

## TELEGRAPH.

- I. CONTRACTS BY—See CONTRACT.
- II. TELEGRAMS IN EVIDENCE—See EVIDENCE.
- III. TELEPHONE—See TELEPHONE.

Arrangements with railway companies. See  
*Canadian Pacific R. W. Co. v. Western Union*  
*Telegraph Co., 17 S. C. R. 151, p. 1800.*

## TELEPHONE.

Interference by wires of Electric Light Com-  
pany with wires of Telephone Company. See  
*Bell Telephone Co. v. Belleville Electric Light Co.,*  
*12 O. R. 571, p. 921.*

Agreement as to transmission of orders by mes-  
sengers. See *Electric Despatch Co. v. Bell Tele-*  
*phone Co. of Canada, 17 O. R. 459; 17 A. R. 292,*  
*p. 335.*

House being moved coming in contact with  
telephone wire across the street, which caused  
some bricks to fall on a passer-by and injure him.  
Liability. See *Howard v. City of St. Thomas, 19*  
*O. R. 719, p. 1393.*

## TEMPERANCE ACTS.

See INTOXICATING LIQUORS.

## TENANT.

- I. AT WILL—See LIMITATION OF ACTIONS.
- II. FOR YEARS—See LANDLORD AND TENANT.
- III. FOR LIFE—See ESTATE—LIMITATION OF  
ACTIONS—WASTE—WILL.
- IV. BY CURTESY—See ESTATE.
- V. IN TAIL—See ESTATE—WILL.

VI. IN FEE—See ESTATE—LIMITATION OF  
ACTIONS—WILL.

VII. IN COMMON—See ESTATE—LIMITATION  
OF ACTIONS—TIMBER—WILL.

VIII. JOINT TENANTS. See ESTATE—WILL.

Tenant in common of chattels. See *Gunn v.*  
*Burgess, 5 O. R. 685, p. 185.*

## TENDER.

- I. OF MONEY, 2014.
- II. OF DEED—See SALE OF LAND.
- III. FOR CONTRACTS—See CONTRACT.
- IV. ON SALE OF LAND BY ORDER OF THE  
COURT—See SALE OF LAND BY ORDER  
OF THE COURT.

## I. OF MONEY.

This action was to recover money as compensa-  
tion for land expropriated, and for other relief.  
Defendants pleaded a defence in denial, and also  
a tender of \$400 and interest, but did not pay  
the amount into court:—Held, that the defence  
of tender without payment into court was a good  
defence under the O. J. Act, and a motion to  
strike out the defence, or to compel payment  
into court, or for judgment for the amount, with  
leave to proceed for a further amount, was re-  
fused. *Demorest v. Midland R. W. Co., 10 P.*  
*R. 640.—Dalton, Master.*

In proof of an alleged tender to the bailiff, the  
plaintiff said that he asked the bailiff for a bill  
of demands, with all costs, and he would pay  
him: that he, plaintiff, had then \$87 in his  
hand, which was sufficient to pay the rent and  
costs, and said, "Here is your money;" but  
that the bailiff refused to receive it. This was  
denied by the bailiff; but the question was left  
to the jury, who found that there was a tender.  
The goods distrained were afterwards sold by  
the bailiff:—Held, that on the evidence the  
finding of the jury could not be interfered with,  
and there must be held to have been a tender  
to the bailiff; and that the landlord was respon-  
sible for the bailiff's act. *Matheson v. Kelly,*  
*24 C. P. 598, distinguished. Howell v. Listowell*  
*Rink and Park Co., 13 O. R. 476.—C. P. D.*

Plea of tender and payment into court. *V.*  
*Hudson Cotton Co. v. Canada Shipping Co., 13*  
*S. C. R. 401, p. 1694.*

## TERM.

Effect of abolition of a term in computation  
of time. See *Kean v. Edwards, 12 P. R. 625,*  
*p. 2022.*

## TERMS.

See WORDS AND TERMS.

**TERM'S NOTICE.**

See PRACTICE.

**TERRITORIAL DIVISION.**

Dickinson's Island in Lake St. Francis, is part of the County of Glengarry. *Regina v. Duquette*, 9 P. R. 29.—Osler.

The township of Humphrey is within the territorial limit of the County of Simcoe, and forms also part of the district of Parry Sound for certain judicial purposes. See *Regina v. Monteith*, 15 O. R. 291, p. 1033.

Somble, R. S. O. (1887) c. 5, s. 1 is to be interpreted as meaning that the townships named shall be townships for municipal purposes when it becomes possible to make them such. *Re Metcalfe*, 17 O. R. 357.—Boyd.

**TESTATOR.**

See WILL.

**THIRD PARTIES.**

See COSTS—PLEADING.

**THREATS.**

See DURESS—PARLIAMENTARY ELECTIONS.

Deed obtained by threats of legal proceedings. See *Sheard v. Laird*, 15 A. R. 339, p. 767.

Intimidation of workmen. See *Hynes v. Fisher*, 4 O. R. 60, 78, p. 921.

**TIMBER.****I. CONTRACT FOR SALE OF.**

1. *Generally*, 2015.
2. *Damages for Breach*, 2020.

**II. RIGHTS OF TENANTS FOR LIFE AND IN COMMON, 2020.****III. MISCELLANEOUS CASES, 2020.****IV. CROWN TIMBER—See CROWN LANDS.****V. RIGHTS OF MORTGAGEES—See MORTGAGE.****VI. FLOATING TIMBER—See WATER AND WATER COURSES.****VII. REPLEVIN FOR—See REPLEVIN.****I. CONTRACT FOR SALE OF.****1. *Generally*.**

By agreement in writing, dated 15th October, 1873, A. agreed to sell, and B. and C. agreed to

purchase, all the merchantable white and red pine timber, suitable for their purposes, standing, lying, or being on certain premises owned by A., for the price or sum of \$600, payable, \$400 on date of agreement, and the balance in one year, with a provision that the timber should be cut and removed off the lands, on or before the 15th of October, 1881. It was further provided that B. and C. their agents, representatives, or assigns, should have the right to enter upon the premises at all times during the period for which the agreement was to continue in force, for the purpose of cutting and removing said timber; and that if B. and C. should remove the whole of the timber off the land before the expiration of the year, they would pay the whole of the purchase money immediately after removing the said timber:—Held (Proudfoot, V.C., dissenting), that this was an agreement for the sale of an interest in land; that *prima facie* the vendor was entitled to a lien for unpaid purchase money, and that the circumstance that the timber was purchased by B. and C., for the purpose of being cut down and used at their mill as soon as possible, did not deprive the vendor of the right to the lien:—Held, also, that the last proviso in the agreement, as to immediate payment of the purchase money in case of removal of all the timber before the arrival of the time for payment of the \$200, did not operate to destroy the vendor's right to the lien. B. and C. did not pay the \$200, and after the expiration of one year from the date of the agreement assigned it to the defendants, who had no actual notice that the \$200 remained unpaid, but the agreement was registered against the lands:—Held that the vendor was entitled to an injunction to prevent cutting and removing by the defendants until the \$200 was paid. *Marshall v. Green*, 1 C. P. D. 35, commented upon and distinguished. *Summers v. Cook*, 28 Chy. 179.—Chy. D.

Under an agreement, dated 2nd October, 1890, the defendant sold to B. all the pine timber growing on certain lands, to be removed during the years 1890 and 1891. The timber was all cut into logs before the end of 1891, but a portion was not then removed:—Held, that this was a sale of goods and chattels, and not an interest in land; and the timber so cut having become the plaintiff's property he had the right to remove it after the expiration of the time mentioned; though, Semble, the defendant might have a right of action for not removing it within the time. The defendant having refused to permit such removal, the plaintiff brought replevin, and was held entitled to succeed. *McGregor v. McNiel*, 32 C. P. 538.—C. P. D.

Guarantee by bank manager as to culling timber. See *Dobell v. Ontario Bank*, 3 O. R. 299; 9 A. R. 484, p. 843.

On a sale of "timber limits" held under licenses in pursuance of the C. S. C. cap. 23, a clause of simple warranty (garantie de tous troubles généralement quelconques) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold. *Ducondu v. Dupuy*, 9 App. Cas. 150. Reversing *S. C. 6 S. C. R. 425*.

W. S. agreed to transfer his timber limits to W. A. S. in case the latter should within two



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fer his timber limits to  
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years, pay off a mortgage to R. and other liabili-  
ties, and in case W. S. was obliged to pay any  
of such liabilities he was at liberty to sell such  
portion of said limits as would recoup him. At  
the same time W. S. wrote to R. authorising  
him to transfer to W. A. S. said lands which he  
held as security, on payment of his claim. R.  
assigned his claim and the limits to B. who, by  
agreement with W. A. S. and the executors of  
W. S., continued to carry on the lumber busi-  
ness formerly owned by W. S. Certain of the  
liabilities of W. S. not having been paid his  
estate claimed a vendor's lien on such limits, and  
relied on the letter to R., and on notice to an  
attorney who prepared the agreement with B.  
to establish notice of such lien in B. :—Held,  
affirming the judgment of the Q. B. D. for  
Ontario, 5 O. R. 1, that even if such lien existed  
B. could not be affected with notice of it. *Scott*  
*v. Benedict*, 14 S. C. R. 735.

C. conveyed to H. certain land by a deed  
which contained the following reservation and  
covenant : "And the said party of the first part  
reserves to himself all the standing timber upon  
the said lands, excepting that which measures  
eight inches through, and the said party of the  
second part, covenants with the said party of  
the first part, to give him five years from the  
date hereof to take the said timber off the said  
lands, with the right of entry upon said lands  
for the purpose of removing said timber."—  
Held that C. was entitled to all the timber over  
eight inches in diameter. *Corbett v. Harper*, 5  
O. R. 93.—Chy. D.

By deed, dated 4th April, 1884, made between  
J. and S. & L., J. agreed to sell and S. & L. to  
purchase all the merchantable pine, suitable for  
the purpose, standing, lying, and being on cer-  
tain described property, for a sum which was  
then named and paid, "Provided, however, that  
the said timber and logs shall be cut and re-  
moved off said lot on or before the 4th April,  
1884." The defendant B. (claiming through S.  
& L.) after the expiration of the time agreed  
upon, removed logs which J. had cut after the  
4th day of April, 1884, and for this J. brought  
this action and recovered a verdict for \$125. B.  
moved against the verdict, on the ground that  
under the deed, and the assignment to him, he  
was the absolute owner of the timber, subject  
merely to such claim as the vendor might have  
against the vendee for breach of the covenant  
to remove the pine within the time named :—  
Held (O'Connor, J., dissenting), that the agree-  
ment could not be construed as an absolute grant  
of the pine trees suitable for the business of the  
grantees, subject to a covenant by them to cut  
and remove the trees within ten years; but that  
it was a grant of the pine subject to the condi-  
tion that the timber and logs should be cut and  
removed off the property on or before the 4th  
day of April, 1884 :—Held, also, that this condi-  
tion applied as well to trees severed before as to  
those severed after the expiration of the term :—  
Held, per O'Connor, J., that the case was with-  
in the meaning of the law as decided by the  
court in the case of *McGregor v. McNeil*, 32 C.  
P. 638, and that the defendant was the absolute  
owner of the timber, with an affirmative license  
to cut and remove the same, which the vendor  
could not revoke, although the time within which  
the timber was to be removed had expired;

though the vendor might have other remedies.  
*Johnston v. Shortreed*, 12 O. R. 633.—Q. B. D.

S. sold all the elm and soft maple trees on a cer-  
tain lot to T.; and at the time of sale gave T. the  
following receipt : "Received from J. L. for T.,  
the sum of \$500, on account of elm and soft maple  
on," etc., the said lot, describing it. Parol evidence  
was admitted to shew, and the jury found, that  
"one of the conditions of the sale was that the  
timber was to be removed by T. within two  
years."—Held, that the receipt here was not the  
contract between the parties, but a mere ac-  
knowledge of so much money; and therefore  
the parol evidence was properly admitted :—  
Held, also that the effect of the condition was,  
that T. was only to have the right to cut and  
remove the timber within the two years from the  
date of the agreement. *Johnston v. Shortreed*,  
12 O. R. 633, followed. *Steinhoff v. McKee*, 13  
O. R. 546.—C. P. D.

Semble, that a sale of growing timber does not  
come within the operation of the Bills of Sale  
and Chattel Mortgage Act. *Id.*

C., after having examined a lot, entered into  
an agreement with W., the owner, whereby the  
latter sold all the pine timber standing on the  
lot to C., "such as will make good merchant-  
able waney-edged timber, suitable for his pur-  
pose, at the rate of \$13 per hundred cubic feet,"  
and C. paid to W. \$1,000, "the balance to be  
paid for before the timber is removed from the  
lot." C. cut \$651. worth of first-class timber,  
suitable for the Quebec market which was all of  
that class to be found on the lot, and sued W. to  
recover back the balance of the \$1,000, namely,  
\$348.83 :—Held, that the true construction of  
the contract was that W. sold and granted to C.  
permission to enter upon his lot, and cut all the  
"good merchantable timber there growing, suit-  
able for his purpose," and not merely "first-  
class timber," that there was more than suffi-  
cient "good merchantable timber" still remain-  
ing on the lot to cover the balance of the \$1,000,  
and that there was no evidence to shew that the  
contract had been rescinded. Per Taschereau  
and Gwynne, JJ., that the payment of the  
\$1,000 was an absolute payment, the plaintiff be-  
lieving and representing to defendant that there  
was sufficient timber to cover that amount, if  
not more, on the faith of which representation  
defendant entered into the contract, which he  
otherwise would not have done, and that if the  
plaintiff made an error, he, and not the defend-  
ant, must suffer the consequences of this error.  
*Clarke v. White*, 3 S. C. R. 309; 28 C. P. 293.

The respondents, owners of timber lands in  
New Brunswick, granted C. & S. a license to cut  
lumber on twenty-five square miles. By the  
license it was agreed inter alia : "Said stumpage  
to be paid in the following manner: Said com-  
pany shall first deduct from the amount of stump-  
age on the timber or lumber cut by grantees  
on this license as aforesaid, an amount equal  
to the mileage paid by them as aforesaid, and  
the whole of the remainder, if any, shall, not  
later than the 15th April next, be secured by  
good endorsed notes, or other sufficient security,  
to be approved of by the said company, and  
payable on the 15th July next, and the lumber  
not to be removed from the brows or landings  
till the stumpage is secured as aforesaid. And

said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then in such case said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and after deducting reasonable expenses, commissions, and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages." For securing the stumpage payable to respondents under this license C. & S. gave to the respondents a draft upon J. & Co., which was accepted by J. & Co., and approved of by the respondents, but which was not paid at maturity. After giving the draft C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land under the said agreement. J. & Co. failed, and appellant, their assignee took possession of the lumber and sold it:—Held, per Strong, Taschereau and Gwynne, JJ. (affirming the judgment of the court below), Ritchie, C. J., and Fournier and Henry, JJ., dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to C. & S. immediately upon the receipt by the company of the accepted draft of C. & S. on J. & Co., and that appellant was liable for the actual payment of the stumpage. *McLeod v. New Brunswick R. W. Co.*, 5 S. C. R. 281.

Where one sold and assigned to another all the pine timber he might choose to cut for twenty years with the right to make roads to get to and remove the same, and a covenant that the grantee might, without let or hindrance from anyone, cut and remove the timber:—Held, (Proudford, J. dissenting), That the timber so sold together with the rights imparted to the purchaser were an interest in land and not chattel property. Where having first granted such timber and rights to the plaintiff's assignor, the defendant five years after sold the timber to another person, who forthwith proceeded to cut the same:—Held, that the defendant was responsible to the plaintiff in damages; and, per Ferguson, J. that he would have been so, even if the timber sold were chattel property, for that the act of the defendant in selling to another person would in that case amount to a conversion of the property. *McNeill v. Haines*, 17 O. R. 479.—Chy. D.

See *Crossfield v. Gould*, 9 A. R. 218, p. 1070; *Reid v. Smith*, 2 O. R. 69, p. 1544.

## 2. Damages for Breach.

The plaintiff contracted to deliver timber to the defendant at St. Ignace, to be transported by him to Quebec for sale there. There was no market nearer to the place of delivery than Quebec. The plaintiff made default and in an action for the price the defendant counter-claimed for damages for non-delivery of the timber:—Held, Cameron, J., dissenting, reversing the judgment of Burton, J. A., that the measure of damages was the value of the timber at Quebec, less the cost of transportation thereto from the point of delivery. Per Burton, J. A., and Cameron, J.—Loss of profits could not be recovered, and as the contract price for such timber had not varied, and there was no evidence of any contract by defendant to resell, which could be taken into consideration, or of any purchase by him to supply its place, there was no right to more than nominal damages. *Hendrie v. Neelon*, 3 O. R. 903.—Q. B. D. Affirmed in appeal, 12 A. R. 41.

The plaintiffs and defendant entered into an agreement in the following terms: "I, the undersigned, agree to deliver S. S. Mutton & Co., forty M. feet black ash, with mill culls out f. o. b. vessel on Cornwall canal, at \$10 per M. feet, also ten M. feet soft elm at \$10 per M. feet f. o. b. vessel on Cornwall canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned," and the plaintiffs signed a corresponding memorandum, agreeing to accept such lumber at the time specified:—Held, that the words "with mill culls out," applied to the ash only, not to the elm:—Held, also, that the plaintiff, not having had a vessel ready to receive the lumber in June, could not recover. Per Osler, J., time was of the essence of the contract, and the defendant was not bound to deliver the lumber in September. *Mutton v. Dey*, 7 A. R. 455.

See *McNeill v. Haines*, 17 O. R. 479, p. 2019.

## II. RIGHTS OF TENANTS FOR LIFE AND IN COMMON.

Held, following *Drake v. Wigle*, 22 C. P. 405, that a tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but that he cannot cut down timber even for the same purpose, and sell it. *Saunders v. Breake*, 5 O. R. 603.—Ferguson.

A tenant in common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupancy. *Munsie v. Lindsay*, 10 P. R. 173.—Hodgins, *Master in Ordinary*.

## X. MISCELLANEOUS CASES.

Pledge of timber limits to bank. Quebec regulations as to timber on Crown lands. See *Grant v. La Banque Nationale*, 9 O. R. 411, p. 139.

Railway line built through lands under license from the Ontario Government. See *McArthur v. Northern and Pacific Junction R. W. Co.*, 15 O. R. 733; 17 A. R. 86, p. 1743.

See *Regina v. Dunn*, 11 S. C. R. 335, p. 1583.

## TIME.

## I. COMPUTATION OF TIME.

## 1. Generally, 1921.

## 2. Sunday, 1922.

## II. REASONABLE TIME, 1923.

## III. MISCELLANEOUS CASES, 1923.

## IV. VACATION—See VACATION.

V. TIME THE ESSENCE OF THE CONTRACT—  
See CONTRACT—SALE OF LAND—SPECIFIC PERFORMANCE.

## I. COMPUTATION OF TIME.

## Generally.

The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the council, a resolution declaring their seats vacant, and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost: whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed. *Mearns v. Town of Petrolia*, 28 Chy. 98.—Proudfoot.

Notice of calls of stock. See *National Ins. Co. v. Egleston*, 29 Chy. 406, p. 251; *Union Fire Ins. Co. v. Fitzsimmons*, 32 C. P. 602, p. 251; *Union Fire Ins. Co. v. O'Gara*; *Same Plaintiffs v. Skoolbred*, 4 O. R. 359, p. 251.

R. S. O. (1877), c. 50, s. 93, provides that a plaintiff shall be deemed out of court unless he declares within one year after the writ of summons is returnable. The writ of summons was served on the 24th February, 1880, and the declaration was served on the 24th February, 1881:—Held, that the plaintiff should have declared on the 23rd February to have been within the statute. *Murchison v. Canada Farmers' Ins. Co.*, 8 P. R. 451.—Dalton, Q. C.

In computing the time within which an action must be brought under the provisions of the Division Courts Act, R. S. O. (1877), c. 47, s. 231, the day on which the fact was committed must be excluded. *Hunns v. Johnston*, 3 O. R. 100.—C. P. D.

A summons issued within a month after the formal acceptance of office by a candidate for mayor of a city by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declaration. *Regina ex rel. Felitz v. Howland*, 11 P. R. 264.—Dalton, Master.

The notice to the revising officer in this case was left with his clerk at his office during the

absence from town of the revising officer on Monday, 28th June, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said what was done was sufficient:—Held, that the last day for service for the sittings for the final revision to be held 12th July was Sunday, 27th June, but that under section 2, sub-section 2, 48 & 49 Vict. c. 40, (Dom.), the time was extended, and he had all the next day, and that the notice was well given on Monday. *Re Simmons and Dalton*, 12 O. R. 505.—Proudfoot.

Section 46 of the Canada Temperance Act provides that the hearing may be adjourned to a certain time and place, but no such adjournment shall be more than a week:—Held, that the week must be computed as seven days exclusive of the day of adjournment. *Regina v. Collins—Regina v. Goulais*, 14 O. R. 613.—O'Connor.

In the computation of the ten days' previous notice necessary to be given under 51 Vict. c. 29, s. 164 (Dom.) to obtain a warrant for the possession of land by a railway company, the day of the service of the notice and the day of the return must both be excluded. *Re Ontario Tanners' Supplies Company and Ontario and Quebec R. W. Co.*, 12 P. R. 563.—Armour.

An award must be moved against within the term following its publication, or within the period which such term formerly occupied. And when the term has been abolished, where award was published on the 13th an August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888, was:—Held, too late, and the appeal was dismissed. *Keen v. Edwards*, 12 P. R. 625.—Armour.

The last of the eight days within which the defendants should have delivered their statement of defence, as required by Con. Rule 371, was a Saturday, and on that day at twenty-five minutes past two in the afternoon, no statements of defence having then been filed, or served on the plaintiffs' solicitor, the officer entered a note that the pleadings were closed:—Held, that the officer had no power to close the pleadings until the end of the day, which would be three o'clock; and therefore the note was irregular and should be set aside. Con. Rules 7, 393, 398, 480, considered. *Lloyd v. Ward*, 13 P. R. 238.—Galt.

Held, that the word "forthwith," contained in section 4 of the Creditors' Relief Act, R. S. O. (1877), c. 65, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, and means "without any delay." Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was held to be not reasonable. *Maxwell v. Scarfe*, 18 O. R. 529.—Armour.

## 2. Sunday.

A chattel mortgage was duly executed on the 12th of July, and filed on the 18th, the 17th having been Sunday:—Held, affirming the judgment of the County Court, that such registration

was too late, the Act R. S. O. (1877), c. 119, requiring the same to be effected within five days from the execution of the instrument; that Sunday counted as one of such five days, and that Rule 457, O. J. Act (Con. Rule 476), did not apply. *McLean v. Pinkerton*, 7 A. R. 490.

Held, reversing the judgment of Armour, J., at the trial (Armour, J., dissenting), that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed. *Gibbon v. Michael's Bay Lumber Co. (Limited)*, 7 O. R. 746.—Q. B. D.

Rule 455 O. J. Act (Con. Rule 473), applies to the Chancery Division of the High Court of Justice. The service of a copy of an appointment to examine on the plaintiff's solicitor on a Sunday for a Monday is insufficient. *Lovell v. Harrington*, 10 P. R. 157.—Dalton, Master.

Sundays and holidays are excluded in computing the five days notice necessary in a short notice of trial. Short notice of trial served on Wednesday for Monday:—Held, bad. *O'Donnell v. O'Donnell*, 10 P. R. 264.—Osler.

See *Re Simmons and Dalton*, 12 O. R. 505, p. 2022.

## II. REASONABLE TIME.

See *Adamson v. Yeager*, 10 A. R. 477, p. 1689; *Carvill v. Schofield*, 9 S. C. R. 370, p. 1926; *Bulmer v. Brimwell*, 13 A. R. 411, p. 1144; *Oldfield v. Dickson*, 18 O. R. 188, p. 1882.

## III. MISCELLANEOUS CASES.

One of the conditions of the sale was that the timber was to be removed by T. within two years:—Held, that the effect of the condition was that T. was to have the right to cut and remove the timber within two years from the date of the agreement. *Johnston v. Shortreed*, 12 O. R. 633, followed. *Steinhoff v. McRae*, 13 O. R. 546.—C. P. D.

R. S. O. (1877) c. 180, s. 59, regulating appeals to the county judge from the Court of Revision as to the assessment of property provides (sub-section 2) that the person appealing shall serve upon the clerk of the municipality within five days after the date limited by the Act for closing the Court of Revision a written notice of his intention to appeal; (sub-section 3) that the judge shall notify the clerk of the day he appoints for hearing appeals; and (sub-section 4) that the clerk shall thereupon give notice to all the parties appealed against. Section 56, sub-section 19, provides that all the duties of the Court of Revision shall be completed, and the rolls finally revised, before the 1st day of July in each year. The Court of Revision heard the appeals in question on the 10th June, 1886, and rendered judgment on the following day. Notices of appeal dated the 15th June, 1886, were served upon the clerk on the 19th; the Court of Revision sat until the 5th July; on the 15th July the clerk notified the judge that notice had been given of these

appeals, and on the 26th July the judge notified the clerk of the day that he had appointed for hearing the appeals, and the clerk notified the parties:—Held, that the limitation in section 59, sub-section 2, should be construed to mean that notice of appeal should not be served after the expiration of five days from the closing of the Court of Revision; and also that the service in this case was within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him; and further, that service prior to the expiry of the five days was good service. *Scott v. Town of Listowel—Livingston v. Town of Listowel*, 12 P. R. 77.—Roos.

On the maturity of a bill of exchange the drawers thereof thinking the acceptor would be unable to meet it telegraphed him that if unable to meet it to draw on them for the amount:—Held, that no time being mentioned in the telegram an authority to draw at sight would be implied. *Bank of Montreal v. Thomas*, 16 O. R. 503.—C. P. D.

The judgment in the Court of Appeal in a habeas corpus proceeding was pronounced on the 13th November, 1886. Notice of intention to appeal was immediately given, but the case in appeal was not filed in the Supreme Court until the 18th February, 1889:—Held, that the appeal was not brought within sixty days from the date on which the judgment sought to be appealed from was pronounced and there was no jurisdiction to hear it. *In re Smart*, 16 S. C. R. 396.

## TITLE

I. ON SALE OF LAND—See SALE OF LAND—SALE OF LAND BY ORDER OF THE COURT—SPECIFIC PERFORMANCE—VENDORS AND PURCHASERS' ACT.

II. COVENANTS FOR—See COVENANTS FOR TITLE.

III. CLOUD ON—See SALE OF LAND.

IV. IMPROVEMENTS UNDER MISTAKE OF TITLE—See IMPROVEMENTS ON LAND.

V. BY POSSESSION—See LIMITATION OF ACTIONS.

VI. DENIAL OF TITLE—See ESTOPPEL—LANDLORD AND TENANT.

VII. QUIETING TITLES—See QUIETING TITLES.

VIII. SLANDER OF TITLE—See DEFAMATION.

IX. REPRESENTATION AS TO TITLE IN APPLICATIONS FOR INSURANCE—See INSURANCE.

X. REQUISITE TO MAINTAIN EJECTMENT—See EJECTMENT.

XI. PROOF OF IN TRESPASS—See TRESPASS.

XII. JURISDICTION OF INFERIOR COURTS WHEN TITLE TO LAND IS IN QUESTION—See COURT—DIVISION COURTS.

XIII. OUSTING JURISDICTION BY CLAIM OF TITLE—See JUSTICE OF THE PEACE.

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## TOLLS.

See INTERNATIONAL BRIDGE COMPANY—WAY.

## TORONTO (CITY OF).

Assessment for sewers. See *In re Brock v. City of Toronto*, 45 Q. B. 53, p. 1374.

## TORT.

See DAMAGES—NEGLIGENCE.

Liability of the Crown. See *Muskoka Mill Co. v. The Queen*, 28 Chy. 563, p. 1580; *Regina v. McFarlane*, 7 S. C. R. 216, pp. 1580, 1581; *Jones v. The Queen*, 7 S. C. R. 570, p. 1576; *Regina v. McLeod*, 8 S. C. R. 1, p. 1582; *Windsor and Annapolis R. W. Co. v. The Queen*, 10 S. C. R. 335; 11 App. Cas. 607, p. 1584.

In torts the principle of agency does not apply; each wrong doer is a principal. See *Ontario Industrial Loan and Investment Co. v. Lindsey*, 4 O. R. 473.

Held, under R. S. O. (1877) c. 125, that in an action for a tort committed by a wife during coverture the husband is not a proper party but the wife must be sued alone. *Amer v. Rogers*, 31 C. P. 195.—Osler.

Joint liability of husband and wife. See *Barber v. Westover*, 5 O. R. 116, p. 880.

Liability of wife. See *Shaw v. McCreary*, 19 O. R. 39, p. 880.

Quære:—In the present state of the law is a release to or satisfaction from one of several joint tort feors a bar to an action against the others. See *Grand Trunk R. W. Co. of Canada v. McMillan*, 16 S. C. R. 543.

P. brought an action against a conductor of the I. C. R. for injuries received in attempting to board a train, and alleged to be caused by the negligence of the conductor in not bringing the train to a stand still. On the trial, P. was nonsuited, and on motion to the full court the nonsuit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial, P. died, and a suggestion of his death was entered on the record. On appeal to the Supreme Court of Canada from the order of the full court:—Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick (C. S. N. B. c. 86), an entirely new cause of action arose on the death of P., and the original action was entirely gone, and could not be revived. There being no cause before the Court of Appeal, the appeal was quashed without costs. *White v. Parker*, 16 S. C. R. 699.

## TOWAGE.

See SHIP.

## TRACTION ENGINE.

See *County of York v. Toronto Gravel Road and Concrete Co.*, 3 O. R. 584; 11 A. R. 765; 12 S. C. R. 517, p. 332.

## TRADE.

I. CONTRACTS IN RESTRAINT OF TRADE—See CONTRACT.

II. DEFAMATION AFFECTING PERSONS IN TRADE—See DEFAMATION.

III. EXEMPTIONS FROM DISTRESS OF PROPERTY FOR THE BENEFIT OF TRADE—See DISTRESS.

IV. RESTRAINING OFFENSIVE TRADES—See INJUNCTION.

V. INFRINGEMENT OF TRADE MARKS—See TRADE MARKS.

VI. TRADE FIXTURES—See FIXTURES.

VII. SEPARATE TRADING BY MARRIED WOMAN—See HUSBAND AND WIFE.

VIII. USAGE OF—See CUSTOM AND USAGE.

## TRADE MARKS.

The principle on which the court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; a party therefore will not be allowed to use names, marks, letters, or other indicia, by which he may pass off his own goods to purchasers as the manufacture of another person. *McCall v. Theal*, 28 Chy. 48.—Blake.

The plaintiff, a resident of New York, was engaged in the manufacture and sale of paper patterns, and under what he considered a permission from, or arrangement with the proprietors of an illustrated paper called "Harper's Bazaar," styled such patterns "Bazaar Patterns," which words he registered in the United States and in Canada as his trade mark, and for the purpose of extending his business in this province appointed the defendant his agent for their sale, who for some years acted in that capacity, and subsequently commenced a like business in his own name, calling his patterns by the same name, stating that they were manufactured by "A. M. Theal," while those of the plaintiff were stated to be those of "James McCall & Co.," the defendant, however, using envelopes of the same colour and size, lettered and numbered in precisely the same way, the only perceptible difference being in the name of the alleged agent, which, to casual observers, would readily pass unnoticed. Thereupon the plaintiff filed a bill to restrain the defendant from using the name "Bazaar Patterns," or from otherwise inducing the public to believe that the patterns sold by him were those manufactured by the plaintiff. The court (Blake, V. C.), under the circumstances, thought there was not any exclusive right on the part of the plaintiff to the use of that term; but restrained the defendant from using wrappers similar to



those of the plaintiff, or in any other way acting in such a manner as to lead to the belief that the defendant was selling the goods of the plaintiff. The plaintiff, however, having failed in the main branch of the relief sought—the use of the word “Bazaar”—this relief was granted, without costs. *Ib.*

G. carried on business in partnership with B., a part of the business being the sale of a series of copy books designed by B., to which was given the name “Beatty’s Head-line Copy Book.” The partnership was dissolved by B. retiring and receiving \$10,000 for his interest in the business. After the dissolution B. made an agreement with the Canada Publishing Co. to prepare a copy book for them, which copy book was prepared and styled “Beatty’s New and Improved Head-line Copy Book,” which the said company sold in connection with their business. G. brought a suit against B. and the company for an injunction and an account, claiming that the sale of the last mentioned copy book was an infringement of his trade mark. He claimed an exclusive right to the use of the name “Beatty” in connection with his copy book, and alleged that he had paid a larger sum on the dissolution than he would have paid unless he was to have the exclusive sale of these copy books:—Held, affirming the judgment of Ferguson, J., 6 O. R. 68, and of the Court of Appeal, 11 A. R. 402, Henry and Taschereau, J.J., dissenting, that defendants had no right to sell “Beatty’s New and Improved Head-line Copy Book” in any form, or with any cover calculated to deceive purchasers into the belief that they were buying the books of the plaintiff. *Canada Publishing Co. v. Gage*, 11 S. C. R. 306.

The L. F. P. Co. published a newspaper called *The Commercial Traveller and Mercantile Journal*, which was known as *The Commercial Traveller*, and registered under the Trade Mark and Design Act of 1879 as *The Commercial Traveller’s Journal*. The company sold the paper and good-will to the plaintiff, and on the negotiations for the sale the plaintiff saw the defendant, who was then employed by the company as manager and editor, and who shewed him the assets of the paper, the printing contracts, etc., and recommended the purchase as a good investment. After the sale the defendant, who had retained the mail list of the subscribers to the paper, published a new paper called *The Traveller*, and used the list to send copies of his paper to some of the names contained therein. It was shewn in evidence that while defendant was in the employ of the company he often used the word *Traveller* as designating the paper then known as *The Commercial Traveller*. In an action to restrain the defendant from infringing the plaintiff’s trade mark, it was—Held, that the title of the paper published by the defendant was an infringement of the trade mark of the plaintiff, and that the subsequent publication by the defendant of a newspaper under the name of *The Traveller* was calculated to mislead persons, and induce them to believe the plaintiff’s paper was the paper referred to. *Carey v. Goss*, 11 O. R. 619.—Galt.

Held, that although the 4th section of the Trade Mark and Design Act of 1879, 42 Vict. c. 22 (Dom.), requires registration of the trade mark before the proprietor can bring an action;

and the 14th section provides for registration of an assignment, the latter section does not enact that registration shall be necessary to give effect to such assignment. An injunction was therefore granted. *Ib.*

B. et al., manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows: A horse’s head, above which were the words “The Imperial;” the words “Trade Mark” one on each side thereof; and underneath it the words “Laundry Bar.” J. Barsalou & Co., Montreal, was stamped on the reverse side. D. et al. manufactured cakes of soap similar in shape and general appearance to B. et al., having stamped thereon an imperfect unicorn’s head, being a horse’s head, with a stroke on the forehead to represent a horn. The words “Very Best” were stamped, one on each side of the head, and the words “A. Bonin, 115 St. Dominique St.” and “Laundry” over and under the head. At the trial the evidence was contradictory, but it was shewn that the appellants’ soap was known, asked for and purchased by a great number of illiterate persons as the “horse’s head soap.”—Held, (Henry, J., dissenting) reversing the judgment of the Queen’s Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of B. et al.’s trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain D. et al. from using the device adopted by them. *Barsalou v. Darling*, 9 S. C. R. 677.

In an action to restrain the infringement of a trade-mark registered under the “Trade Mark and Design Act of 1889:”—Held, following *McCaul v. Theal*, 28 Chy. 48, that prior user can be given in evidence to invalidate the trade mark. *Partlo v. Todd*, 12 O. R. 171.—Proudfoot; 14 A. R. 444; 17 S. C. R. 196.

Held, that the words “Gold Leaf” used in the plaintiff’s trade mark distinguished the flour made by the plaintiff from that made by any other person, and, as such, was a proper subject of a trade mark within the language of section 8 of the Act. *S. C.* 12 O. R. 171.

Held, on the evidence that “Gold Leaf” was a common brand for patent flour in use before the registration of the plaintiff’s trade mark, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and that there must be judgment for defendant with costs. *Ib.*

The fact of proprietorship or ownership is a condition precedent of the right to register a trade mark or to obtain any advantage under the “Trade Mark and Design Act of 1879,” and registration thereunder does not create or confer such status on an unqualified person, and his right thereto may be disallowed. *S. C.*, 14 A. R. 444.

It is only a mark or symbol in which property can be acquired, and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered as a trade mark under the “Trade Mark and Design Act, 1879” (42 Vict. c. 22). *S. C.*, 17 S. C. R. 196.

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Where the statute prescribes no means for rec-  
tification of a trade mark improperly registered  
the courts may afford relief by way of defence  
to an action for infringement. *Ib.*

Per Gwynne, J. Property cannot be acquired  
in marks, etc., known to a particular trade as  
designating quality merely and not, in them-  
selves, indicating that the goods to which they  
are affixed are the manufacture of a particular  
person. Nor can property be acquired in an  
ordinary English word expressive of quality  
merely though it might be in a foreign word or  
word of a dead language. *Ib.*

The plaintiff having registered as a trade mark  
the words "Imperial cough drops" now sued the  
defendant for infringement thereof by selling  
confectionery under the name "Imperial Cough  
Candy."—Held, that inasmuch as the evidence  
showed that the word "Imperial" as a designa-  
tion or mark for cough drops or candy was really  
public property, and a common brand or designa-  
tion for candy long before the plaintiff's regis-  
tration, the plaintiff had not the right to attrib-  
ute to that which he might manufacture a name  
which had been for years before a well-known  
and current name by which that article was de-  
fined, and the action must be dismissed. *Watson v.*  
*Westlake*, 12 O. R. 171, followed. *Watson v.*  
*Westlake*, 12 O. R. 449.—Ferguson.

Words which are separately publici juris,  
such as "Red" and "Seal," when combined  
and applied to a specific manufacture may cease  
to be so, and may well be protected as trade  
marks. Single or more letters may also form a  
trade mark, and more especially when combined,  
woven, or introduced into a monogram. *Smith*  
*v. Fair (Red Seal Case)*; S. C. (*Green Seal*  
*Case*), 14 O. R. 729.—Proudfoot.

A common seal of wax to be used on a cigar  
box is a good trade mark within the terms of 42  
Vict. c. 22 (Dom.), the Trade Mark and Design  
Act, 1879. *Ib.*

The Dominion Trade Mark and Design Act,  
1879, defines "trade mark" in more general and  
comprehensive terms than the English Act of  
1883, 46 Vict. c. 57, s. 64, and some care must  
be used in considering English decisions. Under  
the English Act a trade mark may be registered  
in any colour, and the registration confers on the  
registered owner the exclusive right to use the  
same in that or any other colour, and:—Semble,  
our own Act has as extensive an application. *Ib.*

There is no provision in our Trade Mark and  
Design Act, 1879, similar to section 70 of Imp.  
Act 46-47 Vict. c. 57, which provides that a  
trade mark when registered shall be assigned  
and transmitted only in connection with the  
good-will of the business concerned in the particu-  
lar goods for which it has been registered. *Ib.*

The fact that a plaintiff has brought an action  
for infringement before registering his trade  
mark, which action has therefore proved abortive,  
does not prevent him from bringing another  
action after registering. *Ib.*

Semble, the inability to sue for the infringe-  
ment of a trade mark before registration only  
applies where the infringement has been done  
innocently, and not to the case of fraudulent  
imitation or forgery of trade marks. *Ib.*

The account of profits in an action for in-  
fringement should not be confined to the period  
subsequent to registration, at any rate when the  
infringement has not been innocent. *Ib.*

By "prior user" the Trade Mark and Design  
Act, 1879, 42 Vict. c. 22, s. 6 (Dom.), means  
user before adoption by the registrant, not be-  
fore registration. *Ib.*

User of a trade mark in a foreign country is  
no justification for an infringement in the coun-  
try where the action is brought. *Ib.*

The plaintiffs, proprietors for about twenty  
years of a commercial school, sought to restrain  
the defendant, also a proprietor of a similar  
institution, lately established in the same place,  
from using the name "Belleville Business  
College," which, although generally used by the  
public in describing the plaintiffs' establishment,  
was not its registered name, and had never been  
adopted or appropriated by the plaintiffs them-  
selves, who had carried on their business under  
different names, one of which was registered.  
After the defendants' advent some confusion  
arose in the post office as to letters addressed  
"Belleville Business College," but it did not  
appear that any students were lost to the plain-  
tiffs by reason of the defendant's conduct:—  
Held, that as there had been no actual user by  
the plaintiffs of the name claimed, user by the  
public was not sufficient to attach the designa-  
tion to the business so as to make it equivalent  
to the plaintiffs' personal user thereof:—  
Held, also, that the name in controversy being  
merely descriptive of the nature of the business  
and the locality of its operations, in the absence  
of evidence of user of the name of the plaintiffs,  
or that the name of the locality was so insepar-  
ably connected with their establishment that a  
secondary meaning was attributable to it, there  
was no ground for protecting the name. *Thomp-  
son v. Montgomery*, 41 Chy. D. 35, distin-  
guished. No costs were given to the defendant,  
as he had sought by the use of the name to  
advantage himself in an unmeritorious way,  
*Robinson v. Boyle*, 18 O. R. 357.—Boyd.

## TRAMWAY.

See STREET RAILWAY.

Accident upon. See *McFarlane v. Gilmour*,  
5 O. R. 302, p. 1245.

## TRANSFERRING CAUSES.

See PRACTICE—TRIAL.

## TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS.

## TREATING.

See PARLIAMENTARY ELECTIONS.

## TREATY.

See EXTRADITION.

## TREES.

See TIMBER—WAY.

Observations on the construction of the Tree Planting Act. See *Connor v. Middagh, Hill v. Middagh*, 16 A. R. 356.

## TRESPASS.

## I. TO GOODS.

1. *Generally*, 2031.
2. *Liability of Execution Creditor*—See EXECUTION.

## II. TO LAND.

1. *By and Against Whom*, 2032.
2. *Title and Possession*, 2032.
3. *Several Trespases*, 2034.
4. *Damages*, 2034.
5. *Injunction to Restrain*, 2035.
6. *Effect of Judgment in Trespass*, 2035.
7. *Ousting Jurisdiction by Claim of Title*—See COUNTY COURT—JUSTICE OF THE PEACE.

## III. TO THE PERSON.

1. *For Assault and Imprisonment*, 2035.
2. *For Malicious Prosecution*, 2036.

## IV. FOR WRONGFUL DISTRESS—See DISTRESS.

## I. TO GOODS.

1. *Generally*.

The defendants who lived in Hamilton, had a claim against W. at Ingersoll, and thinking he was carrying on business on his own account, issued a writ therefor through their solicitors C. & B., which was served by C. who went to Ingersoll under special instructions from defendants to do so, and to take such steps as they might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff who accordingly notified C. & B. C. & B. refused to accept this, and wrote the sheriff in effect that he had acted improperly in not seizing the goods on ex parte statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods and applied for an interpleader order. The goods were proved to be the plaintiff's. In an action to recover damages occasioned by the seizure:—Held, that the sheriff must be assumed to have seized, under the circumstances, under instructions from the defendants' solicitors, and as the solicitors were

acting under special instructions from the defendants to take such proceedings as they might think best, the latter were liable to the plaintiff. *Smith v. Keal*, 9 Q. B. D. 340, distinguished. *Wilkinson v. Harvey*, 15 O. R. 316.—Rose.

Under a hire receipt of an organ sold by defendant R., to plaintiff's son, and signed by the latter, the defendant R. was authorized on default of payment to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be, with authority to remove the same, without resorting to any legal process. Default having been made in payment of certain instalments due under the hire receipt, defendant R. sent his bookkeeper, the other defendant and two assistants, with instructions to get the organ. The bookkeeper taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door and entered the hall, but on his attempting to open the door of the room in which the organ was, the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued and the plaintiff's wife was injured:—Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty, and were within the general scope of his authority:—Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrongdoers. *Murphy v. Corporation of Ottawa*, 13 O. R. 334, distinguished. *Ferguson v. Roblin*, 17 O. R. 167.—C. P. D.

See *Schaffer v. Dumble*, 5 O. R. 716, p. 343.

## II. TO LAND.

1. *By and Against Whom*.

Held, Arnour, J., dissenting that the Crown timber licenses claimed by the plaintiff as licensee of the Ontario Government were subject to the right of the Canada Central Railway Company, acquired before confederation, to construct the road across the Crown lands over which the licenses in question extended, and that the defendants, assignees of the railway company, were therefore not liable for trespass for entering upon and cutting timber on the said lands in prosecution of the work of building the said railway. *Foran v. McIntyre*, 45 Q. B. 288.—Q. B. D.

Right to bring action for damages for trespass committed by municipality. See *Van Egmond v. Town of Seaforth*, 6 O. R. 599.

See *Brooke v. McLean*, 5 O. R. 209, p. 206; *Ferguson v. Roblin*, 17 O. R. 167, *supra*; *Brayna v. Rose*, 19 O. R. 433, p. 2034.

2. *Title and Possession*.

On the 18th November, 1878, one Q. acting as agent for St. G., under a power of attorney which empowered him only to protect and lease St. G.'s lands, but not to sell, agreed with the plaintiff to sell him a wild lot, the purchase money to be paid by ten yearly instalments, and time to be of the essence of the agreement. The plaintiff paid only one instalment, which Q.

tions from the defendants as they might be liable to the plaintiff, 340, distinguished, R. 346.—Rose.

An organ sold by a son, and signed by him, was authorized on some possession of agent were given full pay house or premises, with authority to resorting to any legal action made in payment under the hire receipt, bookkeeper, the other acts, with instructions bookkeeper taking the key, went to plaintiff's house, opened the house but on his attempt to enter a room in which the wife (the plaintiff) and her entrance, when plaintiff's wife was in a responsible for the bookkeeper, for they discharge of what he and were within the city.—Held, also, that R. and the bookkeeper was recovered against Murphy v. Corporation, 334, distinguished, R. 167.—C. P. D.

5 O. R. 716, p. 343.

AND.

Whom.

stating that the Crown the plaintiff as licentiate were subject to Central Railway Commission, to construct lands over which the land, and that the defendant railway company, were trespass for entering on the said limits in building the said railway, 45 Q. B. 288.—Q.

damages for trespass v. See Van Eymond R. 599.

5 O. R. 209, p. 206; L. 167, supra; Bruyca 334.

possession.

1878, one Q. acting as a power of attorney to protect and lease sell, agreed with the defendant lot, the purchase early instalments, and the agreement. The instalment, which Q.

said he forwarded to St. G., who ratified the agreement. Shortly after the agreement the plaintiff, with Q.'s permission, went on the lot and cut and removed some timber therefrom, and some two or three days afterwards went back and worked half-a-day underbrushing, but did no further clearing, except to cut timber for firewood. The defendants C. & S., under a mistake as to the plaintiff's boundary, trespassed on the land by cutting timber thereon, but on the boundaries being settled they offered plaintiff compensation, though C. said his offer was for the plaintiff's interest in the land. The plaintiff was in default with St. G. when the action was brought, but not when the trespasses were committed.—Held, that there was sufficient evidence of plaintiff's title as against St. G., for the evidence shewed a partly performed agreement which could have been enforced; and even if the proof of St. G.'s title was defective the admissions of the defendants C. & S., who were mere trespassers, were sufficient evidence of title to constitute plaintiff's acts of entry on the land constructive possession of it by him; and the onus was on the defendants of showing either that St. G. had no title, or that any title acquired by the plaintiff under him had been lost.—Held, also, that although by the agreement time was of the essence thereof, and there was default made, there was no default when the trespasses were committed, and defendants not claiming under St. G. could not set up his right to avoid the agreement, but as it was suggested that St. G. might also bring an action for the same trespasses, a release thereof from him was directed to be filed. With respect to two other defendants P. S. and F., the verdict was set aside, for not only was there no evidence against them, but the record was defective in that an interlocutory judgment had been signed against them for non-appearance, without their having been declared against. Johnston v. Christie, 31 C. P. 358.—C. P. D.

Per Burton, J. A. The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee. Adamson v. Adamson, 7 A. R. 592.

Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it.—Held, that putting up boards on the land by the owner, stating that the land was for sale, was a sufficient entry upon his part to vest the legal possession in him to enable him to maintain formally an action of trespass. Donovan v. Herbert, 4 O. R. 635.—C. P. D.

A testator by his will directed his executors to pay all his debts, etc., out of his estate. Then followed specific devises of his estate to his wife, children, and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, etc., then in the next place to sell and dispose of

lot B, also so specifically devised. The executors before disposing of lots A and B, sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof, the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced.—Held, affirming the judgment of Ross, J., that by reason of there being no such entry or possession the action was not maintainable. Per Cameron, C. J.—To entitle the plaintiffs to recover either at law or in equity, an entry upon the land by the plaintiffs must have been made at a time when they had a right to make such entry to carry the legal possession with it. Baker v. Mills, 11 O. R. 253.—C. P. D.

A lessee of a lot had for more than twenty years exercised acts of ownership over part of a lot adjoining, and now claimed to have acquired title from his landlord by possession to the said part, and brought this action of trespass against the present owner of the rest of the said adjoining lot.—Held, that his action must be dismissed, for although a tenant taking in land adjacent to his own by encroachment, must, as between himself and his landlord, be deemed prima facie to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third persons. The result of the cases appears to be that where a person is in possession with the assent of the Crown, paying rent; or where a person is a purchaser, although the patent has not issued, such person can maintain trespass against a wrong-doer, but this was not the present plaintiff's position. Harper v. Charlesworth, 4 B. & C. 574, referred to and specially considered. Bruyca v. Rose, 19 O. R. 433.—MacMahon.

See McConaghy v. Denmark, 4 S. C. R. 609, p. 1180; Western Bank of Canada v. Greey, 12 O. R. 68, p. 1277.

### 3. Several Trespasses.

See Ross v. Hunter, 7 S. C. R. 289, p. 1834.

### 4. Damages.

The defendant leased certain land to the plaintiff for a term during which the latter was to make improvements, and at the expiration of the term the value of such improvements, as well as the amount of the rent, was to be fixed by arbitration. The defendant having distrained for rent claimed to be due.—Held, that there being no fixed rent agreed upon there was no right of distress, and the defendant was therefore merely a trespasser and liable in damages to the actual value of the goods, but not to double their value, as it was not a case within 2 W. & M. Sess. 1, c. 5, s. 5, which refers to the wilful abuse of the power of distress. Semble that, although there may be no rent in arrear until the same is

fixed by arbitration, there cannot be said to be none due. *Mitchell v. McDuffy*, 31 C. P. 266, 649.—C. P. D.

Where the damage consisted in cutting down some ten or twelve ornamental shade trees growing in the highway opposite the plaintiff's land, for which he was awarded \$150:—Held, not excessive. *Douglas v. Fox*, 31 C. P. 140.—C. P. D.

See *Robinson v. Hall*, 1 O. R. 266, p. 457; *Brooke v. McLean*, 5 O. R. 209 p. 206; *Galarneau v. Guilbault*, 16 S. C. R. 579, p. 748.

#### 5. Injunction to Restrain.

See *Grand Trunk R. W. Co. of Canada v. Credit Valley R. W. Co.*, 27 Chy. 232, p. 1746; *Fenelon Falls v. Victoria R. W. Co.*, 29 Chy. 4, p. 920.

#### 6. Effect of Judgment in Trespass.

A judgment in favour of the plaintiff in an action for trespass to lands upon pleas (amongst others) of land not plaintiff's and liberum tenementum, is not a complete estoppel, preventing the defendant in another suit, from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shewn that the defendant had trespassed. *Hunter v. Birney*, 27 Chy. 204.—Blake.

### III. TO THE PERSON.

#### 1. For Assault and Imprisonment.

Where an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour":—Held (Cameron, J. dissenting), that their assuming so to amend the conviction was not a quashing of the conviction, and therefore trespass would not lie against the justices. *McLellan v. McKinnon*, 1 O. R. 219.—Q. B. D.

The 41 Vict. c. 9, intituled "An Act to widen and extend certain public streets in the city of St. John," authorized commissioners appointed by the governor in council to assess owners of the land who would be benefited by the widening of the streets, and in their report on the extension of Canterbury street, the commissioners so appointed assessed the benefit to a certain lot at \$419.46, and put in their report the name of the appellant (McS.) as the owner. The amount so assessed was to be paid to the corporation of the city, and, if not, it was the duty of the receiver of taxes appointed by the city corporation, to issue execution and levy the same. McS., although assessed, was not the owner of the lot. S., the receiver of taxes, in default, issued an execution, and for want of goods McS. was arrested and imprisoned until he paid the amount at the chamberlain's office in the city of St. John. The action was for arrest and false imprisonment, and for money had and received. The jury found a verdict for McS. on the first count against both defendants:—Held, (reversing the judgment of the Supreme Court of New Brunswick), that S.,

who issued the warrant founded upon a void assessment and caused the arrest to be made, was guilty of a trespass, and being at the time a servant of the corporation, under their control and specially appointed by them to collect and levy the amount so assessed, the maxim of respondent superior applied, and therefore the verdict in favour of McS. for \$635.39, against both respondents on the first count should stand. (Ritchie, C. J., and Taschereau, J., dissenting.) Per Gwynne, J., that the corporation had adopted the act of their officer as their own by receiving and retaining the money paid and authorizing McS.'s discharge from custody only after such payment. *McSorley v. Mayor, etc., of the City of St. John*, 6 S. C. R. 531.

The plaintiff, during his initiation as a member of the defendants' lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked:—Held, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kinver v. Phoenix Lodge, I. O. O. F.*, 7 O. R. 377.—C. P. D.

Held, that the discharge of the plaintiff from custody on habeas corpus was not a quashing of his conviction on a charge on unlawfully removing cordwood from an Indian reserve; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been on the case; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause. *Hunter v. Giltison*, 7 O. R. 735.—Q. B. D.

Suspension of action until criminal charge disposed of. See *Taylor v. McCullough*, 8 O. R. 309, p. 18.

See *Reid v. Maybee*, 31 C. P. 384, p. 1217; *Emerson v. Niagara Navigation Co.*, 2 O. R. 528, p. 1241; *Ferguson v. Roblin*, 17 O. R. 167, p. 2032; *Hamilton v. Massie*, 18 O. R. 585, p. 215.

#### 2. For Malicious Prosecution.

See *Macdonald v. Henwood*, 32 C. P. 433, p. 1218.

### TRIAL.

#### I. NOTICE OF TRIAL.

1. *Where Necessary*, 2038.
2. *By whom Given*, 2038.
3. *When may be Given*, 2038.
4. *Length of Notice*.
  - (a) *Generally*, 2039.
  - (b) *Short Notice*, 2040.



ounded upon a void arrest to be made, was being at the time a surrender their control and to collect and levy the maxim of respondent before the verdict in 9, against both respondent should stand. (Ritchie, J., dissenting.) Per corporation had adopted their own by receiving paid and authorizing custody only after such Mayor, etc., of the City 31.

is initiation as a member, in the presence of the number of members, contact meeting, was injured of some of the members and other proceed knowledge of all those that somewhat similar on the occasion of that they were allowed old, that they must be with the consent of the at the defendants were the injuries sustained. *Je, I. O. O. F., 7 O. R.*

arge of the plaintiff from was not a quashing of on unlawfully removing Indian reserve; and that in force, and the dedication, reaction, which and imprisonment malreasonable and probable maintained, but the action case; but that even if right, there was no available and probable cause. *R. 735.—Q. B. D.*

until criminal charge dis-  
*v. McCullough, 8 O. R.*

, 31 C. P. 384, p. 1217;  
*Navigation Co., 2 O. R.*  
*v. Roblin, 17 O. R. 167,*  
*Massie, 18 O. R. 585, p.*

ious Prosecution.

wood, 32 C. P. 433, p. 1218.

TRIAL.

TRIAL.

January, 2038.

Given, 2038.

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Notice.

ally, 2039.

Notice, 2040.

5. Service of, 2040.

6. Irregularity in, 2041.

7. Countermand of Notice, 2041.

II. REFERENCE FROM SUPERIOR COURT TO COUNTY COURT, AND VICE VERSA, 2041.

III. FEE ON ENTERING RECORD, 2041.

IV. POSTPONEMENT OF TRIAL, 2041.

V. WITHDRAWAL OF ACTION—See PRACTICE.

VI. JURY NOTICE.

1. Filing and Serving, 2043.

2. Right to have Trial by Jury.

(a) Generally, 2044.

(b) Where the Court of Chancery had Formerly Exclusive Jurisdiction, 2047.

VII. SPECIAL JURY, 2049.

VIII. TRIAL OF SEPARATE QUESTIONS ARISING IN THE SAME ACTION, 2049.

IX. CONDUCT OF CAUSE, 2049.

X. RIGHT TO BEGIN, 2050.

XI. RIGHT TO REPLY, 2050.

XII. REFERENCE TO MASTER OR REFEREE—See ARBITRATION AND AWARD—PRACTICE.

XIII. JURY.

1. Challenging, 2050.

2. Omission to Swear Juror, 2050.

3. Withdrawal of Juror, 2051.

4. Withdrawing Case from Jury, 2051.

5. Dispensing with Jury after Evidence Taken, 2051.

6. Directing Jury to Answer Questions of Fact, 2051.

7. Influencing—See NEW TRIAL.

8. In Criminal Cases.—See CRIMINAL LAW.

XIV. VERDICT.

1. Generally, 2053.

2. New Trial when Verdict is Against Evidence or the Weight of Evidence.—See NEW TRIAL.

XV. IN CRIMINAL CASES—See CRIMINAL LAW.

XVI. COUNTY JUDGE'S CRIMINAL COURT—See CRIMINAL LAW.

XVII. EVIDENCE AND WITNESSES—See EVIDENCE.

XVIII. ORDERING WITNESSES OUT OF COURT—See EVIDENCE.

XIX. VENUE AND CHANGING PLACE OF TRIAL—See PLEADING.

XX. OF CONTESTED ELECTIONS—See PARLIAMENTARY ELECTIONS.

XXI. COSTS OF ABORTIVE TRIAL—See COSTS.

XXII. NEW TRIAL—See NEW TRIAL.

XXIII. NONSUIT—See NONSUIT.

I. NOTICE OF TRIAL.

1. When Necessary.

When a cause is postponed by the order of the judge at the assizes, upon the defendant's application, it is a remanet, and no notice of trial for the next assizes is necessary, under the rules of 1875 (37 Q. B. 528) and the O. J. Act. *Donovan v. Boulbee, 10 P. R. 52.—Dalton, Master.—Wilson.*

Dismissal of action under Con. Rule 647 where plaintiff does not give proper notice of trial. See *Clarke v. Creighton, 13 P. R. 113, p. 1651.*

2. By Whom Given.

The words "either party," in Rule 255, O. J. Act, (Con. Rule 654) mean "any party," and when an action is as to all the parties to it ripe for trial one of several defendants may bring the case on under that rule by giving notice of trial to the plaintiff and his co-defendants. *McLean v. Thompson, 9 P. R. 553.—Boyd.*

Since the O. J. Act any one of the parties, plaintiffs or defendants, may give notice of trial. *Tinning v. Grand Trunk R. W. Co., 11 P. R. 438.—Dalton, Master.*

In an action in the Chancery Division in which no jury notice had been given, the defendant gave notice of trial for the assizes beginning on the 10th September, 1889, and the plaintiff for the chancery sittings beginning on the 4th November, 1889.—Held, that under Con. Rule 654, either party has the right to give notice of trial for the next sittings, whether an assize or a chancery sittings; and the plaintiff cannot take away that right from the defendant by giving notice of trial for a later sittings. The plaintiff's motion to set aside the defendant's notice of trial was therefore refused. *Palmateer v. Webb, 7 C. L. T. Occ. N. 244, distinguished. Shaw v. Crawford, 13 P. R. 219.—Dalton, Master.*

3. When may be Given.

Held, that in an action commenced by a writ not specially endorsed where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages. *Fenwick v. Donohue, 8 P. R. 116.—Dalton, Q.C.*

A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was—Held, to be regular. *Merchants' Bank v. Piereson, 8 P. R. 129.—Dalton, Q.C.*

A writ in ejectment was served on the 15th August, 1881, and an appearance entered after the 22nd of the same month.—Held, that the plaintiff need not file a statement of claim, under

the new practice, and that a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue. *Laidlaw v. Ashbaugh*, 9 P. R. 6.—Dalton, Master.

A cause is at issue where a joinder of issue has been delivered, or where three weeks have elapsed after statement of defence has been delivered. A notice of trial served before either of these events had happened was:—Held, irregular and was set aside. *Schneider v. Proctor*, 9 P. R. 11.—Dalton, Master.

On the 22nd August, 1881, a replication had not been filed, but the suit was in such condition that it could then have been filed:—Held, that under the O. J. Act, Rule 494, notice of trial might be given without filing a replication. *Sawyer v. Short*, 9 P. R. 85.—Dalton, Master.

The original defendant dying pendente lite, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for 5th May, at Cornwall. The defendant moved to set aside the notice of trial as irregular:—Held, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular. *New York Piano Co. v. Stevenson*, 10 P. R. 270.—Dalton, Master.

The reply in this action contained two paragraphs, the first denying certain allegations in the fourth paragraph of the defence, and the second joining issue upon the rest of the defence. Notice of trial was served with the reply. A motion to set aside the notice of trial was dismissed, because the affidavit filed in support of it did not state that no joinder was filed when the notice of trial was given:—Semble, the joinder of issue referred to in Rule 176, O. J. Act, (Con. Rule 392) is not a simple denial of a previous pleading. *Weller v. Proctor*, 10 P. R. 323.—Dalton, Master.

The plaintiff delivered a simple joinder of issue upon the statement of defence and counterclaim:—Held, that this closed the pleadings, and that notice of trial served with it was regular. *Hare v. Cawthorpe*, 11 P. R. 353.—C. P. D.

Where a case has been made a remanet at the assizes a notice of trial for the Chancery Division sittings is irregular. *Ward v. Jackson*, 12 P. R. 225.—Dalton, Master.

See *Garner v. Tane*, 12 P. R. 280, p. 1613.

#### 4. Length of Notice.

##### (a) Generally.

Plaintiff's and defendant's attorneys had an agreement between themselves by which papers in the suit should be sent by mail. The notice of trial was posted the day before the last for giving notice, but reached defendant's attorney one day too late. It was shewn that the practice of both attorneys had been to admit service as of the day of receipt:—Held, that the notice of trial must be set aside. *Robson v. Arbuthnot*, 3 P. R. 313, distinguished. *McDonough v. Alison*, 9 P. R. 4.—Dalton, Master.

The words "according to the present practice of the Court of Chancery," in Rule 266, O. J. Act, are only intended to determine that the entry of the suit for trial is to be made with the proper officer of the Chancery Division, leaving the time of entry to be determined by the preceding Rules 259 (Con. Rule 661) and 264 (Con. Rule 665). Ten days' notice of trial is therefore sufficient in all cases coming within its terms. *Bar-ker v. Furze*, 9 P. R. 83.—Proudfoot.

In an action of replevin ten days' notice of trial must be given, instead of eight days, as under the old practice. *Wallace v. Cowan*, 9 P. R. 144.—Dalton, Master.

Where an overdue statement of defence was filed on the last day for giving notice of trial for the assizes, and a joinder of issue and jury notice were filed by the plaintiff on the same day, but after the filing of the defence:—Held, that the service of notice of trial with the joinder and jury notice, on the same day, before the filing of the defence, was not an irregularity. *Broderick v. Broatch*, 12 P. R. 561.—Dalton, Master.—Armour. See *McIlroy v. McIlroy*, 14 P. R. 264.

A defendant is entitled to the full ten days' notice of trial prescribed by Con. Rule 661, unless he has consented to take short notice of trial, or unless short notice can be directed as a term for granting an indulgence sought by a defendant; and there is no power to compel a defendant to take short notice. *Hamilton Provident and Loan Society v. McKim*, 13 P. R. 125.—Rose.

The ten days prescribed by Con. Rule 661 for giving notice of trial cannot be shortened except by consent or when short notice of trial is imposed as a term in granting an indulgence. The plaintiff on the 23rd May, when the pleadings were not closed, gave notice of trial for a sittings beginning on 10th June. The pleadings were closed on the 27th May, and notice of trial might then and up to the 31st May have been regularly given in good time for the 10th June. The defendant waited until the 5th June and then moved to set aside the notice of trial given on the 23rd May, as irregular:—Held, that the defendant had waived the irregularity by his laches. *Whitney v. Stark*, 13 P. R. 129.—Dalton, Master.—Street.

See *Davies v. Hubbard*, 10 P. R. 148, p. 2041.

##### (b) Short Notice.

Sundays and holidays are excluded in computing the five days' notice necessary in short notice of trial. Short notice of trial served on Wednesday for Monday:—Held, bad. *O'Donnell v. O'Donnell*, 10 P. R. 264.—Osler.

See *Hamilton Provident and Loan Society v. McKim*, 13 P. R. 125, *supra*; *Whitney v. Stark*, 13 P. R. 129, *supra*.

##### 5. Service of.

Service of notice of trial effected by leaving a copy of the same in the office of the defendant's solicitor before six o'clock, but after the solicitor and his clerks had left for the day, takes effect only from the time when the notice came to the

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knowledge of the solicitor. The practice laid  
down in *Consumers' Gas Co. v. Kiscock*, 5 Q. B.  
542; *McCallum v. Provincial Ins. Co.*, 6 P. R.  
101, held not to have been altered by the O. J.  
Act as to service upon a defendant's solicitor.  
*Davies v. Hubbard*, 10 P. R. 148.—Dalton,  
Master.

See *McDonough v. Alison*, 9 P. R. 4, p. 2039.

#### 6. Irregularity in.

A notice of trial in an action brought in the  
Queen's Bench or Common Pleas Division given  
for a special sitting for the trial of an action in  
the Chancery Division, is irregular, and will be  
set aside. *Grant v. Middleton*, 10 P. R. 585.—  
Dalton, Master.

See *Stewart v. Sullivan*, 11 P. R. 529, p.  
1870.

#### 7. Countermand of Notice.

Where notice of trial has been given, it can-  
not be countermanded by either party. *Friendly*  
*v. Carter*, 9 P. R. 41.—Dalton, Master.—Osler.

#### II. REFERENCE FROM SUPERIOR COURT TO COUNTY COURT, AND VICE VERSA.

[See Con. Rule 671.]

See *Merchants' Bank v. Brooker*, 8 P. R. 133,  
p. 398; *Barker v. Leeson*, 9 P. R. 107, p. 398;  
*Coyne v. Lee*, 14 A. R. 503, p. 1021; *London and*  
*Canadian Loan and Agency Co. v. Morphy*, 11  
P. R. 86, p. 2042.

#### III. FEE ON ENTERING RECORD.

Where the trial of a cause was postponed till  
the next assizes, defendants to pay the costs:—  
Held, that no second fee was payable to the  
deputy clerk of the crown upon entry of the  
action for trial at the latter assizes, and that  
when so paid by plaintiff, such fee was not tax-  
able against defendants. *Morton v. Grand Trunk*  
*R. W. Co.*, 10 P. R. 62.—Wilson.

See *Bunbury v. Manufacturers' Ins. Co.*, 13  
P. R. 52, p. 2044.

#### IV. POSTPONEMENT OF TRIAL.

W. (plaintiff) entered into negotiations with S.  
(defendant) to purchase a house which defendant  
was then erecting. W. alleged that the agree-  
ment was, that he should take the land (two and  
a-half lots) at \$400 a lot of fifty feet frontage,  
and the materials furnished and work done at  
its value. In August, 1874, a deed and mort-  
gage were executed, the consideration being  
stated in both at \$5,926. The mortgage was  
afterwards assigned to the M. and N. W. L.  
Company. W. alleged in his bill, that S., in  
violation of good faith, and taking advantage of  
W.'s ignorance of such matters, and the confi-  
dence he placed in S., inserted in the mortgage  
a larger sum than the balance due as a fair and  
reasonable market value of the lands, and of  
what he had done to the dwelling-house and  
other premises, and he prayed an account. S.

repudiated the allegation of fraud, and alleged  
that W. had every opportunity to satisfy him-  
self, and did satisfy himself, as to the value of  
what he was getting; that he had told the plain-  
tiff he valued the land at \$2,000, and that in no  
way had he sought to take advantage of the  
plaintiff. S. was unable to be present at the  
hearing, and applied for a postponement, on the  
grounds set forth in an affidavit, that he was a  
material witness on his own behalf, and that it  
was not safe for him, in his state of health, to  
travel from Ottawa to Winnipeg. Dubuc, J.,  
refused the postponement, on the ground that  
the court was only asked now to decree that the  
account should be opened and properly taken,  
and the amount ascertained, which would be  
done by the master if the court should so decide,  
and that the defendant would then have an  
opportunity of being present, and that he was  
not necessarily wanted at the hearing; and, as  
the result of the evidence, made a decree in  
accordance with the contentions of the plaintiff,  
and directed an account to be taken:—Held,  
that under the circumstances, the case ought  
not to have been proceeded with in the absence of  
appellant, and without allowing him the oppor-  
tunity of giving his evidence. Per Ritchie, C.  
J., and Strong and Gwynne, JJ., that on the  
merits there was no ground shown to entitle  
the plaintiff to relief. Per Ritchie, C. J., and Strong,  
J., that the bill upon its face alleged no ground  
sufficient in equity for relief, and was demur-  
rable. *Schultz v. Wood*, 6 S. C. R. 585.

The plaintiff gave notice of trial for 2nd Oc-  
tober. On 23rd September the defendant ob-  
tained an order to postpone the trial on pay-  
ment of costs:—Held, a conditional order not  
staying the plaintiff's proceedings, and one  
which the defendant was at liberty to abandon  
without being liable to pay other than the costs  
of the application. *Allen v. Mathers*, 9 P. R.  
477.—Osler.

An interpleader issue arising out of an action  
in the High Court of Justice was directed to be  
tried in a County Court pursuant to 44 Vict. c.  
7, s. 1 (Ont.):—Held, that a motion to postpone  
the trial of the issue should have been made in  
the County Court. *London and Canadian Loan*  
*and Agency Co. v. Morphy*, 11 P. R. 86.—Dalton,  
Master.

The costs of moving to postpone a trial on ac-  
count of the absence of a material witness, will  
be costs in the cause, where the party moving  
has made diligent efforts, etc., to secure the at-  
tendance. *Brown v. Porter-Knox v. Porter*,  
11 P. R. 250.—Rose.

Costs of the day. See *Hopkins v. Smith*, 9  
P. R. 285, p. 396; *Hogg v. Crabbe*, 12 P. R.  
14, p. 384; *Outwater v. Mullett*, 13 P. R. 509,  
p. 384.

In ordering the postponement of a trial the  
master in chambers has a discretion under Con.  
Rule 681 to impose terms. And where, upon the  
defendants' application to postpone the trial,  
the master so ordered upon their giving security  
for part of the amount sued for:—Held, that  
the term was properly imposed. *Bank of Ham-*  
*ilton v. Stark*, 13 P. R. 213.—Boyd.

See *Bunbury v. Manufacturers' Ins. Co.*, 13 P.  
R. 52, p. 2044.

## VI. JURY NOTICE.

## 1. Filing and Serving.

With his joinder of issue, the plaintiff served notice of trial for the Chancery sittings. Defendant afterwards served a similitur and jury notice:—Held, that the similitur and jury notice were good, and that the notice of trial must be set aside. *McLaren v. McCraig*, 8 P. R. 54.—Dalton, Q. C.

The plaintiff joined issue upon defendants' pleas, and at the same time filed a similitur, without a jury notice, for the defendant. Afterwards the defendant filed a second similitur, and with it a jury notice:—Held, that the defendant should have filed a jury notice with his pleas; that the first similitur was good, and that the second was unnecessary, and must, together with the jury notice, be struck out as bad. *Hyde v. Casmea*, 8 P. R. 137.—Dalton, Q. C.

An order directed the trial of an issue in an interpleader matter. The plaintiff served the issue but did not serve with it a jury notice as required by R. S. O. (1877) c. 54, s. 4. He subsequently served a jury notice with the notice of trial. The defendant did not appear at the trial, and a verdict was rendered for the plaintiff, who afterwards obtained (on notice) in chambers an order for costs:—Held, on appeal affirming this order, that the verdict obtained on the trial by a jury was not a nullity, but only irregular, and not being moved against promptly should stand. *Leeson v. Lemon*, 9 P. R. 103.—Boyd.

The plaintiff omitted to file a jury notice with his last pleading, and applied ex parte to the master in chambers for leave to withdraw the last pleading and refile it with a jury notice. The leave was granted:—Held, on appeal, that when the plaintiff came to the court to be relieved from his slip, he should have been called upon to shew that the case was one which should be tried by a jury, and that unless he had been able to do so the defendants should not have had their statutory right to have the case tried by a judge without a jury taken away:—Held, also, that notice of the motion should have been given to the defendant, in accordance with the spirit of Rule 406, O. J. Act, (Con. Rule 527). The appeal was treated as a substantive motion for leave to file the jury notice, and the order of the master was affirmed, without costs. *Powell v. City of London Assurance Co.*—*Powell v. Quebec Insurance Co.*, 10 P. R. 520.—Rose.

R. S. O. (1877) c. 44, s. 78, sub-s. 2, provides that a party to an action desiring to have it tried by a jury shall, "at least eight days before the sittings at which the action is to be tried," file and serve a notice therefor. R. S. O. (1887) c. 52, s. 148, provides that no record containing issues to be tried by a jury shall be entered for trial unless the fee of three dollars required by that section be first paid. The plaintiff before the following assizes, filed and served a jury notice:—Held, that Con. Rule 671 was not intended to overrule section 148, but was only aimed at protecting litigants from being required to pay a new fee for entering their actions for trial a second time, and not to relieve them from the payment of any other usual fees. The plaintiff had the right to give the jury notice, paying the

jury fee, and annexing the jury notice to the record at the time of setting down. Order of Rose, J., striking out jury notice, reversed. *Bunbury v. Manufacturers' Insurance Co.*, 13 P. R. 52.—Q. B. D.

See *Broderick v. Brouch*, 12 P. R. 561, p. 2040.

## 2. Right to have Trial by Jury.

## (a) Generally.

In ejectment where equitable issues are raised under R. S. O. (1877), c. 50, s. 257 (Con. Rule 677), the issues must be tried without a jury. *Bryan v. Mitchell*, 8 P. R. 302.—Dalton, Q. C.—Armour.

Where the cause of action was one of a purely common law character, and none of the defences or replies presented issues of a merely equitable character, Boyd, C., reversed the order of a local master, striking out the defendant's jury notice. *Bank of British North America v. Eddy*, 9 P. R. 468.

If it were shewn that there was likely to be a great complexity of facts:—Semble, that such an element alone would not be a reason for dispensing with a jury in a common law cause of action. *Id.*

In an action for the recovery of land, in which the writ issued from the Chancery Division, the jury notice served by the defendants was struck out, and a motion to transfer the action to another division was refused. *Bank of British North America v. Eddy*, 9 P. R. 468, does not since Rule 545, O. J. Act, afford any general rule of practice. *Masse v. Masse*, 10 P. R. 574.—Boyd. Reversed, 11 P. R. 81.—Chy. D.

In an action brought in the Chancery Division, on behalf of the plaintiff and other creditors, to set aside an alleged fraudulent transfer of notes, etc., made to the defendants by the debtor, and for an injunction to restrain the defendants from negotiating them, the defendants served a jury notice, which the master in chambers refused to strike out. On appeal to Proudfoot, J., he allowed the appeal and struck out the notice, reserving leave to appeal to the Court of Appeal:—Held, that Rule 545, O. J. Act, was not intended to, and does not, interfere with the power of transferring actions from one division of the High Court to another, nor with the right to give a jury notice in a proper case, nor with the existing modes of trial of particular actions. *Pawson v. Merchants' Bank of Canada*, 11 P. R. 72.—C. of A.

In an action for the price of goods sold and delivered, which was begun in the Chancery Division, the defendant's jury notice, which had been struck out, was restored, and the action was transferred to the Queen's Bench Division. *Masse v. Masse*, 10 P. R. 574, not followed, owing to the judgment of the Court of Appeal in *Pawson v. The Merchants' Bank*, 11 P. R. 72. *Herring v. Brooks*, 11 P. R. 15.—Ferguson.

The action was brought in the Chancery Division to obtain specific performance of a covenant to repair, or for damages:—Held, that it was really a common law action, for specific performance of such a covenant could not be

the jury notice to the setting down. Order of jury notice, reversed. *Waters Insurance Co., 13 P.*

*Rich, 12 P. R. 561, p. 2040.*

*the Trial by Jury.*

*generally.*

equitable issues are raised. *c. 50, s. 257 (Con. Rule 10)* be tried without a jury. *R. 302.—Dalton, Q.C.—*

action was one of a purely legal nature, and none of the defences was of a merely equitable nature. The order of a local judge reversing the defendant's jury notice. *America v. Eddy, 9 P. R.*

it there was likely to be a question of fact.—Semble, that such an order should not be a reason for dismissing a common law cause of

the recovery of land, in the absence of a bill from the Chancery Division, served by the defendants, a motion to transfer the action was refused. *Bank of America v. Eddy, 9 P. R. 468, 465, O. J. Act, afford any relief. Mosse v. Mosse, 10 P. R. 81.—*

in the Chancery Division, the plaintiff and other creditors, to the fraudulent transfer of notes, and the defendants by the debtor, and to restrain the defendants from the defendants served a jury notice. The master in chambers refused the appeal to Proudfoot, J., he and struck out the notice, and appealed to the Court of Appeal. *545, O. J. Act, was not set aside, nor interfere with the actions from one division to another, nor with the right to a proper case, nor with the trial of particular actions. Bank of Canada, 11 P. R.*

the price of goods sold and the action begun in the Chancery Division's jury notice, which had been restored, and the action in the Queen's Bench Division. *R. 574, not followed, owing to the Court of Appeal in *Pawtucket Bank, 11 P. R. 72, 11 P. R. 15.—Ferguson.**

brought in the Chancery Division specific performance of a contract for damages.—Held, that on a common law action, for specific performance a covenant could not be

decreed, and the defendant was therefore entitled to the benefit of his jury notice. *Bingham v. Warner, 10 P. R. 621.—Ferguson.*

In an action of seduction no appearance was entered, the plaintiff then filed a statement of claim to which no defence was made, and interlocutory judgment was signed, and notice of assessment of damages given. The defendant did not appear at the trial and a jury was called who disagreed as to the amount of damages, and were discharged. The judge then tried the case himself without a jury, upon a fresh taking of evidence, and assessed the damages, and gave judgment for the plaintiff.—Semble, that under the O. J. Act and former practice, the judge in such an action had no power to dispense with the jury.—Quere, whether in any event, a jury having been called and disagreed, they could be dispensed with, and a retrial had without a new notice; but it was unnecessary to decide the point, as it was not satisfactorily established that the writ of summons had been served on the defendant; and he was therefore allowed to have a trial on the merits. *Adair v. Wade, 9 O. R. 15.—C. P. D.*

I brought this action against S. in the Chancery Division claiming (1) foreclosure of certain mortgages, (2) upon an open account, (3) damages for breach of a contract; and S. sued I. in the Queen's Bench Division for damages arising out of the same contract, with which also I's other claims were connected. On a motion to strike out a jury notice, S. offered to let I. have judgment upon the mortgages and the open account, with a reference as to the amounts, subject to a defence which he raised as to a contract by I. to purchase the property covered by the mortgages. Boyd, C., directed (1) the trial of an issue, at a sittings of the Chancery Division, as to the defence raised by S.; (2) that the claim for damages in this action should be tried by a jury at the same time and place as the cross-action; and (3) that I. should have judgment upon the mortgages and open account with a reference, which was to be stayed pending the trial of the issue directed. *Irwin v. Sperry, 11 P. R. 229.—Boyd.*

The action was for the amount of a bill for medical attendance; no equitable issue was raised, and it clearly appeared that the only matter in dispute was the amount of the bill.—Held, a proper case for a judge in chambers, under R. S. O. (1877) c. 50, s. 255, to strike out the jury notice. *Pickup v. Kincaid, 11 P. R. 445.—Ferguson.*

Connie and McLennan became contractors for the construction of a section of the Canadian Pacific Railway. The agreement therefor stipulated that ninety per cent of the work should be paid for during the progress thereof upon "the progress estimates" of the proper officer of the company, the remaining ten per cent. to be paid on the completion of the contract, at which time the company alleged that they had discovered that by means of fraud the contractors had procured from their engineer progress estimates for sums greatly in excess of the work done and they claimed for overpayments about \$600,000. The contractors, on the 5th of October, 1885, sued out process in the Queen's Bench Division to recover \$200,000, the balance claimed by

them as still due; and on the 31st of the same month the company sued out process in the Chancery Division against the contractors to enforce payment of the amount claimed to have been overpaid them. Issue was joined in the actions respectively on the 17th and 14th of November following. In the action in the Chancery Division the contractors gave notice for trial by a jury which, on application by the company, was struck out by the master in chambers who also made an order refusing a motion made by the contractors to stay proceedings in the Chancery Division action until the determination of the questions in the other action. Thereupon the contractors appealed, and on argument before Boyd, C., their appeal was dismissed. The company moved for and obtained an order from the master in chambers to stay all proceedings in the Queen's Bench Division action with liberty to the contractors to raise in the Chancery Division action by defence, set-off, counter-claim or otherwise, all questions intended to be raised by them in the Queen's Bench Division action against which order the contractors appealed to Rose, J., who feeling bound by the decision of Boyd, C., affirmed the order of the master.—Held, reversing these orders (11 P. R. 149), that the Court of Appeal had jurisdiction to entertain the appeals, and that a trial with a jury was the *prima facie* right of the contractors whose action was the earlier one, and that the orders complained of were not such as rested in the mere discretion of the judge. (Hagarty, C. J. O., hesitating.) Per Osler, J. A., even if the facts were such as would entitle the judge at the trial to strike out the jury notice, the present orders were premature. *Connie v. Canadian Pacific R. W. Co., and the Canadian Pacific R. W. Co. v. Connie, 12 A. R. 744.*

The question whether an issue as to a mechanic's lien should be summarily tried or not, rests largely, if not entirely in the discretion of the judge. *Re Moorehouse and Leak, 13 O. R. 290.—Chy. D.*

The action was brought (1) for the recovery of instalments of money due under a scrip contract; and (2), for a declaration of the plaintiffs' right to specific performance of the part of the contract as to settlement duties, the time for performance not having yet arrived.—Held, Proudfoot, J., dissenting, a proper case in which to exercise the power under Rule 256, O. J. A., (Con. Rule 655), of severing the action so as to have that part of it which is preliminary tried first, the defendants having a *prima facie* right to a jury as to the main matter in controversy, the (1) claim; while the (2) claim could be better tried without the intervention of a jury. The defendants' jury notice, which had been struck out, was restored, and the whole action was left to the judge at the trial to try partly with a jury, and partly without a jury, or altogether without a jury, as he might think advisable. Per Proudfoot, J.—The court or a judge has power by the C. L. P. Act, section 255, to act before the trial by striking out the jury notice, and the power should be exercised when it is perfectly clear that the issues are such that they cannot be properly tried by a jury; the question should not in every case be left to the trial judge to determine. *Temperance Colonization Society v.*



*Evans*, 12 P. R. 48.—Proudfoot.—Chy. D.; affirmed by the C. of A. *Id.* 380.

The plaintiffs sued, as executors of McB. to recover from the defendant, a solicitor, money placed in his hands for investment, and notes and money received by him as solicitor and agent for McB., and prayed that the defendant might be ordered to assign certain securities in his hands. The defendant set up by way of defence a certain agreement, under which he alleged that the plaintiffs were estopped from making their claim. The plaintiffs then amended their statement of claim, setting up fraud in procuring this agreement, and asked that it might be declared void, and be delivered up to be cancelled:—Held, the case came within sections 257 and 258 of the C. L. P. Act (Con. Rules 677, 678), and that the legal issues should be tried by a jury, and the equitable issues by a judge without a jury, unless the judge at the trial, in the exercise of his discretion, chose to try the whole case without a jury; but that the defendant was not entitled as a matter of right to have the jury notice struck out. *Temperance Colonization Society v. Evans*, 12 P. R. 48, followed. *McMahon v. Lavery*, 12 P. R. 62.—C. P. D.

An action for part of the price of a machine and to enforce a lien on land for such price, with a defence of breach of warranty in the defective condition of the machine, is not distinguishable from an ordinary mortgage action. Such an action would have been in the exclusive jurisdiction of the Court of Chancery before the Judicature Act, and a jury notice is therefore improper under section 45, O. J. A. A separate trial by jury upon the issue raised as to the character of the machine should not be ordered in a case of this kind, where there is but one cause of action. *Temperance Colonization Society v. Evans*, 12 P. R. 48; *McMahon v. Lavery*, 12 P. R. 62, distinguished. *Farran v. Hunter*, 12 P. R. 324.—Chy. D.

The trial judge has by section 255 of the Common Law Procedure Act a discretion to try any case with or without a jury as he may think best, and his discretion will not be interfered with by a Divisional Court. *Brown v. Wood*, 12 P. R. 198.—Chy. D.

Where equitable issues are raised a jury is not of right but of grace under section 257 of the C. L. P. Act (Con. Rule 677). And where, in an action, brought under an order of the court made in a former action, to try the plaintiff's right as against the now defendants to the possession of certain land recovered in that action, equitable issues were raised, and the case had been once tried before a jury, who had disagreed:—Held, that an order striking out the jury notice was properly made. Leave to appeal refused. *Adamson v. Adamson*, 12 P. R. 469.—Boyd.

(b) *Where the Court of Chancery had Formerly Exclusive Jurisdiction.*

Held, that an action to set aside a conveyance could, previous to the O. J. Act, have been brought in the Court of Chancery only, and the defendant had therefore no right, as of course, to have the action tried by a jury. While under the old Chancery Act (R. S. O. (1877), c. 40, s. 99) the court might direct an action to be tried

by a jury upon notice and for good cause, yet this could only be done by the court, and not by a judge or master in chambers. *Thurlow v. Beck*, 9 P. R. 268.—Patterson.

In cases in which, before the O. J. Act the Court of Chancery had exclusive jurisdiction, a jury notice is irregular and will be struck out. *Gowanlock v. Mans*, 9 P. R. 270.—Dalton, Master.

Held, that the exclusive jurisdiction of the Court of Chancery in section 45, of the O. J. Act means its jurisdiction as exercised generally in dispensing equity, and not its exclusive as distinguished from its auxiliary jurisdiction. *Pawson v. Merchants' Bank of Canada*, 11 P. R. 72.—C. of A.

Held, that an action brought by the plaintiff on behalf of himself and other creditors to set aside an alleged fraudulent transfer of notes, etc., made by the defendant was such an action as would, before the O. J. Act, have been in the exclusive jurisdiction of the Court of Chancery, and therefore it fell within section 45, and should be tried without a jury. The practice laid down in *Bank of B. N. A. v. Eddy*, 9 P. R. 468, is still the proper practice. The question whether the order of Proudfoot, J., was appealable was not determined, as the appeal was dismissed. *Id.*

The Court of Chancery had, before the O. J. Act, exclusive jurisdiction in actions to establish wills, and its power to direct a trial by jury (R. S. O. (1877), c. 40, s. 99) is continued in the High Court under section 45, O. J. Act. But the heir-at-law in such an action has not now in this province an absolute right to a jury, and the court refused to direct one on the issues raised herein. *Re Lewis—Jackson v. Scott*, 11 P. R. 107.—Ferguson.

Action by two ratepayers, on behalf of themselves and all other ratepayers of A., against all the members of the municipal council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustee": that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper. *Morrow v. Comor*, 11 P. R. 423.—Proudfoot.

Held, that this being a case which before the O. J. Act would have been in the sole jurisdiction of the Court of Chancery, to grant the relief asked, the Divisional Court could act without the intervention of a second jury; and, the evidence failing to establish the plaintiff's right to the relief asked for, the decree was set aside; but as to the damages, as they had not been moved against, they were not interfered with. *James v. Clement*, 13 O. R. 115.—C. P. D.

This action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract and for

and for good cause, yet by the court, and not chambers. *Thurlow v. Person*.

fore the O. J. Act the exclusive jurisdiction, a and will be struck out. P. R. 270.—Dalton,

ive jurisdiction of the section 45, of the O. J. as exercised generally did not its exclusive as auxiliary jurisdiction. *Bank of Canada*, 11 P.

brought by the plaintiff other creditors to set aside transfer of notes, plaintiff was such an action of the O. J. Act, have been in the the Court of Chancery, within section 45, and to a jury. The practice N. A. v. Eddy, 9 P. R. practice. The question Proudfoot, J., was ap- pined, as the appeal was

ry had, before the O. J. on in actions to estab- to direct a trial by jury 99) is continued in the ion 45, O. J. Act. But an action has not now in ate right to a jury, and direct one on the issues is—*Jackson v. Scott*, 11

yers, on behalf of them- payers of A., against all municipal council of A., acting fraudulent-ly the treasurer of A., after it had come to their a defaulter, and allowed monies, causing loss to d, that the law attaches to municipal councillors, ent to charge them as word "trustee": that the former exclusive juris- diction of Chancery, and a jury improper. *Morrow v. Proudfoot*.

a case which before have been in the sole rt of Chancery, to grant isional Court could act n of a second jury; and, establish the plaintiff's for, the decree was set gements, as they had not y were not interfered f, 13 O. R. 115.—C. P. D.

ght to rescind a contract y the plaintiffs to the de- that the defendant had rt of the contract, and of the contract and for

injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof:—Held, that this was an action over the subject matter of which, before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction, and a jury notice was therefore improper, under section 77 of the Judicature Act, R. S. O. (1887) c. 44. *Toronto and Hamilton Navigation Co. v. Silcox*, 12 P. R. 622.—Dalton, Master.—Galt.

See *Bingham v. Warner*, 10 P. R. 621, p. 2045; *Fraser v. Johnston*, 12 P. R. 113, p. 1976.

## VII. SPECIAL JURY.

The trial judge certified for the defendant's costs of a special jury summoned at his instance. *Farquhar v. Robertson*, 13 P. R. 156.—Rose.

## VIII. TRIAL OF SEPARATE QUESTIONS ARISING IN THE SAME ACTION.

An action brought to enforce the performance by the defendants of a certain by-law passed by the plaintiffs, and also the performance of a duty imposed by the Railway Act, came on for trial without a jury, and the trial judge decided to try the first branch of the case separately; and after hearing evidence upon it, held that the by-law was not legally binding upon the defendants, and dismissed the action without hearing evidence on the second branch:—Held, that Con. Rule 655 must be read in conjunction with section 52, sub-section 12, of the Judicature Act, R. S. O. (1877) c. 44; and this case was not one calling for an application of the Rule by directing separate trials of the questions raised. A new trial was therefore ordered. *Village of Fort Erie v. Fort Erie Ferry R. W. Co.*, 13 P. R. 444.—Q. B. D.

## IX. CONDUCT OF CAUSE.

The defendants appeared by the same attorney pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness, both counsel claimed the right to cross-examine the witness:—Held (affirming the ruling of the judge at the trial), that the judge was right in allowing only one counsel to cross-examine the witness. *Walker v. McMillan*, 6 S. C. R. 241.

Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders. *International Bridge Co., v. Canada Southern R. W. Co.*, 7 A. R. 226. But see 19 C. L. J. 358.

At the trial counsel for the defendant objected that there was no sufficient case made out upon one branch of the plaintiff's claim, the rectification of an agreement. The defendants' counsel thereupon declined to argue the point until the evidence was closed, and the defendants then called one witness upon another point: as to the rectification, the learned judge ruled that the plaintiff had made out no case—and as to the other points he decided in defendants' favour, and dismissed the bill, with costs. Thereupon the plaintiff appealed to this court and the decree

was reversed and the relief prayed for given to the plaintiff. On settling the certificate of judgment the solicitor for the defendants objected to that part of it which directed the taking of the accounts between the parties, and that credit should be given for \$40,000, the value of the plant, etc., seeking to have the action remitted to the court below, in order to conclude the trial and take such evidence as the respondent might adduce in support of his defence, and moved the court to vary the certificate accordingly:—Held, that the defendant was bound by the course which he had elected to adopt, and the application was refused, with costs. *Macdonald v. Worthington*, 7 A. R. 531.

## X. RIGHT TO BEGIN.

Defendants admitted policy, proofs of death, probate, etc., and accepted burden of proof at the trial, and claimed the right to begin:—Held, the plaintiffs had the right to begin, notwithstanding such admissions. *Milner v. Confederation Life Assurance Co.*, 11 O. R. 120.—Q. B. D.

## XI. RIGHT TO REPLY.

The judge at the trial nonsuited, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The defendant's counsel cross-examined one of plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination:—Held, that by reason of such re-examination the plaintiff was not deprived of his right of calling witnesses in reply to the defendant's evidence of fraud; at all events, this was a matter for the judge at the trial, and also the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply. *McDonald v. Murray*, 5 O. R. 559.—C. P. D.

## XIII. JURY.

### 1. Challenging.

At the trial of an action the defendant's counsel challenged a jurymen for cause. On the trial judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the jurymen, but accepted the opinion of the judge, and the jurymen remained on the jury:—Held, that on a motion for a new trial an objection to the jurymen could not be entertained. The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because the jury there were biased against defendant:—Held, that this formed no ground for a new trial. *Wood v. McPherson*, 17 O. R. 163.—C. P. D.

### 2. Omission to Swear Juror.

The court will not grant a new trial because one of the jurors has not been sworn, where no

injustice is done thereby. *Goose v. Grand Trunk R. W. Co.*, 17 O. R. 721.—C. P. D.

### 3. Withdrawal of Juror.

The withdrawal of a juror at a trial has the effect of concluding the suit, and, with it, of determining the whole cause of action. *Flake v. Clapp*, 8 P. R. 62.—Dalton, Q. C.

### 4. Withdrawing Case from Jury.

In a Division Court suit a jury was demanded and called, but the presiding judge withdrew from their consideration everything except the amount of damages to be awarded, saying that there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The jury assessed the damages and judgment was entered for the plaintiff:—Held, that where the plaintiff furnishes evidence which the judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence does not conclude the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition. *Re Lewis v. Old*, 17 O. R. 610.—C. P. D.

See *Ryan v. Canada Southern R. W. Co.*, 10 O. R. 745, p. 1783; *Pettigrew v. Thomas*, 12 A. R. 577, p. 795.

### 5. Dispensing with Jury After Evidence Taken.

The judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised. *Marks v. Town of Windsor*, 17 O. R. 719.—C. P. D.

### 6. Directing Jury to Answer Questions of Fact.

In an action against a railway for injuries caused by a collision at a crossing, the jury in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did," said: "Yes."—Held, that though this was not very definite, yet taken with the evidence on which the jury acted it was sufficient. *Rosenberger v. Grand Trunk R. W. Co.*, 32 C. P. 349.—C. P. D.

Where a question was not put to the jury until after they had rendered their verdict and answered the other questions submitted to them, and after the judge had been moved for judgment upon those answers, but it was done while all the parties and their counsel were present and before the jury had left the court room:—Held, that the question had been properly put. *McLaren v. Canada Central R. W. Co.*, 32 C. P. 324.—C. P. D.

The judge is not bound under the O. J. Act to submit questions in writing to the jury.

*Lett v. St. Lawrence and Ottawa R. W. Co.*; *Hinton v. St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.—Q. B. D.

Per Patterson, J. A., it was not improper to leave to the jury the question whether the amount in this case was ascertained by the act of the parties. *Watson v. Severn*, 6 A. R. 559.

The R. S. O. (1877), c. 50, s. 264, makes it imperative upon the jury to answer questions submitted to them and prohibits them from giving a general verdict instead. But the judge after having put questions, may, nevertheless, in his discretion receive a general verdict. *Furlong v. Carroll*, 7 A. R. 145.

The new system of calling upon juries to reply to specific questions considered and discussed, and, per Hagarty, C. J., questioned. *Canada Central R. W. Co. v. McLaren*, 8 A. R. 564.

It was objected that the representation had not been found to be false to the knowledge of the plaintiff company; but:—Held, that the question as put to the jury having been assented to by counsel on both sides as one the finding on which would be decisive, it was too late to take this objection; and the effect of the finding must be taken to be that the defendant knew the representation, which was as to goods of his own manufacture, to be false. *Star Kidney Pad Co. v. Greenwood*, 5 O. R. 28.—Q. B. D.

An objection was taken to the charge, as being adverse:—Held, that the charge could not be complained of here, for to give effect to the objection would be to compel the judge to submit the case to the jury, leaving them to apply the evidence without any assistance from him, which was not the practice in this province. *Scougall v. Stapleton*, 12 O. R. 206.—C. P. D.

Per Rose, J.—There is nothing to prevent a judge directing the jury to find on equitable issues. In this case the jury having found for the defendants, the court, on the evidence, directed the judgment to be entered for the plaintiff. *Rae v. McDonald*, 13 O. R. 352.

In an action against McK. and M. for goods sold and delivered, the plaintiff swore that he had sold the goods to the defendants and on their credit, and his evidence was corroborated by the defendant McK. The defence showed that the goods were charged in plaintiff's books to C. McK. & Co. (the defendant McK. being a member of both firms), and credited the same way in C. McK. & Co.'s books, and that the notes of C. McK. & Co. were taken in payment, and it was claimed that the sale of the goods was to C. McK. & Co. The trial judge called the attention of the jury to the state of the entries in the books of the plaintiff and of C. McK. & Co., and to the taking of the notes, and to all the evidence relied on by the defence, and he left it entirely to the jury to say as to whom credit was given for the goods:—Held, affirming the judgment of the Supreme Court of New Brunswick (27 N. B. Rep. 42) Strong and Patterson, J.J. dissenting, that the case was properly left to the jury and a new trial was refused. *Miller v. Stephenson*, 16 S. C. R. 722.

In malicious prosecution. See *Gouver v. Lussé*, 16 O. R. 88, p. 2055; *Webber v. McLeod*, 16 O. R. 609, p. 1222.

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McK. and M. for goods plaintiff swore that he the defendants and on dence was corroborated . The defence showed rged in plaintiff's books defendant McK. being a and credited the same s. books, and that the were taken in payment, at the sale of the goods The trial judge called y to the state of the em- plaintiff and of C. McK. y of the notes, and to all y by the defence, and he jury to say as to whom goods :—Held, affirming Supreme Court of New *ap. 42* Strong and Pat- that the case was pro- and a new trial was re- *enson*, 16 S. C. R. 722.

ion. See *Gower v. Lussac*, *Webber v. McLeod*, 16

See *Providence Washington Ins. Co. v. Gerow*, 14 S. C. R. 731, p. 985; *Carter v. Grasett*, 14 A. R. 685, p. 2054.

#### XIV. VERDICT.

##### 1. Generally.

In an action against the sureties of an absconding assignee in insolvency, on the assignee's bond to the Queen under the statute, a verdict was entered at the trial for \$800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed by the parties that in case of such a decision, the amount for which the verdict should be entered was \$700 :—Held, that the verdict was not for a debt or sum certain within R. S. O. (1877) c. 50, s. 269, and that it should not carry interest from its entry. *Woodruff v. Canada Guarantee Co.*, 8 P. R. 532.—Hagarty.

The court refused to quash a conviction under the liquor license Act, affirmed on appeal, on the ground among others that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina v. Grainger*, 46 Q. B. 382.—Q. B. D.

Verdict subject to opinion of the court.—Power of the court. See *Creighton v. Chittick*, 7 S. C. R. 348, p. 117.

Commission allowed by jury without any evidence to support finding. See *Town of Welland v. Brown*, 4 O. R. 217, p. 72.

In an action against the defendant, as a surgeon, for negligence, the jury found for the plaintiff, but added to their verdict the following :—“We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention” :—Held, a mere expression of opinion, and that it did not nullify or affect the verdict. *Sheridan v. Pigeon*, 10 O. R. 632.—Q. B. D.

The judge at the trial in the County Court, entered a verdict for the plaintiff, instead of directing judgment to be entered, and afterwards refused a rule nisi to set aside such verdict. Rule 405 of the O. J. Act (Con. Rule 526) in effect forbids the granting of any rule to shew cause where the application is against the judgment of a judge who tries a cause without a jury. Quere, as to the application of this rule to County Courts by Rule 490 (Con. Rule 1257) :—Held (per Patterson, J. A.), that the entry of the verdict might be treated as a direction to enter judgment, and was a decision from which an appeal would lie under Rule 510, (see Con. Rule 798). An objection to an appeal from a judge refusing such rule might be raised by motion in chambers, but it was not obligatory to raise it in that manner. *Williams v. Crow*, 10 A. R. 301.

The jury were asked : “Did the defendant's house interfere injuriously with the light of the plaintiff's house?” They answered, “Yes, but not injuriously” :—Held, that in effect a question of law had been submitted to the jury and that the finding was too uncertain to support a judgment for the defendant. Per Osler, J. A., dissenting, that the finding of the jury plainly was, that the defendant's house did not

interfere injuriously with the light, and had caused no substantial diminution of the light necessary for the enjoyment of the plaintiff's house. Under all the circumstances, no objection having been made on the ground of misdirection the justice of the case did not require that a new trial should be granted. *Carter v. Grasett*, 14 A. R. 685.

In an action for wrongful dismissal the jury found (1) That there was a final bargain made between the parties (2) That the plaintiff was to get \$900 a year ; and in answer to the question “It being a condition of the bargain that the plaintiff's term of service should end if he was not fit to do the duties of a captain,” was the plaintiff fit to do the duties of a captain ?” (3) “It has not been satisfactorily shewn by the evidence,” and (4) The plaintiff was dismissed, and added as a rider the following : “Your jury believing that the plaintiff did not receive proper aid in the discharge of his duty, would recommend a verdict for plaintiff of \$100.” The judge entered a verdict for the defendant, and the plaintiff moved to set it aside. The Divisional Court being equally divided, the motion to set aside the verdict was dismissed ; but the Court of Appeal directed the judgment entered for the defendant to be reversed, and judgment for \$100 with County Court costs to be entered for the plaintiff, unless the defendant elected to have a time named to take a new trial ; Hagarty, C.J., dissenting. Per Boyd, C.—The onus was on the defendants to prove the unfitness and the jury, as is manifest by their recommendation, did not intend to pronounce against the plaintiff's competency. The findings were left in too uncertain a state to enter a verdict for either party against the will of the other. No material part of what the jury returns to the judge should be disregarded. Per Proudfoot, J.—The duty of the jury was completed when they answered the questions. It was for the judge to determine what the legal result of the answers was. The jury's recommendation would rather seem to have been done more for sympathy for the plaintiff than with the desire of affirming his competency which they had previously found was not proved. *St. Denis v. Baxter*, 13 O. R. 41.—Chy. D. Reversed 15 A. R. 387.

At the trial, the defendant's counsel raised the objection that the amount, if any, due the plaintiff for maintenance, was only payable at the end of the year. The trial judge overruled the objection, and decreed that plaintiff was entitled to receive \$2 a week, payable weekly. The defendants counsel then asked to have the amount payable monthly, to which the judge assented, and gave judgment accordingly :—Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it. *Sweeney v. Sweeney*, 16 O. R. 92.—C. P. D.

Sections 263, 264 of the C. L. P. Act R. S. O. (1887), c. 50, except in certain actions including malicious prosecution, the judge may require the jury to answer questions ; and “in such case the jury shall answer such questions, and shall not give any verdict ;” and by section 252, the parties in person, or by their attorney or counsel may waive trial by jury. In an action for malicious prosecution, the trial judge, without objection, left certain questions to the jury,

which they answered, but added that their verdict was for the plaintiff. The judge disregarded the general verdict and entered judgment, on the answers to the questions, for the defendant:—Held, that the parties must be assumed to have waived their right to a general verdict, and assented to judgment on the specific findings of fact; for if they could waive trial by jury altogether, there was no reason why they could not agree to the course adopted in this case. The jury therefore in finding a general verdict were doing what it was agreed they should not do, and what the parties and the court dispensed with their doing. *Gower v. Luese*, 16 O. R. 88.—C. P. D.

Recommendation by jury in verdict as to costs. See *Walmley v. Mitchell*, 5 O. R. 427, p. 377; *Weaver v. Sawyer & Co.*, 16 A. R. 422, p. 378; *Farquhar v. Robertson*, 13 P. R. 156, p. 379.

See *Star Kidney Pad Co. v. Greenwood*, 5 O. R. 28, p. 2052; *Webber v. McLeod*, 16 O. R. 609, p. 1222.

### TRINITY TERM.

Effect of abolition of the computation of time. See *Kean v. Edwards*, 12 P. R. 625, p. 2022.

### TROVER.

See CONVERSION.

In trover for goods against an assignee in insolvency:—Held, following *In re Barrett*, 5 A. R. 206, that the assignee may object to the absence of a bill of sale on an alleged sale by the insolvent just as an execution creditor or subsequent purchaser for value may do. *Snarr v. Smith*, 45 Q. B. 150.

The plaintiff alleged in the count in trover that the defendant converted to his own use, or wrongfully deprived the plaintiff, etc.:—Held, overruling *Bain v. MacKay*, 5 P. R. 471, that the count was not embarrassing. *Taylor v. Adams*, 8 P. R. 66.—*Dalton, Master*.

In an action of trover or conversion against appellant, high sheriff of the county of Cumberland, N. S., to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff and justification under a writ of execution against the execution debtor. The judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shewn the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence":—Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shewn title or right of possession to the goods in ques-

tion, and therefore there was misdirection. *McLean v. Hannon*, 3 S. C. R. 706.

Action of trover charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. R. the respondent's assignor. One of the branches of appellants' business was supplying merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold and the proceeds placed by appellants to credit of their customers. One S., who so dealt with appellants, in October, 1877, sent them seventy-seven barrels of herring and 236 barrels of mackerel. On 3rd November, 1877, S. sold all the fish he had, including those mackerel, to one R. at \$8 a barrel, when some were delivered, leaving 236 barrels in the appellants' store, and in payment received \$4,000 and a promissory note for \$4,000 at four months. This note was given to appellants by S. on account of his general indebtedness. On the 4th March, 1878, R. became insolvent, and the respondent who was subsequently appointed assignee demanded the 236 barrels of mackerel and brought an action to recover the same. After issue was joined the appellants proved against the estate of R. on the note and received a dividend on it. The chief justice at the trial gave judgment for \$1,888, less \$46.10 for one month's insurance and six months' storage, and found that the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting:—Held (Strong, J., dissenting), that the appellants having failed to prove the right of property in themselves, upon which they relied at the trial, the respondent had, as against the appellants, a right to the immediate possession of the fish. 2. That S. had not stored the fish with appellants by way of security for a debt due by him, and as the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole amount of insolvent's note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon. *Troop v. Hart*, 7 S. C. R. 512.

A cargo of coal was consigned to B. and the master of the vessel refused to deliver it unless the freight was prepaid, which B. in his turn refused but offered to pay it ton by ton as delivered. By direction of the owner's agent the coal was taken out of the vessel and stored, whereupon B. tendered the amount of the freight and demanded it, but the agent still refused to deliver unless the cost of storage was paid. In trover against the master:—Held, affirming the judgment of the court below, Gwynne, J., dissenting, that the refusal of the agent after tender of the full freight was a conversion of the cargo for which the trover would lie:—Held, per Patterson, J., that trover would lie, but not against the master, who was only the servant of the agent, and acting under his directions:—Held, also, that an action ex delicto for breach of duty in not delivering the coal according to the bill of lading would not lie. *Winchester v. Busby*, 16 S. C. R. 336.

See *Stoeser v. Springer*, 7 A. R. 497, p. 1838; *Blackley v. Dooley*, 18 O. R. 381, p. 345.



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## TRUSTS AND TRUSTEES.

### I. CREATION OF TRUST, 2057.

### II. OPERATION OF THE STATUTE OF USES— See USES AND TRUSTS.

### III. RESULTING TRUST, 2061.

### IV. EVIDENCE OF TRUST, 2061.

### V. NOTICE OF TRUST, 2062.

### VI. TRUSTEES.

1. *Appointment of*, 2065.
2. *Acceptance of Trust*, 2066.
3. *Change of*, 2066.
4. *Removal of*, 2067.
5. *Compensation and Allowance*, 2067.
6. *Delegation of Power by Trustee*, 2069.
7. *Power of Trustee to Bind Co-Trustee*, 2069.
8. *Liability for Acts of Co-Trustee—See EXECUTORS AND ADMINISTRATORS.*

#### 9. *Investments by*, 2069.

#### 10. *Sales and Leases by*, 2071.

#### 11. *Mortgages by*, 2074.

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#### 13. *When Trustee's Interest is in Conflict with Trust Estate*, 2075.

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#### 16. *Deposit of Trust Moneys*, 2077.

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#### 18. *Accounts*, 2078.

#### 19. *Liability for Interest*, 2079.

#### 20. *Costs and Expenses*, 2079.

#### 21. *Other Cases*, 2080.

#### 22. *Proceedings Against*.

##### (a) *Injunction to Restrain from Selling*, 2080.

##### (b) *Limitation of Actions in Relation to Trusts—See LIMITATION OF ACTIONS.*

#### 23. *Of Infants—See INFANTS.*

#### 24. *Of Schools—See PUBLIC SCHOOLS.*

#### 25. *Of Religious Institutions—See CHURCH.*

### VII. BENEFICIARIES AND CESTUI QUE TRUST.

#### 1. *Dealings between Trustee and Cestui que Trust*, 2081.

#### 2. *Assent of*, to Transactions, 2081.

#### 3. *Right to Possession of Property*, 2081.

#### 4. *Parties to Actions—See PLEADING.*

### VIII. MISCELLANEOUS CASES, 2082.

### IX. EXECUTORS AND ADMINISTRATORS—See EXECUTORS AND ADMINISTRATORS.

### X. CONSTRUCTION OF WILLS—See WILL.

#### I. CREATION OF TRUST.

The defendant in consideration that his father would convey to him certain lands in the town-

ship of Caledon, undertook and agreed to convey to the plaintiff, a younger brother, 100 acres of land in the township of Artemesia. The father conveyed the land to the defendant, but instead of his conveying to the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age:—Held, that under these circumstances the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the Statute of Limitations; but the defendant having denied the agreement to convey, which, however, was clearly established by his own evidence, the court (Blake, V. C.), on dismissing the bill, refused to give defendant his costs. *Ferguson v. Ferguson*, 28 Chy. 380.

The operation of an ordinary deed of bargain and sale under the Short Forms Act—R. S. O. (1877) c. 102—conveying lands to trustees considered and acted on. *Seaton v. Lunney*, 27 Chy. 169.—Chy. D.

Creation of trusts under building contract in favour of sub-contractors. See *Forhan v. Lalonde*, 27 Chy. 600, p. 1166, 1167.

A testator having disposed of one third of the residue of his estate, real and personal, devised and bequeathed the remainder to J. C. to hold to him, his heirs, executors, administrators, or assigns for ever in trust for the benefit of the testator's two sisters, and with all reasonable expedition to convert the same into money, and apply the same, or the proceeds thereof for the benefit of the said two sisters as he should consider just. And he directed that his other trustees should not enquire into or interfere with such distribution as J. C. might choose to make among the said two sisters, except when their concurrence should be necessary for conformity. J. C. predeceased the testator:—Held, that the above was in substance an imperative declaration of a trust of the whole remainder for the equal benefit of the two sisters with a discretionary power reposed in the trustee as to its mode of execution, and the court would undertake to discharge vicariously what could not otherwise be done, owing to J. C. predeceasing the testator, by referring it to the master to ascertain the proper mode of carrying out the directions of the will. *Re Charteris*, 25 Chy. 376 commented on. Order made referring it to the master to work out a scheme for the application and distribution of the fund. *Charteris v. Charteris*, 10 O. R. 738.—Boyd.

A chattel mortgage made by D. to McL. was given to secure a sum made up of debts due to McL. and two other persons; McL. made the usual affidavit of bona fides, asserting that the whole sum was due him; no trust of any kind appeared upon the mortgage, though the intention was that McL. should hold it as trustee for the other two. The mortgage was filed within the proper time after its execution. McL. assigned the mortgage to the plaintiffs, who afterwards obtained judgment against D. and under the execution the sheriff seized the property covered by the mortgage. After this seizure the plaintiffs instructed the sheriff to withdraw, and then took and held possession of the property under the mortgage. The defendants placed writs of execution against the goods

of D. in the hands of the sheriff after the plaintiffs had taken possession under their mortgage. D. was solvent when he gave the chattel mortgage, but insolvent when the plaintiffs took possession:—Held, that the fact that no trust was declared on the face of the mortgage was nothing more than an informality, and was cured by the taking possession before the rights of creditors had attached on the chattels; and neither the insolvency of the mortgagor at the time of taking possession, nor the fact of the seizure under execution before taking possession affected the position of the plaintiffs:—Held, also, that the taking possession could not be viewed as a preference within 48 Vict. c. 26, s. 2 (Ont.). *Bank of Hamilton v. Tumblyn*, 16 O. R. 247.—Q. B. D.

By a settlement certain lands were conveyed to trustees, upon trust to hold the said land \* \* \* situated \* \* \* being lot No. 2 \* \* \* to G. A.; and also lot No. 1, situate \* \* \* to A. A., sons of (the settlor) \* \* \* to the use of them their heirs and assigns as joint tenants, and not as tenants in common \* \* \* and, lastly, upon trust, that the said trustees \* \* \* shall, well, and sufficiently convey and assure, absolutely in fee to the said parties respectively, etc.:—Held, that this trust was an executed trust, in which the limitations were expressly declared, and that neither a difficulty in ascertaining the true construction and legal meaning of the words used, nor the final trust directing the trustees to make the conveyances of the legal estate made any difference; and that the words must receive the same construction as if they were found in a common law conveyance:—Held, also, that an estate in fee in lot 2 passed to G. A., and that the words "as joint tenants, and not as tenants in common," were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV. c. 1, s. 48, and that they were needlessly used:—Held, also, that as G. A. died intestate and unmarried, 1st January, 1852, the defendants, as the children of a deceased brother of the plaintiff, took an equal share in the lands as co-tenants in common with the plaintiff A. A.: that they were as much entitled to the possession of the lands as the plaintiff, and that the plaintiff having obtained the legal estate from the trustees should hold the same as a trustee for all the tenants in common:—Held, also, that there being no proof of ouster of the plaintiff, he could not recover from the defendants any mesne profits in this action. *Adamson v. Adamson*, 17 O. R. 407.—Ferguson.

The plaintiff and defendant were brothers and their father, who died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other bequests devised the land in question to the defendant. The testator had endorsed a note for the accommodation of the plaintiff, and after the testator's death the holders of this note sued the plaintiff and the two brothers as executors and recovered judgment against them. The land in question was sold under that judgment at sheriff's sale and was bought in by the plaintiff. The will had been registered but had not been proved. Subsequently the plaintiff mortgaged the land in question and sold it subject to the mortgage.

The mortgagees afterwards sold and the plaintiff again bought in the land:—Held, that it being the plaintiff's duty to pay the note, he had not acquired the title to the land for his own benefit at the sheriff's sale, but became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time:—Held, further, that assuming that the plaintiff was not a trustee for the defendant and had no paper title there was not, upon the evidence, any possession of the land in question by the plaintiff sufficient to confer a title under the Statute of Limitations:—Held, lastly, that the situation of the parties not having changed, the defendant was not bound by laches. Judgment of the Chancery Division affirmed. *McDonald v. McDonald*, 17 A. R. 192.

A firm composed of two members dissolved partnership. One of the partners continued the business, giving to the retiring partner a number of notes in payment of his share in the business. The continuing partner afterwards formed a partnership with another person and, by the articles thereof, transferred to the new firm, as his contribution to the capital, all the assets of his business subject to the deduction therefrom of his liabilities, which they were sufficient to pay in full, and which were to be assumed by the copartnership and charged against him. Among these liabilities, known to the new partner, were a number of the notes which the retiring partner had endorsed to the plaintiff before maturity. The new firm paid two of these notes and interest on another, and had some negotiations with the plaintiff for an extension of time for payment of the unpaid notes. Per *Hagarty, C. J. O.*, *Osler and MacLennan, J.J. A.*, differing on this point from the judgment of the Queen's Bench Division, 14 O. R. 137, that no trust was established in favour of the retiring partner by the articles of partnership of the new firm, and that the plaintiff was not entitled to enforce against the new firm the performance of the stipulation in the articles for payment of the notes held by her. Per *Burton, J.A.* There was a trust and the judgment should be affirmed on that ground. Per *Hagarty, C. J. O.* The judgment should be affirmed on the ground that the evidence established an independent agreement between the new firm and the plaintiff to pay the notes in question. Per *Burton, Osler, and MacLennan, J.J. A.* No such agreement was proved. *Gregory v. Williams*, 3 Mer. 582, and *In re Empress Engineering Co.*, 16 Ch. D. 125, specially considered. The court being thus evenly divided as to the result, the appeal was dismissed, with costs. *Henderson v. Kelley*, 17 A. R. 456.—Q. B. D. Reversed 8 C. sub nom. *Osborne v. Kelley*, 18 S. C. R. 698, p. 1540.

See *Glass v. Burt*, 8 O. R. 391, p. 836; *Kennedy v. City of Toronto*, 12 O. R. 211, p. 493; *Ferris v. Ferris*, 9 O. R. 393, p. 593; *Giraldi v. La Banque Jacques Cartier*, 9 S. C. R. 597 p. 133; *Imperial Bank of Canada v. Melcalfe*, 11 O. R. 467, p. 591; *Coyne v. Brodsky*, 13 O. R. 173; 15 A. R. 159, p. 1206; *Gill v. Gilmour*, 14 O. R. 129, p. 869; *Tupper v. Annand*, 16 S. C. R. 718, p. 324; *Re Iron Clay Brick Manufacturing Co.*—*Turner's Case*, 19 O. R. 113, p. 268.

sold and the plaintiff—Held, that it being the note, he had not for his own benefit named a trustee for the deed that this trust resided in the land for further, that assuming a trustee for the deed there was not, in possession of the land in sufficient to confer a Limitations:—Held, the parties not having been not bound by the Chancery Division *McDonald*, 17 A. R.

o members dissolved partners continued the retiring partner a number of his share in the business afterwards formed another person and, by referred to the new firm, capital, all the assets the deduction thereof they were sufficient were to be assumed by charged against him. known to the new partner notes which the retiring partner before paid two of these notes and had some negotiable notes. Per Hagarty, J., dissenting from the judgment of the Queen's Bench, 137, that no trust was created by the retiring partner by the new firm, and not entitled to enforce the performance of the notes for payment of the notes. Per Burton, J.A. There was no agreement should be affirmed Hagarty, C. J. O. The court held on the ground that an independent agreement and the plaintiff to form. Per Burton, Oeler, No such agreement *Williams*, 3 Mer. 582, *Meering Co.*, 16 Ch. D. 11. The court being to the result, the apportionment. *Henderson v. B. D.* Reversed *S. C.* *Rey*, 18 S. C. R. 698, p.

### III. RESULTING TRUSTS.

A resulting trust arises only in favour of a party paying the whole or an aliquot part of the purchase money; and in such case the trust is of a part of the purchased estate proportioned to the sum paid. No such trust arises from the circumstances of a man making advances on behalf of another who has agreed to buy the estate. *Sanderson v. McKercher*, 13 A. R. 561.

The defendant, whose daughter had married a brother of the plaintiff and who was an executor named in the will of S., the father of the plaintiff, took a more than common interest in the settlement of his testator's estate. In consequence he suggested to the plaintiff the desirability of his purchasing the estate of one G., situated near the S. homestead; as by so doing the plaintiff could retain the G. farm leaving the homestead to be equally divided between his two brothers: saying in answer to plaintiff's objection of want of means that he defendant, would assist him with his payments. The purchase was accordingly effected, and plaintiff and defendant paid up the purchase money, but not in any agreed proportions, some of defendant's advances being made partly in cash and partly in kind and the conveyance was made to the plaintiff, the defendant subscribing as the witness and retaining possession of the deed. On an attempted settlement of their respective rights the defendant under the circumstances insisted that he and the plaintiff had purchased on joint account and that there was a resulting trust in his favour as to a moiety of the land and that he was entitled to the then value thereof and on proceedings taken by the plaintiff, *Armour, J.*, gave judgment for the defendant. On appeal to this court:—Held (Hagarty, C. J. O., dissenting), that on the evidence there was not a resulting trust; that all defendant could claim was a lien for the amount advanced by him; and a reference was directed to take the account and if the amount found due should not be paid in six months that the estate should be sold, the amount due defendant paid to him and the surplus, if any, paid to the plaintiff. *Id.*

But held by the Supreme Court reversing the judgment of the court below (13 A. R. 561), and confirming the judgment of the trial judge, Henry, J., dissenting, that the evidence greatly preponderated in favour of the contention of McK. that the purchase was a joint one by himself and S.:—Held, also, that S. being liable for an ascertained portion of the purchase money there was a resulting trust in his favour for his interest in the land. *S. C. sub nom. McKercher v. Sanderson*, 15 S. C. R. 296.

See *Tupper v. Annand*, 16 S. C. R. 718, p. 324.

### IV. EVIDENCE OF TRUST.

In an action for the possession of lands under a mortgage by defendant's brother W., and the foreclosure thereof, the defendant claimed under a trust of the lands by W. in his favour; and also a title by possession. The trust was a parol one, namely, that W. should procure a lease of the lands for defendant, who was then under age, from the Canada Company, the lease apparently containing a right of purchase; and should afterwards pay the purchase money and

take the deed in his, W.'s name, and hold it until defendant became well when he was to transfer it to defendant, he having been ill at the time. The defendant paid the money for the lease and the purchase money for the land:—Held, that the parol evidence was not sufficient to support the trust; but, in any event, as the trust was to be enforced against W. and his grantees it could not prevail against plaintiffs' mortgage, it having been registered without notice of the trust:—Held, also, that the evidence failed to establish a title by possession. *Bank of Montreal v. Stewart*, 140 R. 482.—*Rose*.

See *McLean v. Bruce*, 29 Chy. 507, p. 2066.

### V. NOTICE OF TRUST.

G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half the lot to J. B. P., who conveyed it to trustees to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land, as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. & E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F., conveyed to E. under whom the defendants claimed. E. F. now brought this action to recover the land:—Held (Hagarty, C. J., dissenting), that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.: that this land was subject to the trusts of the previous conveyance to them: that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover:—Held, also, that there should be a reference to the master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved. Per Hagarty, C. J. The legal estate being in the defendant by conveyance from the trustees, the plaintiff should shew an equity to recover what she claimed as part of the trust estate, which she had not done: that the patent to the trustees, though describing them as such, did not in terms declare any trust respecting this land, and it could not be assumed that it formed part of the trust premises. Per Armour, J. The case was not within R. S. O. (1877) c. 95, s. 4, as to improvements under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and cestui

R. 391, p. 836; *Kennedy* R. 211, p. 493; *Ferris* p. 593; *Gibaldi v. La* 9 S. C. R. 597 p. 133; *v. Metcalfe*, 11 O. R. 173; *Gill v. Gilmour*, 14 S. C. R. 113; *per v. Annand*, 16 S. C. R. 718, p. 324; *per v. Annand*, 16 S. C. R. 718, p. 324.

que trust. Per Cameron, J. The case was within the statute. *Foott v. Rice*, 4 O. R. 94.—Q. B. D. See next case.

The plaintiff, who was cestuique trust of certain lands held by B. & P. under a settlement which provided against anticipation, became a party to an instrument, in which B. & P. were named as parties, but did not execute, which amongst other things, declared that B. & P. had no real interest in certain lands which had been allotted to and were subsequently granted to them by a patent from the Crown, in which they were described as trustees for the plaintiff, for the purpose of making compensation for a deficiency in the settled estate, and that the person really entitled to such compensation was her husband, G. W. F. Subsequently B. and P. executed a similar declaration and afterwards G. W. F. joined with them in a conveyance of these lands to a bona fide purchaser (E.), under whom the defendants claimed:—Held (affirming the judgment of Boyd, C., Galt, J., dissenting), (1) That the lands granted as compensation were subject to the terms of the settlement; (2) That the plaintiff's declaration in favour of her husband was inoperative in face of the restraint upon anticipation; and (3) that the terms of the grant from the Crown were sufficient to put E. on inquiry, and that he and the defendants must be taken to have had notice of the settlement, and the plaintiff was therefore entitled to recover. Per Galt, J.—The patent granting the compensation described B. & P. as trustees of the plaintiff, but did not grant the lands to them as such, and it could not be assumed, in the face of the declaration as to the title of G. W. F., that the plaintiff was the party entitled to such compensation. *Foott v. Rice*, 4 O. R. 94, affirmed. *Foott v. McGeorge*, 12 A. R. 351.

The plaintiff placed in the hand of one J., a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a loan company, and which it was arranged, between the plaintiff and J., in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the loan company, amounting with interest to \$6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for \$3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff and transmitted the same to the plaintiff on the 26th of August, 1881, telling the plaintiff in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th September following:—Held, that the bank was not affected with the notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof. After the deposit of the plaintiff's money J. recovered a sum of \$1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit

always exceeded this sum:—Held, that the moneys so deposited by J. had been held by him in a fiduciary character, and might be followed by B. & S.: but (in this reversing the judgment of the court below) as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand. The bank claimed the right to charge against the account in priority to the claims of the plaintiff and S. cheques and notes of J. presented or maturing after notice to the bank of J.'s death:—Held, that they could not do so, and in consequence of having made such claim both in this court and the court below they were refused their costs. *Bailey v. Jellett*, 9 A. R. 187.

A holder of shares "in trust" is not a mandataire prête-nom and holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of the colony a transferee from such holder is bound to enquire whether the transfer is authorized by the nature of the trust. *Bank of Montreal v. Sweeney*, 12 App. Cas. 617; 12 S. C. R. 661.

Three persons occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interests a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator:—Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that no actual notice to them or to the company being shewn the bank had no lien. Judgment of the County Court of York reversed. *In re Herr Piano Co.*, 17 A. R. 333.

The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers, and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of "margins" certain other shares in the same company, the transfer being in the same form "in trust." Subsequently the loan company were paid off by the brokers at the plaintiff's request, and the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier "in trust," and from time to time changed the loan to other banks and financial institutions each transfer being made from and to the managers thereof "in trust." An allotment of new shares was taken up by the then holders of the pledged shares at the request of the brokers. Subsequently the brokers on the security of the old and new shares obtained a loan from the defendants of a much larger

m:—Held, that the J. had been held by er, and might be fol- in this reversing the (below) as between the and a first charge upon y, for the full amount he balance was appli- the plaintiff's demand. ight to charge against to the claims of the and notes of J. pre- notice to the bank of they could not do so, ving made such claim court below they were y v. *Jellett*, 9 A.R. 187.

"in trust" is not a man- holds subject to a prior person undisclosed. forbidden by the law of from such holder is or the transfer is auth- the trust. *Bank of App. Cas.* 617; 12 S. C.

ing a fiduciary position partners in a firm, interests a certain sum of creditors' claims. out out of moneys of the riated by them. Sub- formed into a joint stock of the partnership were to the company. The is failed, and a winding- the original assets, upon a lien, to a considerable possession of the liquida- original partners were not ve notice of the means partners obtained the that no actual notice to being shewn the bank of the County Court of *Herr Piano Co.*, 17 A.

from a loan company an y of certain shares in a numbered or capable of re transferred by him to an company "in trust." o brokers, and were as eck speculations for the rred to them as security "margins" certain other any, the transfer being ust." Subsequently the d off by the brokers at and the brokers continued as well as the others as shares the brokers then an a bank, transferring n trust," and from time loan to other banks and ch transfer being made ers thereof "in trust." gers was taken up by the aged shares at the request quently the brokers on and new shares obtained lants of a much larger

amount than the amount due by the plaintiff to the brokers, the shares being transferred by the then holders to the defendants:—Held, reversing the judgment of Street, J. (19 O. R. 272), that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers; and that the words "in trust" in the transfers meant that the various transferees were holding the shares "in trust" for their respective institutions. *Duggan v. London & Canadian Loan and Agency Co.*, 18 A. R. 303.

One of two joint trustees assumed to lend trust moneys on the security of mortgages on land, taking the mortgages to himself alone "as trustee of the estate and effects of J. C., deceased." These mortgages were hypothecated by him to, and moneys were advanced to him by, the defendants, ostensibly to meet an unexpected call by one of the beneficiaries; but the moneys were not so applied, nor otherwise for the benefit of the estate, and they were not required for any such purposes under the terms of the will creating the trust. In an action by the other trustee and two new trustees, who were also beneficiaries, appointed in his stead:—Held, that he had been guilty of two breaches of trust, and that the plaintiffs were entitled to follow the trust securities and to make the defendants account for all moneys received by them thereunder. *Cumming v. Landed Bankin, and Loan Co.*, 19 O. R. 426.—*Boyd*. Affirmed 20 O. R. 382.

See *Wright v. Leys*, 8 O. R. 88, p. 1875; *Bank of Montreal v. Stewart*, 14 O. R. 482, p. 2062.

## VI. TRUSTEES.

### 1. Appointment of.

A testator devised certain properties to H. F. M., J. H. M., and D. M., as tenants in common, and charged the same with \$100,000 to be paid by them to his son, and two daughters, married women, share and share alike, through his wife M. M., as trustee as therein mentioned; and directed that at the death of M. M. the said \$100,000 should be held by the said devisees and their survivors on the trusts of the will, "unless my said wife shall have previously appointed, by will or otherwise, any other person or persons to be a trustee in her place, which I hereby authorize and give her power to do." On 5th November, 1873, M. M., by deed professed to nominate and appoint L. R. and J. U., to be trustees in her place under the will, and afterwards by another deed of 6th October, 1877, again appointed L. R. and J. U. to be such trustees:—Held, that the will only authorized M. M., to appoint a trustee to be such after her death, and neither of the appointments of L. R. and J. U. were authorized by the will:—Held, however, that although R. S. O. (1877), c. 107, s. 30, could not be invoked to authorize either appointment, since it did not come into force till 31st December, 1877, yet under 40 Vict. c. 8, s. 30. (Ont.), assented to on 2nd March, 1877, the latter appointment was a good and valid one, for that Act applies to the case of a trustee appointed before the passing of it, who desires to be discharged from the trust, and consequently money paid to M. M. as such trustee, after the appointment of 6th October, 1877, did not discharge the

debt:—Held, also, that the fact that L. R. and J. U. were the husbands of the female cestui que trust, although it appeared from the will that the testator intended that the legacies should be free from the control of any present or future husband, did not make the appointment bad, although it might be that if the court were appointing trustees, the husbands of the cestui que trust would not be appointed. *McLachlin v. Usborne*; *Magee v. Usborne*, 7 O. R. 297.—*Ferguson*.

40 Vict. c. 8, s. 30 (Ont.), is very broad in its language, and a trustee who has from the beginning been a sole trustee has, under it, the same position and power as a last retiring trustee, or a sole surviving trustee. *Id.*

Seemingly, that 40 Vict. c. 8, s. 30 (Ont.), is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority. *Id.*

See *In re Treleven and Horner*, 28 Chy. 624, p. 2081.

### 2. Acceptance of Trust.

The plaintiffs, A. & J. filed a bill for the purpose of having a deed made to the defendant by J. declared void, as having been obtained by fraud and misrepresentation. The bill alleged that J. had subsequently made a deed of the same property to A., for the purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant the bill alleging that such deed to A. was made to him "as trustee for the heirs of A. M." who had died seized. The bill in no place alleged that A. was trustee, but in the following paragraph it was stated that "before the execution of such last mentioned deed the heirs of the said A. M., who are the rightful owners of the said land," etc.—Held, that notwithstanding the absence of any express allegation of A. being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was overruled with costs. A demurrer ex tenuis for misjoinder of plaintiffs, it appearing by the will that J. had no interest in the questions raised, was allowed, without costs. *Roche v. Jordan*, 20 Chy. 573, followed. *McLean v. Bruce*, 29 Chy. 507.

### 3. Change of.

The R. S. O. (1877), c. 107, s. 3, provides that every new trustee shall have the same powers, authorities, and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust. Where a mortgage made in favour of two trustees of a marriage settlement, and which contained a power of sale exercisable by them, but not by an assignee of the mortgage, not being in conformity with the Short Form of Mortgage Act, was together with the lands therein, on the resignation of the trustees, assigned to a new trustee appointed in their place:—Held, that the new trustee stood in the place of the former trustees, and could exercise the power



of sale, not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust. *Re Gilmour and White*, 14 O. R. 694.—Proudfoot.

See *McLachlin v. Usborne*; *Mayee v. Usborne*, 7 O. R. 297, p. 2066.

#### 4. Removal of.

In an action to account and for removal from trusteeship instituted by the party who had appointed the defendant trustee and curator to a substitution created by marriage contract, a tutor ad hoc to the minor children and appellee to the substitution has not sufficient quality to intervene in said suit to represent the minors. Art. 269 C. C. provides for the only case where a tutor ad hoc can be appointed to minors. Strong, J., dissenting. *Ratray v. Larue*, 15 S. C. R. 102.

In an action by an incorporated educational institute for the removal of one of the trustees, who also acted as secretary, for alleged improper dealing with the corporate funds, judgment was given, but without any finding of wilful misconduct, directing such trustee's removal, on the ground that so much doubt was cast upon his dealings with the trust funds that it would not be proper to allow him to remain a member of the board. Such an action is maintainable without making the attorney-general a party. *Wilberforce Educational Institute v. Holden*, 17 O. R. 439.—Rose.

#### 5. Compensation and Allowance.

Held, following the case of the commissioners of the Cobourg Town Trust, 22 Chy. 377, that the commissioners of the Toronto Harbour were entitled to compensation for their services; and this whether the harbour belonged to the Dominion or the Provincial Government, as in the event of it being found to belong to the Dominion it must be assumed that the Dominion Government intended the commissioners to be subject to the law of the province in which the trust was to be administered. *Re The Toronto Harbour Commissioners*, 28 Chy. 195.—Spragge.

The sum to be allowed should be such as would be a reasonable compensation for the services rendered, and at the same time such a moderate amount as would not be an inducement to members of the city council, or of the board of trade, or others, to seek the office for the sake of the emolument. The duties of the office being shown to be not at all onerous, an allowance of \$50 a year was named as sufficient to obtain the services of the right class of men to discharge them. *Id.*

The rule that a trustee must not have a personal interest in conflict with his duty as such trustee, applies as well to public as to private trusts. Therefore, where one of the commissioners of a harbour had large landed interests adjacent to and upon one part of it, and was interested in having that portion of the harbour improved, the court (Spragge, C.), on directing an allowance to be made to the commissioners for their services, expressly excepted the commissioner so interested from participating therein, and this although he had not applied for any

compensation and had at the board of commissioners opposed any such allowance being made. *Id.*

What is proper compensation to be allowed to a trustee for his management of the trust estate is a matter of opinion, and even if, in granting the allowance, the court below may have erred on the side of liberality that alone is not sufficient ground for reversing the judgment. Where the master at Guelph had allowed \$125, which the court, on appeal, increased to \$250, this court refused to interfere. *McDonald v. Davidson*, 6 A. R. 320.

Trustees on assuming the trust estate are not to be allowed a commission for merely taking the same over; but trustees, properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission, for the receipt and proper application of the estate, payable out of the corpus. *Re Berkeley's Trusts*, 8 P. R. 193.—Blake.

Trustees are not entitled to a commission for the investment or reinvestment of the funds of the estate. They are entitled to a commission on the receipt and payment of the income of the estate, payable out of the income, and to a compensation for looking after the estate, payable out of the corpus. *Id.*

Trustees may not unreasonably be allowed something for services not covered by the commission awarded. *Id.*

The master has power to allow a lump sum to a trustee as his remuneration for the care and management of real estate, but to entitle him to such sum there ought to be evidence to enable the court reasonably to see that the services for which such sum is asked have been rendered, and to make a proper allowance therefor. Where a master fixed a sum on evidence, not sufficiently particular, the case, on appeal, was referred back to him, with leave to the trustee to give proper evidence. The trustee to pay the costs of the appeal and the additional costs in the master's office. *Stinson v. Stinson*, 8 P. R. 560.—Ferguson.

It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust; and a clause so indemnifying a trustee is infused into every trust deed; and the statute R. S. O. (1877), c. 107, s. 3, does little more than what courts of equity had been accustomed to do without any statutory direction. Therefore a trustee who had been induced by a settler to accept a trust under an instrument void by the law of the settler's domicile, is entitled to be reimbursed by such settler for all his expenses incurred in the execution of the trust. *Hughes v. Rees*, 10 P. R. 301.—Hodgins, *Master in Ordinary*.

Seemingly, that though the trust deed in question was invalid, and notwithstanding *Smith v. Dresser*, L. R. 1 Eq. 651, 35 Beav. 378, yet as against one who himself assisted in creating the trust, a trustee acting under it would have been entitled to expenses incurred in respect of it; but upon the facts stated in the report, it was held that the sums claimed were not shown to have been incurred in respect of the trust deed. *S. O.*, 9 O. R. 198.—Proudfoot.

at the board of commission allowance being made.

to be allowed to the trustee of the trust estate and even if, in granting the same, the court below may have erred, it is not sufficient to set aside the judgment. Where the allowance had allowed \$125, which was increased to \$250, this was affirmed. *McDonald v. McDonald*, 10 O. R. 10.

The trustee of the trust estate is not entitled to a commission for merely taking the trust estate, properly dealing with it, and handing it over to the trustee. He is entitled to one commission only on the corpus. *Re B. 193*.—Blake.

The trustee of the trust estate is not entitled to a commission for the investment of the funds of the trust estate, but is entitled to a commission on the income of the trust estate, and to a commission on the principal after the estate, payable to the trustee.

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Trustees under a marriage settlement exchanged an investment of the estate in Manitoba lands into the stock of a land company. Nothing by way of income had ever been realized from either land or stock, and it was stated that both were valueless. The responsibility of making the exchange was taken away by the consent of those interested.—Held, that a percentage upon the nominal value of the stock was not the way to arrive at the trustees' remuneration, but that they should be allowed a sum to cover their trouble in making the exchange; and the allowance made by a referee was reduced from \$162.50 to \$50. *Re Prittie Trusts*, 13 P. R. 19.—Street.

Certain rents were collected by the trustees through an agent, whom they paid by commission.—Held, that they were justified in employing an agent to make the actual collections for them, but were bound to look after the agent, and for their care, trouble, and responsibility were entitled to an allowance of two and a-half per cent. upon the rents collected. *Ib.*

In the province of Nova Scotia prior to the passing of 51 Vict. c. 11, s. 69, the rule of English law relating to commission to trustees was in force, and no such commission could be allowed unless provided by the trust. *Power v. Menzies*, 17 S. C. R. 287.

See *Hayes v. Hayes*, 29 Chy. 90, p. 1682; *Burn v. Gifford*, 8 P. R. 44, p. 2079; *Burn v. Burn*, 8 O. R. 237, p. 1422; *Taylor v. Magrath*, 10 O. R. 669, p. 2079; *Re Bolt and Iron Co.*—*Livingstone's Case*, 14 O. R. 211; 16 A. R. 397, pp. 260, 267.

See also EXECUTORS AND ADMINISTRATORS.

#### 6. Delegation of Power by Trustee.

See *Smith v. McLellan*, 11 O. R. 191.

#### 7. Power of Trustee to bind Co-Trustee.

See *Davis v. Lewis*, 8 O. R. 1, p. 2072.

#### 9. Investments by.

A, on his marriage, having conveyed a certain farm (which was then under contract of sale) to the trustee of his marriage settlement, provided that the purchase money, if the sale was carried out, and the land itself, if the sale was not carried out, was to be held subject to the trusts of the settlement, as follows: "And it is hereby agreed by and between the parties hereto, that on the payments of principal being made from time to time by the said J. J. V. (purchaser), the said S. B. H. (trustee), or any other trustee or trustees to be appointed as hereinafter mentioned, shall invest the same in such estate or securities, whether real or personal, and of what nature or kind soever as to him or them shall seem best, and most advantageous to the interest of the trust hereby created, and on such investments being from time to time realized the same to reinvest in like manner." The settlement also provided that if the said J. J. V. forfeited any right he had to the said real estate it should vest in the trustee for the purposes and uses of the said trusts thereinbefore mentioned as regards the purchase money with full power to lease or sell the same, etc. The purchaser, J.

J. V., having failed to carry out his purchase, and having relinquished any claim he had to the farm, the trustee subsequently exchanged the farm for a city lot. On an agreement for a sale of the city lot, the purchaser declined to carry out the purchase on the ground that the trustee had no power under the settlement to sell and convey. On an application by the trustee under the Vendors and Purchasers' Act, R. S. O. (1877), c. 109, it was:—Held, that there was a direction to invest in real estate, and following *Joint Stock Discount Co. v. Brown*, L. R. 3 Eq. 139, that "investing in" means the "actual purchase," and the purchaser's objections were overruled, with costs. *Re Barrick and Lot three on the north side of King street: the City of Toronto* 5 O. R. 710.—Boyd.

A testator, by his will, devised all his property to trustees upon trust, after providing for certain annuities, to accumulate the income of the residue for ten years, and then to hold the estate for the benefit of his sons and daughters as therein mentioned, or in the case of a son or daughter who might be dead, to hold the share of such son or daughter according to the provisions of his or her will, and in default of any such will, for any children, him or her surviving, and if no such child, then over. He also empowered his trustees to make advances to his sons and daughters, or any children of his sons and daughters, as they might deem advisable, out of the income of the share of such son or daughter or child, and authorized them to invest the moneys of the estate in such securities as they should think proper, and to continue any business he might be engaged in at the time of his decease, for one year after his death. At the time of his decease the testator was a partner in a firm of distillers. A few months after his death, the surviving partner and the representatives of his estate turned the business into a joint stock company, the testator's share of the assets of the partnership, with the assent of all his children, being valued and put in as so much stock. According to the fundamental agreement entered into by the corporations, a large share of the profits of the company were annually accumulated as a reserve fund. After a period of seven years, the interest of the estate of the testator in the company was bought out by the surviving partner at a large advance, based upon the amount of profits so accumulated in the reserve fund, with an allowance for the prospective amount of such profits in future years.—Held, that the above employment of the funds of the estate was technically a breach of trust, and an improper investment under the terms of the will. "Investment" is not a proper term as to moneys in trade; and "security" means such security as binds lands or something to be answerable for it.—Held, however, that the reserve of profits derived from the user and increase of the capital, was properly regarded income, out of which or out of that part of the purchase money which represented the same, advances might be made by the trustees, under the will. Distinction between this case, and one between tenants for life and remaindermen, pointed out. *Worts v. Worts*, 18 O. R. 332.—Boyd.

Where moneys are left by will to be invested at the discretion of the executor or trustee,

the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court. *Spratt v. Wilson*, 19 O. R. 28.—Boyd.

Held, that an executor and trustee who deposited funds so left in trust for infants, at three and a-half or four per cent. interest, in a savings bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him:—Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs. *Id.*

See *Burritt v. Burritt*, 27 Chy. 143; *Beaty v. Shaw*, 13 O. R. 21; 14 A. R. 600, p. 716; *Re Gabourie—Casey v. Gabourie*, 13 O. R. 635, p. 721; *Re J. T. Smith's Trusts*, No. 2, 18 O. R. 327, p. 2080; *Cumming v. Landed Banking and Loan Co.*, 19 O. R. 426; 20 O. R. 382, p. 2065.

#### 10. Sales and Leases by.

The plaintiff being indebted to the defendants as indorser in the sum of about \$7,000, and being pressed for payment, which he was unable to make, transferred to the defendants certain timber limits which he stated had cost him \$25,000, to hold as security for his indebtedness, and for the purpose of enabling them to sell it and realize their debt. The regulations of the crown lands department, however, forbade the recognition of any conditional transfer, and therefore the assignment was in terms absolute. The defendants, without adopting any means of ascertaining the probable value of the limits, offered them for sale by public auction, with the assent of the plaintiff, when, no sufficient offer having been made they were withdrawn, and, without having made any further inquiry as to value, they were sold by private sale, without consulting the plaintiff for \$6,000. The limits were subsequently sold by the purchaser for a very large sum. Previous to the attempted sale by auction the defendants had received several offers of sums more than sufficient to pay off their claim. In an action brought by the plaintiff against the defendants for selling at a grossly inadequate price, *Armour, J.*, gave judgment in favour of the plaintiff, with \$19,654.38 damages, which, on appeal to this court, was affirmed with costs, *Hagarty, C. J. O.*, dissenting, on the ground that, under all the circumstances, there should be a new trial for the purpose of further investigation. Per *Barton and Patterson, JJ. A.* The defendants sold by private contract, without authorization, and did not take proper steps to have the limits valued. Per *Osler, J. A.* The defendants were bound to exercise proper care and discretion, and to adopt such means as would be adopted by a prudent man to get the best price that could be obtained. *Prentice v. Consolidated Bank*, 13 A. R. 69.

The trustees of M., deceased, who held the legal estate in land in trust for sale for the purpose of a reservoir, sold to one Z, in 1854, a portion of lot ten, Niagara Falls survey, for the purpose of a reservoir, the intention being to run

a line of pipes over the residue of said lot to Niagara Falls, where a pump-house was to be constructed for the purpose of forcing the water to the reservoir, and thence it was to be distributed by pipes over the town of Niagara Falls. T. B., as well as E. B. M., the acting trustee, agreed to extend this lease for ever at a rental to be fixed every twenty-one years. The trustees subsequently sold the land in question to S. B., son of T. B., whose place, it was understood, S. B. was to take, T. B. having the right of purchase under his lease, and having expended large sums in improving the property. S. B. subsequently mortgaged to a certain company, who sold under foreclosure proceedings to the plaintiff. The land through which such pipes were to run had been devised by one M. to E. B. M., his wife and three others as trustees. In 1854 E. B. M. alone leased it to T. B. for fourteen years. In 1854 T. B. leased a strip eight feet wide by 650 feet long to Z, for the purpose of laying his pipes therein, for ten years, at a nominal rent, and both T. B. and E. B. M., in that year, by separate instruments, covenanted with S. B. that she or T. B., if he should purchase the land under a provision in his lease for that purpose, would continue the lease to Z. for twenty-one years, perpetually renewable, at a rent to be fixed by arbitration. Z. constructed the reservoir, etc., and laid down the pipes in 1854, and the town had been supplied by them ever since. In 1864 E. B. M. gave a further lease to T. B. for seven years, and in 1868 she conveyed to S. B., the appointee of T. B., his father. S. B. mortgaged to a loan company, who sold under a decree for sale to the plaintiff, stating in the advertisement that it was subject to the right of the defendants, who represented Z., to lay their water-pipes under the lease from T. B. to Z. After the expiration of that lease no further lease had been executed, but \$12 a year was by agreement, paid as rent to T. B. and to S. B. until the title became vested in the plaintiff, who refused to accept rent or to recognize defendants' rights, and brought trespass against them:—Held, 1. That the lease of 1850 by E. B. M. alone was not binding on her co-trustees unless they could be shown to have agreed to it; 2. That the right of Z. to get a lease from T. B. under the covenant of 1854, continued as against T. B. under the second lease of 1864; 3. That the defendants having under the covenants of T. B. and E. B. M., taken possession and constructed the works, which were of a permanent and expensive character, and for the public benefit, and having paid rent up to the time of the plaintiffs acquiring title, and all parties having had notice, and having made no objection, they were entitled to an injunction staying the action, and to a lease for twenty-one years, renewable at a rent to be fixed by arbitration or by the registrar of the court. *Davis v. Lewis*, 8 O. R. 1—Q. B. D.

Trustees under the will of F. S., holding certain lands by virtue thereof on trust to sell as soon as conveniently might be after her decease, and distribute the proceeds among her children, one of whom was D. V. L., contracted to sell the said lands to one H. T. There were at the time writs of fieri facias in the sheriff's hands against the lands of D. V. L., some of which had been placed therein before the date of the said contract:—Held, nevertheless, that the said

residue of said lot to pump-house was to be of forcing the water it was to be distributed to Niagara Falls. M., the acting trustee, for ever at a rental of one year. The trustees and in question to S. B. ce, it was understood, having the right of purd having expended large property. S. B. subse. certain company, who proceedings to the plain- which such pipes were to y one M. to E. B. M., his trustees. In 1854 E. B. f. B. for fourteen years. strip eight feet wide by the purpose of laying his ears, at a nominal rent, B. M., in that year, by venanted with S. B. that ould purchase the land s lease for that purpose, ase to Z. for twenty-one ewable, at a rent to be Z. constructed the reser- n the pipes in 1854, and plied by them ever since. p a further lease to T. B. In 1868 she conveyed to S. T. B., his father. S. B. mpany, who sold under a plaintiff, stating in the ad- s subject to the right of e represented Z., to lay their e lease from T. B. to Z. at that lease no further lease at \$12 a year was by agree- to T. B. and to S. B. until ed in the plaintiff, who re- to recognize defendants' trespass against them. lease of 1850 by E. B. M. on her co-trustees unless to have agreed to it; 2. to get a lease from T. B. f 1854, continued as against d lease of 1854; 3. That ng under the covenants of taken possession and con- which were of a permanent ter, and for the public bene- rent up to the time of the tle, and all parties having made no objection, the junction staying the action, ty-one years, renewable at arbitration or by the regis- *Davis v. Lewis*, 8 O. R. 1.—

will of F. S., holding cer- thereof on trust to sell as might be after her decease, proceeds among her children. O. V. L., contracted to sell to H. T. There were at the facias in the sheriff's hands D. V. L., some of which had before the date of the said nevertheless, that the said

writes did not form any incumbrance on the lands in the hands of the trustees so as to prevent them conveying the same to a purchaser indefectibly, and that any share of the purchase money which D. V. L. was entitled to he would get as personal, not as real estate.—Held, also, that the purchaser was not bound to see to the application of the purchase money. *Re Lewis and Thorne*, 14 O. R. 133.—Boyd.

The executors of an estate were authorized by the will to sell such portion of the real estate as they in their discretion should think necessary to pay off a mortgage and such debts as the personal estate would not discharge. They offered for sale at auction a lot described as sixty acres (more or less) section 78, Loch End Farm, Victoria District, and giving the boundaries on three sides. The lot was unsurveyed and was offered for sale by the acre, an upset price of \$35 being fixed. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchasers. S. purchased the lot for \$36 an acre and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity, alleging that only some \$2,000 was required to pay the debts of the estate, and refused to execute a deed of the 117 acres tendered by S. In a suit by S. for specific performance of the contract for sale of the whole lot.—Held, reversing the judgment of the court below and restoring that of the judge on the hearing, Gwynne, J., dissenting, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity. *See v. McLean*, 14 S. C. R. 632.

A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death, to sell and divide the proceeds among his children equally.—Held, that the wife had the right to leave the farm and deal herself directly with the tenant during i. r. life. In this case those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will upon the trustees during the continuance of the life estate, and such being the case, the court would give effect to the usual incidents of an estate for life by which the tenant can occupy it or let it, or otherwise dispose of it as seems best to that tenant.—Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of mala fides on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee. *Hefferman v. Taylor*, 15 O. R. 670.—Boyd.

Executors sold and conveyed premises to certain trustees on trust for the infant children of M. G. in fee but with a proviso that the grantees might absolutely dispose of the premises with the consent in writing of a majority of such of the children as had attained twenty-one, and a further proviso that in case either of the grantees, or of the children on attaining twenty-one, should desire to part with their interest in the premises, the same should be first offered to the other members of the family. Three of the children had attained twenty-one years and were willing to consent to the sale.—Held, that the

deed to the trustees containing apt words, might be treated as a deed of bargain and sale, vesting the legal estate in them upon the trusts mentioned, and that the right to sell existed.—Held, also, that the subsequent provision as to the children buying from one another on attaining twenty-one, was not inconsistent with or repugnant to the exercise of the power of sale at present, but would still be operative if no previous sale were made. *Re Graham Contract*, 17 O. R. 570.—Boyd.

The plaintiffs were trustees under a will, holding the legal estate in the property devised and bequeathed, in trust to maintain themselves and their children, with remainder over to the children upon the death of themselves; with power to absolutely convey the property and to exclude any child from participating in the remainder.—Held, that the plaintiffs had implied power to make all reasonable leases. *Brooke v. Brown*, 19 O. R. 124.—Rose.

The plaintiffs made an agreement for a building lease to the defendant of part of the trust estate for twenty-one years, with a provision for compensation to the defendant at the end of the term for his improvements, and the draft lease settled provided that the plaintiffs should at the end of the term pay for such improvements or renew the lease for a further term of twenty-one years.—Held, that the provisions of the agreement and lease were reasonable, and bound the trust estate, and that the plaintiffs were entitled to specific performance. *Id.*

*See In re Jarvis v. Cook*, 29 Chy. 303, p. 119; *Downey v. Dennis*, 14 O. R. 219 p. 2081.

### 11. Mortgages by.

A testator charged his real estate with payment of his debts, which he directed to be paid thereout as soon as possible, and then devised it to his executors and trustees on trust to sell as soon as they should think prudent, and invest the proceeds, and pay an annuity to his widow until sale, and after the sale, invest a sum named from which to give her a specific annuity, and distribute the proceeds among his family; and proceeded: "Until sold as aforesaid I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants, and keep the said vessels in repair; and may store grain and other goods and merchandise in my warehouse for hire or storage, and may take such action as they think advisable to work and develop my interest in the B. gold mine, but the outlay by them shall not at any time exceed \$1,000." The trustees became indebted to a bank for certain expenses incurred in connection with the schooners and repairs to them; and in connection with the warehouse, and to meet this indebtedness, executed a mortgage of the real estate to the plaintiffs, who now brought this action for foreclosure. The testator's debts had all been paid before the execution of the mortgage, but there was no evidence that the plaintiffs knew more as to the purpose for which the money was required, than that it was to pay a debt due at the bank by the estate.—Held, reversing the judgment of Fer-

guson, J., that the plaintiffs were entitled to the usual mortgage judgment, for there was no sufficient evidence of notice to them that the money was not to be expended in conformity with the will. *London and Canadian Loan and Agency Co. v. Wallace*, 8 O. R. 539.—Chy. D.

The testatrix, by her will, devised and bequeathed all the rest and residue of her real and personal estate unto R. G., "upon trust to sell my real estate and to call in and convert into money the remainder of my personal estate, with power to demise or lease \* \* any portion thereof for any term or terms of years.

\* \* And I declare that the said trustees shall out of the moneys arising from such sale, calling in, and conversion \* \* pay off the incumbrance, if any, existing on the F. property, and shall divide the balance of the said moneys among my four children." The remaining property, not included in the residuary estate, was specifically devised by the will among the children of the testator in certain shares. R. G. mortgaged a certain portion of the residuary real estate to one T., and applied the proceeds of the loan in part in liquidation of the outstanding mortgage on the F. property, and in part otherwise for the benefit of the estate. The property comprised in this mortgage was sold by the court on proceedings by T., but did not bring enough to pay of the whole mortgage debt:—Held, on administration of the estate by the court, that the trust of the residue was a mere trust for conversion out and out, and R. G. had no power to make the mortgage in question, nevertheless to the extent to which the estate got the benefit of the loan, the executors of T. were entitled to rank against the estate for the balance of their mortgage debt, but only subsequent to certain mortgages placed by specific devisees since the death of the testatrix on portions of the estate devised to them, including the F. property, without knowledge, so far as appeared, of the source from which the money discharging the F. mortgage came:—Held, also, that the mortgage to T. being invalid, it could only carry interest at six per cent., although it provided for interest at twelve per cent. *London and Canadian Loan Co. v. Wallace*, 8 O. R. 539, distinguished. *Gordon v. Gordon*, 11 O. R. 611.—Proudfoot. See *S. C.* in appeal, 12 O. R. 2063.

#### 12. Improvements on Land.

See *Re Bender*, 8 P. R. 399, p. 895; *Foott v. Rice*, 4 O. R. 94, p. 2063.

#### 13. When Trustee's Interest is in Conflict with Trust Estate.

In *re Toronto Harbour Commissioners*, 28 Chy. 195, p. 2068.

#### 14. Purchase or Lease of the Trust Property by Trustees.

L. and S. were appointed by the court trustees for the plaintiff, a married woman, upon a written consent purporting to be signed by them agreeing to act. Subsequently L. obtained from the plaintiff a lease of the trust estate to himself, at what was alleged to be an inadequate rental.

Some years afterwards, and after the death of her husband, the plaintiff instituted proceedings to have the lease cancelled, alleging as grounds of relief, inadequacy of rent, want of proper advice by the plaintiff in the execution thereof, and the fiduciary relation towards herself which L. had assumed. Under the circumstances the court (Spragge, C.), granted the relief asked, notwithstanding L. swore that he was not aware that he had been appointed trustee; that he never signed the consent to act as such, and that his conduct throughout had been bona fide, it being shewn that he had effected an insurance upon the buildings situate upon the premises, the application for which he had signed as trustee, and there being reason to believe that if he had not signed the consent himself he had authorized the husband of the plaintiff to affix his signature thereto; but gave L. the option of accepting a new lease of the property to be settled by the master; which decree was affirmed by the full court on rehearing. *Seaton v. Lunney*, 27 Chy. 169.

The plaintiff was mortgagee of certain lands, and by the will of the mortgagor was devisee thereof in trust to pay certain legacies charged thereon—amongst others one to the defendant, an infant about ten years old. Having instituted proceedings against the defendant to enforce payment of the mortgage, the conduct of the sale was given to the guardian of the infant, and the plaintiff had liberty to bid at the sale under the decree as mentioned, 27 Chy. 576:—Held (reversing the order then made), that the liberty to bid accorded the plaintiff, who occupied the twofold character of mortgagee and trustee, was given him for the purpose of protecting his interests as mortgagee, but did not absolve him from the duty which, as trustee, he owed to the infant; and that the conduct of the plaintiff prior to and at and about the sale, as set out in the case, by means of which he had been enabled to make a profit at the expense of the infant cestui que trust, was such as would have rendered the sale invalid if the land had remained in his hands; but as it had passed into those of an innocent purchaser the plaintiff should be charged with the outside selling value of the estate at the time of the sale, or should pay to the defendant the amount due to him under the will, with interest thereon from the date of the sale, together with the costs of the court below subsequent to the petition, and also the costs of appeal. *Ricker v. Ricker*, 7 A. R. 282.

Purchase of client's property by solicitor. See *Kilbourn v. Arnold*, 6 A. R. 158, p. 1946.

A director of a joint stock company, having a judgment and execution of his own against the property of the company acting in good faith, purchased the same at a sale by the mortgagees, under a power of sale for \$8,400, and sold it in the following year for \$23,000:—Held, in winding up proceedings, that he could not purchase for his own benefit, but held the land as trustee for the company and was accountable for any profit received on a resale, and by reason of his refusing to pay over or account for such profits, and in fact by his appearing as a bidder at the sale and so damping the bidding, was guilty of a breach of trust within R. S. C. c. 129, s. 83. *Re Iron Clay Brick Manufacturing Co.*—*Turner's Case*, 19 O. R. 113.—Robertson.





professional land agent in connection with the sale of the property, and a certain sum paid by C. M. to a professional accountant for making up the account delivered in 1880 should be allowed to him in his accounts. But that sums paid by C. M.'s executors to a professional accountant for making up the account brought in by them into the master's office, and a certain sum paid to C. M.'s solicitors on account of their costs in the action should not be allowed to C. M. in his accounts:—Held, also, by the master in ordinary, that C. M., as trustee solicitor, was not entitled to profit costs, but, nevertheless, he was entitled to a commission of five per cent. on the amounts coming to A. M. and T., less a certain sum paid as commission to a land agent for effecting the sale of the property, since double commissions cannot be allowed. *Taylor v. Magrath*, 10 O. R. 669.—Hodgins, Master.—Boyd.

It is the duty of a trustee, or other accounting party, at all times to have his accounts ready, to afford all facilities for their inspection and examination and to give full information whenever required. As a general rule he is not obliged to prepare copies of his accounts for the parties interested, though if, for example, the cestui que trust or principal lives at a distance from where the trust affairs are being carried on, or in a foreign country, it would be the duty of a trustee to give all reasonable information and explanations by letter; and even, if requested, but at the expense of the cestui que trust, to prepare and transmit accounts and statements. *Sandford v. Porter*, 16 A. R. 565.

See *Burn v. Burn*, 8 O. R. 237, p. 1422.

#### 19. Liability for Interest.

See *Re Crowter*—*Crowter v. Hinman*, 10 O. R. 159, p. 719; *In re Honsberger*—*Honsberger v. Kratz*, 10 O. R. 521, p. 718; *Taylor v. Magrath*, 10 O. R. 669, *supra*; *Re Gabourie*—*Casey v. Gabourie*, 13 O. R. 635, p. 721; *Spratt v. Wilson*, 19 O. R. 28, p. 718.

#### 20. Costs and Expenses.

Held, that the master had properly allowed to defendant, in his accounts, a fee of \$10 paid by him to a counsel for advice as to his action in respect of two assignments of a policy of insurance. *Hayes v. Hayes*, 29 Chy. 90.—Ferguson.

Where certain persons, including G., advanced money to complete the building of a yacht at Cobourg, in order to sail for prizes at New York and Philadelphia, and scrip under seal was executed, declaring that G. was to hold the yacht in trust as security for the advances; and G. incurred certain running expenses in taking the yacht to the race:—Held, that G. was entitled to a first charge on the proceeds of the sale of the yacht, for these expenses, as they had been incurred in prosecuting the enterprise for which the trust was created. *Burn v. Gifford*, 8 P. R. 44—Taylor, Master.—Proudfoot.

Expenses incurred by trustee under invalid trust deed. See *Hughes v. Rees*, 9 O. R. 198.

Any one cestui que trust may, in the discretion of the court, obtain an order under the third party clauses of the Solicitors' Act for the

taxation of a bill of costs for business connected with the trust estate of a solicitor employed by the trustee. *Sandford v. Porter*, 16 A. R. 565.

Where a creditor brought an action for an account against the assignee for the benefit of creditors of his debtor after demanding copies of the assignee's accounts, but without expressing any desire or making any attempt to inspect the accounts, and without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency the plaintiff was ordered personally to pay it. *Id.*

The mere fact that a trustee in rendering an account to his cestui que trust, claims that he has in his hands a smaller sum than is found to be due by him when his accounts are taken in court does not disentitle him to the costs of an action against him for an account. *Id.*

A trustee or executor stands in the same position as any other litigant with respect to costs. *Smith v. Williamson*, 13 P. R. 126.—Rose.

See *Taylor v. Magrath*, 10 O. R. 669, p. 2079.

#### 21. Other Cases.

The plaintiff in this case being a trustee for sale was held not to be in a position to ask for partition. *Keefe v. McKay*, 29 Chy. 162.—Ferguson.

A trustee is not exonerated by the Act respecting trustees and executors, and the administrator of estates, R. S. O. (1877) c. 107, if he had actual notice of a claim before distribution, even though he may have sent the notice prescribed and received no response to it. *Carling Brewing and Malting Co. v. Black*, 6 O. R. 441.—Ferguson.

Qualification of trustees as voters. See *South Grenville Election (Ont.)*—*Ellis v. Fraser*, H. E. C. 163, p. 1434.

The law attaches the liability of trustees to municipal councillors. See *Morrow v. Connor*, 11 P. R. 423, p. 1378.

On an application by a trustee company, and a party who was entitled for life to the income of a fund in court, which was the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the company as trustees, (they having been appointed the trustees under the will which devised the settled estates), which application was opposed by the official guardian on behalf of the remainderman:—Held, that the practice and current of authority were against what was asked by the petitioners, and that they were not entitled to it as a matter of right, and that the application must be dismissed. *Re J. T. Smith's Trusts (No. 2)*, 18 O. R. 327.—Boyd.

#### 22. Proceedings Against.

##### (a) Injunction to Restrain from Selling.

Held, that the court has jurisdiction to prevent trustees about to sell property under a

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before distribution, even  
ent the notice prescribed  
e to it. *Carling Brewing*  
ck, 6 O. R. 441.—Fergus-

ees as voters. See *South*  
—*Ellis v. Fraser*, H. E.

e liability of trustees to  
See *Morrow v. Connor*,

y a trustee company, and  
ed for life to the income  
ich was the proceeds of  
ed estates, for the pay-  
or the purpose of invest-  
as trustees, (they having  
tees under the will which  
tates), which application  
cial guardian on behalf of  
eld, that the practice and  
were against what was  
ers, and that they were not  
er of right, and that the  
smitted. *Re J. T. Smith's*  
3. 327.—Boyd.

dings Against.

Restrain from Selling.

it has jurisdiction to pre-  
to sell property under a

power or trust for sale, from selling in an im-  
prudent and improper manner; and thus in this  
case where it appeared that although cestuis  
que trustent representing five-sixths of the prop-  
erty desired a sale without reserve, the inter-  
ests of the remainder would be prejudiced by so  
selling, an injunction was granted to restrain  
such trustees from selling without a reserve bid.  
*Downey v. Dennis*, 14 O. R. 219.—Ferguson.

## VII. BENEFICIARIES AND CESTUI QUE TRUST.

### 1. Dealings between Trustee and Cestui que Trust.

See *Beatty v. North-West Transportation Co.*,  
12 App. Cas. 589, p. 267.

### 2. Assent of, to Transactions.

Land was settled on a trustee, in trust for the  
use of H. till marriage, and then upon other trusts  
for the husband and wife as tenants for life, and  
ultimately providing for the issue; the assent  
of the tenant for life was necessary for a sale;  
and there was power in the deed to appoint H.  
as a trustee on the original trustee refusing to  
act. The trustee had an absolute discretion as  
to forfeiting and applying the estate among or  
for the benefit of the parties to the deed in case  
of anticipation or attempted anticipation:—Held,  
that the consent of H. and his wife, as tenants  
for life, satisfied the condition as to assent in  
case of a sale: that H., as trustee, was entitled  
to receive the purchase money, and that the pur-  
chaser was not bound to see to its application.  
*In re Treleven and Horner*, 28 Chy. 624.—Blake.

It having been suggested by the court that the  
appointment of H. as trustee, was not one which  
the court would have made, the matter again  
came on for argument, when it was:—Held, that  
H. was placed in a position in which his interest  
as one of the parties to the deed upon forfeiture  
might conflict with his duty as trustee, and that  
the court would not have made and could not  
sanction his appointment. *Ib.*

### 3. Right to Possession of Property.

The rule is that when property is devised to a  
trustee to pay the rents and profits to any per-  
son the cestui que trust is entitled to the posses-  
sion; but where other parties have also a claim,  
it rests in the discretion of the court whether the  
actual possession shall remain with the cestui  
que trust or the trustees. *Orford v. Orford*, 6  
O. R. 6.—Ferguson.

J. O. by his will provided as follows: "4. Not-  
withstanding the directions hereinbefore con-  
tained, I desire that if my son W. O. returns to  
Toronto within five years from the date of my  
death, my said executors shall hold in trust for  
him from the time of his return to Toronto said  
lots Nos. \* \* subject to the existing life estate  
of my said wife in a portion thereof, during  
the term of his natural life, and shall pay over to  
him all rents, issues and profits thereof, and after  
his death shall divide the same between his chil-  
dren in such manner as he shall in his last will  
and testament direct, and in default of such di-  
rection and appointment to divide said property  
equally between them, conveying to each child

his or her share when, if a son, he attains the age  
of twenty-one years, or a daughter attains the  
age of twenty-one years or marries, and in the  
meantime to apply the proceeds of the same to  
the support and maintenance of said children." In  
an action by W. O. against the executors and  
trustees of the will, claiming the actual posses-  
sion of the property of which he was entitled to  
the rents and profits, it was:—Held, that he was  
not entitled to such possession, and his action  
was dismissed with costs. *Whiteside v. Miller*,  
14 Chy. 393, commented on and followed. *Ib.*

See *Hefferman v. Taylor*, 15 O. R. 670, p. 2073;  
*Adamson v. Adamson*, 17 O. R. 407, p. 2059.

## VIII. MISCELLANEOUS CASES.

Right of equitable tenant in fee simple to re-  
conveyance of trust property. See *Farrell v.*  
*Cameron*, 29 Chy. 313.

Misapplication of moneys assessed under drain-  
age by law.—Trust created. See *Smith v. Town-*  
*ship of Raleigh*, 3 O. R. 405, p. 1358.

Per Hagarty, C. J. It is the duty of a solic-  
itor to inform his client, when a trustee, as to the  
advisability of taking proceedings and incurring  
costs, when it may become a question whether  
the costs will have to be paid out of his private  
funds or out of the trust fund or estate. *Butter-*  
*field v. Wells*, 4 O. R. 168.

Attaching trust moneys. See *Lloyd v. Wallace*,  
9 P. R. 335, p. 87.

Pleading. See *McLean v. Bruce*, 29 Chy.  
507, p. 2060.

A transfer of the estate does not involve the  
transfer of trusts or powers necessarily as insepa-  
rable incidents of the estate. *Re Gilchrist and*  
*Island*, 11 O. R. 537.—Boyd.

Clergy commutation trust. See *Wright v. In-*  
*corporated Synod of the Diocese of Huron*, 11 S.  
C. R. 95, p. 228.

Charitable trust. See *Attorney-General of*  
*Nova Scotia v. Axford*, 13 S. C. R. 294, p. 1735.

A holder of shares "in trust" is not a man-  
dataire prête-nom and holds subject to a prior  
title on the part of some person undisclosed.  
Such holding not being forbidden by the law of  
the colony, a transferee from such holder is  
bound to inquire whether the transfer is author-  
ized by the nature of the trust. *Bank of*  
*Montreal v. Sweeney*, 12 App. Cas. 617. (Judg-  
ment of Supreme Court 12 S. C. R. 661,  
affirmed.)

Article 19, C. C. P., is applicable to mere  
agents or mandataries. It is not applicable to  
trustees in whom the subject of the trust has  
been vested in property and in possession for the  
benefit of third parties, and who have duties to  
perform in the protection or realization of the  
trust estate. Where trustees sold property over  
which they had possession and title:—Held,  
that they were entitled to sue the purchaser to  
whom they had delivered possession, upon his  
covenant to pay the balance of the purchase  
money. *Browne v. Pinsonneault* (3 S. C. R. 102),  
and *Burland v. Moffatt* (11 S. C. R. 76), over-  
ruled. *Porteous v. Regnier*, 13 App. Cas. 120.

See *Kiely v. Smyth*, 27 Chy. 220, p. 254; *Parr v. Montgomery*, 27 Chy. 521, p. 1287; *Adamson v. Adamson*, 7 A. R. 592, p. 1188; *Simpson v. Corbett*, 5 O. R. 377; 10 A. R. 32, p. 727; *Hughes v. Rees*, 5 O. R. 654, p. 1012; *Macklin v. Dowling*, 19 O. R. 441, p. 1887.

## ULTRA VIRES.

- I. CONTRACTS—See CONTRACTS.
- II. COMPANIES AND CORPORATIONS—See COMPANY—MUNICIPAL CORPORATION.
- III. LEGISLATION—See CONSTITUTIONAL LAW.

## UMPIRE.

See ARBITRATION AND AWARD.

## UNDERTAKING TO SPEED.

See PRACTICE.

## UNDERWRITERS.

See INSURANCE.

## UNDUE INFLUENCE.

See FRAUD AND MISREPRESENTATION—PARLIAMENTARY ELECTIONS.

## USAGE.

See CUSTOM AND USAGE.

## USE AND OCCUPATION.

D., by permission of the commissioner of crown lands for Ontario, built a wharf on the waters of Toronto bay at the island near Hanlan's point; and claimed a sum of money from C. for the use and occupation by him of the wharf in landing passengers from the steamer:—Held, that there could be no recovery; for the evidence failed to shew any agreement by C. to pay wharfage, etc., or that tolls had been usually collected or charged, while the relationship and dealing of the parties would raise the inference that no charge was contemplated. *Cleddinning v. Turner*, 9 O. R. 34.—C. P. D.

See *Till v. Till*, 15 O. R. 133, p. 885; *Re Crawford v. Seney*, 17 O. R. 74, p. 537.

## USES AND TRUSTS.

The operation of an ordinary deed of bargain and sale under the Short Forms Act R. S. O. (1877)

c. 102, conveying lands to trustees considered and acted on. *Seaton v. Lunney*, 27 Chy. 169.—Chy. D.

A husband and wife were the parties of the third part in a conveyance, whereby the wife's father did "grant unto the said party of the third part his heirs and assigns forever," etc., habendum "unto the said party of the third part his heirs and assigns, to and for his and their sole and only use forever":—Held, that by the operation of the statute of uses, the husband took an estate in fee simple. *Re Young*, 9 P. R. 521.—Boyd.

Certain owners of the equity of redemption in lands by deed granted the same to "A, his heirs and assigns, to have and to hold the same to A., his heirs and assigns unto and to the use of B., his heirs and assigns." This was dated 17th July, 1875, and registered July 21st, 1875:—Held, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

See *Dunlop v. Dunlop*, 6 O. R. 141; *S. C.*, sub nom. *Dunlop v. Dunlop*, 10 A. R. 670, p. 493.

## USURY.

See PAWNBROKER.

## UTTERING FORGED INSTRUMENTS.

See CRIMINAL LAW.

## VACATION.

A master's report made during long vacation in contravention of G. O. 425 (see Con. Rule 8), is as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void. *Fuller v. McLean*, 8 P. R. 549.—Boyd.

The term "vacation" in G. O. Chy. 642 (see Con. Rule 849), means Christmas as well as long vacation, and hence the former is not to be counted in the time within which an appeal from a master's report may be had under that order. Notice of appeal from a report dated 29th November, 1883, given on the 31st December, 1883, for the 7th January, 1884, is valid. *Blake v. Building and Loan Association*, 10 P. R. 153.—Boyd.

Christmas vacation is not to be excluded in reckoning the eight days within which an appeal from the master or local judge or master in chambers is to be brought on under Rule 427, O. J. A. (Con. Rule 846). As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an ex parte application. *Snowden v. Huntington*, 12 P. R. 1.—Ferguson.

Taxation of bill of costs during vacation. See *Cousineau v. City of London Fire Ins. Co.*, 13 P. R. 36, p. 382.

to trustees considered  
Lunney, 27 Chy. 169.

ore the parties of the  
se, whereby the wife's  
the said party of the  
assigns forever," etc.,  
aid party of the third  
ns, to and for his and  
rever":—Held, that by  
ue of uses, the husband  
ple. *Re Young*, 9 P.R.

equity of redemption in  
the same to "A, his  
re and to hold the same  
signs unto and to the use  
signs." This was dated  
istered July 21st, 1875:  
his deed operated under  
ot, B. took under it the  
e, and it had the same  
evidence to A. upon trust  
imperial Bank of Canada  
7.—Ferguson.

p, 6 O. R. 141; *S. C.*, sub  
p, 10 A. R. 670, p. 493.

## JURY.

NBROKER.

## ED INSTRUMENTS.

MINAL LAW.

## ATION.

made during long vacation  
O. 425 (see Con. Rule 8),  
ant having no notice of the  
h the report is founded,  
d. *Fuller v. McLean*, 8

n" in G. O. Chy. 642 (see  
ans Christmas as well as  
within which an appeal from  
be had under that order.  
n a report dated 29th No-  
n the 31st December, 1883,  
1884, is valid. *Blake v.*  
*Association*, 10 P. R. 153.—

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rought on under Rule 427,  
846). As such appeals are  
on, the time for appealing  
a matter of course upon an  
a. *Snowden v. Huntington*,  
on.

costs during vacation. See  
*London Fire Ins. Co.*, 13 P.

A direction to the registrar to settle in long  
vacation the minutes of a judgment pronounced  
on 30th June, was refused. *Miller v. Spencer*,  
13 P. R. 478.—Ferguson.

See *Sieweright v. Lays*, 9 P. R. 200, p. 1065.

## VAGRANCY.

See PUBLIC MORALS.

## VALUATOR.

The defendant, by a certificate signed by him  
as reeve of the township, stated he had personal  
knowledge of property belonging to one A. M.,  
and occupied by him, which the defendant be-  
lieved to be worth \$2,000, and would readily sell  
at a forced cash sale for \$1,600; that about fif-  
teen acres were cleared and ready for and under  
cultivation, etc., setting forth further favourable  
particulars as to buildings on the land and the  
nature of the soil, all of which proved to be erro-  
neous. In fact the defendant had not any per-  
sonal knowledge of the premises, which were  
almost worthless; and the particulars as given  
had been communicated to him by A. M. him-  
self. The defendant was aware that the plain-  
tiffs were about to advance money by way of  
loan on the security of this property, and had  
called for his certificate, by which they said they  
would be guided in making such advance. The  
court, under these circumstances:—Held, the  
defendant answerable for the loss sustained by  
the plaintiffs in consequence of having acted on  
his certificate, although no fraud was attribut-  
able to him, and his services were gratuitous.  
*Gowan v. Paton*, 27 Chy. 48.—Blake.

The defendant, who was employed on behalf  
of the plaintiff to value certain lands, intended  
to certify the value at \$2,000, but through the  
fraud of the agent he was induced to certify for  
\$3,000:—Held, affirming the decree of Blake,  
V. C. (26 Chy. 390), that the defendant was not  
liable for any loss sustained by the plaintiff:—  
Held, also, that the circumstances of this case  
would not justify the court in reversing the  
finding of the judge of first instance, that the  
valuation was made without fraud or inten-  
tion to deceive. *Silverthorn v. Hunter*, 5 A. R.  
157.

Per Burton, J. A., a valuator is not liable for  
negligence in making a valuation of land, on  
which a loan is procured, unless it be fraudu-  
lently made. *Ib.*

The paid agent of a loaning society, who pro-  
fessed to be skilled, and had a knowledge in the  
valuing of lands, was held liable to the society  
for a loss sustained by them by reason of a false  
report of such agent. *Silverthorn v. Hunter*,  
5 A. R. 157, distinguished. *Hamilton Provid-  
ent and Loan Society v. Bell*, 29 Chy. 203.—  
Spragge.

In order to render the paid valuator of a loan  
company answerable for a loss caused by exces-  
sive valuation of property, it is not necessary to

show that such valuation is made fraudulently.  
*Canada Landed Credit Co. v. Thompson*, 8 A.  
R. 696.

The court below dismissed a bill filed to enforce  
a claim for damages sustained by an excessive  
valuation of land by the brother and partner of  
the paid valuator duly appointed by the plain-  
tiffs, on the ground that it was not shewn that  
the valuation was made fraudulently. This  
court, while differing from such view, declined  
to reverse the decree and ordered a new trial, at  
which the evidence of one of the defendants al-  
ready taken might be used, in the event of his  
then being out of the jurisdiction, but ordered  
the defendants to pay the costs of the appeal;  
the new trial to be without costs in the court  
below. *Ib.*

The defendant L., who was a professional  
valuator, was employed by plaintiff to personally  
investigate the security offered for a loan on real  
estate, and to check the valuation of a local  
valuator. The defendant visited the property  
and reported, in effect agreeing with the local  
valuator, that the property was worth con-  
siderably more than the amount proposed to be  
lent, and that the loan could be safely made for  
the sum proposed, for which report he charged  
and was paid a fee. The loan was effected, and  
default having occurred in its repayment, the  
property was offered for sale, when it was found  
impossible to sell for anything like the mortgage  
money. In an action for negligence in valuing  
the property the jury found for the plaintiff.  
The judge at the trial directed the jury that the  
fact that the defendant did not obtain the opinion  
of other persons as to the value of land in the  
neighbourhood was evidence of negligence:—  
Held (Galt, C. J., dissenting) this was misdirec-  
tion. *O'Sullivan v. Lake*, 15 O. R. 544.—C. P.  
D; but see *S. C.* in appeal, 15 A. R. 711.

It appeared from the evidence that the mort-  
gagor had endeavoured to procure a loan for a  
similar amount on the same property from a  
company in which the defendant L. was a di-  
rector, and that the loan was not effected, hav-  
ing been abandoned by the mortgagor. The  
judge at the trial, although he directed the jury  
that there was no evidence that the defendant  
had acted with intentional dishonesty, pressed  
upon their notice, with other observations, the  
enquiry: "Why was not the original transac-  
tion carried out?"—Held, per Rose and Mac-  
Mahon, J.J., that these observations tended to  
create a prejudice in the minds of the jury  
which was not warranted by the facts. *Ib.*

K., a respectable man living in the neighbour-  
hood of the property, in his evidence valued the  
land at from \$200 to \$300 per acre, but the judge  
told the jury that K. was not in the land busi-  
ness, and had no knowledge of the value of the  
property. Per Rose, J.—The observations as to  
K. were a practical withdrawal of his evidence  
from the jury. *Ib.*

Per Galt, C. J.—There was evidence of negli-  
gence to go to the jury, particularly in defend-  
ant L. not making enquiries of others in the  
neighbourhood as to the value of the land. *Ib.*

See *Agricultural Investment Co. v. Federal  
Bank*, 6 A. R. 192, p. 136; *Moberly v. Brooks*,  
27 Chy. 270, p. 770.



**VARYING DEEDS.**

See DEED—EVIDENCE.

**VARYING MINUTES.**

See PRACTICE.

**VENDITIONI EXPOSAS.**

See EXECUTION.

**VENDORS' AND PURCHASERS' ACT.**

A testatrix devised to trustees all her estate, real and personal, which, or a sufficient portion of which, they were to dispose of for payment of debts, and the support and education of her two youngest daughters C. & M. during their minorities, excepting two tenements known as the Westminster property, which were to be reserved for the use of C. and M. so long as they or either of them should remain unmarried, and in order that C., on attaining twenty-one and being unmarried, might in her option occupy and enjoy for her life, so long as she should be unmarried, one of the houses for her own residence and that of her sister; and, in the event of her marriage, the youngest daughter M. was to have the same option and choice, the intention of the testatrix "being that in addition to their support and maintenance out of all my estate, as devised, my youngest daughters C. & M. shall have a home within their control so long as they or either of them shall remain unmarried;" and upon the marriage of both C. & M. the whole of such Westminster property was to be sold, and the proceeds thereof to form part of the residuary estate and be divided amongst all her children, sons and daughters, then living, share and share alike. C. and M. attained majority and were unmarried, when all the children, including C. & M., together with the trustee, joined in a contract to sell the Westminster property. In answer to a question submitted to the court, under the Act (R. S. O. 1877, c. 109), it was:—Held, that all these parties joining in a conveyance, a good title could be made; and although in applications of this kind the costs are in the discretion of the judge, the purchaser was ordered to pay the costs. *Givins v. Darvill*, 27 Chy. 502.—Proudfoot.

Though on a bill filed for specific performance if the infant children ultimately entitled under the settlement were made parties, the court might order the completion of the sale and payment of the money into court for investment, where the corpus of the estate would be protected for the children, yet on application under the Vendors and Purchasers' Act, in the absence of the other parties to the settlement, it would not compel the purchaser to accept the title. *In re Trevelen and Horner*, 28 Chy. 624.—Blake.

Held, that a mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money does not of itself afford conclusive evidence of

a debt, so that the mortgagee or his assigns can maintain an action for its recovery. In this case it was shewn that no money was ever advanced by the mortgagee to defendant, the mortgagor, but that the mortgage was given for a debt due by defendant to one C., who in consideration of getting it agreed to relieve defendant from all personal liability; and the plaintiffs, assignees of the mortgage, were held not entitled to recover. Quere, whether section 1, sub-section 4, and section 2 of the Vendors and Purchasers' Act, R. S. O. (1877), c. 109, apply to such an action as this, or only to actions where the title to land is in question. *London Loan Co. v. Smyth*, 32 C. P. 530.—C. P. D.

On a petition under the Vendors and Purchasers' Act, the question of the existence or the validity of the contract for sale cannot be tried, but only those matters which would be entertained upon a reference as to title under a decree for specific performance. The only parties necessary on such a petition are those who would be parties to a suit for specific performance, and therefore mortgagees who had been joined were dismissed with their costs. *Re MacYabb*, 1 O. R. 94.—Proudfoot.

Seemle, that R. S. O. (1877) c. 109, s. 2 is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary even though the transaction took place prior to that enactment. *Sanders v. Malsbury*, 1 O. R. 178.—Boyd.

Held, that on an application under R. S. O. (1877) c. 109, s. 3, the question of the abandonment of the contract between the parties cannot be raised. *Henderson v. Spencer*, 8 P. R. 402.—Spragge.

Held, that the Act (R. S. O. 1877, c. 109) was intended to provide for a simple case where there was no dispute as to the validity of the contract and that the court ought not to enter upon the question of the validity of the title, until it was decided that the contract was binding. *Henderson v. Spencer*, 8 P. R. 402, not followed. *Re Robertson and Doganeau*, 9 P. R. 288.—Boyd.

Seemle, applications under the Vendors and Purchasers' Act should not be made for the mere purpose of settling questions of title when the existence and validity of the contract is not disputed. *Re Bingham and Wrigglesworth*, 5 O. R. 611.—Ferguson.

If under R. S. O. (1877), c. 109, the court adjudicates upon a question of title between vendor and purchaser, and directs the purchaser to carry out his contract, and the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific performance of the contract; the requisite relief may be had on notice of motion for payment of the purchase money, or in default a resale, etc. *Re Craig*, 10 P. R. 33.—Ferguson.

More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton and Lot No. 6 on Plan 580 in the County of York*, 7 O. R. 59.—Proudfoot.

Upon a petition under the Vendors and Purchasers' Act:—Held, that the purchasers were

agee or his assigns can recovery. In this case money was ever advanced defendant, the mortgagor, as given for a debt due who in consideration of the defendant from all the plaintiffs, assignees of not entitled to recover. 11, sub-section 4, and the Purchasers' Act, apply to such an action as where the title to land in *Loan Co. v. Smyth*, 32

the Vendors and Pur- on of the existence or the for sale cannot be tried, which would be entered as to title under a decree. The only parties neces- are those who would be specific performance, and who had been joined were *ests. Re MacNabb*, 10.

O. (1877) c. 109, s. 2 is that the onus of disproving consideration on the party ance as voluntary even in took place prior to that *r. Matlaby*, 1 O. R. 178.

application under R. S. O. question of the abandon- between the parties cannot *v. Spencer*, 8 P. R. 402—

(R. S. O. 1877, c. 109) was a simple case where there the validity of the contract ight not to enter upon the ty of the title, until it was act was binding. *Hender- R. 402*, not followed. *Re eau*, 9 P. R. 288.—Boyd.

as under the Vendors and id not be made for the mere uestions of title when the y of the contract is not dis- and *Wrigglesworth*, 5 O. R.

(1877), c. 109, the court question of title between r, and directs the purchaser ract, and the purchaser out the contract, it is un- an action for specific per- tract; the requisite relief e of motion for payment of or in default a resale, etc. 3.—Ferguson.

y be required as between a r than in a suit where the ing under him are parties. No. 6 on *Plan 580* in the R. 59.—Proudfoot.

under the Vendors and Pur- , that the purchasers were

entitled to certified copies of registered deeds or memorials of deeds in the chain of title which the vendors were unable to produce. *McIntosh v. Rogers*, 12 P. R. 389, followed. *Cooper v. Emery*, 1 Phil. 390, distinguished. *Re Robier and Ontario Investment Association*, 16 O. R. 259.—Armour.

A contract of sale of land provided that the vendors should not be bound to produce any deeds or evidence of title except such as they might have in their possession, but should show a good title, etc. It appeared that A. P., by an indenture of 16th January, 1858, conveyed the lands in question to trustees on certain trusts, which deed was registered by memorial not containing the trusts. By deed of appointment dated 4th July, 1862, made in pursuance of the deed of 1858, also registered by memorial which purported to contain a full copy of the deed in which were recitals which set out what purported to be the trusts of the former deed, and showed a life estate in A. P., with a power of appointment in him, A. P. duly appointed to trustees who were represented by the vendors, with directions to sell after his death, which had recently occurred; neither of these deeds was in the possession or power of the vendors, the trustees. On an application under the Vendors and Purchasers' Act:—Held, that the vendors were not bound to produce these two deeds, and that the production of the memorial of the deed of appointment twenty years old, reciting the trusts of the trust deed, was sufficient evidence of what those trusts were; and as there was an absolute trust for sale the purchaser should take the title. A. P. in 1873, assumed to mortgage the lands in fee, and died in 1887:—Held, that the mortgage only bound his life estate, and that the vendors were not bound to procure a discharge thereon. *Re Pantton and Swanston*, 16 O. R. 669.—Boyd.

See *Re Boustead and Warwick*, 12 O. R. 488, p. 1887; *McIntosh v. Rogers*, 12 P. R. 389, p. 1891; *VanVelsor v. Hughson*, 9 A. R. 390, p. 663.

## VENDOR'S LIEN.

See SALE OF LAND.

## VENIRE DE NOVO.

See PLEADING.

## VENUE.

See EJECTMENT—PATENT FOR INVENTION—PLEADING—SHERIFF.

## VERDIOT.

See NEW TRIAL—TRIAL.

## VESSEL.

See SHIP.

## VESTED ESTATE.

See WILL.

## VESTING ORDER.

See SALE OF LAND BY ORDER OF THE COURT.

## VEXATIOUS PROCEEDINGS.

See COSTS.

## VICTORIA UNIVERSITY.

Held, that under the Acts incorporating Victoria University, and the statutes thereof, set out in the judgment, the chancellor has no power to call a meeting of the Senate elsewhere than at Cobourg the present seat of the University. *Town of Cobourg v. Victoria University*, 18 O. R. 165.—Galt.

## VOLUNTARY CONVEYANCE.

AS AGAINST CREDITORS.—See FRAUDULENT CONVEYANCES.

A mortgage which had been executed by the defendant I. reciting that it had been agreed to be given to secure notes held by the plaintiffs and containing covenants for title was reformed on parol evidence by substituting for one of the parcels inserted by mistake which did not belong to I., another lot proved to be his at the time of creating the mortgage, and being the only other lot owned by him. Such a mortgage is not voluntary or without consideration so as to exclude reformation. *Bank of Toronto v. Irwin*, 28 Chy. 397.—Spragge.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside. The plaintiff, who had just come of age, being about to marry, applied to her solicitor who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of the marriage settlement were agreed upon. The solicitor did not know her husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage:—Held, that it was not a voluntary settlement; and, that as it contained the usual clauses in such deeds, and simply omitted a power of revocation, which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake. *Hillock v. Button*, 29 Chy. 490.—Proudfoot.

Held, that 42 Vict. c. 22, s. 2, (Ont.) (amending the law of dower) does not apply to a case of voluntary sale by a husband. See *Calvert v. Black*, 8 P. R. 255, p. 560.

Semble, that R. S. O. (1877) c. 109, s. 2, is retrospective, so as to cast the onus of disproving payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment. *Sanders v. Malsburg*, 1 O. R. 178.—Boyd.

A voluntary or covinous conveyance under 27 Eliz., c. 4 is voidable only, and is good and valid until avoided. *Harper v. Culbert*, 5 O. R. 152. *Ferguson*.

A husband, on 2nd September, 1885, by deed of bargain and sale made in pursuance of the Act respecting Short Forms of Conveyances, conveyed to his wife certain lands, the consideration being "natural love and affection and \$5," the receipt of the consideration was also admitted in the deed, besides the usual marginal receipt of the \$5; habendum to the wife, her heirs and assigns for her and their sole and only use forever.—Held, that the evident intention of the owner might be given effect to, as far at least as the beneficial interest in the property was concerned, and an order was, therefore, made, vesting in the wife all the estate and interest of the husband at the date of this deed to her. *Whitehead v. Whitehead*, 14 O. R. 621.—Proudfoot.

See *Jones v. McGrath*, 15 O. R. 189; *S. C.*, 16 O. R. 617, p. 883.

## VOLUNTARY PAYMENT.

See PAYMENT.

## VOTERS.

- I. IN COMPANIES.—See COMPANY.—RAILWAYS AND RAILWAY COMPANIES.
- II. UNDER CANADA TEMPERANCE ACT OR LIQUOR LICENSE ACT.—See INTOXICATING LIQUORS.
- III. VOTERS LIST.—See PARLIAMENTARY ELECTIONS.

## WAGES.

See MASTER AND SERVANT—LIEN.

## WAIVER.

- I. OF SECURITY FOR COSTS.—See COSTS.
- II. ESTOPPEL.—See ESTOPPEL.
- III. LACHES.—See LACHES.
- IV. OF CONDITIONS IN INSURANCE POLICIES.—See INSURANCE.
- V. OF APPEAL.—See APPEAL.
- VI. MATTERS OF PRACTICE.—See PLEADING—PRACTICE.

Where the advertisement in a quieting titles proceeding was posted at another court house

than that required by G. O. Chy. 504 (Con. Rule 1026).—Held, that the irregularity might be waived under R. S. O. (1887), c. 113, ss. 45, 46. *Re Harris*, 12 P. R. 430.—Boyd.

Where a sheriff seizes goods under writs of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the executions, does not necessarily amount to a waiver of his claim under the mortgage. *Segarworth v. Meriden Silver Plating Co.*, 3 O. R. 413.—Boyd.

When a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety. *Regina v. Ramsay*, 11 O. R. 210.—Galt.

Of service of summons by entering on defence. See *Regina v. Bennett*, 3 O. R. 45, p. 1036.

Issuing of a summons by a magistrate waived by defendant entering on defence. See *Regina v. Clarke*, 19 O. R. 601, p. 1100.

Of irregularity by appearance and pleading to summons of justice of the peace. See *Regina v. Bernard*, 4 O. R. 603, p. 1114; *Regina v. Collins*, 14 O. R. 614, p. 1037; *Regina v. Roe*, 16 O. R. 1, p. 1036.

Of objection to jurisdiction by application for new trial. See *In re Evans v. Sutton*, 8 P. R. 367, p. 551.

Of irregularity in return of commission. See *Darling v. Darling*, 9 P. R. 560, p. 623.

Of conditions for inspection in contract for purchase of grain. See *Goodall v. Smith*, 46 Q. B. 388, p. 1855.

Of forfeiture of breach of covenant to repair. See *Leighton v. Medley*, 1 O. R. 207, p. 1139; *Holderness v. Lang*, 11 O. R. 1, p. 1141.

Of notice to quit by payment of rent after action brought. See *Laxton v. Rosenberg*, 11 O. R. 199, p. 1154.

By receipt of rent after forfeiture. See *Dobson v. Sootheran*, 15 O. R. 15, p. 1152.

Of right of tenant to redeem mortgage. See *Martin v. Miles*, 5 O. R. 404, p. 1303.

Of excessive consignment of goods. See *Good-year Rubber Co. v. Foster*, 1 O. R. 242, p. 1863.

Of mechanics' lien. See *Makins v. Robinson*, 6 O. R. 1, p. 1167.

Election to waive personal liability on a note, and accept liability of a company. See *Brown v. Howland*, 9 O. R. 48; 15 A. R. 750, p. 165.

Of notice to arbitrator of time and place for signing award. See *Norvell v. Canada Southern R. W. Co.*, 9 A. R. 310, p. 1765.

Of priority of rights of the Crown by acceptance of dividends. See *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1, p. 459.

Of objection to assessment. See *Ex parte Lewin*, 11 S. C. R. 484, p. 60.

Of objection to title. See *Clarke v. Langley*, 10 P. R. 208, p. 1894.

Of right of purchaser to compensation from vendor for being kept out of possession, by taking a vesting order. See *Barber v. Barber*, 11 P. R. 137, p. 1897.

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P. R. 430.—Boyd.

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11 O. R. 1, p. 1141.

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*Luxton v. Rosenberg*, 11

at after forfeiture. See  
15 O. R. 15, p. 1152.

to redeem mortgage. See  
R. 404, p. 1303.

ument of goods. See *Good-*  
*oster*, 1 O. R. 242, p. 1863.

See *Makins v. Robinson*,

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of a company. See *Brown*  
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*Norvell v. Canada Southern*  
110, p. 1765.

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See *Regina v. Bank of Nova*  
p. 459.

assessment. See *Ex parte*  
44, p. 60.

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t out of possession, by tak-  
See *Barber v. Barber*, 11

Of notice to vendor of defect in machinery sold.  
See *Tomlinson v. Morris*, 12 O. R. 311, p. 2095.

Of breach of contract and resort to recovery  
of money paid. See *Murray v. Hutchinson*, 14  
A. R. 489, p. 1870.

Of right to appeal from order of the court by  
having complied with such order. See *Re Smart*  
*Infants*, 12 P. R. 635, p. 848.

Of objections to finding of arbitrators. See  
*Comtee v. Canadian Pacific R. W. Co.*, 16 O. R.  
639, p. 41.

Of presentment and notice of dishonour. See  
*Blackley v. McCabe*, 16 A. R. 295, p. 137.

By payee of statutory requirements as to  
notes "given for patent right." See *Girvin v.*  
*Burke*, 19 O. R. 204, p. 1556.

## WALL.

See BUILDINGS.

## WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

See BANKS—BILLS OF LADING AND WAREHOUSE  
RECEIPTS—CONSTITUTIONAL LAW—RAILWAYS  
AND RAILWAY COMPANIES.

## WARRANT.

I. FOR ARREST.—See JUSTICE OF THE PEACE.

II. FOR SALE OF LAND FOR TAXES.—See AS-  
SESSMENT AND TAXES.

III. OF DISTRESS.—See JUSTICE OF THE PEACE.

IV. OF COMMITMENT.—See JUSTICE OF THE  
PEACE.

V. SEARCH WARRANT.—See INTOXICATING  
LIQUORS—JUSTICE OF THE PEACE—  
SEARCH WARRANT.

## WARRANTY.

I. IMPLIED WARRANTY, 2093.

II. ACTION FOR BREACH OF.

1. When Action will lie, 2094.

2. Evidence, 2095.

3. Damages, 2095.

III. MISCELLANEOUS CASES, 2097.

IV. WHERE SALE HAS BEEN BY SAMPLE OR  
INSPECTION.—See SALE OF GOODS.

V. AS TO SHIPS.—See SHIPS.

VI. IN INSURANCE.—See INSURANCE.

### I. IMPLIED WARRANTY.

Plaintiff sued the defendants for the value of  
a portable engine and boiler which had been  
hired by the defendants, and which boiler had  
exploded when in their possession immediately

after they had begun to use it, and while in charge  
of a competent engineer.—Held, that as the lessor  
of a chattel for hire impliedly warrants that it  
is reasonably fit for the purpose for which it  
is let, the plaintiff, in the absence of negligence  
on the part of the defendants, could not recover.  
*Reynolds v. Rozburgh*, 10 O. R. 649.—Q. B. D.

Under a contract to supply goods of a specified  
description which the buyer has no opportunity  
of inspecting, the goods must not only, in fact,  
answer the specific description, but must be  
saleable or merchantable under that description.  
On a sale of goods where the buyer has no  
opportunity of inspection, the maxim caveat  
emtor does not apply. The plaintiffs sold a  
cargo of rye to the defendants to be shipped from  
K. and delivered afloat at the defendants' dock  
at T. On being unloaded at T. into the defend-  
ants' elevator, it was discovered by the defend-  
ants' inspector that the bottom of the cargo  
was heated; and subsequently the whole of it  
became heated. There was no opportunity to  
inspect the rye at the time of the making of  
the contract, nor did the defendants waive in-  
spection. There was no express warranty as  
to quality or condition:—Held, that there was  
an implied warranty on the part of the plain-  
tiffs that the commodity delivered would be  
saleable or merchantable under the description  
"rye," that there was a breach of such war-  
ranty, and that the maxim caveat emtor did  
not apply. *Jones v. Just*, L. R. 3 Q. B. 197,  
cited and followed; *Borthwick v. Young*, 12  
A. R. 671, distinguished. *Moore v. Gooderha*  
*& Worts (Limited)* 14 O. R. 451.—Ferguson.

### II. ACTION FOR BREACH OF.

#### 1. When Action will lie.

The defendant delivered a piano to the plain-  
tiff on a "hire contract," the price being stated  
to be \$500, payable by crediting \$100 on an old  
piano taken in exchange, and the balance of \$400  
by monthly instalments, the plaintiff giving a note  
for the \$400, payable by like instalments. The  
contract stated that the defendant did "neither  
part with said piano," nor did the plaintiff "ac-  
quire any title" to it until the note was fully  
paid. Certain instalments fell due and payment  
was enforced, and there were instalments in ar-  
rear when action was brought. The plaintiff  
sued for fraudulent misrepresentations, and for  
general damages for breach of implied warran-  
ties; the alleged misrepresentations or warran-  
ties being that the piano was worth \$500; that  
it was a first-class instrument; and as good as  
any Steinway or Chickering piano. The jury  
found for the plaintiff with damages:—Held,  
that as the property had not passed, an action  
for the breach of warranty would not lie. *Frye*  
*v. Milligan*, 10 O. R. 509.—C. P. D.

By a written agreement the defendants sold a  
threshing machine for \$500, to the plaintiff, tak-  
ing an engine in part payment of \$250, the balance  
to be secured by promissory notes. The right of  
possession was to be in plaintiff until default, but  
until payment the right of property was to be in  
defendants; with a warranty by defendants that  
with good management the machine would do  
good work and was superior to any other machine  
made in Canada, etc., and if upon starting the  
machine, the plaintiff, following the printed hints,

rules and directions of defendants, was unable to operate it well, he was to give defendants written notice of the defect, and a reasonable time was to be allowed defendants to get to the machine and remedy the defect, unless they could advise by letter; but if they were unable to make it operate well, etc., and the fault was in the machine they were to take it back and refund the payments made, or remedy the defective part, but if the fault was through improper management or neglect to observe the printed, etc., directions, the plaintiff was to pay all necessary expenses incurred; and if, plaintiff observing such directions, any part, except belting, failed during the year, through any defect in material, the defendants, on presentation at the manufactory of the defective piece, were to furnish a duplicate thereof, but defects in pieces were not to condemn other parts. Deficiencies in general adaptation for threshing, separating, etc., for which alone the machine should be taken back, must be reported ten days after starting the machine, and not after continued use or injury thereto. The defendants had, on the plaintiff's complaint, attended and made alterations in the machine, whereupon the plaintiff used the machine for six weeks, and then sent it back to the defendants, because, as the plaintiff said, it failed to comply with the warranty, and he had no further use for it; but, as defendants understood to be repaired. The plaintiff did not ask for the return of the engine. No printed hints, etc., were given by defendants, nor written notice of the defect given by plaintiff; and no default was made by plaintiff in payment of the instalments. In an action to recover the \$250, the value of the engine taken as part payment, the redelivery of the notes, and \$500 damages for breach of warranty:—Held, following *Frye v. Milligan*, 10 O. R. 509, that as the property in the machine had not passed to the plaintiff, he could not maintain an action for breach of warranty. Held, also, that the plaintiff was not entitled to return the machine after the expiration of the ten days, no notice in writing of the defect complained of having been given; and that the fact of the defendants' previous attendance to make alterations did not constitute a waiver of their right to such notice, as the evidence shewed that when plaintiff sent for defendants he did not intend giving notice with a view of availing himself of the right to rescind; and the starting under the contract must be regarded as that which took place after the machine was so altered. *Tomlinson v. Morris*, 12 O. R. 311.—C. P. D.

## 2. Evidence.

See *McMullen v. Williams*, 5 O. R. 518, p. 2096; *La Roche v. O'Hagan*, 1 O. R. 300, p. 658; *Ellis v. Abell*, 10 A. R. 226, p. 658; *Moore v. Gooderham and Worts*, 14 O. R. 451, p. 2097.

## 3. Damages.

The defendants bought a vessel from the plaintiff, who, as the jury found, warranted her to class B. 1, and promised to get her insured in a company, of which he was agent, for \$1,400. She would not class as B. 1, and no insurance could be effected under that class; but defendants sailed her uninsured until she foundered

and was totally lost. In an action for the purchase money:—Held, that the measure of damages to which defendants were entitled for breach of the warranty was not the \$1,400 for which she might have been insured, but the sum which it would have taken to make her class B. 1, which it was for defendants to shew. *La Roche v. O'Hagan*, 1 O. R. 300.—Q. B. D.

The plaintiff sued the defendant, a piano maker, for breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, which is set out in the report, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty:—Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract. Quære, whether this question should not have been left to the jury:—Held, also, that the salesman had authority to give the warranty. Quære, whether any evidence of an express warranty was necessary:—Held, also, that the proper measure of damages to allow was the price which at the time of sale would have been required to remove the alleged defect, and the jury having given much more, the court named a sum to which the plaintiff might reduce his verdict, or that there should be a new trial. *McMullen v. Williams*, 5 A. R. 518.

The defendant was a manufacturer of steam threshing machines, which were recommended as being safe from fire; that the engine would not throw out sparks, and that the separator, which was sold and used therewith, would not throw out grain in the chaff, and that altogether these were the best threshing machines in the world. The plaintiff alleged that after hearing these recommendations he sent a written order to the defendant for a steam engine and separator, which when used proved defective, the engine throwing out sparks and the separator wasting the grain by throwing it out with the chaff; and he claimed to have the contract of purchase rescinded and the notes given by him in payment of the machine returned; and \$300 damages. The judge at the trial having ruled that the plaintiff could not rescind the contract, but could only recover, as damages for breach of warranty, the difference in value between the machine contracted for and the one which was delivered:—the jury found (in answer to questions) that there was a warranty which had been broken and that by such breach the plaintiff had sustained damages to the amount of \$500. Per Cameron, C. J. C. P., the plaintiff's claim on the pleadings was for breach of a contract not proved by the evidence, and no amendment should be allowed to change it into an action for breach of warranty; but there should be a new trial. As to the question of damages.—Per Hagarty, C. J. O., and Rose, J., the damages claimed in the pleadings were claimed upon the basis of a rescission of the contract and return of the notes. The damages awarded were for a breach of warranty, the plaintiff keeping the machine and paying for it; and there was evidence to support the finding of the jury as to damages. Per Cameron, C. J. C. P. There was no evidence from which the



an action for the purchase of the measure of damages was not the \$1,400 for been insured, but the have taken to make her for defendants to shew. O. R. 300.—Q. B. D.

the defendant, a piano warranty given by his a piano, that the instrument in good order. The nary receipt note, which, providing for payment until paid the property plant, in which there was warranty.—Held, that parol receipt was admissible, as it receipt note was not notice of the whole contract. question should not have y.—Held, also, that the y to give the warranty. evidence of an express y.—Held, also, that the images to allow was the e of sale would have been e alleged defect, and the h more, the court named plaintiff might reduce his e should be a new trial. 5 A. R. 818.

a manufacturer of steam which were recommended ; that the engine would and that the separator, ed therewith, would not the chaff, and that altho best threshing machines plaintiff alleged that after ndations he sent a written t for a steam engine and a used proved defective, and sparks and the separa- by throwing it out with ed to have the contract and the notes given by e machine returned; and dge at the trial having ff could not rescind the nly recover, as damages y. the difference in value y. contracted for and the ed.—the jury found (in an- ture was a warranty n and that by such breach nained damages to the Cameron, C. J. C. P., the e pleadings were for breach ed by the evidence, and e be allowed to change it h of warranty; but there l. As to the question of y, C. J. O., and Rose, ed in the pleadings were is of a rescission of the e the notes. The damages e breach of warranty, the machine and paying for it; e to support the finding ges. Per Cameron, C. J. evidence from which the

plaintiff's damages for breach of warranty could be reasonably ascertained, and for this reason also there should be a new trial. The court being equally divided, the appeal was dismissed. *Ellis v. Abell*, 10 A. R. 226.

The breach of warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and it forms no defence to an action by the seller for the price, but the purchaser, on being sued for the price, is allowed to give evidence of the breach of warranty in reduction of damages. *Moors v. Gooderham and Worts*, 14 O. R. 451.—Ferguson.

### III. MISCELLANEOUS CASES.

Covenant to "warrant and defend" in assignment of patent right. See *Green v. Watson*, 2 O. R. 627, p. 1554.

By the Banking Act, 34 Vict. c. 5 (Dom.), banks were prohibited from buying or selling goods or merchandise:—Held, therefore, that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. *Radford v. Merchants' Bank*, 3 O. R. 529.—C. P. D.

On sale of timber limits. See *Ducondu v. Dupuy*, 9 App. Cas. 150, p. 2016.

As to warranty against charges and encumbrances on sale of land in the province of Quebec. See *Windsor Hotel Co. v. Cross*, 12 S. C. R. 624, p. 495.

### WASTE.

BREACH OF COVENANT TO REPAIR.—See LANDLORD AND TENANT.

The plaintiff, in consideration of \$25 paid by defendant, executed in his favour a lease of a small plot of land, at a yearly rent of one cent if demanded, with the right on the part of the defendant to remove all buildings at any time during the lease. The lease contained no covenants on the part of the lessee other than those to pay rent and to pay taxes, and it was silent as to any right on the part of the lessee to bore for oil:—Held, that *prima facie*, the lessee had not the right to bore for oil, and having done so and commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause. *Lancey v. Johnston*, 29 Chy. 67.—Ferguson.

Impeachment of tenant for life for waste. See *Clow v. Clow*, 4 O. R. 355.

Right of tenant for life to cut timber. See *Saunders v. Breakie*, 5 O. R. 603, p. 2020; *Munsie v. Lindsay*, 10 P. R. 173, p. 2020.

Right of mortgagor when lumber is cut on the mortgaged premises. See *Scott v. Vosburg*, 8 P. R. 336, p. 1285; *McLeod v. Avey*, 16 O. R. 365, p. 1285.

Alterations in building by tenant. See *Helderness v. Lupp*, 11 O. R. 1, p. 1141.

A tenant who, for the purpose of clearing the land and rendering it more fit for cultivation,

collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them. *Saunders v. Breakie*, 5 O. R. 603, commented on. *Lewis v. Godson*, 15 O. R. 252.—Q. B. D.

See *White v. Nelles*, 11 S. C. R. 587, p. 1158; *Mill v. Mill*, 8 O. R. 370, p. 906; *Crawford v. Bugg*, 12 O. R. 8, p. 1140.

### WATER AND WATER-COURSES.

#### I. NAVIGABLE WATERS.

##### 1. Generally, 2098.

##### 2. Legislative Jurisdiction—See CONSTITUTIONAL LAW.

#### II. WHAT CONSTITUTES A WATER-COURSE, 2099.

#### III. ACCRETION, 2099.

#### IV. FORMING BOUNDARIES, 2100.

#### V. RIGHTS AND LIABILITIES OF RIPARIAN PROPRIETORS, 2100.

#### VI. FLOATING TIMBER, 2105.

#### VII. PENNING BACK WATER, 2106.

#### VIII. POLLUTION OF WATER, 2109.

#### IX. RIGHTS BY PRESCRIPTION, 2110.

#### X. DRAINS THROUGH ADJOINING PROPERTY, 2110.

#### XI. LIABILITIES OF MUNICIPALITIES FOR INJURIES CAUSED BY SEWERS AND DRAINS.

##### 1. In Cities and Towns, 2110.

##### 2. Other Drains, 2113.

#### XII. DITCHES AND WATER-COURSES ACT, 2115.

#### XIII. DRAINAGE BY LAWS—See MUNICIPAL CORPORATIONS.

#### XIV. CANALS—See RIDEAU CANAL.

#### XV. BRIDGES OVER RIVERS—See WAY.

#### XVI. FERRIES—See FERRY.

#### XVII. FISHERY—See FISHERY.

#### XVIII. HARBOURS—See HARBOUR.

#### I. NAVIGABLE WATERS.

##### 1. Generally.

Held, in this case, that the wharf being constructed over the navigable waters of the bay of Toronto, the license of the commissioner of crown lands for the province of Ontario, even if he had power to grant it, would not confer the right to impose tolls on vessels landing passengers on the wharf, for the public have a right to reach the shore over the waters of the bay, and C. having been invited, as it appeared, by the proprietors of Hanlan's point to run his vessel there, he had a right to land on the wharf which prevented his reaching the island at that place:—Quære, whether the soil at the bottom of the Toronto bay at the place in question was vested in the province, or in the city of Toronto under the patent from the crown of the island. *Clendinning v. Turner*, 9 O. R. 34.—C. P. D.

E. et al. brought an action of tort against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in by them as supports to an extension of their wharf, built on certain land covered with water in the harbour of Halifax, for which they had obtained a grant from the provincial government of Nova Scotia, in August, 1861. W. pleaded inter alia, that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax harbour, to and from the south side of said wharf, with steamers, etc., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his right, he (defendant) removed the same." At the trial there was evidence that the erections which E. et al. were making for the extension of their wharf, did obstruct access by steamers and other vessels to W.'s wharf. A verdict was rendered against W., which the full court refused to set aside:—Held, (reversing the judgment of the Supreme Court of Nova Scotia) that, as the crown could not, without legislative sanction, grant to E. et al., the right to place at said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as W. had shewn special injury, he was justified in removing the piles which were the trespass complained of. *Wood v. Esson*, 9 S. C. R. 239.

See *McLaren v. Caldwell*, 6 A. R. 456, 9 App. Cas. 392, p. 2105; *Gardner v. Chapman*, 6 O. R. 272, p. 2101; *Warin v. London and Canadian Loan and Agency Co.*, 7 O. R. 706; 12 A. R. 327; 14 S. C. R. 232, p. 2103; *Ratté v. Booth*, 11 O. R. 491; 14 A. R. 419; 15 App. Cas. 188, p. 2104, 2105.

## II. WHAT CONSTITUTES A WATER-COURSE.

A water-course entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly-defined channel of a permanent character. *Beer v. Stroud*, 19 O. R. 10.—Chy. D.

## III. ACCRETION.

By 10 Geo. IV., c. 11, the Cobourg Harbour Company were authorized to construct a harbour at Cobourg, and also to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever, as should be useful and proper for the protection of the harbour, and to alter and amend, repair and enlarge the same as might be found expedient. The harbour company commenced their work in 1820 by running a wharf southerly from the road allowance, between lots sixteen and seventeen of the township of Hamilton, which now forms Division street in the town of Cobourg. By means of the mud and earth raised by dredging and gradual accretions, which were prevented from being washed away by being confined by

crib-work, the original wharf was widened to the full width of Division street, and in addition they constructed a storehouse and placed a fence dividing it from the land which appellant (whose lot fronted on Division Street, and extended to the water's edge), had gained by accretion since the addition to the original wharf was made. Thereupon the appellant filed a bill complaining that his access to this alluvial land was obstructed by the storehouse and fence which the respondents caused to be placed on the addition to the wharf and praying that the respondents other than the attorney-general, be decreed to remove them:—Held, 1. That land gained by alluvial deposits arising from natural or artificial causes or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible, accrues to the owner of the adjacent land. 2. That the storehouse and fence complained of in this case were not constructed on any part of Division street, but on an artificial structure constructed under the authority of a statute on the line of Division street for harbour purposes and, therefore, appellant was not entitled to be indemnified because he was denied access to his alluvial land through the premises of the respondents. 3. That the public right of way from the end of Division street to the water of Lake Ontario, was extinguished by statute by necessary implication. *Corporation of Yarmouth v. Simmons*, 10 Ch. D. 518, followed. *Standly v. Perry*, 3 S. C. R. 356; 2 A. R. 195.

## IV. FORMING BOUNDARIES.

River Rideau boundary between townships of Gloucester and Nepean and the city of Ottawa. See *Regina v. County of Carleton*, 1 O. R. 277, p. 2138.

See *McArthur v. Gillies*, 29 Chy. 223, *infra*; *Attrill v. Platt*, 10 S. C. R. 425, p. 2101; *Ratté v. Booth*, 11 O. R. 491, p. 2104; *Re Trent Valley Canal and Land Expropriated at Fenelon Falls*, 12 O. R. 153, p. 2101; *Brady v. Sadler*, 16 O. R. 49; 17 A. R. 365, p. 2108.

## V. RIGHTS AND LIABILITIES OF RIPARIAN PROPRIETORS.

Under a conveyance of land, on a stream not navigable, described as running from, etc., "south, etc., to the northern side of the \* \* \* river, \* \* \* then north-easterly along the bank of the said river, with the stream to the centre of the said lot"—Semble, that the grantee was bound by the bank of the river, and had not any right to extend the boundaries to and along the middle or thread of the stream; but:—Held, whether he had or had not such right, he could not erect any structure in the stream that could or might affect prejudicially the flow of the water as regards other riparian proprietors. *McArthur v. Gillies*, 29 Chy. 223.—Sprague.

A riparian proprietor has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands, but his right is a qualified one, and subject to the lawful and reasonable user of the waters by a mill-owner above him on the same stream, and this although the user above him may be at times

wharf was widened to the feet, and in addition they placed a fence di- which appellant (whose Street, and extended to gained by accretion since ginal wharf was made. t filed a bill complaining nial land was obstructed fence which the respon- on the addition to the t the respondents other al, be decreed to remove land gained by alluvial tural or artificial causes natural and in part artif- is proved that the accre- imperceptible, accrues to cent land. 2. That the mplaind in this case on any part of Division al structure constructed a statute on the line of our purposes and, there- entitled to be indemnified access to his alluvial nises of the respondents. t of way from the end of water of Lake Ontario, tute by necessary impli- f Yarmouth v. Simmons, ed. *Standy v. Perry*, 3 195.

#### BOUNDARIES.

ary between townships of n and the city of Ottawa. of Carleton, 1 O. R. 277. *Phillips*, 29 Chy. 223, *infra*; C. R. 425, p. 2101; *Routé*, p. 2104; *Re Trent Valley Expropriated at Fenelon Falls*, ; *Brady v. Sadler*, 16 O. , p. 2108.

#### LIABILITIES OF RIPARIAN PROPRIETORS.

of land, on a stream not as running from, etc., northern side of the \* \* \* north-easterly along the r, with the stream to the —Semble, that the grantee k of the river, and had not e boundaries to and along d of the stream; but:— or had not such right, he ructure in the stream that e prejudicially the flow of other riparian proprietors. 29 Chy. 223.—Spragge.

tor has not the absolute and unobstructed flow of n over his lands, but his e, and subject to the law- er of the waters by a mill- the same stream, and this ove him may be at times

for an extraordinary purpose. *Dickson v. Carnegie*, 1 O. R. 110.—Ferguson.

C., the owner of two lots of land divided in one place by G.'s land, and in another by a bay formed by the waters of the Rideau canal, which washed the shores of all these lots began to construct a bridge between his two lots for easier access between them, which bridge would have the effect of cutting off G.'s land from the canal, and of making the water between the bridge and G.'s land stagnant. In an action by G. against C. for an injunction to compel him to desist from the work, and remove that part already constructed. It was:—Held, that G. had the rights of an ordinary riparian owner, and that the stream being a navigable one made no difference, except that those rights are subject to the public right of navigation, that those rights had been injuriously affected by the defendant, that the plaintiff shewed that an injury would result to him if the work was completed, and that he might in good time bring his action to prevent the wrong, that even if the bay was not part of the Rideau canal itself, so as to give him the rights of an owner and occupant of lands adjoining the canal under 8 Geo. IV. c. 1, s. 15, he was entitled to use it as a means of access to the canal, and that on the evidence the plaintiff was entitled to his injunction. *Gardiner v. Chapman*, 6 O. R. 272.—Ferguson.

Besides the lands the title to which was derived from their common grantor, the appellant was proprietor of another piece of land, called block A., situated on the opposite side of the River Maitland, the boundary of said block on the river side being high water-mark:—Held, that the lateral or riparian contact of the land with the water would suffice to entitle the appellant to object to any unauthorized interference with the flow of the river in its natural state. *Aitull v. Platt*, 10 S. C. R. 425.

Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part thereof lying N. or E. of the said river to one party, and the part lying S. or W. of the said river to the other party:—Held, that this would carry the ownership of the soil to the mid-thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instrument. *Re Trent Valley Canal and Land Expropriated at Fenelon Falls*, 12 O. R. 153.—Boyd.

Held, reversing the judgment of the court below, *Taschereau, J.*, dissenting, that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property. 2. That the railway company in the present case not having complied with the provisions of 43-44 Vic. c. 43, s. 7, sub-as. 3 and 5 (Que.) the appellant's remedy by action at law was admissible. *Pion v. North Shore R. W. Co.*, 14 S. C. R. 677. See also *Bignouette v. North Shore R. W. Co.*, 17 S. C. R. 363.

A. was lessee for years of the west half, which was practically vacant, of water lot 17, Toronto harbour, B. proprietor of the east half of the same lot, on which, erected more than twenty

years before action, were a wharf and storehouse, so near the dividing line of the half lots that vessels could not call at the west side of the wharf, where all the business was done, without passing over the half lot of A. and partially occupying the same while lying at the wharf. B. and his successors had also laid up vessels at their wharf in winter, two or three abreast, occupying part of A.'s half lot nearly every year since the erection of the wharf, and about eighteen years before action built on the wharf an elevator for receiving and shipping grain at the west side of the wharf. In 1883 A. put up a notice warning persons against trespassing on his half lot, which vessels passing to B.'s lot knocked down. Subsequently, in the same year, A. drove piles into the soil of his own half lot, ostensibly as a foundation for boat houses, and was about to drive others, to the obstruction of the approach to B.'s wharf, when B., to meet this, began moving vessels to and from his wharf, and finally moving them to his wharf and extending into the waters on A.'s lot, thus preventing him from driving more piles. In trespass by the plaintiff, B. claimed, first, an easement by prescription and non-existing grant to the owners of the fee—whose lessee, Taylor, who erected said wharf, was—over A.'s lot to the extent necessary to allow vessels to pass to and from his wharf, and to lie up there, secondly, that the water covering said water lot were navigable waters part of Lake Ontario and Toronto harbour, and that the wharf was a construction within the law for the purposes of enabling the harbour to be used, and the safe and useful navigation of said waters, and that the act of A. was a wrongful interference and an obstruction of the use of the said navigable waters, which B. was entitled to abate:—Held, 1. That the waters covering said lot seventeen were part of the navigable waters of Lake Ontario, and the same law was applicable thereto as in the case of tidal waters, in the absence of a valid grant the soil being vested in the Crown and subject to the jus publicum of navigation; 2. That the Act 23 Vict. c. 2, s. 35 (R. S. O. 1877 c. 23, s. 47), gives to the Crown authority to grant water lots, and the grant of water lot seventeen by the description, "land covered with water," was valid under these enactments, and sufficient to pass to the grantee and his representatives the soil and the jus publicum for navigation and the like in the water, which could be built upon, filled up, or otherwise dealt with, as might be thought proper; 3. That so long as A.'s water was unenclosed or unoccupied any one might pass over or across it without being liable to be treated as a trespasser, and an easement such as that claimed could not therefore be acquired; 4. That the claim to an easement was not founded on an enjoyment nec clam, nec vi, nec precario, and was therefore not as of right, and could not be sustained; 5. That the evidence shewed the user of the plaintiff's water lot was not as of right, and the finding of the jury was warranted by the evidence; 6. That neither the erection of the wharf nor its long use, nor the erection of the elevator, shewed such a claim of enjoyment as of right as to satisfy the statute; 7. That in any event the claim was of an easement in gross, and therefore invalid; 8. That the verdict upon the evidence set out in the report, should have been against the defendants in any event, because they were not making use of the waters for the purposes of trade and commerce

when they anchored the vessels upon the lot; 9. That the patent to the city of Toronto of the water lots, confirmed by the esplanade legislation, gave to the owners of water lots the right to fill in their lots, and turn them into land. *Warin v. London and Canadian Loan and Agency Co.*, 7 O. R. 706.—Q. B. D. Affirmed on appeal, 12 A. R. 327; 14 S. C. R. 232.

J. A. was the patentee of a certain water lot on the River Ottawa, and the description in the patent covered the lot and two chains distant from the shore, but a reservation was contained in the patent "of the free uses, passage and enjoyment in, over, and upon all navigable waters having or may be hereafter found in or under, or flowing through, or upon any part of the said parcel of land hereby granted." The said water lot was subsequently conveyed to A. R., but the description in the deed to him only went to the water's edge:—Held, reversing the judgment of Frowdfoot. *J.* (10 O. R. 351), per Boyd, C.—The effect of the patent is to convey the dry land and the land covered by water two chains out, subject to the rights of the public in the Ottawa as a navigable river. As to the land bordering on the water the plaintiff is a riparian proprietor, and has the right to have the water in front of him open for all navigable purposes, and to enjoy it free from extraordinary impurities. Even if the land under the water is vested in the plaintiff's grantor he could not derogate from his grant to the water's edge by polluting, filling up, or otherwise cutting off his grantee from the beneficial enjoyment of the river, still less can the defendants be protected in their wrong-doing. The grant to the patentee of the river-bed two chains out, carries, as parcel of it, the water thereon so that the bed, the bank, and the water are vested as private property in the patentee, subject to the servitude of a common public right of way for the purposes of navigation. The term "navigable waters" in the patent is to be construed as referring to water of such a depth and situation as is, according to the reasonable course of navigation in the particular locality, practically navigable. The patentee might rightfully use and occupy the land covered by water, but only so much as will not interfere with the public easement; but every encroachment on the water will be at his peril if it is proved that he is guilty of a public nuisance. There was no evidence to shew that the plaintiff's structure (the boathouse) is a nuisance; and whatever may be the nature of the plaintiff's title or occupancy of the water, it is enough that his possession and business are, as against the public, legitimate in order to entitle him to recover as against a wrong-doer. Even if the plaintiff's place of business was proved to be a nuisance because it invaded the navigable waters of the river, it does not follow that that disposes of the plaintiff's claim for an injunction and damages, as he might well invoke the maxim, *Injuria non excusat injuriam*. Per Ferguson, J.—There is nothing either on the face of the conveyance to the plaintiff, or in the surrounding circumstances at the time of its execution, to indicate that the grantor intended, if intention could now be of any consequence, to reserve to himself the part of the lot under the water, or any right or title to it. The contrary would rather appear, from his being in possession at the time, and having a boathouse

situated as the present one is. By the conveyance to the plaintiff he obtained title to the lands in the stream embraced in the two chains from the bank, but subject to the right of navigation expressed in the patent. What the plaintiff has done is no nuisance, nor is it shewn that he has caused any injury to navigation, and he is entitled to redress for the grievances of which he complains. Even if the plaintiff is not the owner of the land under the water, he is entitled to redress for the injuries he has sustained as a riparian proprietor, merely. *Rattév. Booth*, 11 O. R. 491.—Chy. D. See *S. C.*, *infra*.

This judgment was affirmed by the Court of Appeal (Burton, J. A., dissenting). Per Hagarty, C. J. O., and Osler, J. A., the plaintiff is in the position of a riparian proprietor. He owns the land on the bank and has the same right over the water as the rest of the public. There is, however, a special injury to him, and a wrongdoer not in privity with P. cannot be heard to raise the question of P's rights in order to exclude plaintiff from the water. The Crown owning the bed of the river, could grant a portion thereof, reserving the public right of user, which is the effect of the reservation in the patent. Per Patterson, J. A. The plaintiff is a riparian proprietor. The patent to A. granted the land without any restriction of his absolute dominion over it, and there is nothing to distinguish it from an ordinary grant of crown lands. It was made in contemplation of the grantee occupying the land with buildings, or wharves, or otherwise at his pleasure, and so far there was, under legislative sanction, a curtailment of the *jus publicum*. The reservation of the free uses, passage and enjoyment \* \* \* of all navigable waters considered as an exception, was void, as repugnant to the license. The public right to the use of navigable waters is the right of each individual, and stands on a different footing; it does not come by grant from the crown, but is a paramount right to be curtailed only by Act of the legislature. A public easement cannot be the subject of an exception in favour of the grantor. If the exception were construed as perpetuating the *jus publicum*, it would be repugnant to the grant in its operation under the statute 23 Vict. c. 2 s. 35, and would be void. The true reading of the patent is, that the reservation touching navigable waters is applicable only to other parts of the lot, and not to the two chains of the river bed. The whole lot vested in A. free from the asserted *jus publicum*, and the plaintiff as against his grantor, P. and a fortiori as against wrong doers, had acquired a title to the river portions under the Statute of Limitations. Per Burton, J. A.—The plaintiff cannot be regarded as a riparian proprietor; the person occupying that position is P., and on his filling in the lot, as he is entitled to do, to the extent of his grant the plaintiff would be entirely cut off from the stream. The plaintiff, a trespasser, cannot complain of others trespassing on portions of the property of which he is not in possession, although it may interfere with his access to the portion of which he is in possession. If the words of the reservation in the patent extend to the right of navigation, the reservation is absolutely void. The statute 23 Vict. c. 2, s. 35, gives to the crown the right to grant the bed of the river and the water upon it free from any rights *publici juris*. The statute of

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limitations could give the plaintiff no title to  
any part of the land covered by water, except  
that actually occupied by his floating wharf and  
boathouse. *S. C.* 14 A. R. 419; affirmed by  
the Privy Council, *sub nom.* *Booth v. Ratle*, 15  
App. Cas. 188.

There is no distinction in principle between  
riparian rights on the banks of navigable or tidal  
and on those of non-navigable rivers. In the  
former case, however, there must be no inter-  
ference with the public right of navigation and  
in order to give rise to riparian rights the land  
must be in actual daily contact with the stream,  
laterally or vertically. *Lyon v. Fishmongers*  
*Company* (1 App. Cas. 662) followed and held  
to be applicable to every country in which the  
same general law of riparian rights prevails  
unless excluded by some positive rule or binding  
authority of the lex loci. *North Shore R. W.*  
*Co. v. Pion*, 14 App. Cas. 612.

See *Hawkins v. Mahaffy*, 29 Chy. 326, p. 2106;  
*Gray v. Town of Dundas*, 11 O. R. 317, p. 2112;  
*Wood v. Esson*, 9 S. C. R. 239, p. 2099.

#### VII. FLOATING TIMBER.

Held, that although the public may have in a  
river, such as the one in question, an easement  
or right to float rafts or logs down and a right of  
passage up and down in Canada, etc., wherever  
the water is sufficiently high to be so used, such  
right is not inconsistent with an exclusive right  
of fishing or with the right of the owners of prop-  
erty opposite their respective lands, *ad medium*  
*ilium aque*. *Regina v. Robertson*, 6 S. C. R. 52.

Held, that the right conferred to float timber  
and logs down streams by Canadian Statute 12  
Vict. c. 87, s. 5, is not limited to such streams  
as in their natural state, without improvements,  
during freshets, permit said logs, timber, etc.,  
to be floated down them, but extends to the user  
without compensation of all improvements upon  
such streams, even when such streams have been  
rendered floatable thereby. *Boale v. Dickson*,  
13 C. P. 337, overruled. Such right is only con-  
ferred by the statute during freshets; *quare* as  
to the rights at other seasons of the year of the  
parties, that is, of the lumberers on the one side,  
and the owners of the improvements, and the  
bed of the stream whereon they have been effec-  
ted on the other. *Caldwell v. McLaren*, 9 App.  
Cas. 392. Judgment of the Supreme Court, 8  
S. C. R. 435, reversed.

The plaintiff had erected dams, slides, and  
other improvements for facilitating the passage  
of sawlogs and timber down a stream, float-  
able in a state of nature. Some of these slides  
were situated in the bed of the stream, others  
were built entirely on the plaintiff's land on one  
side of the stream, the water of which was  
dammed back so as to flow in part through the  
artificial channel thus constructed. The defend-  
ants, in driving their logs and timber down  
the stream, used all the slides and improvements.  
In an action for tolls for such user:—Held, fol-  
lowing *Caldwell v. McLaren*, 9 App. Cas. 352,  
that as to all slides and improvements construc-  
ted in the bed of the stream, plaintiff could not  
recover; but:—Held, also, as to all such im-  
provements outside the channel, and upon plain-  
tiff's land, that a recovery by the plaintiff was

proper:—Held, also, that the absence of aprons  
of the proper statutable dimensions upon plain-  
tiff's dams across the river afforded defendants  
no ground for claiming the right to use without  
compensation plaintiff's improvements not in  
the bed of the stream. *Boale v. Dickson*, 13  
C. P. 337, remarked upon. *Mackey v. Sherman*,  
8 O. L. 28.—Q. B. D. See R. S. O. (1887), c. 120.

See *Queddy River Driving Boom Co. v. David-*  
*son*, 10 S. C. R. 222, p. 316.

#### VII. PENNING BACK WATER.

In order to establish a right to damages as  
against the crown for having, as alleged, ob-  
structed the flow of water to the mills of the  
suppliants, it is incumbent on the suppliants to  
shew that less than the natural volume of water  
forming the stream reaches their mill on account  
of such alleged obstruction: therefore, where it  
appeared upon the evidence that certain waters  
alleged to have been penned back by a dam  
would never have reached the mills of the sup-  
pliants, and the extreme and unprecedented dry-  
ness of the season had had an appreciable effect  
upon the supply of water:—Held, that the evi-  
dence did not sustain the petition, which alleged  
that the suppliants sustained damage by the  
erection of a dam across the river, above their  
mill. The redress of a subject suffering damage  
from such acts, if unauthorized by statute,  
would be against the subject who committed the  
wrong, and not against the crown. *Muskoka*  
*Mill Co. v. The Queen*, 28 Chy. 563.—Spragge.

The patent from the crown of a lot of land  
situate on the bank of a river, reserved free  
access to the bank for all persons, vessels, etc.  
There was a quantity of stone on the lot, which  
the plaintiff desired to quarry, but was prevented  
by the penning back of the water of the river  
by the defendant, the owner of a mill thereon  
below the plaintiff's land:—Held, that the re-  
servation by the crown in the grant was merely  
an easement to the public, notwithstanding  
which the plaintiff was a riparian proprietor,  
and as such entitled to complain of the injury  
caused by the penning back of the water. The  
parties desired the assistance of scientific evi-  
dence as to the height of the defendant's dam  
and the effect of raising it. The court (Proud-  
foot, J.) appointed an engineer to inspect and  
report thereon, reserving the costs until his re-  
port should be obtained. *Hawkins v. Mahaffy*,  
29 Chy. 326.

When one brought action to restrain the diver-  
sion of the water which supplied his mill, from  
the channel in which it had flowed for more than  
twenty years, and it appeared that the channel  
was an artificial cut, diverting the water from  
its natural outlet, and had been made originally  
at the instance, and by permission of the then  
owner of the creek, in which the water naturally  
flowed, partly for the benefit of the owner, who  
had however, on many occasions blocked up the  
cut, so as to turn the water to its natural outlet:—  
Held, that such an occupation would not give a  
statutory right to the licensee, and that the onus  
was on the plaintiff to make out his right, and  
shew that there had been a change in the mode  
of user, after the origination by permission.  
*Malcolm v. Hunter*, 6 O. R. 102.—Boyd.



The defendants were incorporated by 31 Vict. c. 66, (Ont.), with power to take and appropriate a slip of land 200 feet wide, and to construct and maintain a canal from Black river to Lake St. John, and thence to Lake Couchiching, with the full use and enjoyment of the waters of said river, and the tributary streams and Lake St. John for floating or moving logs; and to execute thereon all necessary works, but so as not to impair and injuriously affect the enjoyment of the present channels thereof; and to construct and keep in repair, subject to such provision, all locks, bridges, and erections necessary for said works; the price or the compensation for the lands taken in case of dispute, or for any lands flooded or injuriously affected by the company's works, to be settled by arbitration. The defendants under their statutory powers erected a canal, and at the point of commencement constructed two piers extending into the river; and in the St. John's creek, which flowed from Lake St. John to Black river below the canal, a dam was erected. A break occurred in the bank of Black river on the canal side beyond the piers, whereby large quantities of water from Black river flowed into the canal, and thus into Lake St. John. Owing to the formation of Black river below the junction of St. John creek therewith, the water in the creek at high water during freshets was backed up into Lake St. John and overflowed the plaintiff's and other lands at the head of the lake. The plaintiff contended that either by the break in the river bank whereby more water was brought down than usual, or by the dam preventing the water from flowing away, it remained longer than it otherwise would have done, and thus caused the damage complained of. Special questions were not submitted to the jury, and there was no finding by them as to whether the cause of damage, if any, was the dam or the break in the river bank. The jury found for the plaintiff:—Held, therefore, there must be a new trial to ascertain whether the damage, if any, was caused by such dam or by the break in the river bank; and, if by the latter, was it the result of negligence or by vis major?—Quære, whether there was any liability cognizable in a court of law attachable on the defendants; and whether the compensation clause applied, the plaintiff's land not having been flooded under any right so to do claimed by the company. *Clarke v. Rama Timber Transport Co., (Limited)*, 9 O. R. 68.—C. P. D.

The approaches to a bridge built over a river were supported on trestle work, the water flowing through the trestle work and spreading over the low land until it fell into the river. The municipality subsequently filled in the trestle work and made a solid embankment there whereby the water was penned back, and sent down in a greater body and with greater force in the regular channel, by reason whereof a great part of the bank of the river upon which the plaintiff's factory was erected, was washed away, and was being so washed away from year to year:—Held, that as the work was done by defendants in such a way as to occasion damage to the plaintiff, whereas it could and should have been done without such effect, this was a matter in which the plaintiff must prosecute his rights by action, and was not the subject of compensation under the arbitration clauses of the Municipal Act. The land in respect of which the claim

was made was mortgaged:—Held, that the mortgagee was not a necessary party, the proceeding not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but as the compensation was only some \$50, the court would not require him to be made a party. *In re Nickle and the Town of Walkerton*, 11 O. R. 433.—Wilson.

A crown patent, issued in 1852, conveyed to the plaintiff M. B. a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot nine in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons." The lot actually contained 200 acres, but the dry part was only sixty acres. At and before the issue of the patent, there was a certain mill dam on the S. river, which raised the water of the river and flooded a portion of lot nine; the plaintiffs did not object to the flooding of lot nine by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam, which raised the water about a foot:—Held, reversing the judgment of Proudfoot, J., (13 O. R. 692), that the defendants had no prescriptive right to overflow the plaintiffs' lands by means of the bracket boards:—Held, per Armour, C. J., that the words in the grant, "containing by admeasurement sixty acres, be the same more or less," did not control or affect the description of the land granted, that description being plain and unambiguous; that the words "exclusive of the lands covered by the waters of the S. river, which are hereby reserved," meant the waters of the river S. in its natural channel, the waters between its shores in its natural condition; and therefore that B. took under the patent, not only the dry part of lot 9, but also the drowned land excluding the channel of the river; and the plaintiffs had established their title to the land upon which the water was penned back by the use of bracket boards upon the dam. Per Street, J.—The language of the description in the patent admits of two different constructions, and that should prevail which would make the quantity of land conveyed agree with the quantity mentioned in the patent; and therefore the patent should be construed as if it excluded all the drowned land both within and without the actual channel of the river; the extent of the drowned land being measured by reference to the height of the water as maintained by the dam without the bracket boards. Remarks upon the admission of extrinsic evidence to aid in the construction of a crown patent. *Brady v. Sadler*, 16 O. R. 49.—Q. B. D.

Held, per Proudfoot, J., that, in construing the patent, reference might be had to papers in the crown lands office connected with the application for the patent, and that the reservation in the grant covered the land drowned by the waters of the river Scugog and its affluent as



ing had occurred before the construction of the Bathurst street sewer north of Queen street, coupled with the other evidence, was sufficient to shew *prima facie* that that sewer brought down more water than the Queen street sewer, and Bathurst street sewer, south of Queen street, were capable of carrying away rapidly enough, and that the plaintiff was entitled to recover. *Noble v. City of Toronto*, 46 Q. B. 519.—Q. B. D.

Many years before the defendant municipality was laid out, a culvert was constructed by Z. on private property for the benefit of a railway company whose lands adjoined the stream in question. By reason of the culvert, the water brought down by the stream was not carried off, but overflowed the plaintiff's land. The stream was the natural drain for the surrounding country, but the defendants used it to a small extent for the drainage of the town. It was found that the flooding would not have been occasioned by the water brought down through the defendants' user of the stream, but that water brought down from the area drained, apart from the defendants' user, would have alone caused the damage:—Held, that the defendants were not liable. *Law v. Town of Niagara Falls; Bamfield v. Town of Niagara Falls*, 6 O. R. 467.—C. P. D.

The defendants constructed a number of drains in their town, discharging into a creek running through the lands of the plaintiff, which drains conducted a quantity of brine or salt and refuse from salt manufactories in the neighbourhood into the creek and rendered the water filthy and unfit for drinking, and also corroded the machinery in the plaintiff's woollen factory. And the defendants, having passed a by-law to deepen the creek, threw down the plaintiff's fences, entered upon his land, and threw up earth from the bed of the creek and left it there:—Held, affirming the decision of Proudfoot, J., that the drains not being constructed under a by-law, the plaintiff was entitled to maintain an action for his injury sustained, and for an injunction, and was not compelled to sue those who had discharged the offensive matter into the drains, nor to seek his remedy under the arbitration clauses of the Municipal Act, nor to resort to mandamus to compel better drainage:—Held, also, that damages for the trespass on the plaintiff's land could be recovered by action, as the corporate powers under the by-law for deepening the creek might have been exercised without the commission of the trespass; and this, too, notwithstanding that the work was done under and by means of a contractor, who, however, was not an independent contractor, but worked under the superintendence of the council. *VanEgmond v. Town of Seaforth*, 6 O. R. 599.—Chy. D.

A drain of the defendants for carrying off the surface waters of a street ran along the street and across it, and then through private property until it reached a creek. On the street there was a screw factory, the proprietors of which, by defendants' permission, connected a drain from their works with the defendants' drain, which had the effect of carrying noxious matter from the factory into the creek; but, on complaint thereat, the proprietors used an old cellar as a reservoir for the noxious matter; but which, it was alleged, filtered through from the cellar

into the drain and so into the creek. The drain, without the infiltration into it from the cellar, from which it was twenty-six feet distant, conveyed nothing injurious into the creek. The plaintiff, a riparian proprietor on the creek, having a factory there, claimed that by reason of such fouling he was prevented from using the water of the creek for domestic purposes or for his factory, and brought this action against the defendants therefor:—Held, that defendants were not liable; but that the liability, if any, was on the screw factory. *VanEgmond v. Corporation of Seaforth*, 6 O. R. 599, distinguished. *Gray v. Town of Dundas*, 11 O. R. 317.—C. P. D.; 13 A. R. 588.

A drain was constructed by a municipal corporation, and by reason, as was alleged, of the negligent construction thereof it was not of sufficient capacity to carry away the water brought down it as was intended, or by reason of an obstruction negligently allowed to remain therein, the water overflowed the banks of the drain and damaged the plaintiff's premises:—Held, that the plaintiff's claim for the damage sustained was not one for compensation under the arbitration clauses of the Municipal Act; but was properly the subject of an action in which the findings of the jury should be had as to whether the damage was caused by such negligent construction, etc., or by vis major, namely an unusual flood. *McArthur v. Town of Collingwood*, 9 O. R. 368.—C. P. D.

The plaintiff's house was drained by a private drain into the street drain, which was near to but did not extend as far as his house. L., who also had a house drain connected with the street drain, put a grating across it near the connection with the private drain, which obstructed the street drain, and dammed back the water and sewage through plaintiff's private drain into his cellar and damaged the plaintiff's premises. The nature of the obstruction was known to the plaintiff but not to the defendants, and the plaintiff did not notify them thereof. There was no by-law compelling property-owners to drain their premises into the street drain, and their use of it was entirely voluntary. There was no complaint as to the insufficiency or construction of the street drain. In an action by the plaintiff against the defendants for the injury sustained by him:—Held, that the defendants were not liable. *McConkey v. Town of Brockville*, 11 O. R. 322.—C. P. D.

The plaintiffs owned and occupied a house and premises which had been drained by a drain running through private grounds to and under a raceway, which the owners of the lands on the other side thereof on which the water flowed had stopped up. On the east side of the street on which plaintiffs' house was there was an open ditch or drain connecting with the raceway, which at first was no higher than the street, but being afterwards banked up, the flow of the water was stopped and was spread over the adjoining lands. R., the then owner of plaintiffs' land, and others interested, petitioned the council to construct a drain under the raceway, which the corporation did by means of a well at the raceway and a five-inch pipe under it. R. then connected his private drain with the well. The defendants afterwards connected the drainage of other streets with the well, whereby more water

to the creek. The drain, into it from the cellar, six feet distant, comes into the creek. The proprietor on the creek, having claimed that by reason of the overflow from using the domestic purposes or for at this action against the—Held, that defendants that the liability, if any, *Van Egmond v. Cor- O. R. 599*, distinguished. *as*, 11 O. R. 317.—C. P.

ected by a municipal corporation, as was alleged, of the thereof it was not of sufficient way the water brought, or by reason of an overflowed to remain therein, the banks of the drain and a premises:—Held, that or the damage sustained nsation under the arbitral Act; but was pro- action in which the find- he had as to whether the such negligent construction, namely an unusual *Town of Collingwood*, 9 O.

was drained by a private drain, which was near to far as his house. *L.*, who connected with the street across it near the connection drain, which obstructed the dammed back the water plaintiff's private drain into d the plaintiff's premises. construction was known to the defendants, and they notify them thereof. There selling property-owners to into the street drain, and entirely voluntary. There to the insufficiency or con- tain drain. In an action by the defendants for the in- n:—Held, that the defen- *McConkey v. Town of 322*.—C. P. D.

d and occupied a house and been drained by a drain run- grounds to and under a race- of the lands on the other which the water flowed had east side of the street on se was there was an open necting with the raceway, higher than the street, but raked up, the flow of the and was spread over the then owner of plaintiffs' ested, petitioned the council under the raceway, which by means of a well at the ch pipe under it. *R.* then e drain with the well. The ds connected the drainage of e well, whereby more water

was brought down to the well than the five-inch pipe would carry off, and it flowed back on the plaintiffs' premises which were damaged. There was no authority given from the defendants to use the well, and the only evidence of acquiescence was the knowledge by O., defendants' street inspector, and no objection made by him:—Held, following *McConkey v. Town of Brockville*, 11 O. R. 322, that the defendants were not liable for the damage sustained by the plaintiffs. *Welsh v. City of St. Catharines*, 13 O. R. 369.—C. P. D.

An action lies against a municipal corporation where by the means of their works in grading their streets or otherwise they cause surface water to be discharged upon the lands of a neighbouring proprietor to his damage, if by the exercise of proper care in performing the work such injury might have been avoided. The corporation of Ottawa, in the exercise of their right to make drains and ditches to carry off surface water from several streets in the neighbourhood of the plaintiff's property, so negligently executed the work as to cause damage to the plaintiff by the overflow of the surface water upon his lands. In an action brought therefor the trial judge nonsuited the plaintiff. The nonsuit was subsequently set aside by order of the Divisional Court, costs of the first trial and of the order to be costs in the cause to the plaintiff in any event. On appeal to this court the judgment of the Divisional Court was affirmed with costs. (*Burton, J. A.*, dissenting.) per *Burton, J. A.*—There was no negligence, and on that ground the nonsuit should be upheld. *Derinzy v. City of Ottawa*, 15 A. R. 712.

See *Duck v. City of Toronto*, 5 O. R. 295, p. 2141.

## (2) Other Drains.

The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiffs, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear:—Held, affirming the judgment of Hagarty, C. J. (*Cameron, J.*, dissenting), that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair, under *R. S. O.* (1877), c. 174, s. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs. Per *Cameron, J.* An action is expressly given by section 542 for injury done by such neglect, where the drain serves two municipalities; but in a case like the present, though under section 543 the municipality may be compelled by mandamus to repair the drain at the expense of the lands benefited, no action lies for injury caused by non-repair. *White v. Township of Gosfield*, 2 O. R. 287.—*Q. B. D.*; 10 A. R. 553.

Held, affirming the decision of *Rose, J.*, that the proper construction of *R. S. O.* (1877), c. 33, s. 30, sub-s. 3, as also of the re-enactment in 47 Vict. c. 8 (Ont.), is that as a pre-requisite to the maintenance of an action for damages arising from neglect to repair, there should be reasonable notice in writing given by the plaintiff to the municipality alleged to be in default, and this requirement is not confined to the remedy by mandamus:—Held, therefore, in this action, in which the plaintiff sued a municipality for flooding his lands by not providing a proper outlet for certain drains, and also by not repairing the drains; that inasmuch as there was no evidence of injury, other than arising from the non-repair, and as to this no statutory notice had been given, the plaintiff's action must be dismissed. *Cryder v. Township of Sarnia*, 15 O. R. 180.—*Chy. D.*

Where a municipality, acting under the Ontario Drainage Act, in pursuance of a scheme for the drainage of their township, constructed a system by which water was drained off into a certain drain formerly constructed through the plaintiff's land and running into a natural creek, whereby the creek, by reason of the accumulation of water caused by the new drains, though sufficient before to carry off the water brought down into it, overflowed and injured the plaintiff's land:—Held, that the defendants were liable for any damage thus caused to the plaintiff, and there was nothing in the municipal or other legislation of this province to change the illegal character of such an act. It appeared, however, that the plaintiff's property had been benefited by the drainage works as a whole to a greater extent than it had been injured by the overflow complained of, and the defendants acceded to the reasonableness of the plaintiff's demand for a better outlet, and were proceeding to make it:—Held, that under these circumstances it was sufficient for the present to declare the plaintiff entitled to have the creek widened and deepened to the necessary extent within a reasonable time. *Northwood v. Township of Ralceigh*, 3 O. R. 347.—*Boyd.*

When M. brought action for an injunction against a municipal corporation for that by reason of certain drainage works constructed by them the defendants had caused an increased quantity of water to flow into a creek running through his lands which were situate in an adjoining township, and which had consequently been flooded and damaged, partly from the access of water sent into the creek, and partly from the increased velocity imparted to the flow of water into the creek:—Held, that M. was entitled to an injunction restraining the increased flow of water into the creek, and also the increased velocity, and to a reference as to damages, and that he was not bound to proceed by way of arbitration under 46 Vict. c. 18 (Ont.), ss. 590, 591, but was at liberty to seek relief in the ordinary way by action:—Held, also, that the fact that the by-law under which the said drainage work was done had not been quashed, did not prevent the plaintiff from bringing this action. *Malott v. Township of Mersea*, 9 O. R. 611.—*Chy. D.*

Reference under the Municipal Act. See *In re Hodgson and the Township of Bosanquet*, 11 O. R. 589, p. 1381; *In re Smith and the Township of Plympton*, 12 O. R. 20, p. 1382.

The defendants enlarged a drain running through the plaintiff's land; the earth taken from which they deposited on either side and left it there. The plaintiff sued for damages to his land, etc., by reason of such depositing of the earth. It was admitted that the work was done under a by-law, passed under section 576 of the Municipal Act (1883), and it was not suggested that the by-law was defective in any way. The jury found that the defendants were not guilty of any negligence, but that the plaintiff had suffered damage in consequence of the execution of the work:—Held (reversing the decision of Rose, J.), that upon these findings judgment should have been entered for the defendants; that a cause of action could not accrue from the doing of a lawful act, unless in a negligent manner; and that the plaintiff's remedy, if any, was by arbitration to obtain compensation under the Municipal Act of 1883, section 91. *Preston v. Corporation of Camden*, 14 A. R. 85.

The plaintiffs brought this action as land-owners injuriously affected by certain drainage works of the defendants and the assessments made under by-laws relating to the same, seeking damages and other relief:—Held, that there was no misjoinder of plaintiffs, nor was it incumbent on the plaintiffs to sue on behalf of any others, and also that the plaintiffs had the right thus to proceed by way of action and not of arbitration. *Alexander and the Township of Howard—Galbraith v. Township of Harwich*, 14 O. R. 22.—Ferguson.

Damage to land arising from an overflow of water caused by negligently diverting the water from its natural course without providing a sufficient outlet, is not the subject of compensation under the Municipal Act, 1883. *Stalker v. Township of Dunwich*, 15 O. R. 342.—Q. B. D.

See *Walton v. County of York*, 6 A. R. 181, p. 2140; *Gray v. Town of Dundas*, 11 O. R. 317; 13 A. R. 588, p. 2112; *In re Nickle and the Town of Walkerton*, 11 O. R. 433, p. 2108; *O'Byrne v. Campbell*, 15 O. R. 339, p. 2116.

## XII. DITCHES AND WATER-COURSES' ACT.

Held, that the defendants a railway company were not subject to the provisions of "The Ditches and Water-courses' Act," R. S. O. (1877), c. 199. *Miller v. Grand Trunk R. W. Co.*, 45 Q. B. 222.—Q. B. D.

After the time fixed by an award under the Ditches and Water-courses' Act, 1883, for the completion of certain drainage work by neighbouring landowners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work, with the object of having it completed according to the award; but, as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, etc.:—Held, that the provisions of section 13 of the above Act as to the inspection by the engineer are imperative, and an action would lie for breach of his duty; but even if the evidence had shewn such a breach, the damages claimed were not

proximate, necessary, or a result thereof. The other provisions of a s. 13 are merely permissive, and no action would lie for their non-performance: nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance. Those who, by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages. *O'Byrne v. Campbell*, 15 O. R. 339.—Q. B. D.

Where an award has been made under the "Ditches and Water-courses' Act, 1883," the only remedy for the non-completion of the work in accordance with the award is that provided by section 13 of the Act. *Murray v. Dawson*, 17 C. P. 588, followed; and *O'Byrne v. Campbell*, 15 O. R. 339, distinguished. No other or greater costs were allowed to the defendants than if they had successfully demurred instead of defending and going down to trial. *Hepburn v. Township of Orford*, 19 O. R. 585.—Q. B. D.

## W.

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#### I. HIGHWAYS VESTED IN THE CROWN.

Certain lands on which were two roads called "Water Street" and "The Road to the Wharf," being required for public works, were expropriated by the Dominion Government, and the compensation therefor was claimed by the corporation of the village in which the roads were, and by one R. C. S. through or over whose lands the roads ran. It appeared that the roads were established as public highways by the municipal authorities by by-laws in the years 1842 and 1845, respectively, under 4 & 5 Vict. c. 10, ss. 39 and 51, although no compensation was paid to the owners therefor:—Held, that although originally the soil and freehold of the roads or streets may have remained in the private owner, subject to the public easement (the right of user); since the year 1858, at all events, they became vested in the Crown as representing the province of Ontario, by virtue of 22 Vict. c. 99, s. 301, and that the compensation therefor was payable to the Attorney-General of Ontario, who was ordered to be made a party in order to give protection to the Dominion Government in expropriating the land. *Re Trent Valley Canal—Re "Water Street" and "The Road to the Wharf,"* 11 O. R. 687.—Boyd.

See *Rae v. Trim*, 27 Chy. 374, p. 2126.

#### II. DEDICATION OF HIGHWAYS.

Parties in possession of crown lands before patent issued cannot dedicate any portion of the same: parties so in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained. *Rae v. Trim*, 27 Chy. 374.—Blake.

The corporation of East Whitby by by-law closed up an old travelled road, whereby the applicant was shut out from ingress to his lands except by a short road leading to the original road allowance, which was now for the first time opened. For some years prior to 1844 the short road was used as a private road for the con-

venience of persons going to one F.'s place, mills, brewery and distillery. In 1844 F. conveyed the land on each side of it to his son and son-in-law, but no mention of it was made in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road might be closed up. F. replied that they would still have the short road leading to the road allowance, which would still be opened if the old travelled road were closed:—Held, that the latter statement, in connection with the facts of the former user of the road, and of its not having been disposed of when F. disposed of the lands on each side thereof, sufficiently shewed the intention to dedicate the short road to the public: that the applicant had therefore another convenient way to his lands, and that the by-law should not be quashed; but, under the circumstances, no costs were given. *Adams and the Township of East Whitby*, 2 O. R. 473.—Osler.

K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost:—Held, reversing the judgment of the Supreme Court of Nova Scotia that in the absence of any evidence of dedication of the road it must be presumed that the proceedings under the statute were rightly taken and K. could not recover. *Dickson v. Kearney*, 14 S. C. R. 743.

Uninterrupted user by the public, for seventy years, of a roadway along the edge of an unoccupied and uninclosed farm bordering on a lake, upon a sandy beach formed there by the waters of the lake, and the course of which roadway was slightly varied from time to time by the rise and fall of the waters of the lake, is sufficient evidence of dedication of a right of way, and the breaking through of a small inland lake by which the road was cut across and a navigable channel created was held not to deprive it of its character of a highway. *Frank v. Township of Harwich*, 18 O. R. 344.—Chy. D.

Held, that the registration of a plan of a subdivision of a town lot and sales made in accordance with it, does not constitute a dedication of the lands thereon to the public. *In re Morton and the City of St. Thomas*, 6 A. R. 323.

The mere fact of the owner of lands selling them in lots according to a plan shewing streets and lanes adjoining the several lots does not bind him to continue such streets and lanes unless a purchaser is materially inconvenienced by the closing of any of them. *Carey v. City of Toronto*, 11 A. R. 416; 14 S. C. R. 172.

#### III. PRIVATE WAYS.

##### (a) Generally.

An arrangement made between the plaintiff and B., whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an arrangement whereby, in consideration of 150 cords of wood and the making of a road by B.,

the latter was to have a right of way through the same land. The plaintiff was to erect and keep up the gate at one end, and B. was to keep up the gate at the other end of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three additional gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting those three gates when going through:—Held, reversing the decree of Spragge, C., that the right of way having been purchased when there were but two gates, the plaintiff had no right to fetter the enjoyment of the way by adding additional gates. *Kastner v. Beadle*, 29 Chy. 286.—Blake.

Where C., by deed conveyed certain land to S., who owned certain land adjoining the land of C., but not adjoining the land now conveyed, and the deed proceeded—"and I further convey the right of way to cross my land \* \* \* from the highway \* \* \* to the land owned by S., \* \* \* to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of S., his heirs and assigns forever:"—Held, that the right of way was not a mere way in gross, but became appurtenant to the land of S., generally, and not merely to the land conveyed by the deed. The word "premises" in a deed may cover not merely the land conveyed, but all that goes before in the deed. *Saylor v. Cooper*, 2 O. R. 398.—Proudfoot; 8 A. R. 707.

Held, on appeal that the words employed in the deed were sufficient to pass the interest intended, and that the right of way was thereby made appurtenant to all the lands of S. there situated; not merely to that so conveyed by C. S. C., 8 A. R. 707.

In an action of trespass q. c. f. the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title and in which the description of property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot":—Held, that this was only a reservation of a right of way to the grantor and not an exception of the soil. *Wright v. Jackson*, 10 O. R. 470.—Q. B. D.

On the 26th March, 1853, one G. L. by deed of sale granted to P. C. "a right of passage through the lot of land of the said vendor fronting the public road as well on foot as with carriage," and to the charge of the said purchaser "of keeping the gates of the said passage shut." In 1882 McM., having acquired the dominant land, built a coal oil refinery and warehouses thereon. In the course of his trade he had several carts making three or four trips a day through this passage leaving the gates open, and in addition to his own carts most of the coal oil dealers of the city of Montreal, wholesale and retail were supplied there with their own carts. At the time of the grant the land was used as agricultural land:—Held, affirming the judgment of the Court of Queen's Bench for Lower Canada, Henry, J., dissenting, that the passage could not be used for the purpose of a coal oil refinery and trade, as McM. thereby

aggravated the servitude and rendered it more onerous to the servient land than it was when the servitude was established. Art. 558 C. C. *McMillan v. Hedge*, 14 S. C. R. 736.

Plaintiff's predecessors in title had granted to defendant's predecessors in title a right of way over land afterwards conveyed to plaintiff, such right of way being conditioned upon the grantees thereof "fencing and keeping in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides of the roadway, and put gates at each end of it, which after remaining many years, rotted away:—Held, that on the proper construction of the instrument the right of way was dependent upon defendant's maintaining fences not merely at the sides of the way in question, but also at the ends of it, where they might have gates as part of the fences:—Held, also, that even if this was not the proper construction of the instrument, plaintiff, as owner of the soil, was entitled, himself, to fence the ends of the way, putting gates therein of such width and construction as would reasonably admit of the right of way being conveniently used. *Glendon v. Blatchford*, 15 O. R. 285.—Q. B. D.

Some years prior to 1847, J. D., plaintiff's father, became the owner of lot 18 in 5th concession of York, and built the house, in which he lived up to the time of his death, on the north-west half and near the sixth concession line. In 1847 J. D. purchased lot nineteen adjoining lot eighteen on the north, the occupiers of the eastern portion of which prior thereto and J. D.'s tenants since, used a trail or road running from the northerly part of the east half of eighteen, where the plaintiff's house stood, across the west half of nineteen to the boundary between eighteen and nineteen where there were several trails or roads across the west half of eighteen to a private lane leading in a westerly direction past J. D.'s house to the sixth concession. The trails ran through bush land, and no one was used continuously or exclusively, but as was convenient. In 1860, J. D. conveyed the east half of nineteen to plaintiff, and plaintiff also acquired by devise from his father, who died in 1877, the north-east quarter of eighteen, which adjoined the east half of nineteen on the south. The west half of nineteen J. D. devised to his daughter who had ever since been in occupation thereof, and the north-west half of eighteen to his son W. who was living with him at his death, who conveyed to the defendant. Shortly after J. D. had conveyed the east half of nineteen to him, the plaintiff with J. D.'s permission cut a new roadway outside of the woods on lot eighteen connecting thereby with the lane to the sixth concession. In 1877, by an agreement entered into between plaintiff and W. D., in consideration of certain privileges granted to W. D., W. D. covenanted to permit plaintiff to have a right of way along the said lane from the sixth concession and extending forty rods east of the centre of the lot, so as to allow plaintiff free communication from the lot nineteen along said lane to the sixth concession:—Held, that there was no defined right of way existing in 1860 over the west half of lot eighteen appurtenant to the east half of nineteen so as to enable plaintiff to claim an easement therein as granted under the words therefor in the conveyance of 1860; that the user

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of the roadway cut in 1860 being merely permissive, there was no prescriptive right thereto, but merely a license, which was revocable at any time, and was revoked by the father's death, and thereafter, as the evidence shewed, the user was regarded by W. as merely permissive, which was acceded to by plaintiff in 1877 by his then entering into the agreement of that date. Per MacMahon, J.—The jury are to find specific questions of fact to which the court must apply the law on the facts so found. The construction of the agreement was for the court, and its meaning was that the old lane has to be extended easterly in a straight line for forty rods. *Duncan v. Rogers*, 15 O. R. 699.—C. P. D. But see *S. C.*, *infra*.

The Court of Appeal reversed this decision being unanimously of opinion that upon the evidence it was clear a defined right of way existed at the time of the grant to the plaintiff and that under the terms of the grant had passed to him. They were also of opinion that the finding of the jury as to the location of the extension of the lane should not have been disturbed, the written agreement with regard to this extension being ambiguous and both parties having given evidence as to its real meaning and allowed the question to be submitted to the jury. *S. C.*, 16 A. R. 3.

Held, however, by the Supreme Court, Ritchie, C. J., dissenting, that plaintiff had no title to the right of way by prescription, the evidence clearly shewing that the user was not of a well defined road but only of a path through bush land and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death, but:—Held, affirming the judgment of the Court of Appeal, that under the agreement the right of way granted to the plaintiff was wholly over defendant's land, the agreement not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor. *S. C. sub nom. Rogers v. Duncan*, 18 S. C. R. 710.

Where a right of way is granted as appurtenant to certain lands, there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it is appurtenant by every part-owner of the property, but such part-ownership confers no right to further burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed. *Telfer v. Jacobs*, 16 O. R. 35.—Boyd.

See *Dixon v. Cross*, 4 O. R. 465, p. 2122; *Bliss v. Boeckh*, 8 O. R. 451, p. 1389; *Regina v. McDonald*, 12 O. R. 381, p. 1099.

#### (b) Right by Necessity.

Where C., conveyed to S., land which was inaccessible from the highway without passing over the lands of C., or some other person:—Held, that a way of necessity was impliedly granted by C., over his land conveyed to S. *Saylor v. Cooper*, 2 O. R. 398.—Proudfoot; 8 A. R. 707.

Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a

party to an action claiming such way, and where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing. *Id.*

B. and W., becoming entitled in 1830, as tenants in common of 100 acres of land, under a devise, made a partition thereof by agreement, whereby fifty acres were allotted to each in severalty. The fifty acres allotted to B. were land-locked, and there was no way out to the highway, except over the fifty acres of W., over which accordingly B. was allowed by W. to pass at will. In 1840, W. sold to E. the thirty acres of his fifty next adjoining B.'s fifty acres, and also a strip for a road across the other twenty acres. In 1848, E. granted to the then owner of B.'s fifty acres a strip for a road along the north side of his thirty acres, and also the strip along W.'s twenty acres conveyed to him in 1840. This made a change in the course of the way theretofore used by B., and his successors, and was thenceforth the course followed by the latter, and was the right of way in question in this action; but this deed was not registered till 1882. B.'s parcel subsequently became vested in the plaintiff, under conveyances granting not only the land, but also all ways, etc., therewith used and enjoyed. The defendant claimed title to part of W.'s fifty acres by deed made in 1854, without notice, as he alleged, of the deed of 1848. The right of way in question had been used by the plaintiff and his predecessors in title for over thirty years, prior to the obstruction thereof by the defendant, to restrain which, this action was brought:—Held, that the effect of the will and agreement together was the same as if the will itself had devised the one-half to B., and the other to W., and the plaintiff had a right of way of necessity over the defendant's land, and was entitled to an injunction to restrain the obstruction complained of; and it was not necessary for him to shew any express grant of the right of way by the defendant, or his predecessors in title:—Held, however, that the right of way would have passed under the grant of land, and all ways, etc., used and enjoyed therewith, as also under a deed of grant drawn according to the Act respecting short forms of conveyances, even if it had not been a way of necessity, and no such words were necessary in order to pass a way of necessity:—Held, also, that the subsequent express grant of a right of way by the defendant's predecessor in title, did not destroy the right to a way of necessity:—Held, also, that the defendant having notice of an actual travelled way across his land was affected, also, with notice of the origin, as well as the existence of the right:—Held, also, that changing the locality of the way, from time to time, by the agreement of the respective owners, did not destroy the right of way, nor could the grant of a certain specific line for the road put an end to the right, in case a purchaser should buy without notice of the grant:—Held, lastly, that any act of a tenant, without the knowledge or sanction of the landlord, could only affect his interest as tenant, and could not prejudice the reversioner. *Dixon v. Cross*, 4 O. R. 465.—Proudfoot.

Semble, that a way of necessity does not give a right to the owner of the dominant tenement

to cross any part of the servient tenement at pleasure, but is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or of the dominant tenement in his default. *Id.*

8. by his will devised his farm to trustees, who divided up the property into six several parcels, designated parcel one, parcel two, etc., according to a plan which was registered, and by contemporaneous conveyance under the Short Form Act, conveyed the parcels to the testator's six surviving children. The description of parcel two included the lane in question, described as a right of way, the use of which was thereby reserved to the owners of parcels four and six, to which it was a way of necessity. Parcel three, which adjoined the way, was conveyed without any mention of the lane. During the unity of title some farm buildings stood upon parcel three, adjacent to the lane in question, which was used as a means of ingress and egress thereto, but they had long since disappeared. By the Short Form Act, R. S. O. (1877), c. 102, s. 4, every deed, unless an exception be made therein, shall be held to include all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any wise appertaining or with the same, held, used, occupied, and enjoyed:—Held, that the defendant claiming under the grantee of parcel three, could not claim a right of way over the lane; that section 4 of the Short Form Act could not, under the circumstances, be deemed to apply: that the right of way was not a continuous easement, or way of necessity; and that plaintiff's right thereto was not barred by the Statute of Limitations:—Held, also, that the defendant as owner of a part of parcel four, could not claim the right to use the way as appurtenant to parcel three. *Maughan v. Casci*, 5 O. R. 518.—C. P. D.

C. conveyed to R. fifty acres of land and also a strip twenty feet wide, to the south, to give access from the fifty acres to the town line. R. mortgaged to C. the fifty acres, but not the twenty feet strip, and then conveyed the strip to N. Afterwards R. conveyed the fifty acres to his son, subject to C.'s mortgage, and on the same day gave him the occupation under an agreement for sale of the adjoining fifty acres to the west. The son mortgaged to the plaintiff the fifty acres conveyed to him. During the possession of R. and his son they got access from the east fifty acres to the side line through the west fifty acres owned by R. The agreement for sale of the west fifty acres to the son having been cancelled, and R. having refused to allow a tenant of his son of the east fifty acres access to the side line through the west fifty acres, the plaintiff brought this action against R., C., and N. for a declaration as to the existence of a right of way through the strip conveyed to N., or of a way of necessity through the west fifty acres, and for other relief:—Held, that if a right of way through the twenty feet strip did pass to C. under the mortgage to him, it was a right of way only to C., his heirs and assigns; and the existence of a right in the plaintiff to redeem C. did not give her the rights of C. until after redemption. But:—Held, that the plaintiff was entitled to a declaration of the existence of a way of necessity through the west fifty acres, which was given by way of implied

grant when R. conveyed to his son. The exercise of the implied grant was suspended during the time that the son had possession of the west fifty acres, but upon the termination of that possession the implied grant and the right of way under it was revived. *Lupton v. Rankin*, 17 O. R. 599.—Q. B. D.

Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts. *Briggs v. Semmens*, 19 O. R. 522.—Q. B. D.

#### (c) Right by Prescription.

Held (Armour, J., dissenting), that the Ontario Act (R. S. O. 1877, c. 108) reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way in alieno solo, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction. *Mykel v. Doyle*, 45 Q. B. 65.—Q. B. D.

In a possessory action *en réintégrande* brought by P. against H., the latter denied P.'s possession and pleaded, inter alia, that he was proprietor and had exercised a right of way over the land in dispute for a number of years. The land in dispute consisted of a roadway situated between the adjoining properties of the plaintiff and defendant. At the trial P. proved that he had had possession for a year by closing up the roadway with a fence and putting his cattle there, and that at times he allowed the defendant H. and others to use the roadway to get to the river, and that when defendant H. took down the fence he immediately restored it, and that defendant H. then asked him to let him use it. That it was after the defendant H. had again taken forcible possession of the land that he instituted against him the present action. H. proved he had used the roadway as a passage for a number of years, and put in his title. The courts below held that both parties had proved only an equivocal possession and dismissed the plaintiff's action, ordering that their rights should be tried by an action *au petit titre*. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the court below, Fourrier, J. dissenting, that as P. had proved a possession *animo domini* for a year and a day, he should be reinstated and maintained in peaceable possession of the land, and H. forbidden to trouble him by exercising a right of way over the land in question, reserving to the latter his resource to revendicate *au petit titre* any right he might have. *Pinsonnauld v. Hebert*, 13 S. C. R. 450.

E. and B. owned adjoining lots, each deriving his title from S.—E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in this right of way was in S., but E. founded his claim to a user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial shewed that it had been used in common by the succes-

to his son. The execution was suspended during possession of the west lot, the termination of that grant and the right of red. *Lupton v. Rankin*,

of a tenement by devise only do rights of way of at also rights of way ne- enjoyment of the parts been and were up to the by the owner of the en- f parts. *Briggs v. —Q. B. D.*

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Joining lots, each deriving brought an action of trespass- ing his enjoyment of a said lots and for damages. of way was in S., but E. user of the way by him- selves in title for upwards of dence on the trial shewed in common by the success

sive owners of the two lots:—Held, affirming the judgment of the Supreme Court of Nova Scotia, Ritchie, C. J., and Gwynne, J., dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action. *Ellis v. Black*, 14 S. C. R. 740.

A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During such unity of possession the running of the Statute of Limitations, is suspended. *Stothart v. Hilliard*, 19 O. R. 542.—Boyd.

See *Rogers v. Duncan*, 18 S. C. R. 710, p. 2121; *Wells v. Northern R. W. Co.*, 14 O. R. 594, p. 2133.

#### IV. POWERS, DUTIES AND LIABILITIES OF MUNICIPAL CORPORATIONS.

##### 1. Jurisdiction and Powers.

By a special Act of the legislature of Ontario, 45 Vict. c. 45, provision was made for the construction of a sub-way or sub-ways as a means of crossing certain railways entering the city of Toronto, part of which had to be constructed within the city, and part within the adjoining municipality of the village of Parkdale, and in consequence of a disagreement between the city and the village as to the terms upon which the undertaking should be proceeded with, the latter united with the railway companies in obtaining an order in council under the Dominion Act, 46 Vict. c. 24, authorizing the companies to execute the work, and the latter entered into an agreement with the village authorities that they should construct the same, which they proceeded to do. In an action against the village brought by the holders of property in the city and village, which was greatly damaged by the mode of executing the work:—Held (reversing the judgment of the courts below, 7 O. R. 270, 8 O. R. 59.—Hagarty, C. J. O., dissenting), that the municipality was not answerable for any damages caused by the works. Per Hagarty, C. J. O. The defendants could not legally undertake the work merely as the agent of the railway companies, and can only be treated as principals; the plaintiffs are entitled to a reference as to the compensation to be awarded to them. Per Burton, J. A. When the council of a corporation professing to act under the authority of the corporation does acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate duty imposed on it by law, the corporation is not liable. What the corporation attempted to do here was not to put in force any of the corporate powers of the municipal body, but the powers supposed to be possessed by the railway companies, and for this reason they are not liable. Per Osler, J. A. If the defendants could act as agent of the railway companies they can defend themselves just as an individual could do under the authority of the Railway Act and order in council; if they could not so act it is equally open to them to defend themselves from liability as a corporation, and either way the plaintiffs fail. But on appeal to the Supreme Court:—Held, Per Ritchie, C. J.,

Fournier and Henry, JJ., that the work was not done by the municipality under the special Act, nor merely as agent for the railway companies and the municipality was therefore liable as a wrong-doer. Per Gwynne, J. That the work should be considered as having been done under the special Act and the plaintiffs were entitled to compensation thereunder. Per Taschereau, J. That the work was done by the municipality as agent for the railway companies and it was therefore not liable. The decision was affirmed by the Privy Council, 12 App. Cas. 603, but, no opinion was expressed as to the rights of the corporation of Parkdale to recover again against the railway companies either under the general law of principal and agent or under the express provisions of their agreement with those companies. *West v. Village of Parkdale—Carroll v. Village of Parkdale*, 12 A. R. 393; 12 S. C. R. 250; 12 App. Cas. 602.

Quare, as to the jurisdiction of a local municipality over a road running within one or more townships or through more than one township. See *Regina v. County of Perth*, 6 O. R. 195; *Hewison v. Township of Pembroke*, 6 O. R. 170.

Jurisdiction over bridges. *Traversay v. Gloucester*, 15 O. R. 214, p. 2138; *County of Victoria v. County of Peterborough*, 15 A. R. 617, p. 2139; *Johnston v. Township of Nelson*, 17 A. R. 16, p. 2140.

See *Township of Ancaster v. Durrand*, 32 C. P. 563, p. 2134.

##### 2. Opening or Establishing Roads.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the crown in addition to those appropriated by the crown for the purpose of highways in order to the opening up of the country. *Rae v. Trim*, 27 Chy. 374.—Blake.

Held, where a by-law has been passed for opening a road over certain land, the municipality is not bound under R. S. O. (1877), c. 174, s. 456 to make compensation to the owner before entering on the land. *Harding v. Township of Cardiff*, 2 O. R. 329.—Chy. D.

On the 13th November, 1883, the judge of the County Court of the county of Halton, in which county the lands mentioned in the report were situate, after hearing the several parties interested in the said lands and the streets thereon, made an order altering and amending the plan thereof by closing up and declaring closed certain streets and parts of streets. Notwithstanding such order the council of the defendant municipality on the 5th of December, 1883, passed a by-law accepting and declaring open some streets so closed, and authorizing and directing the road commissioner to remove all fences and obstructions therefrom; whereupon the plaintiff moved for and obtained an order nisi to quash such by-law, which upon argument before Rose, J. (7 O. R. 192), was made absolute with costs. On appeal to this court that order was affirmed, and the appeal dismissed, with costs. Sections 82, 83, 84, 85 of the Registry Act, R. S. O. (1877), c. 111, and sections 525, 527 of the Municipal Act 1877 considered. *In re Waldie and the Village of Burlington*, 13 A. R. 104.



Where the owners of lands, adjoining original road allowances, laid out roads on their lands which were used as public roads for upwards of eighty years, the original road allowances being all that time in the occupation of the owners of the lands, and used and treated as their own property, and no evidence was adduced to raise a presumption that compensation had been paid to them for the roads so laid out:—Held, affirming the judgment of Osler, J. A. (8 O. R. 98), that the presumption was that the original road allowances had been taken and used in lieu of the roads laid out by the original owners through their lands, and that a by-law to open up the original road allowance as of right, was invalid. *Burritt v. Marlborough*, 29 Q. B. 119, approved; *Cameron v. Wait*, 3 A. R. 175, explained. *Beemer v. Village of Grimsby*, 13 A. R. 225.

It was contended that since the passing of 44 Vict. c. 24, ss. 15, 16 (Ont.), the only remedy for persons claiming an interest in a road allowance was by arbitration to fix compensation:—Held, that the Act only applies to the case where the council have in good faith intended to open a road allowance, but by mistake have not done so on the true line. *S. C.*, 8 O. R. 98.

It is discretionary with and not obligatory upon a municipal council to open a road allowance, and the fact that a by-law has been passed does not create such an obligation, and a mandamus was refused. *Re Wilson v. Wainfleet*, 10 P. R. 147.—Rose.

It is essential to the validity of a by-law to expropriate land for the purpose of establishing and laying out a highway, that the course, boundary, and width of such highway should be capable of being ascertained from the by-law itself or from some document or description referred to by it, which may be treated as incorporated therewith; failing this the by-law is necessarily inoperative and void. In an action by a municipal corporation to restrain the owner of land from obstructing an alleged public highway over his land, the onus of proving the existence of such highway rests on the plaintiffs; and where the road in question, the land for which had not been expropriated, was described as being "A road on the boundary between the 11th and 12th concessions of the said township from the line between lot No. 30 and lot No. 31, to the line between lot No. 35 and lot No. 36," no survey or other description of the road being referred to in the by-law passed for the purpose of opening up the same, and no sufficient evidence having been given of the performance of statute labour on the line of road, it was:—Held (affirming the judgment of the C. P. D. 12 O. R. 297), that the plaintiffs had failed in shewing that the road as claimed by them had been duly established as a public highway:—Sembie, the land for a road not having been expropriated the mere expenditure of public money in opening it and the performance of statute labour upon it does not make it a highway. *St. Vincent v. Greenfield*, 15 A. R. 567.

The proposed road was to be only forty feet in width. The authority of the county council in this behalf was not obtained until after the by-law had been passed, and this application to quash it made:—Held, that the consent of the county council, though a condition precedent to

the laying out of the road, was not a condition precedent to the passing of the by-law. *Ib.*

The Municipal Act, (1883) sec. 584, enacts that no council shall pass a by-law for establishing a public highway until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the neighbourhood of such road, etc. The defendants on the 29th of July, 1887, published notices of their intention to pass a by-law on the 29th of August, 1887, to open a road across nine lots in the first concession of the township. On that day the council met and passed a by-law establishing a road across four only of the lots mentioned in the notice. The date of putting up the notice was recited in the by-law, and was admitted by the affidavits filed by the defendants on shewing cause to the motion to quash the by-law. Nothing had been done under the by-law:—Held, reversing 15 O. R. 43 on this point, that the giving of the prescribed notice is a condition precedent to the right of the council to pass such a by-law; that the month is to be computed exclusive of the first and last days thereof, and, therefore, that a notice on the 29th of July of intention to pass a by-law on the 29th of August was insufficient. Authorities as to computation of time in such a case considered. *Laplane v. Peterborough*, 5 O. R. 634; *Wannamaker v. Green*, 10 O. R. 547, approved. Quære, whether the council could pass a by-law to open up or establish a road other than the road as described in the notice. *Baker v. Saltfleet*, 31 Q. B. 386, referred to. *Re Ostron and the Township of Sidney*, 15 A. R. 372.

A by-law was passed by the city of Hamilton on the 10th January, 1887, granting \$5,000 towards the construction of a free road leading into Hamilton from the east, to be paid when and so soon as the sum of \$3,500 should have been contributed by the corporation of the township of Barton, or any other municipality and private subscribers, and actually expended on the work of construction of the said roads, or on the purchase of the right of way therefor. The payment was also made conditional on the construction of the roads in manner, and on the terms, and subject to the conditions as in the by-law contained. Among other conditions was one that no moneys should be paid until the council of the township of Barton should have passed a by-law for the assumption of the said roads, and the proper maintenance thereof by the said township, and until an agreement should have been entered into between the corporation of the said township, and the corporation of the city of Hamilton, providing for the maintenance of the said roads in a proper state of repair, and as free roads for all time to come; and it was further provided that before any moneys were paid the city was to be satisfied that the eastern free road should provide connection with the present system of township roads to secure free travel from the top of the mountain, etc. No date was fixed for doing the work, or paying the money, and no provision was made for levying the amount during the municipal year, nor was the by-law submitted to the vote of the people:—Held, that the by-law created a future indefinite and contingent liability, and if such a by-law was valid at all it ought to have been submitted to the vote of the ratepayers. The



### 5. Abandoning Roads.

A road ran between several townships in the defendants' county, and was constructed by a joint stock company. In 1866, the defendants purchased the right of the road company in the road at a sheriff's sale under an execution against the company, and received a deed from the sheriff. A by-law had been passed authorizing the purchase, but through inadvertence was not signed or sealed, but the purchase was recognized in subsequent by-laws, and the defendants took possession of and exercised exclusive jurisdiction over the road, expended some \$2,500 in its repair, and continued to deal with it as their own property until 8th June, 1881, when they passed a by-law divesting themselves of the road, after which the defendants ceased to exercise any control over it:—Held, that the defendants were not liable for the non-repair of the road. *Per Galt, J.*—The defendants never had any authority over the road under the provisions of the Municipal Act; but they acquired the road, and became responsible therefor under their purchase from the road company, which must be deemed valid, the defendants, under the circumstances, being estopped from denying the validity of the by-law authorizing such purchase. They, however, as they had a right to do, had put an end to their liability by the by-law passed divesting themselves of the road. *Per Wilson, C. J.*—The defendants could legally acquire the road by purchase and make themselves responsible for the same under a by-law properly passed for such purpose; and if the defendants are bound by their acts, and are precluded from denying their legal responsibility to maintain the road as a county road so long as they keep it, or if they can be made to perfect the original defective by-law, as to the latter of which propositions he expressed no opinion, they had by the by-law passed therefor, divested themselves of the road and terminated their liability. *Per Rose, J.*—If the defendants had power to purchase the road, and did purchase it, they had power to abandon it, and they had by their by-law exercised such power. *Regina v. County of Perth*, 6 O. R. 195.—C. P. D.

### 6. Closing Roads.

#### (a) Notice.

Held, that the notice of intention to pass a by-law to close a road should state the day on which the municipal council intend considering the by-law. *Semble*, that the mere fact of the relator having knowledge aliunde was not a sufficient answer to an application by him to quash for want of proper notice of the day on which the by-law was to be considered. *In re Birdsell and the Township of Asphodel*, 45 Q. B. 149.—Hagarty.

A municipal corporation passed a by-law to close up a highway, but the notices of the intended by-law, required to be given under the "Consolidated Municipal Act, 1883," were only published for three successive weeks in a newspaper, instead of four, as required by section 546 of that Act, and it was not shewn when the six notices required to be posted up were posted, nor what they or the advertisement contained:—Held, in an action for breaking down

fences across the road closed up under the by-law, that the notices required to be given were conditions precedent, the due performance of which were essential to the validity of the by-law. *Wannamaker v. Green*, 10 O. R. 457.—Q. B. D.

#### (b) Other Cases.

The power of a municipal council to close up a road, under section 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed. The onus of shewing that another convenient road is open to the applicant is upon the corporation. *Adams and the Township of East Whitby*, 2 O. R. 473.—Osler.

A by-law was passed by the defendant municipality to close up land grant to a railway company a portion of a street, by which alone the applicant had access to a piece of land sold and conveyed to him by the municipality at a tax sale, without providing other convenient access to the land. The land was unpatented, but the applicant had paid all dues to the crown land department. The by-law was objected to on the ground that it did not provide other convenient access to the land; that a month's notice of the passing of the by-law was not given, the notice having been given on the 28th of March, for the 28th of April: that it provided for arbitration by the mayor, and by two persons, one appointed by the railway company and one by the applicant, a mode different from that provided by the statute; and that the award was to be made within one month from the date of passing the by-law instead of one month from the appointment of third arbitrator:—Held, that all the objections were well taken, and that the by-law was invalid:—Held, also, that the applicant had sufficient interest in the land in question to entitle him to apply; and, at any rate, the municipality were estopped by their conveyance from setting that up; that an applicant affected by such by-law is not bound to wait until the road is actually closed before coming to the court. *In re Laplante and the Town of Peterborough*, 5 O. R. 634.—Rose.

Quere, whether there is any power to close up a road of the nature of the one in this case, running through more than one municipality. *Herison v. Township of Pembroke*, 6 O. R. 170.—Rose.

Held, that a by-law closing a road across a lot where there was more than one road was void for uncertainty in not shewing which road was meant. *Wannamaker v. Green*, 10 O. R. 457.—Q. B. D.

See *Carry v. City of Toronto*, 11 A. R. 416; 14 S. C. R. 172, p. 1884.

#### 7. Compensation.

Wherein building their road the defendants left a subway under a trestle bridge, and the evidence shewed that the plaintiff the owner of the land crossed by the railway at this point, had en-



der this section, which authorized and empowered the pathmasters and other employees of the corporation to enter upon any land within the municipality when necessary to do so, save and except orchards, gardens, and pleasure grounds, and search for and take any timber, gravel, etc., was upon its face illegal, because it purported to confer upon its officers wider and more extensive powers than the statute authorized:—Held, also, notwithstanding the provisions of section 338 of R. S. O. (1887), c. 184, that the plaintiff was entitled without quashing the by-law to an injunction to restrain the defendants from proceeding to enforce the rights they claimed under this by-law, by entering upon his lands. *Rose v. Township of West Wairanosh*, 19 O. R. 294.—Street.

(b) *Liability to Repair.*

Held, that a prohibition would not lie in this case, the title to the road, upon which the injury complained of arose, not being in question, the road being a colonization road built by the government before the organization of the townships of Medora and Wood as a municipality, and the question arising not being one of title but of liability to keep in repair a road so built. Per Wilson, C. J. The road in question was a colonization road vested in "the crown or in a public department or board," and which had not been renounced by proclamation, and the municipality were not bound to repair it. *In re Knight v. United Townships of Medora and Wood*, 11 O. R. 138.—Q. B. D. Affirmed 14 A. R. 112.

An appeal from the judgment of Rose, J. (not reported), dismissing an application under 46 Vict. c. 18, s. 535 (Ont.), for a mandamus to compel the repair by the county of Haldimand of an existing bridge or the construction of a new one over the Oswego creek, where it crosses the boundary line between the townships of Moulton and Haldimand, by reason of the judges of this court being divided in opinion, was dismissed. Per Hagarty, C. J. O., and Osler, J. A.—Indictment was the appropriate remedy. The court below had the right to grant the writ in its discretion, which was, however, properly exercised in refusing it. Per Burton and Patterson, JJ.A.—The duty under the statute is not the general obligation to keep highways and bridges in repair, but is a specific duty like that cast upon railway companies by their charters with respect to the restoration of roads or the building of bridges. The existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party charged by statute with a specific duty. Indictment would in this case be neither a specific nor an adequate remedy, and a mandamus should have been granted. The demand made upon the county council previous to the application was sufficient. Per Osler, J. A.—The demand was insufficient. Per Curiam.—The county council were liable for the nonrepair of the bridge in question. *In re the Townships of Moulton and Canborough and the County of Haldimand*, 12 A. R. 503.

See *Traversy v. Gloucester*, 15 O. R. 214, 2138; *Histop v. Township of McGillivray*, p. 2138; 17 S. C. R. 479, p. 2130.

(c) *Proceedings Against for Non-repair.*

See *Re Knight v. Medora and Wood*, 14 A. R. 112, p. 2135; *Histop v. Township of McGillivray*, 15 A. R. 687; 17 S. C. R. 479 p. 2130; *Hubert v. Township of Yarmouth*, 18 O. R. 458, p. 2130.

10. *Injury to Property by Raising or Lowering Roads.*

The corporation of the city of Toronto, in the exercise of its corporate powers, necessarily raised the sidewalk in front of plaintiff's premises whereby, as was alleged, the plaintiff's premises were injuriously affected, he having had to raise the premises to the level of the sidewalk. In an action to recover the expenses occasioned thereby:—Held, on demurrer, that this was not the subject of an action, but for compensation under the arbitration clauses of the Municipal Act, 1883. *Adams v. City of Toronto*, 12 O. R. 243.—Wilson.

Action for damages sustained by the plaintiff by reason of the defendants lowering the grade of the street in front of her store. The property owners, but not including plaintiff, had petitioned the council for the block paving of the street as a local improvement under section 612 of the Municipal Act of 1883. The matter was duly considered, and a by-law passed to ascertain the property to be benefited thereby, and the expense and amount of assessment; and subsequently a further by-law was passed for raising the money required therefor by loan, and for assessing the amount. It was deemed advisable to change the grade, and the street was lowered in front of the plaintiff's premises about four feet. No reference was made in the said by-laws as to any alteration in the grade, nor was any by-law passed therefor:—Held, that there was no negligence in the corporation by reason of the lowering of the grade, for the work was undertaken in the interest of the residents, and executed under the advice and direction of a presumably competent engineer, the judge considering that he could not assume the discretion vested in the corporation of deciding as to the necessity of lowering the grade; but:—Held, that in order to justify the interference with the grade of the street a by-law therefor was necessary; and in the absence of such by-law the defendants were liable, by action, for the damage sustained. *Ayers v. Town of Windsor*, 14 O. R. 682.—Rose.

Held (Burton, J. A., dissenting), affirming the decision of Boyd, C., that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways and bridges or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor, and that the plaintiff whose premises were "injuriously affected" by the level of the street on which they fronted being raised in order to construct a proper approach to a bridge that the defendants were lawfully rebuilding, could not maintain an action against the defendants, but must, in the absence of any negligent construction, proceed under the arbitration clauses of the Municipal Act, R. S. O. (1887) c. 184, notwithstanding the absence of any by-law for the prosecution of the work. Per Burton, J. A. There was no obligation cast upon the



*ra and Wood*, 14 A. R. 479 p. 2130; *Hubert v. S. O. R.* 458, p. 2130.

*Raising or Lowering*

city of Toronto, in the powers, necessarily front of plaintiff's pre-alleged, the plaintiff's affected, he having to the level of the to recover the expenses held, on demurrer, that of an action, but for arbitration clauses of 1883. *Adams v. City of* Wilson.

maintained by the plaintiff the powers lowering the grade shore. The property plaintiff, had petitioned the block paving of the pavement under section 612 of 1883. The matter was by-law passed to ascertain benefited thereby, and of assessment; and a sub-law was passed for raising therefor by loan, and for It was deemed advisable and the street was lowered plaintiff's premises about four feet made in the said by-law in the grade, nor was therefore:—Held, that there the corporation by reason grade, for the work was rest of the residents, and advice and direction of a engineer, the judge could not assume the discretion of deciding as to raising the grade; but:—to justify the interference street a by-law therefore the absence of such by-law liable, by action, for the *Yers v. Town of Windsor*,

A., dissenting), affirming C., that a municipal corporation perform their statutory repairing highways and new bridge instead of an without passing a by-law plaintiff whose premises affected" by the level of the by-law fronted being raised in proper approach to a bridge were lawfully rebuilding, action against the defendant absence of any negligent and under the arbitration Act, R. S. O. (1887) c. the absence of any by-law of the work. Per Burton, obligation cast upon the

defendants to rebuild the bridge at such a height as to necessitate a change in the level of the street, and therefore the defendants could not lawfully change the level of the street without passing a proper by-law for that purpose. Per Boyd, C. An owner of land has by common law no vested right to the continuance of a highway at the level it was when he purchased. The corporation as owners or trustees for the public have the right to repair and in repairing to improve streets or bridges without a by-law for that purpose. *Yeomans v. County of Wellington* 4 A. R. 301, followed; *McGarvey v. Town of Strathroy*, 10 A. R. 636, and *Adams v. City of Toronto*, 12 O. R. 243, discussed; *Van Egmond v. Town of Seaforth*, 6 O. R. 610, distinguished. *Pratt v. City of Stratford*, 14 O. R. 260; 16 A. R. 5.

See *Quillman v. Canada Southern R. W. Co.*, 6 O. R. 567, p. 1749; *West v. Parkdale*, 15 O. R. 319, p. 2133.

### 11. Bridges.

The township of Gloucester and the city of Ottawa, which was part of the township of Nepean, are on the easterly and westerly sides respectively of the river Rideau, and both within the county of Carleton. In the river at this point is situate Cumming's Island and a bridge extended from the Ottawa side to the island, and from the opposite side of the island to the Gloucester shore. A line drawn down the middle of the river equidistant from the banks, without regard to any islands, would leave the greater part of Cumming's Island on the Gloucester side, but the channel between the island and Gloucester is the most navigable, while the largest amount of water passes through the other channel:—Held, that a line so drawn properly ascertained the limit between the adjoining municipalities, for the words "middle of the main channel," used in 14 & 15 Vict. c. 5, s. 11, and R. S. O. (1877) c. 5, s. 10, have their common law signification of the middle of the stream, and therefore the island formed part of the township of Gloucester, and that part of the bridge from the island to the latter township was wholly within that township. Per Armour, J.—If this be not the true construction, then, as the legislature were dealing with territorial and proprietary rights, and not with navigation, the words "main channel" mean the widest and not the deepest or most navigable channel, in which case also the island would be wholly within Gloucester. The county was found guilty on an indictment for not keeping the bridge in repair, which had been removed into this court, but the indictment described the bridge as being in the townships of Gloucester and Nepean:—Held, that by 12 Vict. c. 81, s. 201, schedule B. 4, the easterly limit of Ottawa is the middle of the river, and is coincident with the westerly limits of Gloucester and that no part of the township of Nepean lies between Ottawa and the river and the bridge was therefore wrongly described as being in the two townships:—Held, also, that though this could have been amended at the trial, it could not be amended on this motion, and a new trial was ordered. Per Cameron, J. The situation of the island in the river should not affect the liability of the municipality, for the bridge was evidently a county work, being

intended to span the whole river and form a way from one bank to the other, the island, which was out of the direct course that the bridge would otherwise have taken, being merely used for engineering purposes:—Held also, that under R. S. O. (1877) c. 174, s. 495, the duty of maintaining the bridge was cast upon the city and county. *Regina v. County of Carleton*, 1 O. R. 277.—Q. B. D.

Section 530 of the Municipal Act, 46 Vict. c. 18 (Ont.), provides that "the approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by the local municipalities in which they are situate." The action was brought under Lord Campbell's Act. The deceased met with the accident which caused his death at the intersection of two roads, both alleged to be out of repair, and both lying within the boundaries of the defendant township, but one of them leading to a bridge under the jurisdiction of the city of Ottawa and the county of Carleton, and the approaches to which, therefore, under the above section, should have been kept up and maintained by the city and county. The point where the accident occurred was within 100 feet from the end of the bridge, but it was not shewn that there was any artificial structure to enable the public to pass from the road on to the bridge and from the bridge on to the road which would cover the point where the accident occurred:—Held, reversing the judgment of Robertson, J., at the trial, dismissing the action: 1. That the word "approaches," in the section, means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge and from the bridge on to the road, and does not include the highway to the distance of 100 feet from each end of the bridge, at all events, unless the artificial structures extended so far. 2. That in any case section 530 does not relieve the local municipality from its statutory liability to repair, but merely gives to such municipality the right to enforce the provisions against the municipality or municipalities owning the bridge. *Traversy v. Gloucester*, 15 O. R. 214.—Q. B. D.

By the R. S. O. (1887) c. 184, s. 535, sub-a. 2, it is the duty of the councils of adjoining counties to erect and maintain bridges over rivers forming or crossing the boundary line between the two counties; and it is declared that a road which lies wholly or partly between two municipalities, shall be regarded as a boundary line, although it may deviate so that in some place or places it is wholly within one of the municipalities. The boundary line between the counties of Victoria and Peterborough, in part of its course was formerly passed between the 10th concession of the township of Verulam in the former, and the 19th concession of the township of Harvey in the latter county, the lots in the latter concession from one to fifteen being a range of broken lots forming a narrow strip of land fronting on the west side of Pigeon Lake. By 42 Vict. c. 47 (Ont.) these lots were detached from the township of Verulam and annexed to the township of Harvey and after the 1st of March, 1880, for all municipal, judicial, electoral and school purposes, and for

the purpose of registration of titles, as fully as if the same had always formed part of that township; and the remainder of the township of Harvey was entirely separated from the parts so detached for all purposes whatsoever:—Held, that by force of this Act and of the Territorial Act R. S. O. (1887), c. 5, sec. 10, Verulam had become a township bordering on a lake, and that the boundary line between these two townships and consequently the county boundary line, in front of the range of lots so detached, was in the middle of Pigeon Lake, and no longer on the road allowance between such lots and the lots in the 10th concession of Verulam:—Held, also (reversing the judgment of Robertson, J., 15 O. R. 446), that the road on the former county boundary line, or on what might have been previously considered a deviation therefrom, was not a deviation within the meaning of section 535, from the road on the boundary line between the counties to the north of the range of lots transferred to the township of Verulam; and, therefore, that the duty of maintaining a bridge over a river crossing the road on the former boundary line or deviation therefrom, and which was wholly in the county of Victoria, was cast upon that county alone; and that the adjoining county of Peterborough was not liable therefor. The term "deviation" is used in the same sense in sections 535, (2), and 538. Its meaning considered, and the case of *Brant v. Waterloo*, 19 Q. B. 450, approved. *County of Victoria v. County of Peterborough*, 15 A. R. 617.

Section 535 of the Municipal Act, R. S. O. (1887) c. 184, provides that "It shall be the duty of councils to erect and maintain bridges over rivers forming and crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county." The question in this action was whether the bridges over Doty's Creek, Kettle Creek, and Caddy's Creek, each of which is a stream crossing a boundary line between two township municipalities, were "bridges over rivers" within the meaning of the enactment. At Doty's Creek the span of the bridge was sixty-seven feet; at Kettle Creek, thirty-one feet nine inches; and at Caddy's Creek, nine feet. The evidence shewed that at Caddy's Creek a culvert would have been sufficient, while to cross the two other creeks bridges were necessary:—Held, that the bridges over Doty's and Kettle creeks were "bridges over rivers" within the meaning and intention of the statute, and that the duty of erecting and maintaining them rested upon the county council, but that the bridge over Caddy's Creek was not such a bridge. *McHardy v. Ellice*, 1 A. R. 628, applied, notwithstanding changes in the statute, and followed. *Township of North Dorchester v. County of Middlesex*, 16 O. R. 658.—Ferguson.

An action to recover damages sustained by reason of the neglect of a municipal corporation to keep in repair the approaches to a bridge, where the bridge and approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained. Section 530 of R. S. O. (1887), c. 184, applies only to cases where one municipality has jurisdiction over a bridge and another has jurisdiction over the adjacent ap-

proaches. Judgment of Armour, C.J., affirmed. *Johnston v. Township of Nelson*, 17 A. R. 10.

Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway, such highway is still a public highway, and as such comes within the provisions of the Municipal Act, R. S. O. (1887), c. 184, s. 521, requiring every public road, street, bridge, and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default by the liability, if any, of the railway company. *Mead v. Township of Elobicoke*, 18 O. R. 438.—Q. B. D.

See *Steinhoff v. Corporation of Kent*, 14 A. R. 12, p. 2143; *Re Peck and the Township of Ameliasburg*, 17 O. R. 54, p. 2149.

## 12. Liability for Negligence.

### (a) Defect in Roadway.

In driving along a country road the plaintiffs were injured by their horse and buggy falling into a ditch at the side of the road. It was shewn that the roadway between the ditches was thirty feet wide; that the ditch was of the same character as those along other roads in the county; and that in some places where the ditches are deeper than usual there are guards. There was evidence produced on the part of plaintiffs which, if believed, established facts from which a jury might draw the inference that the ditch, constructed where and as it was, was dangerous, although there was evidence on the part of the defendants to the contrary. The jury found a verdict for the plaintiffs, but the Court of Common Pleas afterwards, upon a rule nisi to enter a nonsuit or for a new trial, granted a nonsuit, holding that they having made a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that a person could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair. Held, reversing this judgment (30 C. P. 217), that it was a question of fact for the jury, whether, having regard to all the circumstances, the road was in a state reasonably safe and fit for ordinary travel. As the court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit, but leaving the question of new trial untouched. *Walton v. County of York*, 6 A. R. 181.

In pursuance of the powers conferred by sections 551 and 553 of the Municipal Institutions Act, R. S. O. (1877), 174, the council of the defendant municipality passed a by-law authorizing the paving of F. street with cedar blocks, which work was proceeded with, but executed in such a manner as to cause water to flow over and rest upon the lands of the plaintiff:—Held (affirming the judgment of Proudfoot, J., who found that the work had been negligently performed), that the plaintiff was entitled to recover the amount of damages sustained by her, and to enjoin the defendants from further overflowing the land; and that in consequence of such negligence her proper remedy was by action, not by a proceeding under the statute for

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compensation. *McGarvey v. Town of Strathroy*,  
10 A. R. 631.

After a block pavement had been laid down on Queen street, one of the most travelled streets in the city of Toronto, a drain about two and a-half feet wide was opened out across the street to the street railway track, and then tunnelled under the track. It was filled in with loose earth not rammed down. On Sunday it rained, in consequence of which the earth was washed down and sunk, leaving a very dangerous hole. On Tuesday or Wednesday some residents in the neighbourhood, seeing its dangerous condition, took some cedar posts and placed them lengthwise in the hole. On Thursday night, about nine o'clock, it being very dark and no light at the drain, and the street lamps not being sufficient to shew it, the plaintiff, his wife, and another person, were driving along the road, and on reaching the drain the horse stumbled and fell, whereby the plaintiffs were pitched out of the waggon and injured. The jury found that the accident was caused by the wheels of the waggon coming in contact with the drain. The defendants contended that it was caused by the waggon coming in contact with the posts, and as they had not put them there they were not liable. It was agreed on the argument in the Divisional Court, that the court might draw inferences of fact as a jury, and give such judgment as in its view the evidence might warrant:—Held, that on the evidence the defendants must be deemed to have had notice of the condition in which the drain was at the time of the accident; and therefore it was immaterial whether the accident was caused by the drain or posts:—Sembie, that as the manner in which the drain was filled in made it certain that in the event of rain the earth would sink, the defendants must be assumed to know that some one to protect the public would place posts or other covering over the hole, and were liable for any injury resulting. *Duck v. City of Toronto*, 5 O. R. 295.—C. P. D.

The macadamized toll road known as Yonge street, formerly a provincial public work, was in 1855, by Act of the legislature and order in council, vested in and acquired by the county of York. The order in council described it as "the macadamized toll road running northerly from the liberties of the city of Toronto to the village of St. Albans (Holland Landing), known as Yonge street or the North Toronto Road to Holland Landing," etc. One of the conditions of sale was that the road should be kept in thorough repair by the county. The roadway intended for and used by travellers was a macadamized road of the width of thirty feet, and was not in any way out of repair, and was at the place where an accident occurred in all respects exactly as it was when transferred by the government to the county. The plaintiff when turning out of a side road, in order to reach an hotel which stood near the side of Yonge street, drove along part of the original allowance for road on which the toll road was constructed, but which had never been opened for travel by the defendants, and was used merely as an approach to the hotel. In doing so, the night being dark, the plaintiff missed the way leading to the hotel, ran against some obstruction, and was, with his buggy,

thrown down a cutting or embankment into the toll road and was injured:—Held (reversing the decision of the court below), that there was no evidence of negligence, and that the defendants were not liable. The plaintiff had not been invited to use the travelled way to the hotel as part of the toll road, and the accident had not happened on any part of the toll road, or in consequence of that road being out of repair. *Steele v. York*, 15 A. R. 666.

By 36 Vict. c. 99 (Ont.), the London Street Railway Company was incorporated. By section 13 of that Act the city of London was authorized to enter into an agreement for the construction of the railway on such of the streets as might be agreed on, and for the paving, repairing, etc., of the same. By section 14 the city was also empowered to pass by-laws to carry such agreement into effect, and containing all necessary provisions, etc., for the conduct of all parties concerned, including the company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the streets by the street railway company who were to be liable for all damage occasioned to any person by reason of the construction, repair or operation of the railway, or any part thereof, or by reason of the default in repairing the said portions of the streets, and that the city should be indemnified by the company for all liability in respect of such damage. An accident having happened to plaintiff by reason of said portions of said streets being out of repair, an action was brought by plaintiff against the city of London therefor. After action brought, and more than six months after the occurrence of the accident on the application of the city of London the street railway company were made parties defendant:—Held, that notwithstanding, the said legislation, by-law, and agreement, the city was liable under section 531 of the Municipal Act (R. S. O. (1887) c. 184) to the plaintiff for the damage he had sustained: but that they had a remedy over against the street railway company:—Held, also, following *Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747, that the six months limitation clause in the Railway Act did not apply, the right of the city against the street railway company being one of contract. *Carty v. City of London*, 18 O. R. 122.—C. P. D.

See *Maw v. Township of King and Albion*, 8 A. R. 248, p. 2144; *City of Montreal v. Labelle*, 14 S. C. R. 741, p. 1395.

#### (b) Drawbridges.

The defendants constructed a bridge across a navigable stream having in it a draw or swing to enable vessels to ply on the river. There was not any gate or other protection to guard the approaches to the bridge when swung. A horse belonging to the plaintiff, broke away from the person in charge of him, escaped out upon the public road and ran a distance of about two miles to the bridge, reaching it while the draw was open to allow a vessel to pass, and rushing into the gap was drowned. *Toms v. Whitby*, 37 Q. B. 104; *Sherwood v. Hamilton*, 38 Q. B. 410; *Price v. Cataragui Bridge Co.*, 35 Q. B. 314 considered:—Held, affirming the judgment of the court below, that the defendant municipi-

pality could not be made answerable for the loss of the horse. *Steinhoff v. Corporation of Kent*, 14 A. R. 12.

(c) *Defects in Sidewalks and Crossings.*

In an action against the town of Portland for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the window of her dwelling from the outside of her house, and that in taking a step backward, her foot went into a hole in the sidewalk, and she was thrown down and hurt; she also swore that she knew the hole was there. There was no evidence as to the nature and extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation. The jury awarded the plaintiff \$300 damages, and a rule nisi for a new trial was discharged:—Held, per Taschereau and Gwynne, J.J., that there was no evidence of negligence to justify the verdict of the jury, and there must be a new trial. Per Henry, J., that there was evidence of negligence on the part of the officers of the corporation, but the question of contributory negligence was not properly submitted to the jury, and there should, therefore, be a new trial. Per Ritchie, C. J., and Fournier, J., that the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the said street as alleged in the declaration, and she was therefore not entitled to recover. *Town of Portland v. Griffiths*, 11 S. C. R. 333.

A building was being erected on a street in the village of Blenheim. It had a basement several feet deep, the joists of the first floor being about level with the sidewalk. For the purpose of excavating the basement planks for the distance of twenty feet had been removed from the sidewalk, and the earth taken away so as to form a grade into the basement, planks being laid across the space so made. In the centre of the basement wall, where the doorway was, there was a hole made by the grade into the cellar. During the daytime a plank was laid from the planks across the sidewalk to the first floor, which it was customary to remove at night, and there was no direct evidence that it was not removed on the night in question. On the outside of the sidewalk there was a pile of stones and bricks, and the road was muddy. The plaintiff, who knew of the dangerous character of the place, was at night going along the sidewalk, and while in front of the building met two persons. He then stepped to the right on to the ground next to the building, standing still till the persons had passed by, when, on attempting to proceed himself, he struck against something and fell into the hole made by the grade into the cellar, and was injured:—Held, that the defendants were guilty of negligence; and that there was no evidence of contributory negligence on the plaintiff's part. *Copeland v. Village of Blenheim*, 9 O. R. 19.—C. P. D.

Held, reversing 11 O. R. 26, which was affirmed by the Court of Appeal, that a municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and that a sidewalk which is at an elevation of four inches above the level of the crossing is not

such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger sustained by striking her foot against the curbing while attempting to cross the street. Strong and Fournier, J.J., dissenting. *City of London v. Goldsmith*, 16 S. C. R. 231.

See *Beasley v. City of Hamilton*, 9 O. R. 112, p. 1394.

See also *Subhead V.*, p. 2145.

(d) *In Use of Machinery.*

The defendants, for the purpose of sinking a well in one of the public streets of the village, to procure water for public purposes, under the power conferred by section 489 of the Municipal Act, had erected a derrick in the said street without placing a hoarding round it. The plaintiff had driven into the village past the derrick without its appearing to affect the horse, the derrick not then being at work, but on attempting to pass it on her way home, while the derrick was at work and making an unusual noise, the horse took fright and ran away, the plaintiff being thrown out of the carriage, and severely injured. The jury found that the derrick was of a nature to frighten horses, and that the defendants had not taken proper precautions to guard against accidents, and that there was no contributory negligence on the plaintiff's part:—Held, that the defendants were liable for the injury sustained by the plaintiff. *Lawson v. Alliston*, 19 O. R. 655.—C. P. D.

(e) *Contributory Negligence.*

A portion of a highway which the defendants were bound to keep in repair, had a trench running across it, caused by water running from a culvert, and was a gully so to continue out of repair for a number of years. The deceased while lawfully travelling on the road which he had passed over the night before, attempted to cross such trench in a waggon, from which he was thrown and killed. In an action for damages, it was alleged by the defendants that deceased was well aware of the defect in the road, if any, and at the time of the accident was intoxicated, and thus contributed to the accident. It was left to the jury to say whether the deceased had so contributed to the accident, that but for want of reasonable care it would not have occurred. The jury answered this in the negative, and rendered a verdict in favour of the plaintiff:—Held affirming the decision of the Court of Queen's Bench, who refused a rule nisi to enter a nonsuit, that the question of contributory negligence was one for the jury, and could not have been withdrawn from them. *Maw v. Townships of King and Albion*, 8 A. R. 248.

See *Bliss v. Brock*, 8 O. R. 541, p. 1389; *Copeland v. Village of Blenheim*, 9 O. R. 19, p. 2143; *Town of Portland v. Griffiths*, 11 S. C. R. 333, p. 2143; *Gordon v. City of Belleville*, 15 O. R. 26, p. 2146.

13. *Lease of Minerals On or Under Roads.*

Mineral gas is a "mineral" within the meaning of section 565 of the Municipal Act, R. S.

in the construction of the corporation liable for foot passenger sustenance against the curbing of the street. Strong v. City of London.

1111, 9 O. R. 112,

, p. 2145.

#### Machinery.

purpose of sinking a test of the village, purposes, under the 480 of the Municipal Act in the said street and round it. The village past the bridge to affect the horse, at work, but on at-way home, while the making an unusual and ran away, the of the carriage, and found that the de-then horses, and that proper precautions and that there was on the plaintiff's defendants were liable for the plaintiff. *Lawson v. C. P. D.*

#### Negligence.

which the defendants to repair, had a trench water coming from to continue out of deceased while law- road which he had e, attempted across, from which he was an action for damages, plants that deceased fect in the road, if any, ident was intoxicated, the accident. It was ether the deceased had dent, that but for want tld not have occurred. in the negative, and our of the plaintiff:— sion of the Court of sed a rule nisi to enter ection of contributory he jury, and could v. from them. *Maw v. Athol*, 8 A. R. 248.

D. R. 541, p. 1389; *Cope-* 111, 9 O. R. 19, p. 2143; *Smith*, 11 S. C. R. 333, p. *Belleville*, 15 O. R. 26,

#### On or Under Roads.

eral" within the mean- e Municipal Act, R. 8.

O. (1887), c. 184. A lease under that section should be of the right to take the minerals, and not of the highway itself. The lease in this case was of a portion of the highway, "for the purpose of boring for and taking therefrom oil, gas, or other minerals;" the quantity of land was no more than was necessary for the company's purposes, and the rights of the public were fully protected:—Held, that the practical difference here was so small as not to constitute a ground for quashing the by-law. The council before passing the by-law, insisted on an indemnity from the gas company against any costs and damages that might be incurred by reason of the passing of same:—Held, that under the circumstances, this could not be deemed to be evidence that it was not passed in the public interest. The plaintiffs, by first sinking a well on the land near the defendants, did not thereby acquire the right to restrain the defendants from using the reservoir lying under the said land. *Ontario Natural Gas Co. v. Smart and In re Ontario Natural Gas Co. and the Township of Gosfield South*, 19 O. R. 591.—Street. Affirmed, 18 A. R. 625.

#### V. SNOW AND ICE ON SIDEWALKS.

The defendants were the owners of a building on the street. A pipe, connected with the cave troughs conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known of it:—Held, *Armour*, dissenting, that the defendants were not liable. Per *Hagarty, C. J.* The carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants not having knowingly allowed ice to accumulate were not responsible. Per *Armour, J.* The conducting of the water to the sidewalk was a wrongful act, of which the formation of ice on the sidewalk in winter was the natural certain and well known result, and the defendants were responsible for the accident. *Skelton v. Thompson*, 3 O. R. 11.—Q. B. D.

In an action for damages sustained by the plaintiff by reason of ice and snow falling from the roof of the defendant's house and injuring him while he was walking on the highway, evidence was given to shew that about half an hour before the accident happened the defendant was notified of the dangerous character of the roof, but took no precautions to guard against accidents, and a by-law of the municipality was proved requiring the citizens to keep their roofs clear of ice and snow:—Held, that there was evidence to go to the jury of negligence in the defendant. A nonsuit entered at the trial was therefore set aside, and a new trial granted. *Lazarus v. Corporation of Toronto*, 19 Q. B. 9, commented on and distinguished. *Landreville v. Gouin*, 6 O. R. 455.—C. P. D.

The plaintiff, a resident inhabitant of the town of Prescott, whilst proceeding along one of the sidewalks of the town attempted to cross from

one side of such walk to the other over an accumulation of hard beaten snow, where there was a slight declivity in the sidewalk, and in doing so slipped and fell, thereby injuring herself:—Held, reversing the judgment of the Q. B. D. (7 O. R. 281), that there was no proof of such accumulation of snow as indicated negligence on the part of the defendants, and there being no evidence of negligence in the construction of the sidewalk the corporation was not liable. *Brakley v. Corporation of Prescott*, 12 A. R. 637.

To an action by plaintiff against defendants for an accident to plaintiff on 11th April, 1886, caused by slipping on a sidewalk of defendants "covered with snow and ice, negligently allowed to accumulate thereon by defendants, and being otherwise defective and negligently out of repair for a long time to the defendants' knowledge, and which it was their duty to keep in repair," defendants pleaded that the village had not at the date of the accident been organized according to the terms of 49 Vict. c. 55, incorporating said village, and could not have any officers or servants, and could not be and was not guilty of negligence, and by reason of anything done or omitted previous to or at the said date of said alleged accident:—Held, on demurrer, a good defence. *Simpson v. Village of Huntsville*, 13 O. R. 101.—Rose.

The plaintiff, walking home at night, as he was accustomed to, along the sidewalk provided by the defendants for foot passengers, and which the defendants were bound by statute to keep in proper repair, but along the centre of which a ridge of ice had accumulated, and been allowed by them to the knowledge of the plaintiff, to remain in that condition for a couple of months, slipped across the ridge and fell, injuring himself. While stating that he was walking carefully, he admitted that he was aware that it was a dangerous place, and might have been avoided, either by his taking to the travelled road, or by going home another, but longer, way. Numbers of people were in the habit of using it daily without accident. The judge at the trial declined to withdraw the case from the jury:—Held, that the plaintiff, having the right to use the sidewalk, it was a question for the jury whether under the circumstances of the case he was exercising such care as a prudent person would reasonably exercise in using it, knowing its condition. Knowledge is not per se contributory negligence. *Gordon v. City of Belleville*, 15 O. R. 26.—Q. B. D.

By reason of ice on the sidewalk on Yonge street, in the city of Toronto, the plaintiff, who was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of the lane, which sloped towards the sidewalk; the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there:—Held, that there was no evidence of negligence on the part of the defendants. *Forward v. City of Toronto*, 15 O. R. 370.—C. P. D.



## VI. REMOVAL OF BUILDINGS.

See *Toronto Street R. W. Co. v. Dollery*, 12 A. R. 679, p. 10; *Howard v. City of St. Thomas*, 19 O. R. 719, p. 1393.

## VII. TRACTION ENGINES.

See *County of York v. Toronto Gravel Road and Concrete Co.*, 3 O. R. 584; 11 A. R. 765; 12 S. C. R. 517, p. 332.

## VIII. TREES.

Held, that the owner of land adjoining a highway has, under R. S. O. (1877), c. 187, such a special property in the shade and ornamental trees growing on such highway opposite to his land as to entitle him to maintain an action against a wrong-doer to recover damages for the cutting down or destroying such trees; and he is not restricted to the penalty given by section 5:—Held, also, that the Act refers to trees of natural growth as well as to those planted. *Douglas v. Fox*, 31 C. P. 140.—C. P. D.

In this case the damage consisted in the cutting down of some ten or twelve of the trees, for which the plaintiff was awarded \$150:—Held, not excessive. *Id.*

See *Connor v. Middagh*, 16 A. R. 356, p. 2120.

## IX. LIABILITY OF PRIVATE PERSONS.

## 1. For Obstructions.

An action for an injunction may be maintained by a municipality to restrain the obstruction of a highway. They are not confined to the remedy by indictment; *Fenelon Falls v. Victoria, R. W. Co.*, 29 Chy. 4, approved of, *St. Vincent v. Greenfield*, 15 A. R. 567.

See *Standly v. Perry*, 3 S. C. R. 356, p. 2100; *Toronto Street R. W. Co. v. Dollery*, 12 A. R. 679, p. 10; *Dickson v. Kearney*, 14 S. C. R. 743, p. 2118.

## 2. For Accidents.

See *Skelton v. Thompson*, 3 O. R. 11, p. 2145; *Landreville v. Gouin*, 6 O. R. 455, p. 2145; *Bliss v. Boeckh*, 8 O. R. 451, p. 1389.

## X. ROAD AND BRIDGE COMPANIES.

## 1. Formation of.

By R. S. O. (1877), c. 152, five persons are allowed, on taking certain steps, to form themselves into a company for the purpose of either making a road or purchasing one already constructed, without the sanction of any authority, executive or judicial. Such proceeding is wholly the act of the parties, and no conclusive force is afforded by the certificate of registration issued by the registrar under the 15th section of the Act. Therefore, where one W., with his wife and two sons—one a minor—together with another relative, by an instrument in the form required by the statute, executed by them, and duly registered, declared that they had formed a joint stock company (limited) for the purpose of purchasing the roads, franchise, etc., of the

Hamilton and Milton Road Company, etc., with a capital stock of \$5,000, the whole amount of which was subscribed for by these persons, on which they had paid five per cent. into the hands of the treasurer of the company—another son of W.—and all five of the shareholders were duly chosen directors; and having thus purported to constitute themselves a company, they purchased the roads from the companies holding the same at the alleged price of \$31,000; and subsequently brought action to recover tolls said to be due for the use of the road:—Held, reversing the judgment of the court below, that, by reason of the infancy of one of the subscribers, the company had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract, and:—Quære, whether the contract was signed by more than three persons capable of contracting, as the Married Woman's Property Act, 47 Vict. c. 19 (Ont.), did not enable married women to bind themselves personally by their general contracts:—Held, also, that the amount of the stock subscribed could not be said to be sufficient in the judgment of the shareholders as required by the statute as a condition precedent to the incorporation of a company to purchase a road. *Hamilton and Flamborough Road Co. v. Townsend—Hamilton and Flamborough Road Co. v. Platt*, 13 A. R. 534.

The H. and M. Road Co., the owners of a certain road, and in possession thereof as a toll road, levying and collecting tolls thereon, assumed to sell the road to the H. and F. Road Co., who entered into possession thereof. Subsequently it was held by the Court of Appeal, on appeal from the judgment of Wilson, C.J., that the H. and F. Road Company were not duly incorporated, because, while the Joint Stock Companies' Act, R. S. O. (1877) c. 152, requires at least five incorporators to enable a company to be incorporated, there were not five here, one of the alleged incorporators being a minor. The corporation of the township of East Flamborough thereupon passed a by-law assuming possession of the road:—Held, that the by-law was illegal, and must be quashed: that the effect of the judgment of the Court of Appeal was to restore to the applicants the franchise they held before the abortive sale took place, the road having been kept alive as a toll road, and repaired as such from time to time, and nothing having transpired to justify the municipal corporation, in interfering with the road, or assuming possession and control of it, as the by-law authorized them to do. *In re the Hamilton and Milton Road Co. v. Township of East Flamborough*, 13 O. R. 128.—Cameron.

## 2. Municipalities Taking Stock.

Held, that sub-section 11 of section 479 of the Municipal Act, R. S. O. (1887), c. 184, providing that the council of a municipality may pass by-laws for taking stock, etc., in an incorporated company, in respect of any bridge, etc., "under and subject to the respective statutes in that behalf," only authorizes the passing of by-laws to take such stock where in any special or general Act under which a bridge, etc., company is in-

company, etc., with whole amount of these persons, on per cent. into the company—another shareholders were having thus purchase a company, they companies holding of \$31,000; and to recover tolls of the road:—Held, the court below, that, of one of the sub-legal existence at of their declaration o subsequent ratifying majority could:—Quære, whether y more than three ing, as the Married Vict. c. 19 (Ont.), omen to bind them-general contracts:—at of the stock sub- be sufficient in the rs as required by the ecedent to the incor- purchase a road. h Road Co. v. Town- borough Road Co. v.

o., the owners of a sion thereof as a toll etting tolls thereon, to the H. and F. to possession thereof. id by the Court of e judgment of Wil- d F. Road Company id, because, while the Act, R. S. O. (1877) e. corporators to enable ated, there were not d incorporators being n of the township of upon passed a by-law e road:—Held, that d must be quashed: ment of the Court of o the applicants to e the abortive sale took en kept alive as a toll ch from time to time, aspired to justify the e interfering with the sion and control of d them to do. In re Road Co. v. Township O. R. 128.—Cameron.

Taking Stock.

11 of section 479 of the (1887), c. 184, providing nicipality may pass by- etc., in an incorporated ny bridge, etc., " under tive statutes in that be e passing of by-laws to n any special or general ge, etc., company is in-

corporated, a provision is contained authorizing the municipal council to hold such stock, etc. Where, therefore, the Act incorporating a bridge company, did not profess to confer any power on the municipality to take stock, etc., in such company, no power was conferred under the Municipal Act to do so; and a by-law passed by the municipal council for such purpose was therefore held bad, and directed to be quashed. *Re Peck and the Township of Ameliasburg*, 17 O. R. 54.—Street.

### 3. Tolls.

The plaintiff, a stage driver, was in the habit of driving passengers over that part of the road of a company incorporated under C. S. U. C. c. 49, and previous Acts, from T. to the terminus of a street railway laid down on the line of the road, being between two principal gates on the road, a distance of nearly three miles, thus using many miles of the road daily. The defendant, who was the lessee and manager of the road, erected a check gate across the road at a point within the space travelled by the plaintiff, and then enforced payment of a toll of five cents each way from the plaintiff, giving a ticket to pass through the principal gate beyond:—Held, that such check gate was legally erected, and the toll was legally demanded; and that the fact that the plaintiff did not intend to pass through a principal gate could make no difference. The road company consisted of four persons, of whom F. and another personally signed an authority to the defendant to erect the gate, and F. signed for the other two under powers of attorney for the management of their affairs, but not specially referring to this road. After action commenced these two ratified F.'s act by endorsement on the back of the authority:—Held, sufficient. *Vanderlip v. Smyth*, 32 O. P. 60.—C. P. D.

The provisions of the "General Road Companies' Act" (R. S. O. 1877, c. 152), respecting the extension of roads, apply to roads which have been constructed and completed, and tolls established thereon. In this case the extensions were new constructions within the city of Hamilton, and, measured separately, were less than two miles, though the distance of the original road and the extensions together much exceeded two miles:—Held, that the defendant were entitled to exact toll therefor. *Knott v. Hamilton and Flamborough Road Co.*, 45 Q. B. 338.—Galt.

The tollgate had been maintained for nearly nine years on the portions of the road within the city of Hamilton:—Held, that this did not preclude defendants from erecting a gate and taking toll there. *Id.*

Under "The General Road Companies Act," R. S. O. (1877), c. 152, ss. 102, 104, 109, the first engineer appointed to examine a road alleged to be out of repair, must act throughout the proceeding unless another is appointed under section 109; but under that section the judge is the person to be satisfied that the first engineer is unable to make or complete the examination, and his decision on that point cannot be reviewed. The engineer appointed under the Act need possess no official certificate or degree. The second engineer having been ap-

pointed in January to examine and report "as to the present condition of the road" made an examination and so certified, but was unable to report whether the repairs directed by the previous engineer had been performed, as it was covered with snow. In May following, without any further authority, he again examined and certified that it was in good repair, and the company began again to take tolls:—Held, that he was functus officio after the first examination, and that the tolls therefore were illegally imposed. *Regina v. Greaves*, 46 Q. B. 200.—Osler.

Held, on demurrer to the statement of defence herein, omitting the allegation of demand and refusal of toll at the gate, under R. S. O. (1877), c. 152, s. 131, and a seizure immediately following thereon, that the demand should have been at the gate, and the seizure should have followed immediately thereupon; and that the statement of defence was therefore bad. *Enrick v. Township of Yarmouth*, 9 O. R. 162.—Rose.

By agreement made in the year 1869, between a road company and the city of Hamilton, the road company were to extend their road from a point near the Desjardins Canal into the limits of the city, and as part of such road should build a bridge over the canal, the city to lend the road company \$5,000 for ten years at the nominal rate of interest of one per cent.: and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no toll should be exacted from any parties residing upon or owning property within the limits of the city on passing over said bridge. The road was subsequently extended into Hamilton, and a toll-gate erected within the city limits. Litigation afterwards arose between the road company and the city, the Great Western Railway Company, and the Desjardins Canal Company, as to the erection of the bridge which was continued until 1874, when a settlement was affected by its being agreed by all parties that a fixed stationary bridge should be erected and maintained by the road company free from any toll thereon, which was legalized by 37 Vict. c. 73 (Ont.). The defendant, passing through the said tollgate, refused to pay toll, on the ground that the by-law was ultra vires:—Held, that the proviso in the by-law was not ultra vires, for the road company could agree not to exact tolls from any person or body of persons, as there was nothing in the Act of incorporation to prevent their doing so: that the city of Hamilton had paid a substantial sum for the privilege; and there was no discrimination as regarded the residents thereof; and that the proviso only applied to the non-exaction of tolls on the bridge, and had nothing to do with the road, and was legalized by the 37 Vict. c. 73 (Ont.):—Held, also, that an objection that the location of the road had not been made prior to the passing of the by-law was not tenable after the road had been located and in use for more than fifteen years. *Hamilton and Flamborough Road Co. v. Binkley*, 9 O. R. 621.—Rose.

On a motion by a road company for an injunction to restrain the defendant from passing through their tollgates without paying tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under section 129

of R. S. O. (1877), c. 152, the court would not interfere by way of injunction:—Held, that as the plaintiffs had established a *prima facie* case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial and an injunction was granted, upon a consideration of the balance of convenience, in favour of the plaintiffs. *Letton v. Goodden*, L. R. 2 Eq. 130, and *Cory v. Yarmouth, etc.*, R. W. Co., 3 Ha. 593, considered and followed. *Hamilton and Milton Road Co. v. Raspberry*, 13 O. R. 466.—Ferguson.

See *Canada Southern R. W. Co. v. International Bridge Co.*, 8 App. Cas. 723; 7 A. R. 226; 28 Chy. 114, p. 1011.

#### XI. MISCELLANEOUS CASES.

Quebec turnpike trust. See *Regina v. Bell-eau*, 7 App. Cas. 473, reversing 7 S. C. R. 53, p. 318.

Prohibition to judge of the County Court to prohibit him from amending a registered plan so as to close up a portion of a street. See *In re the Town of Oakville and Chisholm*, 12 A. R. 225, p. 1829.

Remarks on the serious consequences likely to arise from the constant changes in the names of streets in the city of Toronto. *VanKoughnet v. Denison*, 11 A. R. 699.

Statute 48 Vict. c. 21 (Ont.), does not empower the commissioners appointed thereunder to expropriate the rights of a road company, or to close up any part of the road for the purposes of the Niagara Falls Park. *Re Niagara Falls Park—Fuller's Case*, 14 A. R. 65.

As to what constitutes a "highway." See *Shoebrink v. Canada Atlantic R. W. Co.*, 16 O. R. 515, p. 1780.

See *Standly v. Perry*, 3 S. C. R. 356, p. 2100; *Golarneau v. Guilbault*, 16 S. C. R. 579, p. 748.

#### WEEKLY ALLOWANCE.

Under Indigent Debtors' Act. See *Wheatly v. Sharp*, 8 P. R. 189, p. 903.

#### WEIGHTS AND MEASURES.

Held (Armour, J., dissenting), that although irregularly directed, imprisonment was justified in default of distress by section 62 of 32 & 33 Vict. c. 31 (Dom.), incorporated in the Weights and Measures' Act by section 53 thereof; but that if such imprisonment were not so justified the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment. Per Armour, J.—That the 32 & 33 Vict. c. 31, s. 62 (Dom.), should only be construed as fixing the duration of the term of imprisonment, where the special Act provides specifically for some imprisonment without fixing its duration; and that as no imprisonment is expressly imposed by the Weights and Measures' Act for the offence charged here,

so much of the conviction as awarded imprisonment was made without jurisdiction, and was therefore bad; but that it was separable from the rest of the conviction, and should be quashed, leaving, however, the rest of the conviction to stand. *Regina v. Dunning*, 14 O. R. 52.—Q. B. D.

#### WELLAND CANAL.

Compensation for lands taken. See *In re Welland Canal Enlargement—Fitch v. McRae*, 29 Chy. 139, p. 460.

#### WHARF.

See *Standly v. Perry*, 3 S. C. R. 356, p. 2100.

#### WIDOW'S ELECTION.

See DOWER.

#### WIFE.

See HUSBAND AND WIFE.

#### WILD LANDS.

See CROWN LANDS.

Thirty or forty years before action a blazed line had been run between the lots of plaintiff and defendant by S., a surveyor, along part of which a fence had been erected. The parties respectively cut timber and exercised acts of ownership on the lands on each side of and up to the blazed line. The plaintiff swore that although he and his father had been governed by this line and never claimed or went beyond it, it was always their intention to dispute it when they should be able to establish the true line. The judge at the trial found that there was sufficient evidence of defendant's occupation of the land up to the blazed line to extinguish the plaintiff's title:—Held, Armour, J., dissenting, that the verdict was right. Title by possession to wild land can be made out otherwise than by actual enclosure. *Steers v. Shaw*, 1 O. R. 26.—Q. B. D.

#### WILL.

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LANDS.

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## I. TESTAMENTARY CAPACITY.

### 1. Infants.

In a so-called will, executed a few days before her death, G., L.'s wife, assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age:—Held, that the will was invalid. C. S. U. C. c. 73, s. 16 (R. S. O., 1877, c. 106, s. 6), only removes the disability of coverture in respect to wills, not of infancy. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

### 2. Married Women.

See *Smith v. Smith*, 5 O. R. 690, p. 597; *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685, *supra*.

### 3. Mental Capacity.

The testator a man of education and a minister of the Presbyterian Church, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were entirely obtained by the person preparing it, by putting questions to the testator as to the disposition of his different properties, and suggesting also the objects of his bounty; such will, when drawn, having been read over to the testator clause by clause, who expressed his assent to some of the bequests, while as to others he made intelligent remarks, and some changes in the provisions thereof. The court (Blake, V. C., 28 Chy. 253), in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate, although it was shown that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act; that there had not been any previous intention on his part to make a will; that he was a man who, when in possession of

his mental faculties, was not likely to take suggestions from others; that not a single bequest or devise originated with the deceased; that the writer of the will did not know what property the deceased had, and admitted that if he had had this knowledge he would have spoken to him seriously on the subject of his relations, of whom there were several; that the will was inofficious; that the testator was eighty-four, and during the preparation of the will, as one clause would be written out after his giving assent to a devise or bequest, he fell into a doze or sleep, from which he had on each occasion to be aroused; that it took two hours to prepare the will, although it covered but one foolscap sheet, and that the parties preparing the will sent for and obtained the numbers of the lots devised by the will from a neighbour, thus shewing that they could not obtain such information from the deceased. The court being equally divided, the appeal was dismissed, with costs to be paid out of the residuary estate. *Per Spragge, C. J. O., and Galt, J., affirming the judgment of the court below, that the evidence set forth in the report shewed that the testator was of sufficient mental capacity to execute the will, and fully understood the act he was performing. Per Barton and Patterson, J.J. A. Although there is no doubt as to the validity of a will made by question and answer, yet in such a case the court is more strict in requiring evidence of spontaneity and volition than in an ordinary case, and that the evidence here shewed a want of either spontaneity or volition. Thompson v. Torrance, 9 A. R. 1.*

P. L., executor under the will of the late W. R., sued W. C. A., curator of the estate of W. R. during the lunacy of the latter, to compel W. C. A. to hand over the estate to him as executor. After preliminary proceedings had been taken, E. R. (the appellant) moved to intervene and have W. R.'s last will set aside, on the ground that it had been executed under pressure by D. J. M., W. R.'s wife in whose favour the will was made, while the testator was of unsound mind. The appellant claimed and proved that D. J. M. was not the legal wife of W. R., she having another husband living at the time the second marriage was contracted. W. R. who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about \$16,000. On the 4th October, 1878, W. R. made a will by which he bequeathed \$4,000 and all his household furniture and effects to his wife J. M., \$2,000 to his niece E. R., \$1,000 to F. S. for charitable purposes, and the remainder of his estate to his brothers, nephews and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving \$800 to his wife J. M., \$400 to each of his nieces M. and E. R., and \$400 to his brother with reversion to the nieces if not claimed within a year, and the remainder to E. R. On the 27th November 1878, W. R. made another will which is the subject of the present litigation, and by which he revoked his former wills and gave \$2,000 to F. S., for the poor of the parish of St. Roche, and the remainder of his property to his "beloved wife J. M." On the 10th of January following W. R. was interdicted as a maniac, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released, and lived until his death with his niece E. R., sister of the

appellant. Meredith, C. J., upheld the validity of the will, and his decision was upheld by the Queen's Bench. On appeal:—Held (reversing the judgments of the courts below, Ritchie, C. J., and Strong, J., dissenting), that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 21st November, was that the testator, at the date of the making of the will, was of unsound mind. *Russell v. Le-francois, 8 S. C. R. 335.*

The testator when nearly eighty years of age executed a will devising the whole of his estate to a son and daughter by his first marriage to the exclusion of his wife and other children of the second marriage. At the time of its execution he was on his death-bed, staying with his daughter in the United States, having shortly before left his farm in Ontario without any notice to his wife and other children. For some time before he had been afflicted with a complication of diseases rendering him incapable of managing his farm, and which resulted in his death shortly after the execution of the will in question. A will was prepared by an attorney practising in the place the testator was staying at, leaving everything to the daughter, solely on the instructions of her husband. On this being read over to the testator, who was lying in bed and unable to rise, suffering great physical and mental prostration, he remarked that it was not right, that he wanted the son's name in it too. The will in question was then prepared, and after being read over to him, without explanation as to the effect of the language used, was executed by him with assistance, with great difficulty. The attorney and medical man in attendance were of opinion that he had sufficient mental capacity to make a will. The same attorney had some time before induced him to refrain from making a similar will. Shortly before the execution of the will he had handed to his daughter a bank deposit receipt which she had transferred to her name, and partly used, he stating that he wanted her to take care of him and that he was going to have a will drawn. From the evidence it appeared that the testator, as well as his daughter, were under the impression that the will had reference to the deposit receipt only:—Held (varying the judgment of the trial judge), that the will was invalid, its execution under circumstances of the testator's condition, and the absence of any explanation to him of the effect of his testamentary act, being a fraud on the part of those concerned in procuring its execution. *Freeman v. Freeman, 19 O. R. 141.—C. P. D.*

The decision of Spragge, C., who set aside the will on the ground of the insane delusion of the testator as to the illegitimacy of his youngest child, reversed. *See Bell v. Lee, 8 A. R. 185.*

*See Hogg v. Maguire, 11 A. R. 507, p. 2161.*

## II. WHAT MAY BE DEVISED.

On 26th September, 1844, J. Le B. by deed bargained and sold, etc., to the municipal council of D. district, in consideration of five shillings, a certain lot for the purpose of erecting thereon a school-house for the use of the D. district.



upheld the validity of the will. The decision was upheld by the House of Lords on appeal:—Held (reversed by the majority of the courts below, 3 to 2, dissenting), that the will was validly drawn from all the facts and circumstances of the case. The capacity of the testator was not in question. The will, made on the 1st November, was validly made. The will was of the making of the testator. *Russell v. Russell*.

eighty years of age, the whole of his estate in his first marriage to and other children of the time of its execution, staying with his estates, having shortly thereafter without any other children. For one afflicted with a lingering illness incapable of which resulted in his execution of the will in the care of an attorney testator was staying in his daughter, solely on and. On this being who was lying in bed of great physical and urged that it was not son's name in it too. Then prepared, and m., without explanation, language used was, assistance, with great and medical man in that he had sufficient a will. The same before induced him to similar will. Shortly he will have handed some receipt which she one, and partly used, her to take care of him have a will drawn. That the testator, were under the impression reference to the deed (varying the judgment that the will was in the circumstances of the absence of any conflict of his testimony the part of those concerned. *Freeman v. C. P. D.*

See *Bell v. Lee*, 8 A.

11 A. R. 507, p. 2161.

BE DEVISED.

1844, J. Le B. by deed to the municipal corporation of five shillings, a rose of erecting thereon use of the D. district.

Habendum, for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso that the said council should within one year from its date erect a school-house for the use of the said district, or if the said council should at any time erect any other building save said school-house and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. Le B. and his heirs to re-enter and avoid the estate of the said municipal council. J. Le B. by his will, dated 23rd July, 1847, devised all his real estate to certain nieces, and died in the year 1848, without having revoked or altered said will. The municipal council complied with the condition by building a school-house, and at the time of the making of the will, the condition had not been broken, but the successors of D. district dealt with the land otherwise than was authorized by the deed, and broke the condition. The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. Le B. or his heirs-at-law were entitled to the proceeds thereof:—Held, that the word “possibility” in R. S. O. (1877), c. 106, s. 2, includes a “right of entry for condition broken,” mentioned in section 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of “land.” And that upon the breach of the condition no new estate was acquired, so as to require words applicable to after acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made, and the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession:—Held, also, that a “condition of re-entry,” or condition strictly so called, as distinguished from a “conditional limitation,” is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room; and that the condition in this case was therefore perfectly valid. The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it. *In re Melville*, 11 O. R. 626. —Proudfoot.

### III. PROMISES TO BEQUEATH PROPERTY.

The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was subject to a mortgage, saying that if he would do so, and have the property conveyed to his (plaintiff's) wife he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the installments on the mortgage and the plaintiff was compelled to pay it off himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for them; that he would pay plaintiff \$150 a year for ten years, and bequeath to his wife \$1,000. By the will, however, only \$100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement, or for payment of damages by reason of the breach thereof. The only direct evidence was

that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for \$260 and \$200, respectively, expressed to be on account of money lent her by her father's will; and witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in his wife's name, and that he was making the payments as the plaintiff had so taken the deed. — Held, that there was sufficient corroboration of the evidence of the plaintiff as required by R. S. O. (1877) c. 62, and that the second agreement or promise by the testator was not voluntary, the former promise, even if barred by the statute, being a sufficient consideration, as well as the conveyance to the daughter made in pursuance of it; and a decree was made for payment of the legacy of \$1,600, less the two sums of \$260 and \$200, with interest from one year after the death of the testator on the balance. *Halloran v. Moon*, 28 Chy. 319, — Sprague.

An agreement to make a will in favour of an adopted child may be enforced against the personal representatives of the obligor. See *Roberts v. Hull*, 1 O. R. 388, p. 1974.

C. C., the plaintiff, alleged that A. C., his father, being the owner of certain land, induced him to abstain from enforcing a certain claim, and also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; and A. C. being dead, C. C. now claimed the land as against one to whom A. C. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged:—Held, reversing the decision of *Frontotout, J.*, that this was not such part performance as to take the case out of the Statute of Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, and not of the person seeking to enforce the contract, and, moreover, did not import a contract, but only indicated a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature: *Quere*, whether if it had been proved, which it had not, that A. C. had, by his representations that he had devised the land to C. C., induced him to forgo his claim, and to work on the land as alleged, this would have entitled C. C. to succeed. *Cumpph v. McKerricher*, 6 O. R. 85.—*Chy. D.*

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. But where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule; the promise made and the consideration for it being both of too

uncertain a character to entitle the plaintiff to come to the court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of special contract, whilst they form part of the household. Decision of Proudfoot, J., varied. *Walker v. Boughner*, 18 O. R. 448.—Q. B. D.

See *Turner v. Preost*, 17 S. C. R. 283, p. 1878.

#### IV. EXECUTION OF WILLS.

A testator brought his will which had been previously signed by him to two persons to sign as witnesses. The witnesses signed in the testator's presence, at his request, and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature:—Held, that the will was validly executed. *Scott v. Scott*, 13 O. R. 551.—Rose.

The plaintiffs were the devisees of the land in question in this action under the will of H. O'N.; the defendant A. O'N., the father of the plaintiffs, was one of the heirs-at-law, and had obtained conveyances of the land from the other heirs-at-law, of H. O'N.; and the defendant O. was the assignee of all the estate of A. O'N., and had besides a mortgage from A. O'N. on the land in question. On the 17th April, 1877, H. O'N. signed a will in the presence of one witness; another witness was then called in, before whom the testator acknowledged his signature, and then both witnesses signed in the presence of the testator and of each other. On the 23rd April, 1877, the testator, desiring to have two changes made, caused two of the sheets of the will to be rewritten and read to him; the two new sheets were then put into the place of the old ones, the document pinned together, and on the last sheet, which was not one of those rewritten, the date 17th was changed to 23rd; the same witnesses were then called in and the testator then acknowledged his signature to the will, and each of the two witnesses his. The two sheets taken out of the will were afterwards destroyed by one H., by the direction of the testator, but not in his presence. The testator died a few days after this without having made any other will. The will of the 23rd April was offered for probate, but was refused by a Surrogate Court:—Held, that the will of the 17th April was duly executed; but that the will of the 23rd April was not duly executed, and probate was properly refused; and the will of the 17th April was not revoked by the destruction of the two sheets out of the presence of the testator, nor by the defective execution of the will of the 23rd April, the intention of the testator not being to cancel the whole of the earlier will, but only to make two changes in it, and he being under the belief that the later will was a valid one; and it was adjudged that the earlier will should be admitted to probate. *O'Neill v. Owen*, 17 O. R. 525.—Ferguson.

Effect of beneficiary witnessing execution of the will. See Subhead VII. (c), p. 2217.

#### V. PROOF OF WILLS.

A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained. *Gough v. McBride*, 10 C. P. 166, specially referred to. *McDonald v. McDougall*, 16 O. R. 401.—Rose.

In an action for the recovery of land, the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of that will produced by them was the copy of the probate from the registry office, with the affidavit of verification attached:—Held, that this was not proper evidence of the will. The plaintiffs, however, sought to support their case by reference to a certain statement in the defendants' pleading, in which, besides denying their right to recover, she herself also claimed title under a deed from the executors of S.:—Held, that they could not take that part of the pleading which suited their purpose and reject the rest: that they could not use a scrap of it to eke out the insufficiency of their own evidence. *Barber v. McKay*, 17 O. R. 562.—Chy. D.

In an action to establish a will in the handwriting of the testator, purporting to be executed in the presence of two subscribing witnesses, who could not be found and whose handwriting could not be proved, and probate whereof had been refused by the proper Surrogate Court, a motion for judgment asking to have the will established and probate thereof granted, notwithstanding that all parties interested consented, was dismissed and the application refused, on the ground that sufficient evidence had not been produced to show that such will was the will of the testator under R. S. O. (1887), c. 109, s. 12. *Williamson v. Williamson*, 17 O. R. 734.—Robertson.

#### VI. REVOCATION OF WILLS.

The testator, by his will, made in June, 1880, gave the bulk of his property to the plaintiff, his sister, with whom, in the autumn before his death, he had quarrelled, and it did not appear that she saw him again before he died. The defendant, another sister, claimed under a second will made an hour or two before the testator's death. The evidence showed that the testator was a very determined man, and not easily influenced; that he was suffering from excessive indulgence in drink; that he latterly spoke in very bitter and offensive terms of the defendant, and had frequently said that she should have nothing; that he had frequently, and as late as a few days before his death, stated that if he died everything was arranged and that the plaintiff would get his property. Shortly before his death the defendant had him brought to her house. On the night of his death the physician in attendance told defendant that if anything was to be settled it should be done at once. A solicitor was sent for to draw a will. The defendant instructed him before he saw the testator, and upon her instructions the will was drawn, which gave the bulk of the property to the defendant, and a bequest of \$1,000 to the plaintiff. This the solicitor read over to the testator and asked him if he approved of it. He made a sign of dissent. The defendant urged

## OF WILLS.

twenty years old of a  
see when possession of  
ent was the registered  
the devise therein con-  
ride, 10 C. P. 166, spe-  
*Donald v. McDougall*,

recovery of land, the  
under a deed from the  
at the only evidence of  
them was the copy of the  
try office, with the at-  
tached:—Held, that this  
of the will. The plain-  
to support their claim by  
statement in the defen-  
sion, besides denying their  
self also claimed title  
executors of S.:—Held,  
e that part of the plead-  
purpose and reject the  
not use a scrap of it to  
of their own evidence.  
R. 562.—Chy. D.

lish a will in the hand-  
purporting to be executed  
by subscribing witnesses,  
and whose handwriting  
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asking to have the will  
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parties interested con-  
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show that such will was  
under R. S. O. (1887), c.  
v. *Williamson*, 17 O. R.

## TION OF WILLS.

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st. The defendant urged

the testator to give the plaintiff the \$1,000, but  
(as the defendant stated), he said \$10 was  
enough for the plaintiff. The solicitor there-  
upon went away leaving the will with the de-  
fendant, and during his absence it was signed.  
The evidence of various witnesses for the de-  
fence was conflicting as to the incidents which  
happened during this time and until the testa-  
tor's decease; and while they all spoke of the  
testator's unwillingness to give the plaintiff  
more than \$10, there was no evidence, other  
than that of the defendant, of his desire to give  
her the bulk of his property or to make any dis-  
position of it:—Held, reversing the judgment  
of Proudfoot, J., that the second will could not  
be established on the uncorroborated evidence  
of the defendant, and the prior will was declared  
to be the testator's last will. *Hogg v. Maguire*,  
11 A. R. 507.

See *O'Neill v. Owen*, 17 O. R. 525, p. 2159.

## VII. CONSTRUCTION AND INTERPRETATION.

## 1. Generally.

It is a principle of construction that the same  
meaning shall, as far as possible, be given to the  
same words in the same will. *Boys' Home of  
the City of Hamilton v. Lewis*, 4 O. R. 18.—  
Boyd.

## 2. Admissibility of Parol Evidence.

Where a testator devised lot 14 concession 10,  
in the township of A. to his two nephews, and,  
after certain pecuniary bequests, directed as fol-  
lows: "The balance of my estate that may re-  
main after paying the above bequests, to be paid  
to my relatives as my executors may think ad-  
visable;" and the evidence showed that the  
testator did not and never had owned that lot;  
but that he did own lot 21, con. 10, in the town-  
ship A., which was not specifically devised by  
the will:—Held, that the evidence of the testa-  
tor's intention to devise lot 21, in con. 10 to his  
nephews was inadmissible:—Held, further, that  
the court would not authorize the executors to  
convey lot 21, in con. 10 to the nephews under  
the residuary clause in the will. *Summers v.  
Summers*, 5 O. R. 110.—Ferguson.

A testator by his will devised as follows:—  
"I devise the south-west quarter of lot 5, con.  
2 of Westminster, containing fifty acres, more or  
less, to H. P. S., his heirs and assigns, in fee  
simple. "The evidence showed that the testa-  
tor did not own the south-west quarter of the  
lot, but did own the south-east; that he and  
the devisees had lived on it for many years, and  
that he did not own any other part of the lot,  
except the fifty acres of the south-east quarter:  
—Held, that the evidence was admissible to ex-  
plain the error, and cause the will to operate on  
the south-east quarter. *Re Shaver*, 6 O. R. 312.  
—Boyd.

The erroneous part of the description in a will  
may be rejected if there is enough left to identify  
the subject matter devised. *Summers v. Sum-  
mers*, 5 O. R. 110, distinguished. *Ib.*

A testatrix devised the south quarter of lot  
20 concession 9, township of R., to T. L., and  
the east quarter of said lot to her two daughters.

It was sought to show that she had at the time  
of her death no other land than the south half  
of lot 20, concession 8, of R., and to make the  
will operate to pass this to T. L.:—Held, that  
the devise being in its terms free from ambiguity,  
the judge below was right in rejecting evidence  
of extrinsic facts, and that even if it might have  
been shown that lot 20, in concession 8, was the  
only land which the testatrix owned, the will  
could not operate to pass it. *Hickey v. Storer*,  
11 O. R. 106.—Chy. D.

A testator by his will directed his executors,  
"hereinafter named," to pay his debts and fun-  
eral expenses; and then devised the residue as  
follows: To his son David, "lot 16, con. 7, N.  
H., real and personal property;" the said David  
to pay to each of his daughters \$500, namely,  
Janet, Mary, and Agnes in two years after his  
death; Margaret and Ellen at twenty-five, and  
Christina to remain on the farm, the said sum  
to be given her when she became of age. No  
executors were named. Parol evidence was  
admitted to shew that the land mentioned was  
in the township of Morris, that "N. H." meant  
the north half, and that it was the only land  
owned by the testator; parol evidence was also  
admitted to shew that Christina, though spoken  
of as a minor, was twenty-three years old when  
the will was made, and that she was of delicate  
constitution and of weak mind:—Held, that  
there was an effectual disposition of the real  
and personal estate: that to a disposition of  
personal estate executors need not be expressly  
named, but may appear by implication, and  
that David was executor according to the tenor:  
that as to the land the parol evidence, which  
was properly admissible, cleared up any am-  
biguity as to the description; and the parol  
evidence also showed that as regards the pro-  
vision in favour of Christina, she must be treated  
as an adult; and that the provision for her  
would include maintenance. *Young v. Purvis*,  
11 O. R. 597.—Proudfoot.

See *Dumble v. Dumble*, 8 A. R. 476, p. 2194;  
*Clark v. Clark*, 17 S. C. 376, p. 2179.

## 3. Particular Words and Expressions.

A testator died in 1847 leaving a will in which,  
after devising his farm to his wife for life, and  
at her decease to be divided by his executors  
between his sisters F. and H. in certain propor-  
tions, he continued: "and in case either or both  
of my sisters F. and H. die previous to my de-  
cease, then my will is that each of their por-  
tions devised to them respectively, shall be by  
my executors divided between their and each of  
their heirs, share and share alike, that is each  
sister's share to each sister's children, to them  
their heirs and assigns for ever." The testator's  
sister H. predeceased him, leaving children,  
who survived him, and having had also a  
daughter, who predeceased her, leaving a son,  
H. H.:—Held, that H. H. took no share of the  
devise to H., for it was clear the testator was  
using "heirs" in a colloquial and not a techni-  
cal sense, as meaning "children," and the legal  
construction of the word "children" accords  
with its popular signification, viz., as designat-  
ing immediate offspring. *Paradis v. Campbell*,  
6 O. R. 632.—Proudfoot.

A testator, by his will made on the 14th of August, 1850, devised certain land to his widow for life, and after her death to two nephews, and in the case of the death of them, or either of them, in his own lifetime he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her or their heirs and assigns. The Act commonly known as the Act abolishing Primogeniture, 14 & 15 Vict. c. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870:—Held (Galt, C. J. C. P., dissenting), affirming the judgment of Robertson, J., (16 O. R. 341), that the Act abolishing Primogeniture did not apply (1) because the will was made before it was passed or took effect, and (2) because the land had been lawfully devised by the person who died seised, and therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow. *Tylee v. Deal*, 19 Chy. 601, approved. *Baldwin v. Kingston*, 18 A. R. 63.

A testator by his will, provided as follows: "I will and bequeath to \* \* \* C. H., all properties, moneys, and personal effects now in my possession, for her own and sole use, to be disposed of as she may see proper":—Held, that the devise passed real estate:—Held, also, that real estate in the occupation of a tenant at the time of the testator's death, was in the possession of the testator. *Re Hargan and Fritzing*, 16 O. R. 28.—Ferguson.

Where a testator, by his will, in which he used the words "executor" and "executrix" several times, made a residuary bequest and devise to "the heirs and representatives of M. B.":—Held, that, having regard to the context, the next of kin according to the Statute of Distributions, and not the executor of M. B. were entitled to take under the above words. The weight of decision shows that the word "representatives," when standing alone, means "executors or administrators," but that very slight expressions in the context have turned the meaning in the other direction, to that of "next of kin." *Burkitt v. Tozer*, 17 O. R. 587.—Boyd.

"Child or children."—See *Stobhart v. Guardhouse*, 7 O. R. 239, p. 2170.

"Children."—See *McPhail v. McIntosh*, 14 O. R. 312, p. 2176.

"Dying without heirs."—See *Tyrwhitt v. Dawson*, 28 Chy. 112, p. 2171.

"Effects."—See *Hammill v. Hammill*, 9 O. R. 530, p. 2167.

"To be equally divided."—See *Woodhill v. Thomas*, 18 O. R. 277, p. 2199.

"Family," intended in this case to include the widow.—See *Dawson v. Fraser*, 18 O. R. 496.

"Family now at home."—See *Dawson v. Fraser*, 18 O. R. 496, p. 2227.

"Heirs."—See *In re Biggar*—*Biggar v. Stinson*, 8 O. R. 372, p. 2191.

"Heirs."—See *Scott v. Gohn*, 4 O. R. 457, p. 2203.

"Heirs-at-law."—See *Harrison v. Spencer*, 15 O. R. 692, p. 2169.

"Heirs of the body."—See *Re Cleator*, 10 O. R. 326, p. 2172.

"Home."—See *Augustine v. Schrier*, 18 O. R. 192, p. 2213.

"In case of death of my children."—See *Dumble v. Dumble*, 8 A. R. 476, p. 2194.

"Issue."—See *Re Hamilton*, 18 O. R. 195, p. 2177.

"Next of kin."—See *Mays v. Carroll*, 14 O. R. 699, p. 2169.

"Now reside upon."—See *Hatton v. Bertram*, 13 O. R. 766, p. 2168.

"Offspring."—See *Sweet v. Plutt*, 12 O. R. 229, p. 2175.

"Worldly estate."—See *Town v. Borden*, 1 O. R. 327, p. 2182.

#### 4. Description of Land.

Held, that "200 acres of land, the west half of lot No. 14," was falsa demonstratio of the west half, the testator having referred to the whole lot as being 200 acres in a subsequent part of the will. *Holby v. Wilkinson*, 28 Chy. 550.—Spragge.

A. McL. S. being the owner of a 200 acre lot, and having disposed of twelve acres at the north-east corner and five acres in the centre portion in his lifetime, by his will devised as follows: First, I devise and bequeath unto W. A. S. the easterly part of my lot No. 6, \* \* \* being described as one-third part of the length and the entire width, measuring westward from the easterly limit of the said lot No. 6, and containing sixty-six and two-thirds acres, more or less. Second, I devise and bequeath unto H. D. S. the middle part of my said lot No. 6, in \* \* \* being described as one-third part of the length and the entire width, measuring westward from the land hereinbefore devised to W. A. S., of the said lot No. 6, and containing sixty-six and two-thirds acres, more or less. Third, I devise and bequeath to my daughter A., the wife of J. B., of \* \* \* the remaining one-third part of my said lot No. 6, in \* \* \* being described as one-third of the length and the entire width of the said lot No. 6, measuring westward from the land hereinbefore devised to H. D. S., and extending to the westerly limit of said lot No. 6, containing by admeasurement sixty-six and two-thirds acres, more or less. To have and to hold the said hereby devised land and premises, unto and for the use of my said daughter A., for and during the term of her natural life, with remainder thereof on her decease to the children of her body, and their heirs and assigns for ever. A codicil provided as follows: I do hereby alter my said will, so that if my said daughter A., the wife of J. B., die without issue, or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike:—Held, that each of the three devises took under the will according to the measurements given, that is to say, one-third part of the length of the lot, and the whole width of it, and only such portion of his or her respective parcel thus described, as the testator had title to and power

*Harrison v. Spencer*, 15

—See *Re Cleator*, 10 O.

*Stine v. Schrier*, 18 O. R.

of my children."—See  
R. 476, p. 2194.

*amilton*, 18 O. R. 193, p.

*Mays v. Carroll*, 14 O.

—See *Hatton v. Ber-*  
2108.

*Sweet v. Platt*, 12 O. R.

—See *Town v. Borden*, 10.

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H. D. S. the middle part of  
\* \* \* being described as

length and the entire width,  
from the land hereinbefore  
of the said lot No. 6, and  
and two-thirds acres, more  
devise and bequeath to my  
ife of J. B., of \* \* \* the  
part of my said lot No. 6, in  
d as one-third of the length  
of the said lot No. 6, meas-  
he land hereinbefore devised  
ending to the westerly limit  
ntaining by admeasurement  
rds acres, more or less. To  
said hereby devised land and  
for the use of my said daugh-  
ter the term of her natural life,  
proof on her decease to the  
y, and their heirs and assigns  
as provided as follows: I do  
id will, so that if my said  
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er issue, the remainder there-  
y own heirs, share and share  
each of the three devisees  
according to the measurements  
one-third part of the length  
whole width of it, and only  
or her respective parcel thus  
estator had title to and power

to give, and that it could not be held that what  
land the testator had was to be equally divided  
amongst his three children. *Saunders v. Breakie*,  
5 O. R. 603.—Ferguson.

A testatrix by her will devised as follows: "I  
give, devise, and bequeath to my husband all my  
real estate, comprised of the north-west quarter  
of lot number ten, in the sixth concession of the  
Township of Mersea;" and it appeared that she  
had never owned the said lands, but had owned  
and lived upon the north-west quarter of lot ten  
in the fifth concession of the said township.  
There was no residuary devise:—Held, that as  
the will, taken apart from the erroneous descrip-  
tion, contained a gift or devise of all the real  
estate of the testatrix, which would, if taken  
alone, be a sufficient description for the purpose  
of passing the lands really owned by her, the  
part of the description referring to lot ten in  
concession six, might be rejected as falsa demon-  
stratio, and that the lands really owned by the  
testatrix, passed to the devisee. *Hickey v.*  
*Stover*, 11 O. R. 106; *Re Shaver*, 6 O. R. 312;  
*Summers v. Summers*, 5 O. R. 110, distinguish-  
ed. *Wright v. Collings*, 16 O. R. 182.—Ferguson.

A testatrix, being the owner of certain lands  
and premises upon which a block of buildings  
was erected, devised the property in two parcels,  
describing the buildings thereon as being in the  
occupation of certain tenants. The description  
of one parcel included an alley-way running  
through the centre of the block, but the rooms  
built over the arch of the alley-way were struc-  
turally a part of, and were used with a store that  
formed part of the other parcel, to which a right  
of way over the alley-way was given:—Held,  
Burton, J. A., dissenting, affirming the judgment  
of the Common Pleas Division, 16 O. R. 152,  
that the presumption "cujus est solum ejus est  
usque ad coelum" is a rebuttable one, and that  
under the circumstances the rooms in question  
did not pass with the land. *Potts v. Boivine*, 16  
A. R. 191.

Parol evidence to explain. See Subhead VII. 2,  
p. 2161.

See *Hatton v. Bertram*, 13 O. R. 766, p. 2168.

### 5. After Acquired Property.

The testator by his will devised as follows:  
4th. I give and devise unto my son Nathan his  
heirs and assigns for ever \* \* \* as much of lot  
number 12, in the first concession of the township  
of Beverley \* \* \* as I may die seised and pos-  
sessed of (except therefrom the south eighty acres  
of said lot). 5th. I further give and bequeath  
unto my said son Nathan, his heirs and assigns,  
the south eighty acres of said lot number 12  
in the 1st concession of the said township of  
Beverley, excepting so much thereof as I may  
have sold and conveyed, subject, however, as  
follows: "providing in certain events for the  
division thereof between the children of Nathan  
and the four other sons of the testator. At the  
time of making the will the testator had sold  
portions of the said southerly eighty acres;  
amongst others, lots 1 and 2 on the south side  
of Margaret street which afterwards became  
vested in his son George. Subsequently George  
reconveyed these lots to the testator. Nathan

claimed that the consideration therefor was paid  
or secured by him, and that in fact they should  
have been conveyed to him. Per Spragge,  
C. J. O., and Morrison, J. A., (agreeing with  
Ferguson, J.) that although the will spoke from  
the death of the testator these lots did not pass  
under it; but (in this differing from Ferguson,  
J.), that the facts, stated in the report, suffi-  
ciently established that the testator, as to these  
lots, was trustee for Nathan. Per Burton and  
Patterson, J. J. A. (differing from Ferguson, J.),  
that the will spoke from the death of the testa-  
tor and that therefore these lots passed under  
it. The judgment of Ferguson, J. (1 O. R. 107),  
was therefore reversed. *Vansickle v. Vansickle*,  
9 A. R. 352.

A testator, by his will dated 19th May, 1873,  
devised to R. M. the "property on H. street,"  
and proceeded: "I give all the rest and residue  
of my estate, real, personal and mixed, which I  
shall be entitled to at the time of my decease, to  
A. M." At the date of the will he possessed  
only one property on H. street, known as the  
Red Lion Hotel, but he subsequently acquired  
other property on that street:—Held, that, not-  
withstanding R. S. O. (1877), c. 106, s. 26, the  
after-acquired property on H. street did not go  
to R. M., but fell into the residue. The testator  
having expressed his intention with reference to  
all land acquired by him after the date of his will  
by appropriate words in that will, it would be  
going contrary to that intention to declare that  
some after acquired property should be with-  
drawn from the residuary clause and held to pass  
under the prior specific devise. *Lord Lifford v.*  
*Powys Keck*, 30 Beav. 300, distinguished. *Mor-*  
*rison v. Morrison*, 9 O. R. 223.—Boyd.

The above judgment sustained on appeal to  
the divisional court, Proudfoot, J., dissenting.  
Per Boyd, C.—The residuary clause in the will  
covers unquestionably all that the testator might  
acquire subsequent to the date of the will and  
down to the day of his death. Per Proudfoot,  
J.—There is nothing in the will indicating that  
the testator was referring to a specific piece of  
property. The words, "The property on Hugh-  
son street," read immediately before the death  
of the testator, would apply to all the lands on  
Hughson street he then possessed, which, there-  
fore, all passed to Robert Morrison; and the  
will should be thus read under R. S. O. (1877),  
c. 106, s. 26. Per Ferguson, J.—The will shows  
an intention on the part of the testator that his  
subsequently acquired property should be dis-  
posed of differently from the property vested in  
him at the time of the making of the will, and  
thus the "contrary intention" mentioned in sec-  
tion 26 of R. S. O. (1877), c. 106, appears by  
the will, which consequently does not "speak  
or take effect as if executed immediately before  
the death of the testator." *S. C.*, 10 O. R.  
303.—Chy. D.

A testatrix by her will, after giving to her two  
sons a certain mortgage, and after sundry other  
specific bequests, continued: "I further direct  
that the balance of personal property, consisting  
of notes and other securities for money, be given  
to my two sons aforesaid \* \* \* also that if  
there be any effects possessed by me, at the time  
of my decease, that the same may be divided  
equally in value among my grandchildren share  
and share alike." The testatrix had no rea



estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of land of which she died seized:—Held, affirming the decision of Proudfoot, J., 6 O. R. 681 (who held that the word "effects" was wide enough to carry the real estate), that the grandchildren were entitled to the said lands, as well as to the personal estate, of which the testatrix died seized and possessed, not specifically disposed of by the will. *Hammill v. Hammill*, 9 O. R. 530.—Chy. D.

J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects, real, personal and mixed upon trust (after reciting that his intention was to make provision for his daughter E. M. C., and to do it in such a way that the administration of the fund thereafter provided, should be controlled by the trustees of his will), to hold that part of "my property known as 'Walkerfield,' being the property I now reside upon, containing fifty acres more or less, until the same shall be sold by them as hereinafter provided for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter directed, with regard to the sum of \$40,000 hereinafter directed to be set apart." He then directed his trustees to set apart the sum of \$40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of \$1,200 for his wife, and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces; and lastly, he gave to his trustees "full and absolute power to sell and dispose of all his lands ('Walkerfield,' if sold in my daughter's lifetime, to be sold with her consent only) at such time or times, and in such manner as to them may seem best." The will was made on 10th September, 1879, and J. C. died 18th December, 1885. After making the will, on 27th June, 1883, J. C. purchased five acres, and on 21st September, 1883, another five acres, forming a block of ten acres, of which one corner nearly coincided with one extremity of a diagonal of "Walkerfield." On 22nd November, 1884, he sold a piece of about three and one-third acres of "Walkerfield." In his lifetime J. C., entered into a contract in writing for the erection of a dwelling-house on "Walkerfield," which was not completed at his death, and since his death the executor had paid to the contractor and architect certain sums in respect to it:—Held, affirming the decision of Proudfoot, J., that the ten acres subsequently purchased passed under the devise of "Walkerfield." Per Boyd, C.—The word "now," in the devise of "Walkerfield," which I now reside upon "should not be allowed to control the other parts of the will, and is not sufficient to oust the effect of the statute by virtue of which the will is to speak from the death:—Held, per Proudfoot, J., that the daughter of E. M. C. was tenant for life of "Walkerfield," and after the death her children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children, the residuary legatees took:—Held, also, per Proudfoot, J., that the funds to build the house must

come out of the residue. *Hatton v. Bertram*, 13 O. R. 766.—Chy. D.

See *In re Melville*, 11 O. R. 626, p. 2157.

#### 6. Period of Distribution.

S. P. by her will provided as follows: "Also, I will and ordain that my said (property) after the death of my before mentioned daughters E. O. W. and S. A. W., be sold \* \* \* and the proceeds \* \* \* be divided between the children of my daughters E. O. W., M. K., and S. A. W., \* \* \* one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and share alike, and in case of the decease of one of the said families of children as aforesaid, then I will and ordain that the said proceeds \* \* \* be equally divided between the two remaining families, the children of each family receiving share and share alike, of such half to each family." At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix, S. A. W. survived E. O. W., and died many years after the testatrix. All three of the said children of M. K. pre-deceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived M. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her:—Held, that the period of distribution was the time of the death of M. A. W., and that the children of E. O. W. and M. A. W., then living, were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety. *Jenkins v. Drummond*, 12 O. R. 696.—Ferguson.

J. C. died leaving a wife, and E. C., a daughter. By his will, after giving all his property to his executors to pay the whole income to his wife for life or during widowhood, and after her death or second marriage, to pay the said income to his daughter, E. C., yearly, if she had attained the age of twenty-one, for her life \* \* \*, he provided as follows: "And I hereby empower her, my said daughter, if she come into possession of the said income, and have lawful issue, to make a will bequeathing my said property absolutely to any or all of her said children in such manner as she may think best. And if she have no children, then the said property to fall to my next of kin who may be living on this continent," and further provided, "In case \* \* \* then notwithstanding anything heretofore provided, I will and direct that neither she (Ellen) nor any of her children shall receive any portion of my property, and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead, then the property to go to my nearest of kin as above provided." The wife died and the daughter, E. C., attained twenty-one, came into possession of the income and died unmarried without issue, having made a will appointing the plaintiff her executor. In an action by the plaintiff, M., as executor of the daughter, E. C., against W. C. and F. McQ. as executors of the testator, J. C., for the pro-

ne. *Hatton v. Bertram*.

O. R. 626, p. 2157.

### *f* Distribution.

divided as follows: "Also,  
my said (property) after  
mentioned daughters E.  
be sold and  
be divided between the  
pers E. O. W., M. K., and  
ne-third to the children of  
ne-third to the children of  
ne-third to the children of  
are and share alike, and in  
one of the said families of  
then I will and ordain that  
be equally divided  
aining families, the chil-  
receiving share and share  
o each family." At the  
the will M. K. was dead.  
who survived the testatrix,  
S. O. W., and died many  
rix. All three of the said  
e-deceased S. A. W., two  
d without issue, and one  
who survived S. A. W.  
children, one of whom died  
testatrix, and the other two  
S. A. W. had several  
om died during her lifetime  
the others all survived her:  
period of distribution was the  
f M. A. W., and that living  
and M. A. W., then living,  
whole of the property, one  
mily, the members of each  
ly their moiety. *Jenkins v.*  
ct. 696.—Ferguson.

ing a wife, and E. C., a will, after giving all his property to pay the whole income or during widowhood, and second marriage, to pay the daughter, E. C., yearly, the age of twenty-one, for her provided as follows: "And I, my said daughter, if she be one of the said income, and to make a will bequeathing absolutely to any or all of her such manner as she may think have no children, then the all to my next of kin who may continent," and further provided, " \* \* \* then notwithstanding I provided, I will and direct (Ellen) nor any of her children portion of my property, and in the property shall be given to absolutely, or if my said wife at then the property to go to as above provided." The daughter, E. C., attained into possession of the income and without issue, having made the plaintiff her executor. The plaintiff, M., as executor of the testator, against W. C. and F. McCall, testator, J. C., for the pro-

erty, which the defendants resisted on the ground that the next of kin of the testator other than E. C. were entitled to it:—Held, that the "next of kin" must be ascertained at the death of the testator, J. C., and not at the death of his daughter, E. C., and as E. C. was sole next of kin, and being tenant for life, she had also a remainder in fee expectant on her own death, and contingent upon her dying without issue, and that this was such an interest as would pass by her will, and the plaintiff, as her executor, was entitled to the property. *Mays v. Carroll*, 14 O. R. 699.—Ferguson.

By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be sold and the proceeds equally distributed among the testator's nephews and nieces, such bequests on the death of any of them entitled to the same previously to the period of distribution to go to their "heirs-at-law." At the time of this action, the widow of the testator was still alive, but some of the nephews and nieces had died:—Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who should die before the said period of distribution, in favour of their representatives, who were entitled to take in substitution for the original legatees, and, *Semble*, for this reason it was to be inferred that by "heirs-at-law" the testator meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin. *Harrison v. Spencer*, 13 O. R. 692.—*Boyd*.

A testator gave two legacies to become due and payable in three and four years respectively from his decease, and instructed his executors to invest the same and pay the interest to the beneficiaries, and directed the investment of two separate sums for the benefit of two other devisees (one of whom was his sister) with a direction to pay them the interest for their lives, and proceeded, "and should there be a residue or surplus after paying out the foregoing bequests I will that the same be equally divided between my sisters and S. J. B., or the survivors of them at the time of winding up the affairs":—Held, that the time for the division of the residue was, when sufficient funds were invested to produce the legacies and fulfil the directions of the will, and that it was not postponed until the legacies were paid over or to any subsequent time. *Macklin v. Daniel*, 18 O. R. 434.—Boyd.

See *Tyrwhitt v. Dawson*, 28 Chy. 112, p. 2171; *Anderson v. Bell*, 29 Chy. 452; 8 A. R. 531, p. 2180.

7. *Estate or Interest Taken.*

(a) *Estate in Fee.*

J. C., by his will directed his trustee to divide his real estate equally between his sons then living, when his eldest son should attain the age of twenty-five years, when the share coming to his eldest son was to be conveyed to

him and they were to give him \$2,000 to stock the same. In case any of his sons should die, before attaining the age of twenty-five years, without issue, then the share of the party so dying should be divided equally among the survivors. J. J. C., the eldest son, died under the age of twenty-five leaving a widow and infant daughter, having made a will making no devise of real estate, but giving his wife his life insurance, then standing in favour of a loan company, and directed that so much of his \$2,000 as was necessary be used to redeem the insurance from the company, and the balance he gave to his wife:—Held, that the devise to the eldest son was a devise in fee simple, subject to an executory limitation over on his dying under twenty-five and without issue, and as issue was left, the infant was entitled to the land, as her father's heiress-at-law subject to her mother's dower:—Held, also, that the \$2,000 was an absolute bequest, with a direction as to its application, and that the legatee was entitled to the money regardless of the particular mode of its application. *Cook v. Noble*, 5 O. R. 43.—Proudfoot.

T. S. after providing for his widow in his will, made the following devise: "And I give and devise to my nephew R. S., lot No. 30 in the 2nd con., said township of Etobicoke, during the term of his natural life (excepting he have child or children), if not at the expiration of his life to go to my daughter Ann Guardhouse or her heirs, etc., \* \* \*". The will also contained a residuary devise in favour of the testator's widow. R. S. took possession, married, had children and died leaving his widow and several children. In an action by the widow of T. S., claiming that R. S. was only entitled to a life-estate in the lot and that she was entitled to it in fee under the residuary clause. It was:—Held, following *Lethbridge v. Tracy*, 3 Atk. 796, that an estate in fee might by implication be vested in the child or that the testator's intention might be properly effectuated by applying the rule in *Biffeld's case* (acted upon in *Doe d. Jones v. Davies*, 4 B. & Ad. 55), and reading "child or children" as *nomen collectivum*, and so creating an estate tail in R. S. Under the circumstances in this case "child" was not a designative personae, but comprehended a class and therefore the plaintiff must fail. *Stobhart v. Guardhouse*, 7 O. R. 239.—Boyd.

A devise in a will was as follows: "I also will, devise and bequeath to my daughter L. A. the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns." L. A. married and had issue. In an application under the Vendors and Purchasers' Act:—Held, that she took an estate in fee simple. *Re Traynor and Keith*, 15 O. R. 469.—Robertson.

See *Scott v. Gohn*, 4 O. R. 457, p. 2203; *Dickson v. Dickson*, 6 O. R. 278, p. 2174; *Re Winstanley*, 6 O. R. 315, p. 2206; *Re Casner*, 6 O. R. 282, p. 2178; *Re Northcote*, 18 O. R. 107, p. 2208.

(b) *Estate Tail.*

A testator, amongst other devises and bequests, devised as follows:—“Secondly, I bequeath to my son, Robert Little, eighty-six acres of land

(describing them), also one span of horses and one-half of my farming utensils; he is nevertheless subject to pay the sum of £112. 10s. to my daughters, as hereinafter provided, the sum of £18. 15s. to be paid annually, the first instalment to be paid one year after my decease, until the whole is paid." He next devised to his son John fifty acres of land, together with one span of horses and one-half of his farming utensils, subject also to a charge of £112. 10s. for his daughters. He then made several bequests in favour of his daughters and wife; and if his unmarried daughters should die before their legacies were paid, John and Robert were to divide the unpaid sums equally between them. He then provided as follows: "Should either of my two sons, Robert and John, die without issue, I wish that their shares should be divided equally among my surviving children:—" Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over. *Little v. Billings*, 27 Chy. 353.—Proudfoot.

A devise was to A. C. M. for life with remainder to her husband, W. M., "and the heirs of their bodies for ever:—" Held, that W. M. took an estate tail. By a subsequent clause the will provided that, in the event of the said W. M. dying without making a will, the property should be divided among his surviving children in certain shares, but declared it to be the intention of the testatrix that he should have full powers, with the consent of his wife, to sell and convey absolutely any part or portion thereof; "and in case of his making a disposition by will to vary the shares and proportions thereof as he may deem best:—" Held, that the powers so given to W. M. to vary the shares or proportions of the heirs in tail, did not affect the quality of the estate devised. *Fleming v. McDougall*, 27 Chy. 459.—Spragge.

By his will and codicil a testator devised to his son J. on the death of his mother, certain land in consideration for which he was to pay the sum of £150 to the executors in four years. In the event of his dying without heirs the land was to be sold and the amount received therefor over and above £150 "to be equally divided amongst my surviving children:—" Held, (1) that J. took a fee-tail in remainder after an implied life estate in favour of the mother, as the "dying without heirs" must be taken to mean heirs of the body, not heirs generally, he having brothers and sisters still living. J. died during the lifetime of his mother:—Held, (2) that the period of division should be the death of the tenant for life, and the survivors at the time of such death were to take the whole amount realized by the sale of the lands upon which, however, the £150 was to form a charge. *Tyrwhitt v. Dawson*, 28 Chy. 112.—Proudfoot.

The testator directed all the lands to be sold by public auction or private sale on his youngest surviving child attaining twenty-one, and the proceeds to be divided amongst nine of his children, share and share alike; but in the event of either of the nine children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors:—Held, that these words did not create an estate tail or quasi entail—and that the shares of the legatees were vested. *Scott v. Duncan*, 29 Chy. 496.—Proudfoot.

The testator devised certain lands to his son W. M. "for and during and unto the end and term of his natural life," and after the determination of that estate to the sons of the body of W. M. in tail male, as they should be in point of birth, and for want of such issue to the daughters of the body of W. M. and the heirs of the body of such daughters, who were to take as tenants in common, and for want of such issue the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies, who at the death of W. M. should be entitled to any part of the lands devised in tail in the will to hold to his said other sons respectively, or the heirs of their respective bodies in the same course of descent in tail as the other lands devised to them in tail respectively, and for default of such other sons and of their issue at the death of W. M. to the right heirs of W. M. for ever:—Held, that W. M. took a life estate, with remainder in tail male, to his first and other sons successively, according to priority of birth, and failing male issue, with a further remainder to his daughters. And though circumstances might arise in which W. M. would have an estate in tail by way of remainder after the intermediate limitations to his first and succeeding sons, yet he could not so deal with that ultimate remainder as to divest their right to take as purchasers. *Riddell v. McIntosh*, 9 O. R. 606.—Boyd.

M. C. by her will devised as follows: "First, I give and devise to my grandson, J. C., the farm \* \* to have and to hold the same and every part thereof for and during his natural life, and after his death to the heirs of his body, should he leave any such, him surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be, amongst \* \* to have and to hold the same to them, their heirs and assigns for ever; but my will and desire is that my said grandson, J. C., shall not have or go into the possession \* \* until he shall have attained the age of twenty-five years, or five years after my death. Secondly, I give and bequeath to my son, J. C., \$100 annually during his natural life, the same to be paid to him quarterly \* \* and to be a charge on the farm or homestead above devised to his said son John:—" Held, reversing the decision of Proudfoot, J., that the effect of the limitations was to give J. C. an estate tail, which he had barred as the result of his dealings with the land by way of conveyance. *Greenwood v. Verdon*, 1 K. & J. 74, distinguished. Per Proudfoot, J.:—"Heirs of the body" means heirs of the body living at the death of J. C. J. C. took only a life estate, and his heirs of his body would take as purchasers a fee simple, if at J. C.'s death there were no heirs of his body, the estate would go to his then living brothers and sisters in fee simple. *Eden v. Wilson*, 4 H. L. C. 257 distinguished. *In Re Cleator*, 10 O. R. 326—Chy. D.

A testator, by his will, provided as follows: "I leave and bequeath to my lawful wedded wife, M. E., all my personal property, as also the sole control and management of my real estate \* \* said estate being composed \* \* I leave and bequeath the afore-said estate to my son J. C., after my wife's death \* \* and the said estate is not to be sold or mortgaged by my

[illegible]

devised as follows: "First, to my grandson, J. C., the and to hold the same and and during his natural death to the heirs of his body, such him surviving, and if such no such heirs, then the thereof is to be divided as may be, amongst \* \* \* to same to them, their heirs; but my will and desire is, J. C., shall not have or until he shall have of twenty-five years, or five Secondly, I give and be- C., \$1000 annually during name to be paid to him quar- be a charge on the farm or- vided to his said son John"; the decision of Proudfoot, J., limitations was to give J., which he had barred as the re- with the land by way of con- v. Verdon, 1 K. & J. 74. Proudfoot, J.,—"Heirs of heirs of the body living at the B. took only a life estate, and would take as purchasers and C.'s death there were no heirs tate would go to his then liv- ters in fee simple. Eden v. 257 distinguished. *In Re* 28—Chy. D.

s will, provided as follows:  
death to my lawful wedded  
personal property, as also  
and management of my real  
estate being composed  
th the aforesaid estate to my  
wife's death \* \* and the  
to be sold or mortgaged by my

son J. C., but is to belong to his heirs. Should my son J. C. die without heirs the estate \* \* \* my daughters shall get their maintenance off said estate during \* \* \* I also bequeath the sum of eighty dollars to each of my daughters \* \* \* to be paid out of the said estate by my said son J. C." In an application under the Vendor and Purchasers' Act, it was :—Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M. E., subject, however, to the charges of the several legacies to each of the testator's daughters. *Re Colton and Laufergan*, 15 O. R. 471.—Robertson.

See *Stobhart v. Guardhouse*, 7 O. R. 239, p. 2170; *Sweet v. Platt*, 12 O. R. 229, p. 2173; *Peterborough Real Estate Investment Co. (Limited) v. Patterson*, 13 O. R. 142; 15 A. R. 751, p. 2176; *McPhail v. McIntosh*, 14 O. R. 312, p. 2176; *Re Hamilton*, 18 O. R. 195, p. 2177.

(c) *Estate for Life.*

After directing a sale and division of the proceeds of an estate, the will as to one of the legatees, M. S., "provided that the said M. S.'s interest in my estate should not be transferable or transferred to any other person whatsoever, but may be inherited by her children, legitimate; and in case the said M. S. die without legitimate issue, then her interest in my estate shall revert back to the other legatees," etc.—Held, that M. S. took only a life estate. *Jeffrey v. Scott*, 27 Chv. 314.—Blake.

A testator devised certain real estate "to be owned, possessed, and inherited by my wife during her natural life subject to the further provisions of my will," followed by a devise to "W. G. when he is of the age of twenty-three years, 200 acres, or if sold before he arrives at the years mentioned, that some other lot of land or money amounting in value to the above mentioned lot be given him in lieu thereof."—Held, that the wife took a life estate with a vested remainder over to W. G., and the testator having shortly before the date of his will contracted for the sale of the land so devised, that the estate of W. G., who died during the life of the widow, and before he had attained twenty-three, was entitled to the proceeds of such sale. *Holby v. Wilkinson*, 28 Chy. 550.—Sprague.

A testator devised certain lands as follows: "I will, devise, and bequeath unto my wife for and during her natural life all that parcel of land (describing it) \* \* \* I also will and bequeath unto her, my beloved wife, everything, real and personal, within and without; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate, shall descend to my nephew and his heirs." The testator had no other real estate than the said lands, and there was nothing else to which his language, importing that his wife was to have control of everything, real and personal, could be referred:—Held, nevertheless, that the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such life estate, so as to render her punishable for waste. *White v. Briggs*, 15 Sim. 17; S. C. in appeal, 2 Phil. 583, distinguished. *Clow v. Clow*, 4 O. R. 355.—Bovd.

A. devised land to his executors, "to hold the same in trust for the use and benefit of my son W. during his lifetime, and after the death of my son W. in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son W. taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion :—Held, That W. took only an estate for life, and that the legal estate in remainder vested in the trustees for the benefit of his heirs. *In re Romanes and Smith*, 8 P. R. 323.—Proudfoot.

A testator, by his will, dated 25th June, 1866, devised to the plaintiff "and his heirs and executors for ever," a parcel of land subject to the following proviso: "That he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867:—Held, that the plaintiff could not, by his own conveyance, confer an indefeasible title upon an intending purchaser, and that the preferable construction of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in fee. *Dickson v. Dickson*, 6 O. R. 278.—Boyd.

J. P., by his will provided as follows: "I give and devise to my brother D. P. the \* \* \* on which he resides \* \* \* to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P., I give and devise the said \* \* \* to H. P., second son of said D. P., to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving, then I give and devise the same to such of his offspring as the said H. P. shall appoint, and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee and in case the said H. P. shall die without lawful offspring or during his father's lifetime, then I give and devise the same to \* \* \* " D. P. and H. P. by conveyances and mortgages dealt with the land as if they were the owners in fee. After several mortgages to one J. E. who was H. P.'s solicitor, were registered against the land, and after D. P.'s death J. E., having assured H. P. that his (J. E.'s) title to the land was perfectly good, and that H. P.'s children had no interest in it, persuaded H. P. as a matter of form to execute the power of appointment in favour of L. S., one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representation and without consideration, a quit claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estate. It was:—Held, that only a life estate was given to H. P., and not an estate in fee tail. If "offspring" is read as "children," or construed as meaning "issue," the devise falls within the rule that when words of distribution, together with words which would carry an estate in fee are attached to the gift to

the issue, their ancestor takes for life only. Here to the children or issue, in default of appointment, is given expressly an estate "in fee," and it is distributed to them "equally":—Held, also that untrue representations were made which induced the execution of the power of appointment and the transfer of the estate thereunder without consideration; and that the instruments subsequent to the deed of appointment, did not affect the fee simple of the land and that the operation of the mortgages should be limited to the life estate of H. P. in the land. *Sweet v. Platt*, 12 O. R. 223.—Boyd.

A testator made his will as follows: "I bequeath to my wife E. K. all the real and personal property that I die possessed of \* \* My wish and desire is, that she shall divide the said real estate or personal property, £50 to my daughter S., £50 to my daughter E., the balance to my son W. (providing any more) (if a daughter) £50, and if a son then the balance after £50 to each of my daughters to be equally divided betwixt them at her decease."—Held, reversing the decision of Proudfoot, J., that the widow E. K. took a life estate in the whole real and personal property, excepting what was necessary to pay the legacies. *Wilson v. Graham*, 12 O. R. 469.—Chy. D.

A. by his will devised as follows: "I give and bequeath to my nephew B., and C. his wife (describing the land) to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit." C., the wife, died, and after her death B. conveyed to one of his children, D., B. and D. then mortgaged to the company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company's title:—Held, that B. and C. took an estate for life only: that the appointment in favour of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to accept.—Semble, Had a similar appointment been made by both husband and wife, it would have been invalid. *Re Ontario Loan and Savings Co. and Powers* 12 O. R. 582.—Ferguson.

By her will the testatrix devised as follows: "I give and devise to my beloved children A. P. [her son] and M. P. [his wife] and to their children and children's children for ever all and singular lot 15. \* \* Provided always that the aforesaid A. P. or M. P. shall not be at liberty at any time or for any purpose to convey or dispose of (said lot) as it is my will that the same be entailed for the benefit of their children." The residue of her estate the testatrix devised to her daughter-in-law the said M. P.:—Held, that upon the true construction of the will A. P. and M. P. took only an estate by entireties for their lives and the life of the survivor of them:—Held, also, that they did not take an ultimate remainder in fee, expectant on any estate tail given to the children, and that under 48 Vict. c. 13, s. 5, R. S. O. (1887), c. 44, s. 62, sub-s. 5, it was the duty of the court to make a declaratory decree as to this in order to answer as to the whole estate taken by the parents:—Held, also, that a mortgage by A. P. and M. P. was valid and bound their life estate in the land notwithstanding the attempted restraint on aliena-

tion:—Semble, that the children took an estate tail but the special case which was stated for the opinion of the court did not require this to be declared. The judgment of the Q. B. D. 13 O. R. 142, affirmed with a variation. *Peterborough Real Estate Co. v. Patterson*, 15 A. R. 751.

One J. McP. lived upon lot 26, of which his father A. McP. was owner from 1826 till 1873, when he died, leaving twelve children him surviving. A. McP. died in 1841, having by will devised lot 26 to J. McP., but adding: "He is not to sell or dispose of the said lands, nor any timber or wood now growing on the said lot; on the contrary, the land is to devolve on the most deserving of his children according to the discretion of my executors, that is to say after his own death." In 1869 J. McP. conveyed the north half of lot 26 in fee to the defendant. The executrix of A. McP. made no selection as to who was the most deserving of his children on whom the land should devolve. Nevertheless the plaintiff, a son of A. M. P., now laid claim under the above devise to seven-twelfths of the lot, being his own share and six other shares which he had acquired:—Held, affirming the decision of Rose, J., that he was entitled to judgment in respect to seven-twelfths of the land, for that J. McP. only took a life-estate under the said will, under which he must be held to have taken, as he did not disclaim the benefit of it, and had not acquired title by possession at the time of his father's death; and though no selection had been made among the children of A. McP., the court would carry out the general intention in favour of the class by holding that the estate descended on the twelve children of J. McP. Per Boyd, C.—There was no estate tail given to J. McP. under the will. for (1) "children" in it had its primary meaning of descendants of the first generation only; and (2) the children were not to take as a class, in the first instance, but only those out of that class to be indicated by the executors as the most deserving. *McPhail v. McIntosh*, 14 O. R. 312.—Chy. D.

A testator directed his real estate to be sold and the proceeds, after payment of debts and certain legacies, to be divided into twelve equal parts, "five of which I give and devise to my beloved daughter C. M., four of which I give and devise to A. E. F. (daughter), and three of which subject to the conditions and provisions hereinafter set forth, I reserve for my son C. W. M. But in no case shall any creditor of either of my children, or any husband of either of my children, daughters, have any claim or demand upon the said executrices, etc., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually \* \* \* during their respective lives." In an action by the daughters to have their shares paid over to them untrammelled by any trust:—Held, affirming the judgment of the court below, that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives. *Foot v. Foot*, 15 S. C. R. 699.

A will contained the following clause: "To my son G. W. I give and bequeath during his life time, the south-east quarter of said lot 4 before mentioned, and at his death to go to and be vested in his son W. C., or in case other sons



children took an estate which was stated for the not require this to be at of the Q. B. D. 13 O. variation. *Peterborough v. Thon*, 15 A. R. 751.

pon lot 26, of which his ner from 1826 till 1878, twelve children him sur- in 1841, having by will P., but adding: "He is f the said lands, nor any owing on the said lot; on is to devolve on the most on according to the di- , that is to say after his J. McP. conveyed the fee to the defendant. The made no selection as to serving of his children on devolve. Nevertheless A. M. P., now laid claim to seven-twelfths of the are and six other shares and—Held, affirming the that he was entitled to seven-twelfths of the P. only took a life-estate under which he must be as he did not disclaim the did not acquired title by ne of his father's death; ion had been made among P., the court would carry tion in favour of the class estate descended on the J. McP. Per Boyd, C.—ail given to J. McP. under "children" in it had its primary ns of the first generation lildren were not to take as a ance, but only those out of ted by the executors as the P. *Phail v. McIntosh*, 14 O.

his real estate to be sold er payment of debts and e divided into twelve equal I give and devise to my M., four of which I give P. (daughter), and three e conditions and provisions I reserve for my son C. W. shall any creditor of either y husband of either of my have any claim or demand rices, etc., but their respec- and the interest, rents, shall be paid and allowed to \* \* \* during their respec- action by the daughters to over to them untrammelled d, affirming the judgment of t it was clearly the intention e daughters should only from the shares during their 15 S. C. R. 699.

the following clause: "To e and bequeath during his -east quarter of said lot 4 and at his death to go to and W. C., or in case other sons

should be born to my son G. W., then to be equally divided between all the boys:"—Held, that G. W. took a life estate only, and that there was a vested remainder in fee in his sons, as a class, which would let in all born before his death. *Re Chandler*, 18 O. R. 105.—Boyd.

A testator devised lands to his daughter: "to her own use for the full term of her natural life, and from and after her decease to the lawful issue of my said daughter to hold in fee simple," and in default of such issue over. The daughter contracted to convey in fee to a purchaser; and the question whether she took a life estate or an estate tail was brought up on a vendor and purchaser petition. The court refrained from making any order on the petition, for the law on this head seemed to be in a state of uncertainty, if not of transition, and any experiment could better be made in a contested case when all parties interested were represented:—Semble, however, that the issue should hold the property in fee simple appeared incompatible with an estate tail in the mother, and that "issue" must be construed "children," and the mother took an estate for life only. *Re Hamilton*, 18 O. R. 195.—Boyd.

The testator by his will made a provision for his wife as follows: "I give and devise to my beloved, etc., 'all household goods,' etc., 'for the term of her natural life; and I give and devise to her one bedroom, and one parlour of her own choice in the dwelling-house wherein I now dwell,' etc., 'also the use of the kitchen, yard, garden; also, I give and devise to my said wife her life in the said lot heretofore mentioned; also an annuity of \$20 yearly.'" He then subject to the above and to the payment of \$1,000 to his eldest son D., and other legacies, devised the lot to his second son J. After the testator's death the plaintiff, the widow, and J., lived on the lot, arranging between them as to her maintenance. In order to raise money to pay D.'s legacy, the plaintiff and J., mortgaged the lot to a loan company, and on default, proceedings were taken under the power of sale to compel payment. The plaintiff set about making arrangements to pay off the mortgage, but the company refused to accept payments unless the amount of two other mortgages made by J., alone were also paid. No tender was made by plaintiff, nor was any demand made by her for arrears of annuity or dower. An action was brought by plaintiff to establish the will, and to have the rights of the loan company declared:—Held, that the proper construction of the will was, that the widow was to have a life estate in the bedroom and parlour she should select, and also in the kitchen, yard, garden, and also the annuity of \$20; and that the loan company could not claim to have the mortgages consolidated, and that as the plaintiff had not made any tender to the loan company she could not claim her costs, but it was directed in lieu of her paying costs that the arrears of annuity and dower should be wiped out. *Smith v. Smith*, 18 O. R. 205.—C. P. D.

See *Rogers v. Louthian*, 27 Chy. 559, p. 2192; *Tyrchitt v. Dawson*, 28 Chy. 112, p. 2171; *McGarry v. Thompson*, 29 Chy. 287, p. 2209; *Re Smith*, 8 P. R. 384, p. 2194; *Dumble v. Dumble*, 8 A. R. 476, p. 2194; *Johnson v. Kramer*, 8 O. R. 193, p. 2188; *Smith v. Smith*, 8 O. R. 677, p. 2178; *Re Charles—Fulton v. Whatmough*, 10 A.

R. 281, p. 2184; *Riddell v. McIntosh*, 9 O. R. 606, p. 2172; *Hutton v. Bertram*, 13 O. R. 766, p. 2168; *Re Colliton and Landerjyn*, 15 O. R. 471, p. 2173; *Re Collard and Duckworth*, 16 O. R. 735, p. 2216.

#### (d) Rule in *Shelley's Case*.

A testator devised as follows: 1. I will and direct that all my just debts and funeral expenses be paid by my two sons, A. & B., share and share alike, and I hereby charge the estate hereinafter devised to them with the said payments \* \* \* 3. I give and devise unto my son B., the north part of lot 24, to have and to hold unto the said B., his heirs and assigns to and for his and their sole and only use for ever \* \* \* 6. I desire it should be distinctly understood that the property hereinbefore devised unto my two sons, A. & B., is to be held by them only during their lifetimes and then to become the property of their heirs, and that they, my said sons, shall have no power to convey or dispose of the said lands in any manner whatever:—Held, that the rule in *Shelley's case* applied, and B. took an absolute and unconditional estate in fee simple, and that the limitations contained in clause (6) were void as repugnant to the estate devised by clause (3) and unreasonable. *Re Casner*, 6 O. R. 282.—Proud-foot.

J. S. by his will devised as follows: "I will and bequeath to my son J. S., for the term of his natural life, the farm I purchased \* \* \* but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands to be sold and the proceeds thereof to be equally divided among my remaining children or their heirs." The son J. S. had been married for some years at the date of the will, and had a daughter after that date, who with her father was living at the time of the testator's death:—Held that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in *Shelley's Case*. *Smith v. Smith*, 8 O. R. 677.—Boyd.

A testator by his will devised certain lands to his son N. M., for life and after his decease to his heirs and assigns for ever, but subject to the payment within three years out of the rents and income of a sum of money charged upon the lands therein specified; after his death the land was to be sold provided N. M.'s youngest child then living was of the age of twenty-one years, the proceeds thereof to be equally divided between N. M.'s children at the time of sale:—Held, affirming the judgment of Street, J., at the trial, that under the rule in *Shelley's Case* N. M. took an estate in fee simple in the land, but reversing it so far as it held that there was a trust in favour of N. M.'s children:—Held, also, that by the terms of the will there was a restraint on alienation by sale, but not by mortgage:—Held, lastly, that the executory devise in favour of N. M.'s children was void as a violation of the rule against perpetuities. *Meyers v. Hamilton Provident and Loan Co.*, 19 O. R. 358.—C. P. D.

See *Sweet v. Platt*, 12 O. R. 229, p. 2175; *Re Chandler*, 18 O. R. 103, p. 2177.

(e) *Joint Tenants and Tenants in Common.*

A will devised certain property to the testator's two sons, their heirs, etc., and provided that the devisees should jointly and in equal shares pay testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of two, three, four, five, six and seven years respectively. The estate vested before the statute abolishing joint tenancies in Nova Scotia came into operation:—Held, reversing the decision of the court below, Taschereau and Gwynne, J.J., diss., that these provisions for payment of debts and legacies indicated an intention on the testator's part to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. *Fisher v. Anderson* (4 S. C. R. 406), followed. On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised, evidence of a conversation between the devisees, which plaintiff claimed would show that a severance was made after the estate vested, was tendered and rejected as being evidence to assist in construing the will:—Held, Gwynne, J., dissenting, that it was properly rejected:—Held, per Gwynne and Patterson, J.J., that the evidence might have been received as evidence of a severance between the devisees themselves, if a joint tenancy had existed. *Clark v. Clark*, 17 S. C. R. 376.

See *Donald v. Donald*, 7 O. R. 669, p. 2210.

(f) *Taking per Stirpes or per Capita.*

A testator disposed of the residue of his estate as follows: "I give and bequeath the remainder of my personal and real estate to my legal heirs including my daughter Jennima Woodside, to be divided equally amongst them." He left three children and four grandchildren, the issue of two other of his children, who predeceased him:—Held, that a division per capita (not per stirpes) was proper. *Chadbourne v. Chadbourne*, 9 P. R. 317.—Boyd.

The testator bequeathed his residuary estate, all other property, in lands, mortgages, and stocks to his grandchildren, "the children of J. C., and of my daughter A. J. B., wife of D. B., share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming to the age of twenty-five years. Provided, nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than half of what their share will be on the youngest coming of age." Then directions were given as to keeping books of account, and managing the estate. "And when the books so audited show the revenue of my estate after paying the before mentioned bequests, taxes and other charges on the same, amounts to \$500, then half of such revenue or income be divided, share and share alike, between the families of my son J. C., and the family of my daughter A. J. B." (The other half going into the estate).—Held (1), that the children referred to, the grandchildren of the testator, took per capita, and not per stirpes. (2) That when the eldest attained the age of twenty-five years he was en-

titled to receive one half of his share payment of which could not be delayed and that date must be taken as the period at which those to take were to be ascertained and that any child born subsequent to the time the eldest child attained twenty-five was excluded and all born before that period were entitled to share in the estate. (3) That the children did not take vested interests, the gift to each being contingent on attaining twenty-five. (4) That twenty-five was the age at which the parties became entitled to an arrangement as to the amount of their shares, and (5) That the trustees could charge the shares of any who had been overpaid with the excess of such payments. *Anderson v. Bell*, 29 Chy. 452; 8 A. R. 531.

See *Wood v. Armour*, 12 O. R. 146, p. 2195.

(g) *Taking as a Class.*

Where a testator, after devising certain lands to "my trusty friends J. L. and R. M." on certain trusts for the maintenance and education of his son, J. E., and devising the residue, real and personal, to the said "J. L. and R. M., or the survivor of them," in trust to sell and distribute the proceeds in payment of certain legacies, therein specified, continued, "should there ultimately be any residue, I direct my said trustees, or the survivors of them, to divide and pay the same to and among my legatees, hereinbefore named and my said trustees, or the survivor of them, in even and equal shares and proportions:—Held, that the trustees took as a class, i. e., one share between them, equal to the shares taken respectively by the legatees; for looking at the whole will, it appeared that the testator was speaking of the trustees in their official capacity, and regarding them as one legal person. *Born's Home of the City of Hamilton v. Lewis*, 4 O. R. 18.—Boyd.

See *Stobbs v. Guarantors*, 7 O. R. 239, p. 2170; *McPhail v. McWhose*, 14 O. R. 312, p. 2176; *Re Chandler*, 18 O. R. 105, p. 2177.

(h) *Vested or Contingent.*

The testator gave £1,500 by will to his widow, and in the event of her marrying again or dying intestate, this sum was at her death to be divided share and share alike among "my heirs (my brothers' children)." The widow did marry again, and a daughter of W., a brother of the testator, died after marriage but before the death of the widow, and so before the time for distribution:—Held, that the rule in such a case, that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow, and that this was a share vested in the deceased child of W., which passed to her representatives. *Webster v. Leys*, 28 Chy. 475.—Proudfoot.

A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy and direct the management of the property: and at her death or second marriage, "my son Thomas, if he be then living, shall



wife, M. S. C., for life; appointed her guardian to the son to take charge of all remaining money that should accrue from all sources; such money to be used for the necessary expenses of education, etc., for the son. He desired that the wife should have control of all money coming to the son till he was of the age of twenty-four years, and at that time all rents and other property should come into his possession, except the annuity. He further declared that at the death of the wife all rents and all interests and all property should pass into the possession of the son, to be owned by him, his heirs and assigns for ever. In case of the death of the wife before the son attained twenty-four another guardian with similar powers was appointed. In case of the death of the son before his mother, then all the property and rents, etc., were to be hers during her natural life, and after her death one half to go to the testator's relatives and the balance to the relatives of the wife, she making this disposition before her death; but if the son at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time of his death. On an application, under the Vendors' and Purchasers' Act, R. S. O. (1877) c. 109, for the opinion of the court:—Held, that the will was sufficient to pass all the testator's property, including the land to question; that the interest taken by the son was a vested one, and was to come into his possession and control on his attaining twenty-four, and, following *Gairdner v. Gairdner*, 1 O. R. 191, that the son having attained that age the subsequent gift never could affect his interest, which had become absolute. If the lands passed by the will, the son and the widow joining as grantors could convey such title as the testator had. If the lands did not pass by the will, the son as heir-at-law and the widow as to dower could make title. *Re Cooke and Driffl*, 8 O. R. 530.—Ferguson.

A testator directed the trustees under his will to hold for accumulation the proceeds and income of his personal estate upon certain trusts. He also directed with reference to his real estate (with the exception of some land in Lindsay) that the income should, in the same manner as the income from his personal estate, form one fund until the death or second marriage of his widow and his youngest child should attain twenty-one, when the lands were to be sold and the proceeds held upon the same trusts as were declared concerning the personal estate, which were for the children named, in equal shares as tenants in common. The will contained a provision that in the event of the death of any of the children leaving issue, the share of the one so dying should be divided among the issue on their attaining twenty-one. As to the lands in Lindsay, the will contained a power to the trustees to grant building leases for terms not exceeding twenty-one years, and he directed that upon the happening of the double event above referred to the trustees should hold and apply the rents in the same manner and proportions as theretofore limited with reference to the accumulations, and the dividends and income derived therefrom. The will further provided that in default of any of his grandchildren attaining majority the proceeds of all his estate, real and personal, should be applied towards founding an institution in the city of Toronto for the dumb

and blind:—Held, reversing the judgment of Proudfoot, J. (1 O. R. 302), Burton, J. A., dissenting, that the children took absolute vested interests on the happening of the double event. —Per Burton, J. A., that they took only estates for life with remainder to the grandchildren. *Re Charles—Fulton v. Whatmough*, 10 A. R. 281.

A testator left all his estate to his executors "in trust for the benefit of G. H. till he arrives at the full age of twenty-one, at which time I direct my said executors to give to G. H. all the said property," subject to the condition that "should the said G. H. at any time before coming of age go to live with his father, W. H., he is to be disinherited of the whole or any portion of my estate. And the said estate so forfeited is to be then given to my son J. D., his heirs and assigns." The testator died in 1875. In 1876, while G. H. was still a minor, being only eleven years old, J. D. and W. H. entered into an agreement under seal, whereby it was agreed that J. D. should support the widow of the testator, who was his mother and the mother-in-law of W. H., during her life, and should convert into money the estate of the testator, to which he was or should be entitled under the will, and pay a moiety of the proceeds to W. H. in trust for the support of G. H. till he should attain twenty-one, the residue to be then paid by W. H. to G. H. Pursuant to this agreement G. H. forthwith resided with W. H. till he was seventeen years of age, when this action was brought by the executors for a declaration of the rights of G. H., J. D., and W. H. under the will:—Held, that G. H. took a vested interest in the property under the will: that the condition was a condition subsequent, and was void as being "against law;" and G. H. was entitled to all the estate given to him by the will, notwithstanding the agreement of 1875, which could not be regarded as a family compromise, or for the benefit of the infant. *Clarke v. Darragh*, 5 O. R. 140.—Ferguson.

A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one; when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to be invested, and the income arising from each share was to be accumulated until the remaining three children respectively attained twenty-one, when they were each to receive the annual income thereof, until the youngest (son), F., attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid equally to the two daughters, C. and J., until one of them should die, and then one share was to be paid to the person or persons who would be entitled thereto under the Statute of Distributions in case of intestacy. The property of the daughter so dying, C., attained twenty-one, married, and died before F. attained twenty-one, having made her will and left all her property to her husband and their children:—Held, that the proper effect of the will of A. was to vest in C.'s husband and children the one-fourth share that she was to draw the income of for life, and they were respectively entitled under the Statute of Distributions, as pertaining to the personal estate of married women

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*Arkell v. Roach*, 5 O. R. 699.—Boyd.

The testator made a residuary devise of real estate to his executors, in trust for his four children, "until they, or the survivor or survivors of them, shall have attained the age of twenty-one years, said real estate to be divided among the said four children, share and share alike, and in case any of them shall have died, leaving issue, the said issue shall take the share which otherwise would have gone to his, her or their parents." The will further directed the four children of the testator should be maintained and educated out of the income of such property during their minority, and the surplus to be invested during such minority, and upon the youngest, or the survivor or survivors of them, attaining twenty-one to divide the personal estate share and share alike. And upon any of the children attaining twenty-one, the executors were directed to advance such sum as might be necessary to establish such child in business, etc. And all the residue of his personal estate was to be held by his executors and divided at the same time as the lands:—Held, (1) affirming the judgment of Ferguson, J., 14 O. R. 13, that one of the sons, who had attained twenty-one, was not entitled to maintenance out of the estate:—Held, (varying the decision of Ferguson, J., 14 O. R. 13), that the four children took vested and not contingent interests in the residuary real and personal estates, the interest in the real estate being liable to be defeated as to any one or more of them, upon the condition subsequent of death before partition leaving issue, in which event the share of the deceased would go over to the issue. *Ryan v. Cooley*, 15 A. R. 379.

D. was entitled to a legacy under a will provided he survived the testator's wife, and during her lifetime he brought a suit to protect his legacy against dissipation of the estate by the widow:—Held, reversing the judgment of the court below, that D. had more than a possibility or expectation of a future interest; he had an existing contingent interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended. *Duggan v. Duggan*, 17 S. C. R. 343.

See *Holby v. Wilkinson*, 28 Chy. 550, p. 2173; *Scott v. Duncan*, 29 Chy. 496, p. 2171; *In Re Romanes v. Smith*, 8 P. R. 323, p. 2174; *Dumble v. Dumble*, 8 A. R. 476, p. 2194.

#### (i) Vested Liable to be Divested.

The testator expressed a desire "to have retained for my children my property on Yonge street; and for this purpose I desire that the proceeds of my life insurance be applied in the purchase for my daughters' benefit of the incumbrances of that property. Under any circumstances, I desire that all my other lands be sold. \* \* I desire that the proceeds of my estate and rents of my Yonge street property be applied \* \* in the support, maintenance, and education of my two daughters, and in paying the incumbrances on the Yonge street property. After paying the necessary charges, my wish is, that the interest of my estate be applied by my

trustees in the support of my children. Should one of my said two daughters die, or become a Roman Catholic, her share to go to the other, and should both die without issue, or become Roman Catholics, then my estate is to go to my sister L. and her heirs. \* \* I direct that my trustees shall divide the proceeds of my estate equally between my two daughters, allowing each, during their minority, or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age an equal share of all proceeds to be secured and paid them, free from all control of any husband or any other person." There were only these two daughters, children of the testator, and both attained the age of twenty-one years without either having become a Roman Catholic:—Held, that the interests taken by the daughters were vested, though subject to be divested upon the happening of the events mentioned before twenty-one; and that at that time the shares vested absolutely in them: so that L. took nothing under the will. *Griffith v. Griffith*, 29 Chy. 145.—Ferguson.

A testator devised certain land to E. T. "during his and M. A.'s natural life, then and after that to be given to M. A.'s children to them, their heirs and assigns for ever:—Held, that the children of M. A. in existence at the testator's death forthwith took vested interests, subject to be partially divested in favour of children of M. A. subsequently coming into existence during the life of M. A., and that the representatives of any child dying before the period of distribution were entitled to claim the share of that child. *Paradis v. Campbell*, 6 O. R. 632, distinguished. *Latta v. Lorry*, 11 O. R. 517.—Boyd.

See *Kerfoot v. McKay*, 29 Chy. 162, 9 A. R. 117, p. 2182; *Ryan v. Cooley*, 15 A. R. 379, p. 2185; *Harrison v. Spencer*, 15 O. R. 692, p. 2169; *Woodhill v. Thomas*, 18 O. R. 277, p. 2195.

#### (j) Executory Devises.

See *Litt v. Billings*, 27 Chy. 353, p. 2171; *Cook v. Noble*, 5 O. R. 43, p. 2170.

#### (k) Estates or Interests taken by Trustees or Executors.

*Precedatory Trusts*.]—A testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable":—Held, affirming the decision of Ferguson, J., reported 17 O. R. 548 (Robertson, J., dubitante), that this did not create a precedatory trust, and that the wife took the property absolutely. Per Boyd, C.—If the entire interest in the subject of the gift is given with superadded words expressing the motive of the gift, or a confident expectation that the subject will be applied for the benefit of particular persons, but without in terms putting down the interest before given, it will not now be held, without more, that a trust has been thereby



created. In *re Adams and the Kensington Vestry*, 27 Ch. D. 394, and In *re Diggles, Gregory v. Edmondson*, 39 Ch. D. 253, specially referred to and followed. *Bank of Montreal v. Bower*, 18 O. R. 226, — Chy. D.

The change in the current of decision on the subject of precatory trusts remarked upon. *S. C.*, 17 O. R. 548.

*Beneficial interest.* — A testator devised to four nephews and a grandnephew, their heirs, executors, administrators, and assigns, all his real and personal property, share and share alike, upon trust that they, or the survivors or survivor of them, should out of the same "suitable and well" support his wife during her natural life in as comfortable a position as she was then in with him. He appointed his said four nephews executors of his will. The plaintiff and the defendants, the said devisees and the other defendants were all nephews and nieces of the testator and would have been entitled to share in the estate in case of the testator dying intestate. The testator's wife died before him: Held (*Armour, J.*, dissenting), that the devisees took the beneficial interest in the estate, real and personal, share and share alike. Per *Armour, J.* The creation of the trust in favour of the wife was the sole object of the devise and the testator never intended the devisees to take beneficially. *Ballard v. Storey*, 14 O. R. 153. Q. B. D.

*Power to Sell, Lease or Mortgage.* — A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient: Held, that in the conflicting state of the authorities upon the question, the title was not one which the court would force upon a purchaser: — Held, also, that under such a power the land could be sold in parcels. *Re MacNabb*, 1 O. R. 94, — Proudfoot.

J., by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows," etc.: "But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children their heirs or assigns, after the death of H., share and share alike." He then nominated P., executor of his will, "with full power and authority to act in the same." H. died in 1838, leaving H. and three children his surviving. P. took out probate. In 1840, H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which he retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will: —

Held, affirming the decision of Osler, J. A., that P. could not be said to have been an express trustee within R. S. O., (1877) c. 108, s. 30, and that being so, the plaintiff's action was barred by the Statute of Limitations. The proper construction to be placed on the will was, that a life estate was given to H. with a power of sale to P. during her life time with her consent, and the remainder in fee to the children in the event of non-execution of the power: that unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the lands; and he did not take, nor was it necessary for him to take, the legal estate: that as he never was required to execute the power, he never became trustee. *Johnson v. Kromer*, 8 O. R. 193. Chy. D.

A testator by his will directed his executors to pay all his debts, etc., out of his estate. Then followed specific devises of his estate to his wife, children and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, etc., then in the next place to sell and dispose of lot B, also so specifically devised. The executors before disposing of lots A and B sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof, the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced: Held, per Rose, J., (1) that the general language of the will was controlled by the codicil, and so the debts were not charged on the unappropriated estates; and therefore the executors had no power to sell the timber on the land in question; (2) that if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold; and (3) that the purchaser, not shielded by s. 30 of 29 Vict. c. 20 (Ont.), was bound to see that the power was rightly exercised. *Baker v. Mills*, 11 O. R. 253. C. P. D.

Right of executors to mortgage. See *Law and Canada Loan and Agency Co. v. Wallace*, 8 O. R. 539, p. 2075; *Gordon v. Gordon*, 11 O. R. 611; 12 O. R. 593, p. 2075.

A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire, exclusive and undivided



and had children living at the testator's death :—Held, that the children meant were those of C. R. B. and G. B., and there was a simple gift to G. B. and her children, who took concurrently ; and C. R. B. and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the \$500, but they were not authorized to receive, and could not give a good acquittance for, the moneys bequeathed to their children in the 10th clause. *In re Biggar—Biggar v. Stinson*, 8 O. R. 372.—Ferguson.

In another clause of his will, the testator willed and bequeathed "unto G. G. B.'s wife, E. B., \$5,500. This bequest is under the joint management of G. G. B. and his wife for their heirs, should there be none, then at their death to revert back to my heirs to be equally divided"—Held, that there was a trust of the \$5,500 reposed in G. G. B. and E. B. ; that E. B. was entitled to the benefit of the trust during her life, and upon her death the benefit of it would go to any children there might be of G. G. and E. B., or any descendants there might be answering the description "their heirs," and if there were no such children or descendants, then to the heirs of the testator, to be equally divided amongst them. *Id.*

Another clause was as follows : "I will and bequeath unto M. R. B.'s wife and his heirs \$5,000, and appoint M. R. B. as guardian and manager of this bequest"—Held, that a trust of the \$5,000 was thereby reposed in M. R. B., and "heirs" was merely descriptive of the legatees intended. M. R. B. was entitled to receive the fund and hold it in trust. During his life his wife would be entitled to the whole benefit arising from the fund, and on his death there would be a distribution of it amongst his wife, or her representatives, as the case might be, and those persons who would answer the description of heirs of M. R. B. ; and M. R. B., as such trustee, was entitled to receive, and could give a good acquittance and discharge for, the money. *Id.*

See *Boys' Home of the City of Hamilton v. Lewis*, 4 O. R. 18, p. 2180 ; *In re Romanes and Smith*, 8 P. R. 323, p. 2174 ; *Charteris v. Charteris*, 10 O. R. 738, p. 2058.

#### (l) Giving Right to Purchase.

A testator directed that "in case any one of the above named three legatees be able and willing to buy the farm, as aforesaid, at the price of \$4,000, my executors hereafter named shall so sell said farm." Each of the three legatees claimed the right to purchase the farm :—Held, under these circumstances, that the executors were precluded from carrying out this direction of the will, and that they must sell the estate and divide the proceeds between the parties interested, according to another provision of the will. *Jeffrey v. Scott*, 27 Chy. 314.—Blake.

The testator was seized of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, R., to whom the first privilege of redeeming was given, availed himself thereof, and redeemed the property, which was subject to certain charges imposed by the will, in addition to the incum-

brances :—Held, that the right to redeem was in effect a right to purchase, as the mortgages and charges created by the will amounted to about as much as the land was worth ; and that R. had acquired a good title free from any claim of his brothers ; and his brothers having instituted proceedings against him claiming an interest in the estate that he was entitled to recover his costs, not out of the estate of the testator but from the plaintiffs personally. *Stevenson v. Stevenson*, 28 Chy. 232.—Proudfoot.

#### (m) Bequests of Personality.

A testator bequeathed to his two daughters (both of whom were married and had children at the time of his will) the sum of \$1,000 each, charged upon his realty, which he devised, such sums to be invested in bank stock, and the interest accruing thereon to be paid to his daughters during their natural lives, and after their decease directed these sums to be equally divided amongst their heirs. By a collicil, the testator directed that, should his real estate be sold, the \$2,000 might remain on mortgage at interest, payable half-yearly to the daughters, and when the mortgage should be paid, his executors were to have full power to invest that sum in homesteads for his daughters, should they desire to do so :—Held, that the daughters took a life estate, with remainders to their heirs as purchasers. *Rogers v. Lorthian*, 27 Chy. 559.—Proudfoot.

By his will J. H. A. directed :—"Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of sixteen hundred dollars, and if any of my children shall have died, leaving issue, then a like sum to and among the issue of the child so dying, such sum of sixteen hundred dollars to be paid by half-yearly instalments to such of my children as shall be of age or be married ; but if any advances shall have been made to any of them, and interest shall be due thereon, such interest to be deducted from the said sum of sixteen hundred dollars. As regards the division, appropriation, and ultimate disposition of my estate, it is my will that, subject to the payment of my just debts and legacies, bequests and annuities, I have heretofore given or may hereafter give, and to the expenses of the management of my estate, all the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead, at the time and in the manner following, that is to say : That immediately on the expiration of four years from my death, my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of the management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children, and of my children who shall

the right to redeem was in  
e, as the mortgages and  
will amounted to about  
was worth; and that R.  
e free from any claim of  
others having instituted  
claiming an interest in  
entitled to recover his  
ate of the testator but  
ersonally. *Stevenson v.*  
—Proudfoot.

#### of Personality.

ed to his two daughters  
married and had children  
the sum of \$1,000 each,  
, which he devised, such  
bank stock, and the in-  
to be paid to his daugh-  
lateral lives, and after their  
sums to be equally di-  
vided. By a will, the  
should his real estate be  
remain on mortgage at  
yearly to the daughters,  
should be paid, his exe-  
cutor power to invest that  
in his daughters, should  
—Held, that the daugh-  
with remainders to their  
*Rogers v. Louthan*, 27

directed:—"Until the ex-  
from the time of my de-  
division of my estate as  
my executors shall every  
t of each of my children  
ndred dollars, and if any  
have died, leaving issue,  
l among the issue of the  
m of sixteen hundred dol-  
lars yearly instalments to  
as shall be of age or be  
advances shall have been  
and interest shall be due  
to be deducted from the  
ndred dollars. As regards  
tion, and ultimate dispo-  
sition, my will that, subject  
to debts and legacies, be-  
I have heretofore given  
and to the expenses of  
estate, all the rest, reser-  
ving estate, and the inter-  
mulation thereof, be dis-  
posed of, to and  
who may be alive at the  
and appropriation into  
hereinafter directed, and  
of such of my children as  
of the time and in the man-  
ner to say: That imme-  
diately from four years from my  
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ding annuities, and of the  
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g estate into as many just  
e number of my then sur-  
viving children who shall

before them have died, having lawful issue then  
surviving, shall amount unto, and shall appor-  
tion and set off one such share to each of my  
said then surviving children, and one such share  
to the lawful issue of each of my then deceased  
children, whose lawful issue shall be then sur-  
viving, all the issue of each deceased child stand-  
ing in the place of such deceased child. And it  
is my will, and I direct, that from henceforth a  
separate account shall be kept by my trustees of  
each share, and of the interest and profit thereof,  
and the payments made to or on account of or for  
the maintenance and education of each of my  
said children or issue, shall be charged against  
the share apportioned to such child or children,  
or wherein such issue shall be interested, so that  
all accumulations and profits that may arise shall  
enure to the increase of each several share on  
which such accumulation or profit shall accrue—  
it being my intention that after such division  
shall take place, the maintenance, education, and  
support of each of my children while under the  
age of twenty-one years shall be drawn from the  
separate income of such child, and the mainte-  
nance and education of the children of any of  
my children who may have before them died,  
leaving issue, shall be drawn from the share or  
shares set apart for the issue of such deceased  
child or children. And that my children, and  
such issue of deceased children being of age,  
that is to say, of the age of twenty-one years, or  
when respectively they shall attain the age of  
twenty-one years shall be severally entitled to  
receive for their own use the whole of the inter-  
ests and profits of the share and proportion of  
my estate to which they may be respectively  
entitled." On 26th May, 1864, M. L. A., tes-  
tator's daughter, married C. H. F., appellant.  
Testator died 24th December, 1870. On 25th  
August, 1872, testator's daughter died, leaving  
three children, H. A. F., E. B. F., and W. S. F.  
On the 14th September, 1877, H. A. F., the  
eldest son of the appellant and M. L. A., died.  
Thereupon the appellant claimed that the three  
brothers took their mother's share under the will  
as tenants in common and, the property being  
personal property, H. A. F.'s share vested in  
the appellant his father:—Held, that the inten-  
tion of the testator was that his estate should be  
divided, and that the children of the testator's  
daughter took as tenants in common, and con-  
sequently on the death of the eldest son the  
whole right, title and interest in his share,  
vested in the appellant. *Fisher v. Anderson*, 4  
S. C. R. 406.

A testator who died in February, 1869, by  
his will, amongst other things, gave legacies pay-  
able in eight and thirteen years, and devised lot  
8 to his son R., and lot 9 to his son D., subject  
to charges, the devisees to get possession thereof  
when his youngest child attained twenty-one.  
At that time D. and R. were to get one-half of  
the stock and implements which would then be  
on the said lots, the other half to be divided  
amongst other legatees. The youngest child had  
not yet attained twenty-one. The master at  
Hamilton directed an account to be brought in  
of the stock and implements at the time of the  
reference on said lots, being the proceeds of the  
old stock left thereon by the testator, and also  
those subsequently produced from the produce of  
the said lots; and also an account of the stock  
or implements left by the testator which still

remained on the land. The defendants appealed  
on the ground that if any further account was  
to be furnished, it should be only of stock and  
implements purchased with the proceeds of the  
sale, or obtained by the exchange of the stock or  
implements left by the testator; which appeal  
was dismissed, with costs. *Davidson v. Oliver*,  
29 Chy. 433.—Proudfoot.

The will of a testator contained the following  
clause: "To my daughters Ellenor and Mary  
Maria I give, devise, and bequeath the interest  
of three thousand dollars each per annum, to be  
paid to each of them half yearly":—Held, that  
the devisees took an absolute interest in the  
\$3,000 given to each of them. *Elton v. Sheppard*,  
1 Bro. C. C. 532, followed. *Morrow v. Jenkins*,  
6 O. R. 693.—Proudfoot.

A will directed an executor to pay A. for life  
"the interest, dividends, and profits of certain  
stock, and of the moneys into which the said  
stock might be changed." Subsequently new stock  
was issued at par and eighteen shares allotted to  
the executor. Not being accepted, these new  
shares were sold and produced a premium of  
\$226.67, which was credited to the executor:—  
Held, that the premium was principal, and that  
A. was entitled only to the interest on it during  
her life. *Re Smith*, 8 P. R. 384.—Proudfoot.

Testator by his will gave all his property, real  
and personal, to trustees, directing that his wife  
should receive all rents and interest during  
widowhood, and until his youngest child should  
come of age; that in case of her death or mar-  
riage before the youngest child came of age, his  
property should be divided equally among his  
children on their respectively coming of age, and  
in case all his children should die under age with-  
out issue, their portions should be divided equally  
among his brothers and sisters. A letter was  
found among his papers, addressed to his wife,  
saying that he had made two wills, "one before  
I was married, which is to be considered void,  
but the other I wish to modify, as it was written  
in a hurry. I wish my dear wife and our chil-  
dren to have all my property, to be divided equally  
my wife to have the use of the whole until the  
children are of age. In case of death of my  
children my wife to have the use of the property  
in her lifetime, and then to go to my brothers and  
sisters." The testator left two children, who  
both died under age unmarried, their mother  
surviving them:—Held, reversing the judgment  
of the court below (29 Chy. 274), that the will  
and letter must be read together, and that the  
will must stand except so far as "modified;" that  
the "death of my children" referred to their  
death under age without issue before his wife;  
and therefore that she took the personality (which  
alone could be affected by the letter) for life, and  
after her death it would go to testator's brothers  
and sisters. *Dumble v. Dumble*, 8 A. R. 476.

See *Cook v. Noble*, 5 O. R. 43, p. 2170. In *Re*  
*Biggar*—*Biggar v. Stinson*, 8 O. R. 372, p. 2191.

#### 8. Conversion.

A testator by his will directed his executors  
to pay his debts, funeral expenses and legacies  
thereinafter given out of his estate, and pro-  
ceeded: "My executors are hereby ordered to sell  
all my real estate, after the payment of all my





the will he devised to of \$10,000 for her life, in lieu of her dower, so directed should be real estate. The testator bequeathed to the executors certain real and personal described in five schedules A, B, C, D, and E, annexed thereto, viz.:—Upon trust, life, to collect and receive the annuities thereof which should form a portion of his "general" from and out of the general life of testator's wife, to pay to each of his five yearly sum of \$1,000 by instalments, free from the debts, and annuities of their respective annuities, the annuitants were entitled to have the same raised out of the corpus of the estate. *Jones v. Jones*, 27 Chy. 317.—Sprague.

A testator by his will and codicils, devising his real estate, etc., to G. H. M. and B. M. trustees, and the survivor of them, and the heirs of such survivor, gave his widow an annuity and provided that, when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject, however, to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions." The last codicil appointed G. E. T. and G. R. and the survivor of them, and the heirs, executors, administrators and assigns of such survivor new trustees and executors in place of G. H. M. and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue:—Held, that the widow was entitled to her annuity at well as her share under the Statute of Distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby—Quimby v. Quimby*, 5 O. R. 738.—Boyd.

J. S. by his will gave his wife E. S. an annuity of \$2,000 a year, and charged it on his estate. After his death E. S. the annuitant, C. E. S. and M. A. S., two daughters, and W. A. S. and G. E. S., two sons, entered into an agreement whereby the annuity was charged on certain real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J. S. to the said sons, subject to the said charge. Subsequently all parties joined in borrowing \$16,000 on mortgage of part of the property for the purpose of reconstructing the buildings, the annuity being postponed to the mortgages. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died having made a will by which she devised all her estate to C. E. S. and M. A. S., who brought an action against

a sufficient sum set apart to provide for her annuity. *Almon v. Levin*, 5 S. R. 514.

A testator bequeathed the annual income of all his estate, real and personal, to his widow during widowhood, subject to the payment of \$160 a year to his father, and after the death of his father to his mother, and after the death of both his father and mother, the said annuity of \$160 was given in equal shares to N. and J., a sister and niece of the testator, and he thereby made this annuity to his father and mother, as also the annuities to N. and J., a charge upon all his real estate; and directed his executors and trustees to pay or cause to be paid the net annual income of his estate ("after payment of the annuities as aforesaid") to his wife absolutely during widowhood:—Held, that in the event of the income of the estate proving insufficient to pay the annuities, the annuitants were entitled to have the same raised out of the corpus of the estate. *Jones v. Jones*, 27 Chy. 317.—Sprague.

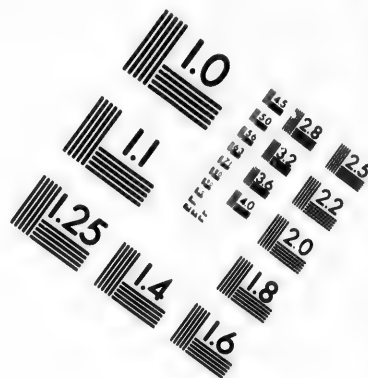
A testator by his will and codicils, devising his real estate, etc., to G. H. M. and B. M. trustees, and the survivor of them, and the heirs of such survivor, gave his widow an annuity and provided that, when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject, however, to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions." The last codicil appointed G. E. T. and G. R. and the survivor of them, and the heirs, executors, administrators and assigns of such survivor new trustees and executors in place of G. H. M. and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue:—Held, that the widow was entitled to her annuity at well as her share under the Statute of Distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby—Quimby v. Quimby*, 5 O. R. 738.—Boyd.

J. S. by his will gave his wife E. S. an annuity of \$2,000 a year, and charged it on his estate. After his death E. S. the annuitant, C. E. S. and M. A. S., two daughters, and W. A. S. and G. E. S., two sons, entered into an agreement whereby the annuity was charged on certain real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J. S. to the said sons, subject to the said charge. Subsequently all parties joined in borrowing \$16,000 on mortgage of part of the property for the purpose of reconstructing the buildings, the annuity being postponed to the mortgages. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died having made a will by which she devised all her estate to C. E. S. and M. A. S., who brought an action against

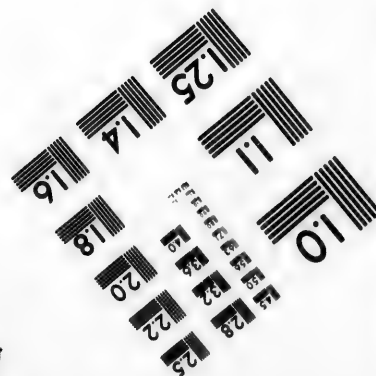
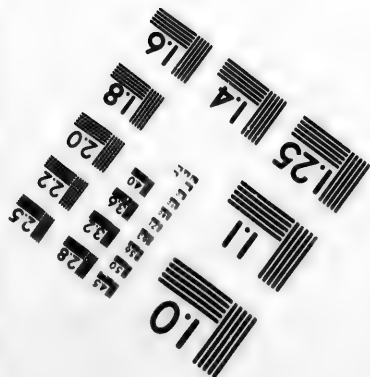
have a lien declared on the property for the amount of the arrears of the annuity. On a reference to the master he found that they had the right to maintain the action, and settled the amount of the annuity due, and allowed interest for the six years preceding action brought. On an appeal from the master's report, it was:—Held, that R. S. O. (1877), c. 50, ss. 206 and 207, under which the interest was allowed, is not applicable to cases where a recovery is sought not against a defendant personally, but against his estate, and following *Booth v. Coulton*, 2 Giff. 520, that except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity. In this case, under any circumstances, the award of interest could not be upheld as against the assignee in insolvency:—Held, also, that the expense of some flooring, lathing, and plastering, was properly charged against the defendant, as W. A. S. and G. E. S. had covenanted to keep the houses tenable, and these repairs were made because the tenant threatened to leave:—Held, also, on the evidence in this case that the master was right in disallowing a large set-off brought in by the defendant over and above the sum of \$16,000 allowed for reconstructing the buildings. *Snarr v. Badenach*, 10 O. R. 131.—Boyd.

A testator gave his son A. his board and lodging and £5 a year during his natural life. He devised to his eldest son a portion of his real estate on condition of his paying A. £3 out of the £5 a year. He further devised another portion of his real estate to his wife for her life, and then to his son R., on condition that R. should pay the balance £2 a year and keep his son A. in board and lodging during his natural life:—Held, that the annuity to A., though chargeable against different parties, was not separable. (2) That the intention of the testator was to provide for A. from the time of the testator's death, and that R.'s land was chargeable with such £2 a year, and the board and lodging from that time, notwithstanding the tenancy for life. *Mumie v. Lindsay*, 10 P. R. 432.—Hodgins, *Master in Ordinary*. But see also *S. C.*, 11 O. R. 520, p. 2212.

A testator, by his will, provided as follows:—"I give and devise to my four daughters" (naming them), "an annuity of \$120 per year each, to be paid once a year after my decease, and to be for the period of their natural lives. Also to my two granddaughters" (children of a deceased daughter), an annuity of \$60 each, to be paid annually, \* \* \* which annuity will expire at the death of my last daughter. In the event of the death of any of my daughters, the annuity which she received during life to be equally divided amongst her children until the decease of my last daughter, share and share alike. In the event of the death of my last surviving daughter, the annuities are immediately to cease, and the amount of real and personal estate in the hands of the executors is to be equally divided amongst my grandchildren, provided they are not lazy spendthrifts, drunkards, worthless characters, or guilty of any act of immorality." One of the granddaughters named married and died, leaving an infant child, and her husband was appointed administrator of her estate:—Held, that each annuity given was to continue to the death of



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the last surviving daughter, and that the annuity of the deceased granddaughter from the time of the last payment to her until the death of the last surviving daughter was payable to her proper personal representative for the benefit of those who were, according to law, entitled to her estate:—Held, also, that the words "to be equally divided," were equivalent to a direction to "pay and divide," and that the interest taken by the deceased granddaughter, in the property to be divided by the executors, was a vested interest subject to be divested by the clause as to lazy spendthrifts, etc., which clause was not a condition precedent but rather in the nature of a condition subsequent, and that her personal representative became entitled to her share. *Woothill v. Thomas*, 18 O. R. 277.—Ferguson.

See *Edwards v. Pearson*, 4 O. R. 514, p. 2204; *Macdonald v. McLennan*, 8 O. R. 176, p. 2211; *In re Macklen and the Commissioners of the Niagara Falls Park*, 14 A. R. 20, p. 2208.

### 11. Legacies.

#### (a) Ademption or Revocation.

The testator by his will, made in July, 1877, devised to his son G., certain real estate and brewery, expressing that "this devise be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause: "L." the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of \$36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell part of the lands devised to him, including the brewery, to G. for \$27,000, and the brewery plant for \$6,987.20, which was credited on G.'s claim against the testator. G. subsequently, under clause "L." claimed against the estate of the testator payment of the amount for which the brewery premises and plant were sold, he swearing that he was ignorant of the contents of the will. Thereupon the plaintiffs, two of the executors and trustees, instituted proceedings seeking to obtain a construction of the will:—Held, reversing the judgment of the court below, that the agreement entered into between the father and son superseded the devise to the son. *Archer v. Seavern*, 8 A. R. 725.

W. F. by his will bearing date 11th February, 1833, inter alia devised to M. his daughter by an Indian woman and to E. and M. his daughters by another woman, a defined portion of the seigniories of Temiscouata and Madawaska, and the balance of said property to his sons W. and E. A short time after making his will the testator, who was heavily in debt, received an unexpected offer of £15,000 for the said seigniories, and he therefore sold at once, paid his most pressing debts, amounting to £5,400 and the balance of £9,600 was invested by loaning it on security of real estate. At his death, his estate appearing to be vacant as regards the £9,600, a curator was appointed. On the 27th September, 1839, the parties entitled under the will proceeded to divide and apportion their

legacies, basing their calculations upon the approximate area of the seigniories devised, and received the collected part of the sums allotted to each by the partition. In an action brought by W. F. the respondent, who was residuary legatee, against the curator in order to make him render an account, the court ordered the curator to render an account which he did, and he deposited \$50,000 and other securities. On a report of distribution being made W. F. (the respondent) filed an opposition claiming his share under the will. This opposition was contested by J., the appellant, on the ground: 1st. That the legacies were revoked and that in his capacity of universal legatee to his mother (the legitimate child, he alleged of the testator and the Indian woman who was commune en biens with the testator) he was entitled to one-half of the proceeds of the said £9,600; and 2nd, that in the event of his claim to legitimacy and revocation of the legacy being rejected, as by the will the daughters were exempt from the payment of the debts, he should, as representing one of the daughters be entitled to her proportion of £15,000, the net proceeds of the sale:—Held, affirming the judgment of the court below, that J. (the appellant), not having at the death of his mother repudiated the partage to which she was a party, but on the contrary having ratified it and acted under it, was estopped from claiming anything more than what was allotted to his mother. Per Strong, Fournier and Taschereau, JJ.—That under the law prior to the code the sale of the seigniories which were the subject of the legacy in question in this cause, had not, considering the circumstances under which it was made, the effect of defeating the legacy:—Sembler, per Henry, J.—That there was a revocation of the legacy. The judgment of the court below held that as the testator declared that the daughters should not be liable for the payment of his debts, partition as regards them, should be made of the sum of £15,000, the price obtained from the sale of the seigniories bequeathed, and not of £9,600 remaining in his succession at his death. On cross appeal to the Supreme Court of Canada:—Held, that on the pleadings before the court no adjudication could be made as to the sum of £5,400 paid by the curator for the debts, and that in the distribution of the moneys in court all that J. (the appellant) could claim to be collocated for, was the unpaid balance (if any) of his mother's share in the moneys, securities, interest, and profit of the said sum of £9,600 in accordance with the partage of the 27th September, 1839. *Jones v. Fraser*, 13 S. C. R. 342.

#### (b) Time of Vesting.

A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold, and the proceeds equally divided among his four daughters and three sons and their children, after paying \$200 to each of the three children of his deceased daughter R. He left surviving him his widow, who was still living, three sons and four daughters and twenty-seven grandchildren, besides the children of R. Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his

death:—Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the court declined to make any order upon the will. *Dryden v. Woods*, 29 Chy. 430. Proudfoot.

S. by his will gave four legacies to his daughters in four different clauses, each worded as follows: "I bequeath to my daughter—the sum of five hundred dollars." By a subsequent clause he provided: "I also order that should any of my daughters die, their portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased but not paid for in his lifetime was paid for, and all his debts paid, his two sons E. and A. "shall each pay my daughter M. A. S., the sum of \$50, which she shall receive together with the rent of lot 126 (from the executors), to apply on her legacy. The other three daughters to be paid in the same manner, E. in one year after M. A., etc." A direction was also given, that in case of any of the daughters dying their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source:—Held, on an appeal from a master, that these provisions and all others of a like kind in the will, had reference at most to the mode and time of payment of the legacies, and not to the substance of the gift, and that as the testator had not clearly and with certainty expressed the intention that the legacies should not vest until times of payment, the legacies were given in the ordinary way to vest upon the death of the testator. *Re Stevens*—*Stevens v. Stevens*, 14 O. R. 707.—Ferguson.

See *Graham v. Bolton*, 9 O. R. 481, p. 2207.

#### (c) Charged on Land.

A testator, after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows: First, he gave and bequeathed certain legacies "to be paid out of my estate," and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. sole executor:—Held, that the legacies were, by the will, charged upon the estate, real and personal, and failing personal estate became a charge on the land; and that W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money. *Moore v. Mellish*, 3 O. R. 174.—Chy. D.—Ferguson.

A testator, after directing payment of his debts out of his personal property, or if that should prove insufficient, then, that so much of his real estate as would supply the deficiency might be sold for that purpose, went on to direct that his land should be sold, and the income of the capital arising from the sale be paid yearly to his wife, for her maintenance during her natural life, after which he gave a number of charitable bequests and pecuniary legacies, but made no residuary gift:—Held, that the testator had created a mixed fund to answer the

purposes of his will, and if the personalty was not sufficient for the payment of the debts, the legacies were payable out of the land; if it was sufficient, they were payable out of the mixed fund; but so far as the charitable bequests were payable out of the land they were void. *Toomey v. Tracey*, 4 O. R. 708.—Proudfoot.

Held, also, that interest was payable on the legacies from a year after the testator's death, in accordance with the general rule, in any event; and this, although as the whole interest of the proceeds of the land was given to the wife, for life, the capital had to be kept invested by the executors; and, consequently, there was no fund for the payment of legacies until her death. *Ib.*

A testator devised his real estate and chattel property (excepting some bequests to his wife) to his son Robert, subject to the payment of his just debts, funeral expenses, and certain specified legacies, which legacies he directed his executors to pay. By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold, and the proceeds equally divided amongst all his children:—Held, that the specific legacies were a charge on the real estate. *Stewart v. Dick* 10 P. R. 411.—Hodgins, *Master in Ordinary*.

Legacies directed to be paid out of a mixed residue are a charge on land. *Young v. Purvis*, 11 O. R. 597.—Proudfoot.

A testator after devising certain pecuniary legacies and a home to two of his children until they became of age, provided as follows: "And I will and bequeath unto my daughter C. J., all my real estate and the remainder of my personal estate after the above legacies are paid":—Held, (affirming *Robertson, J.*), that the legacies were charged upon the real estate. *Johnston v. Denman*, 18 O. R. 66.—Chy. D.

See *Munie v. Lindsay*, 10 P. R. 432, p. 2198; *S. C.* 11 O. R. 520, p. 2212.

#### (d) Demonstrative or Specific.

A testator by his will directed that "\$5,000 of the money which I may be entitled as my share of the partnership business now carried on at," etc., under the name of E. H. & Co., should be invested by his executors at interest, and that the income derived therefrom should by them be paid over, as received, to his daughter M., for her maintenance until she attained twenty-one, when she should be entitled to \$5,000; and if the interest in any year from the investment should fall short of \$400, the difference to make up that sum should be paid by his executors out of the interests or profits derived from the remainder of her estate. Subject as aforesaid, he gave the residue of his estate, real and personal, to his executors in trust for his son. Subsequently to the making of the will the partnership of E. H. & Co. was dissolved, and the testator until his death carried on the business alone, but under the name of E. H. & Co., his interest in the partnership having been realized by him and carried into his new business:—Held, that the legacy of \$5,000 was demonstrative and not specific, and that she was entitled to be paid the same out of the general estate. *Day v. Harris*, 10 O. R. 147.—Proudfoot.



By the first clause in his will, a testator directed that his executrix should pay his debts out of his personal estate, and then proceeded to leave to his wife, whom he named as his executrix, certain lands subject to incumbrances, and all his stock, cattle, etc., upon the said lands, and then devised the residue of his real and personal estate (after payment of his just debts and funeral expenses) and all the rents and issues thereof to a brother and sister for their lives, to be equally divided between them, share and share alike, and after their death, to their children, their heirs and assigns for ever, share and share alike. The brother predeceased the testator. The widow now brought this action for the construction of the will:—Held, that the bequest of the stock, cattle, etc., to the testator's wife was a specific legacy, and was not subject to the testator's debts, notwithstanding the first clause of the will:—Held, also, that the gift of the residue to the brother and sister was a gift to them as tenants in common, but that the brother having predeceased the testator, there was an intestacy as to his share. *Rudd v. Harper*, 16 O. R. 422.—MacMahon.

The testator bequeathed to his wife "the full control of all my real and personal estate, stock and implements, during her lifetime," and willed that at his wife's decease "all the stock, of whatever kind, with the farming implements on the farm at my wife's decease shall be equally divided between my sons."—Held, that the bequest to the widow of the stock and farm implements was specific, and therefore exempt from the payment of the pecuniary legacies. *Augustine v. Schrier*, 18 O. R. 192.—Boyd.

(e) *Cumulative or Substitutional.*

A testator, after making certain bequests to his wife, directed that after her death, his executors should sell all his estate, real and personal, and after providing for certain pecuniary legacies, should give the legal interest on one-fourth of the remaining proceeds of his estate to his daughter E., to be paid to her yearly during her life, and after her death to be divided among her surviving children. By a codicil he willed to "E. and her heirs that share or division of my estate, as referred to in a former will, in land composed of the north-east part of lot 7, concession 3, Markham." It appeared that the testator had put E. in possession of the said fifty acres sometime before his death and that the said fifty acres were about equal to one-fourth of the whole residue of his estate:—Held, that the devise to E. in the codicil was substitutional to her for the bequest to her in the will:—Held, also, that under the codicil E. took an estate in fee, and not one subject to the incidents of the original gift in the will. In no case of substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift. The word "heirs" may sometimes mean "children," both in regard to personal and real estate, but that meaning will only be given to it when it is clear that the property was intended to go to the children. *Scott v. Gohn*, 4 O. R. 457.—Proudfoot.

A testator, after directing payment of his debts, and funeral and testamentary expenses,

disposed of the residue as follows:—"Secondly, I give to my wife \$150 annually, during her natural life, or so long as she may remain my widow, the said sum, to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate, and to be paid my said wife as she may need it either quarterly or half-yearly." He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds: first to pay his debts, etc., as aforesaid; and to divide the balance then remaining between his sons, subject to each of them securing to their mother an annual payment of \$50 during her natural life, the security to be satisfactory to her and his executors:—Held, that there were sufficient points of difference between the first annuity and the subsequent ones, to make it apparent that the several annuities in favour of the widow were intended to be cumulative. *Edwards v. Pearson*, 4 O. R. 514.—Proudfoot.

One S. by his will directed his estate, real and personal, to be sold, except certain stocks, lands, and securities thereafter specifically devised, and that his debts and "testamentary expenses" should be paid out of the first moneys that should come into the hands of his executors: and after making certain pecuniary bequests, which he charged primarily on the fund to be produced by the sale of his real estate as aforesaid, and secondarily on the proceeds of his personal estate, he directed that "as to the residue of my personal estate which may be exclusively devoted by me to charitable purposes, I bequeath the same to the churchwardens of the A. church, to be invested by them for the purpose of forming an endowment for the support of the said church." Afterwards, by a codicil, S. bequeathed to three persons named by him \$30,000 as an endowment for the A. church, to be invested by them in their own names as trustees for the said church, and to be disposed of for the benefit thereof as therein mentioned, but in certain contingencies to merge in his residuary estate, and be disposed of under the last clause of his will, by which he devised all the rest, residue, and remainder of his estate of which he should die possessed to A. and L., to be equally divided between them, share and share alike:—Held, that on a proper construction of the will and codicil, \$30,000 of the pure personality was to be held by trustees on the trusts as defined for the benefit of the A. church; and as to the residue of that fund, it was to be held generally by the churchwardens for the support and maintenance of that church. A legatee is entitled to take both a pecuniary gift and a residue, whether given in a will or in a combined will and codicil, and the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift. *Ball v. Rector and Churchwardens of the Church of the Ascension*, 5 O. R. 386.—Boyd.

(f) *Vested or Contingent.*

A testator by his will provided that in case his father did not revoke his will and so deprive him (the testator) of certain lands therein devised to him, then he (the testator) devised to S. certain lands, but in the event of his father

—“Secondly, during her natural life, her share and all her property remain in my hands, and I may need it. He then devised the said land otherwise. He then bequeathed pecuniary legacies to certain of his children, adding in the case of those of them who were under eighteen, the words “to be paid to them when they come of age,” and concluding, “I do hereby authorize and direct my said executors to invest the moneys devised to my children in good legal securities, until they arrive of age, and the interest obtained from such investment to be paid to my wife to assist her in supporting and educating my family.” The father of the testator did not revoke or alter his will in the way referred to, but the testator predeceased him:—Held, that the words relating to the alteration of his will by the father of the testator must be construed as meaning that if the testator became the owner of the lands devised in his father's will, so that he could have a disposing power over them, then that they should go in the manner mentioned:—Held, also, that the pecuniary legacies were all of them vested; and that the legacy left to each child which did not attain twenty-one within the year after the testator's death, was to be invested until each child came of age, and the interest up to the several times when they should each attain twenty-one, should be applied in assisting the widow or mother to maintain and educate such child or children, and as each child attained twenty-one he or she would be entitled to be paid their respective legacies. *Re Sproule—Sharp v. Sproule*, 17 O. R. 334.—Robertson.

See *Gill v. Gilmour*, 14 O. R. 129, p. 869.

#### (g) Liability to Refund.

Held, in this case that although the sums overpaid to some of the legatees had been so paid with the sanction of the court, but in a suit in which infants now claiming were not properly represented, that did not relieve the parties to whom such payments were made from refunding the amount, but under the circumstances the order for repayment should arrange the mode thereof so as to be as little burdensome as should appear to be consistent with justice to the parties entitled to receive the money. *Anderson v. Bull*, 8 A. R. 531.

#### (h) Interest on.

See *Toomey v. Tracey*, 4 O. R. 703, p. 2202; *Munsie v. Lindsay*, 11 O. R. 520, p. 899.

#### (i) Release of.

Right to compel legatee to execute release. See *Kaiser v. Boynton*, 7 O. R. 143, p. 1163.

#### (j) Abatement.

A testator bequeathed, “unto my sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make \$6,000.” At the time of the making of the will there was \$3,258.47 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of \$2,930 to M. J.'s credit, making

the whole sum at her credit \$5,258.42; of this sum, \$3,000 was placed on a special account at interest, \$2,000 was agreed to be paid to her by the purchasers, and the balance, \$258.42, was paid in cash, and her account balanced in the books, leaving nothing at her credit:—Held, that M. J.'s legacy was to be reduced by the amount of testator's debt to her at the time of his death; that what had taken place amounted to payment of the debt; and that she was entitled to the legacy of \$6,000. *Wilkes v. Wilkes*, 1 O. R. 131.—Proudfoot.

#### 12. Conditions and Conditional Limitations.

E. R. W. was a devisee under the will of her father R. B., of certain real estate in Toronto, the material parts of which will were as follows: “After the death of my wife I direct the said freehold and leasehold property to be for the benefit of my son R. and my daughters M. and E., their heirs and assigns, to be divided in the manner following.” He then gave a part to the son R. and proceeded thus: “The freehold property I hold at present on Jarvis street in this city, to be divided in two lots from Jarvis street (to) Mutual street, the lot with the house to be given to M. L. to hold for her benefit during her natural life, and to dispose of the same by will and testament only, the remaining lot thirty-five feet wide on Jarvis street, running through to Mutual street, I bequeath to my daughter E. R. and that she shall not dispose of the same only by will and testament, and if either of my said daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister.” E. R. W. contracted to sell the property devised to her when the purchaser objected to complete the purchase on the ground that she had only a life estate in it. On an application under the Vendors and Purchasers' Act, R. S. O., (1877) c. 109. It was:—Held, that E. R. W. took an estate in fee simple, which was, however, restricted by a condition against alienation in any manner, except by a testamentary instrument and that such restraint was valid. *Re Winstanley*, 6 O. R. 315.—Chy. D.

After a devise to his son C., his heirs and assigns for ever, of certain lands, a testator added that his devise to C., was subject to this express condition, that he should not sell or mortgage the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire:—Held, that the case was governed by *Re Winstanley*, 6 O. R. 315, and that the property was not clothed with a trust in favour of the children, but the devise took it in fee simple with, however, a valid prohibition against selling and mortgaging it during his life. *Re Northcote*, 18 O. R. 107.—Boyd.

W. O., by the third clause of his will devised and bequeathed the residue of his estate to his wife, four sons and two daughters, the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st January, 1877, the sum of \$1,600, and the same sum before the 1st January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the fourth clause he gave the sum of \$1,600, without condition,

to each of his sons, Alexander and Duncan. By the 5th clause he devised to his sons Douglas and Robert Oliver two lots, and after giving several legacies to his daughters, he proceeded: "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits:—Held, reversing the judgment of the court below, 6 A. R. 595, which affirmed the judgment of Proudfoot, V. C., Ritchie, C. J., and Henry, J., dissenting, that the direction that Alexander should work on the farm was a condition precedent to his right to the legacy of \$1,000. *Oliver v. Davidson*, 11 S. C. R. 166.

A testator bequeathed his chattels and \$1,500 to his widow. His estate he directed to be sold and the \$1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded: "the yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my son shall become twenty-one; 5th. It is my will that the above-mentioned gifts and bequests to my wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one; 6th. It is further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies; 7th. In case my said son should die before coming of age, then the money so remaining as above, and to which he would then be entitled, shall be paid over to my two eldest brothers." The son died under twenty-one:—Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death, the gifts were denuded of the condition:—Held, also, that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained the age of twenty-one if he had lived; and in the meantime the widow was entitled to the income. *Graham v. Bolton*, 9 O. R. 481.—Ferguson.

Testator, after granting to his wife a life estate in certain land, devised the same to his son, subject to the following conditions: "First, that he abstain totally from intoxicating liquors and card-playing. Second, that he be kind and obedient to his mother. Third, that he be known among his friends as an industrious man ten years after the death of his mother. Should he fulfil these above mentioned conditions I give and devise to him to hold to his heirs and assigns for ever the said lot. Should my son Michael not fill to the letter these conditions, then he shall have no right or title to the use of the said property during or after his mother's lifetime. But I will and bequeath said half lot to my grandson J., to hold to his heirs and assigns for ever."—Held, (1) that the three conditions were conditions precedent up to the time of the mother's death, and that conditions one and three were conditions subsequent for ten years after the mother's death. 2. That either the use of intoxicating liquors or the playing of cards would be a breach of the first condition. 3. That the first condition was valid and was not too vague

or indefinite for trial or adjudication by the court; and having been broken the son's title failed in so far as the condition was precedent, and was forfeited in so far as the condition was subsequent. Semble, that conditions two and three were valid, and not too vague or indefinite for trial or adjudication by the court:—Held, also, that although the son was one of the heirs-at-law it was not necessary to shew that he had notice of the will or the conditions in it, for he had possession of the land as devisee under the will from his mother's death until his own. *Jordan v. Dunn*, 13 O. R. 267.—Q. B. D.; 15 A. R. 744.

Such a condition as the first could not fairly be interpreted to preclude the use of intoxicants for purely medicinal purposes. *S. C.*, 15 A. R. 744.

T. C. S. devised his estate of Clark Hill, with the islands, lands, and grounds appertaining, to his nephew M. M.'s grandmother, by her will, directed her executors to pay him \$2,000 a year so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate, and beautify the property known as Clark Hill and the islands connected therewith":—Held, that the expropriation, under an Act of the Legislature, of part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated the arbitrators properly excluded the consideration of any contemplated loss by M. of this annuity. A failure by M. to reside and occupy would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate which must be by his own act or default: the vis major of a binding statute could not work a forfeiture. Upon the evidence the court refused to interfere with the amount of compensation awarded. *In re Macklem and the Commissioners of the Niagara Falls Park*, 14 A. R. 20.

S. M. had become entitled under T. C. S.'s will to certain property called "Clark Hill," of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common. He also became entitled to a legacy under the following clause of A. H. S.'s will: "I will and direct that so soon as S. M. \* \* \* can and does take actual possession of the real estate and property \* \* \* under the will of T. C. S. \* \* \* my executors \* \* \* shall \* \* \* so long as he remains the owner and actual occupant of the said real estate pay over to him \* \* \* the annual sum of \$2,000 to enable, etc.":—Held, that this clause, read in connection with the will of T. C. S., referred only to the land of which T. C. S. was absolute owner, and not to the land he owned as tenant in common:—Held, also, that actual possession and occupation of the land by S. M. was consonant with and satisfied by the possession of a servant or caretaker, or even a worker on shares, and that S. M.'s temporary absence from the mansion house on the property, which was kept furnished and in charge of a servant, did not create a forfeiture. *Macklem v. Macklem*, 19 O. R. 482.—Boyd.

See *Clarke v. Darragh*, 5 O. R. 140, p. 2184; *Re Casner*, 6 O. R. 282, p. 2178.

## 13. Contribution.

*See Almon v. Levin*, 5 S. C. R. 514, p. 2197;  
*Cook v. Noble*, 12 O. R. 81, p. 748, p. 2212.

## 14. Provisions for Support and Maintenance.

A testator devised all his real and personal estate, to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in a course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution, amongst them, the share or respective shares only, which the deceased parent or parents would, if living, have taken:—Held, that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose, that a complete conversion had been effected by the trust for sale in the will, so that the interests of the sons should be ascertained as if the will consisted of personal estate only; and that the sons took life estates therein only; and one of the sons having died without children that there was an intestacy as to his share, subject however, to a proportion of the charge for the maintenance of the widow. *McGarry v. Thompson*, 29 Chy. 287.—Proudfoot.

The testator by his will devised the proceeds of certain real estate to his daughter-in-law, E. D., widow of his son, W. D., deceased, to her use and support of his son W. D.'s children during her natural life, or so long as she remained his widow; and in the event of the death of his said daughter-in-law, then to his grandchildren so long as they remained minors. He then devised the land to his grandson P. D., in fee, but subject to the above devise. After the testator's death E. D. married again, and was still living:—Held, that the intent of the testator was, that in any event the minors were to have the support of the land during minority, and therefore were so entitled during such minority, upon the determination of the mother's estate by marriage as well as by death. *Henry v. Gillette*, 31 C. P. 243.—C. P. D.

A testator devised certain lands to his two sons, declaring that the legacies thereinafter mentioned should be a charge thereon. He then bequeathed certain pecuniary legacies to his daughters, adding, "I give and devise also unto (his said daughters) their support and maintenance so long as they, or either of them, remain at home with (his two sons); and he gave his personal property to his two sons in equal shares:—Held, that the support and maintain-

ance of the plaintiffs was, by the will, made a charge upon the lands; and they might for sufficient reasons, cease to live at home, and yet still be entitled to such support and maintenance. *Swainson v. Bentley*, 4 O. R. 572.—Ferguson.

The testator also devised certain lands to his widow, to have and to hold the same for the following uses: "To sell and dispose of the same as she should think proper and right, and the moneys thereupon coming and arising to use and apply for the payment of my just debts, and for the maintenance of herself and my minor children, and the education of such children as she may see to be fit and necessary," and he authorized his wife to convey the said lands in fee simple to the purchasers and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain twenty-one, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children. The testator was twice married:—Held, that the children and grandchildren of the testator's first marriage had no right to demand an account of the lands sold under the above provisions, or investigate the amount used for maintenance:—Sembly, that the widow took absolutely the balance of the proceeds of sale not required for debts. In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others. *Cowan v. Besserer*, 5 O. R. 624.—Proudfoot.

A testator willed as follows:—"I give, devise and bequeath to my executor and executrix" (of whom one was the plaintiff, the testator's widow), "all my real and personal property of every kind whatsoever, for the benefit of my children, share and share alike, and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my children and my wife while she remains my widow":—Held, in an action brought by the widow, that under the above will, she and the children took the real and personal property jointly, she during widowhood, and they share and share alike absolutely; that she did not take an immediate estate in the whole with reversion to her children:—Held, also, that a reference might be directed similar to that in *Maherly v. Tunton*, 14 Ves. 499, to ascertain whether it would have been reasonable and proper in the trustees to apply any or what part of the land, having regard to the situation and circumstances of the children to their support and maintenance, and a declaration made that the sum which the master should find to have been properly expended by the mother in past maintenance formed a charge upon the inheritance of the children respectively in the land, but as the directions of the will had not been observed, the enquiry must be at the expense of the mother. *Donald v. Donald*, 7 O. R. 669.—Boyd.

A testator by his will, dated 31st May, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to pay to each of his daughters, J. and L., for life, the annual allowance of \$800

each, which they were then receiving, to be paid to them semi-annually, and to pay for the education, maintenance and ordinary requirements of his son G., and then proceeded: "And I direct my trustees in their discretion, if they find my son G. deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, and if my said trustees are satisfied as to his steadiness they are to treat my said son G. in respect to the said allowance in the same manner as my said daughters, J. and L. \* \* \* It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct:"—Held, that George was only entitled to his maintenance and education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance and education beyond that period:—Held, also that George was not entitled to any annual allowance in addition to his maintenance and education during his minority, and the amount which might be paid him after attaining majority, as an annual allowance, rested on what the trustees in their discretion might deem warranted by the estate. For by treating G. in the same manner as J. and L. the testator referred only to the mode of payment, and the power of disposing of the principal, not to the amount of the allowance. *Macdonald v. McLennan*, 8 O. R. 176.—Proudfoot.

G. H. Z. in his will provided, with respect to a certain mortgage, "I give and bequeath out of the proceeds of said mortgage to each of my daughters (naming them) the sum of \$200, to be paid to them respectively when the youngest reaches the age of twenty-one, and if any of them shall not have been married before that time the child or children being then unmarried shall not receive their shares until such times as she or they shall marry. Provided that my executors may pay such part or parts of said legacies to my married daughters before the youngest attains twenty-one if they can do so without interfering with the proper support of my wife and family. Provided if any of my daughters die without issue the legacy bequeathed to them shall be divided among their surviving sisters. The balance of the proceeds of said mortgage I give and bequeath to my said wife, to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family, during the natural life of my said wife, after which my will is, that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving:"—Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried, treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided; and that the widow had the right to draw *bona fide* from the proceeds of the mortgage even if it consumed the whole of the corpus. *Barclay v. Zaritz*, 8 O. R. 663.—Boyd.

A testator made his will as follows:—"I leave to M. the west half of lot 9 during her

natural life. I leave to my son A." (an imbecile) "his board and lodging with £5 per year during his natural life, to be given as hereinafter mentioned. I leave to B." (certain other lands) "under the following restriction: i. e., he is to pay A. £3 every year during his natural life. I leave to R. the west half lot 9, after his mother's death, on the following condition: i. e., £2 in each year to be paid by him to A., and to keep A. in board and lodging during his natural life." The devise to R. failed, he being an attesting witness:—Held, that A.'s maintenance as from the death of the testator, and not as from the death of M., was a charge on the west half lot 9 in the hands of the heirs: and the land having, for some time after the testator's decease, been occupied under mistake of title by R. and his assigns, who had paid for A.'s maintenance, the heirs could not enjoy the land without making good the charge thereon to those who had thus exonerated them. *Munroe v. Lindsay*, 11 O. R. 520.—Boyd. See also *S. C.*, 10 P. R. 432, p. 2198.

A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert his personal estate into money, pay debts, and invest the balance. He directed them to pay his wife from time to time such money as might be sufficient to support, maintain, and educate his family, and to maintain his wife in a manner suited to their condition in life, and for that purpose gave his wife power to collect money and to take therefrom enough to maintain his family and herself. And he directed his sons to pay her \$150 a year after they received their lands, charging it on his lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay \$1,000 to each of the daughters as they attained twenty-one, and if there was not sufficient personal estate to pay them, the balance was to be a charge on the real estate: the real estate was to be divided between the sons when the eldest attained twenty-five, and then the trustees were to give him \$2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his \$2,000. The testator's widow married again:—Held, that the children were only entitled to maintenance until they attained their majorities:—Held, also, that the widow was entitled to maintenance until the provision as to the \$150 came into operation which would be when the sons respectively attained twenty-five. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained twenty-five, the intermediate rents not being disposed of descended to the heirs-at-law, i. e., the children, and might be applied for their maintenance if the personal estate was insufficient. *Cook v. Noble*, 12 O. R. 81.—Proudfoot.

When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance and support, when given in general terms, will cease with the marriage or forisfiliation of a child. *Knapp v. Noyes*, Amb. 662; *Gardner v. Barber*, 18 Jur. 508; and *Wilkins v. Jodrell*, 13 Ch. D. 564, considered and commented on. *Id.*



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A widow ceases to be entitled to support and maintenance upon marrying again:—*Quere* as to her rights if she should again become a widow without means of support. *Ib.*

The personal estate turned out insufficient to pay the legacies of which the one of \$2,000 was first payable out of those remaining unpaid:—Held, if the \$2,000 legacy to the son absorbed all the personal estate, the daughters would get none of it as their legacies were charged on the land, and that the \$2,000 legacy and the legacy for maintenance must abate proportionally, and that there was no ground for marshalling. *Ib.*

C. devised the residue of his real estate to his executors in trust for his four children (naming them) "until they or the survivor or survivors of them shall have attained the age of twenty-one years, said real estate to be divided amongst the said four children, share and share alike, and in case any of them shall have died leaving issue, the said issue shall take the share which otherwise would have gone to his, her, or their parent." He also directed that his executors should provide for the maintenance, support and education of the said four children during their minority out of the income to be derived from time to time out of his real and personal property not otherwise devised and bequeathed by his will:—Held, that P. J. C., one of the four children who had attained twenty-one was not entitled to maintenance after that age. *Ryan v. Cooley*, 14 O. R. 13.—*Ferguson*; 15 A. R. 379.

A testator by his will provided as follows: "I will and devise that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime, and that the same shall be a charge upon my estate." The father and mother died and during their last illness certain expenses were incurred for medical attendance, nurses, etc., and after their death for funeral expenses and English solicitor's fees in endeavoring to collect the several accounts for the same:—Held, that the expenses were covered by the provision for maintenance, and an order was made for their payment out of the testator's estate. *Hoice v. Carlaw*, 15 O. R. 697.—*Ferguson*.

A testator bequeathed to his daughter "a home as long as she may remain single" in his dwelling-house:—Held, that though in the case of an infant "home" would probably include maintenance, yet that the legatee in this case being of age, and there being no express words giving her maintenance after minority, she was not entitled to maintenance under the above bequest. *Augustine v. Schrier*, 18 O. R. 192.—*Boyd*.

Where a provision is made for maintenance, the duration of which is defined by the testator, it will go on for the prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the court will adjudge it to the representatives of the deceased. *Dawson v. Fraser*, 18 O. R. 496.—*Boyd*.

See *Givins v. Darvill*, 27 Chy. 502, p. 2087; *Graham v. Bolton*, 9 O. R. 481, p. 2207; *Young v. Purvis*, 11 O. R. 597, p. 2162.

### 15. Exercise of Power of Appointment.

The decree in this cause (28 Chy. 150) reversed so far as the will was declared void, on the ground of insane delusion. The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or to his brother or sister. By his will the testator gave portions, about one-fourth of his estate to two of his children, and as to the residue he appointed the same to his brother C. T. B., desiring him to pay first his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to a stranger the policy of assurance upon his life for \$3,000, and all moneys arising therefrom:—Held, that as to the portions of his estate given to his two children the will was valid; but as to the appointment to his brother, the same was void as being a fraudulent exercise of the power of appointment; and therefore that as to the residue after payment of the amounts given to the two children the will was inoperative and void, and that as to so much there was an intestacy. *Bell v. Lee*, 8 A. R. 185.

A testator devised certain lands to his wife, "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife, by deed, under her hand and seal, and to his heirs and assigns for ever." The widow married again, without having executed the power:—Held, that there being no specific limitation as to time, the whole period of the life of the donee was allowed for the execution of the power, and it did not cease upon her second marriage:—*Quere*, whether she could exercise it till after her second marriage. *Cowan v. Bessever*, 5 O. R. 624.—*Proudfoot*.

Power to appoint trustees. See *McLachlin v. Osborne*, *Magee v. Osborne*, 7 O. R. 297, p. 2066.

A mortgage to secure \$800 on certain lands was made by T. K. to his father. The proviso for payment was that the \$800 was to be paid to the mortgagee's executors or administrators in eight weekly annual instalments of \$100 each, the first payment to be made one year after the mortgagee's decease, upon trust to pay the same to such person or persons as the mortgagee should by deed endorse on the mortgage, or otherwise by deed direct and appoint; and in default of appointment to his children other than his son John, etc. No appointment was made by deed endorsed on the mortgage, or otherwise by deed. The mortgagee by his will directed that the \$800 should be payable, namely, \$200 to each of his three daughters A., M. and B., and \$100 each to his granddaughter K. and his widow, to be paid forthwith after his death:—Held, that the will constituted a valid appointment under the proviso in the mortgage, and that the legatees or appointees under it were entitled to the sums bequeathed to them; but that the time for the payment of the money must be in accordance with the terms of the mortgage. *McDermott v. Keenan*, 14 O. R. 687.—*Wilson*.

By a marriage settlement lands were conveyed to the use of the settlor, the mother of the intended husband, for life, and after her death in trust to pay the rents to the intended wife and, in case of her death before her husband, upon certain trusts in favour of the husband and the children of the marriage; but if he should die in her lifetime then in trust for such persons as he by any deed with power of revocation and new appointment, or by his will should direct and appoint, and in default of appointment in trust for his right heirs. Before the 1st of January, 1874, the husband predeceased his wife, leaving no children. By his will he devised as follows: "I give unto my wife all my real and personal estate whatever and wheresoever to hold unto her and her heirs, etc., absolutely for ever. I do also transfer unto her all the powers vested in me to bequeath, convey, or execute by will or otherwise all or any of the properties conveyed to her under the settlement by Bathsheba Smith." The settlor was then dead. The wife, assuming to execute the power contained in the settlement, by deed not containing a power of revocation appointed the lands to her own use absolutely and then contracted to sell a part of them in fee. Upon a case stated for the opinion of the court, under the Vendor and Purchasers' Act as to whether a good title could be made to the purchaser, it was held by the Chancellor:—(1) That the power was not executed by the will. (2) That there was a valid delegation of the power to the wife by the will. (3) That the deed executed by her was not a valid execution of the power because not made with power of revocation and new appointment; and that the purchaser could not be compelled to accept the title because of the revocable character of any valid appointment by deed. On appeal to this court:—Held, that the donee could not by his will delegate the execution of the power to his wife, and therefore that she could not, under any circumstances, make a valid appointment thereunder. Judgment of the chancellor (11 O. R. 191, sub nom. *Smith v. McLellan*), affirmed on this ground. *Smith v. Chishome*, 15 A. R. 738.

M. D. by her will devised certain land to trustees upon trust to hold one part to the use of her son C. S. C. for his life, and after his decease to convey the same to his children or to such of the testatrix's other three sons or their children as C. S. C. might by his last will appoint; and the other part to the use of her son W. D. in precisely the same way. C. S. C. and W. D. each appointed his parcel to the other by will duly executed, and each conveyed to the other his life interest, and covenanted in the conveyance not to revoke the appointment made by the will. They then contracted to sell both parcels to a purchaser:—Held, that C. S. C. and W. D. each took under the will a life estate with a power to appoint the inheritance in fee by will amongst the specified objects, and that such a power could not be executed except by will; the intention being that the donee of the power should not deprive himself until the time of his death of his right to select such of the objects of the power as he might deem proper; and notwithstanding the covenants here given not to revoke the appointments, a subsequent appointment by will to one of the other objects of the power would be a good execution of it,

and the covenants would not affect the title of the subsequent appointee, for he would take the estate under the original testatrix and not under the devise for life:—Held, also, that the position of C. S. C. and W. D. was not aided by section 19 of R. S. O. (1887), c. 100, which gives to the donee of a power the right to release or to contract not to exercise it; by so doing they could not confer upon themselves the right to give the purchaser a good title. Upon a petition under the Vendors and Purchasers' Act, it was, therefore, declared that C. S. C. and W. D. could not make a good title. *Re Collard and Duckworth*, 16 O. R. 735.—Street.

See *Sweet v. Platt*, 12 O. R. 229, p. 2175; *Re Ontario Loan and Savings Co. and Powers*, 12 O. R. 582, p. 2175.

## 16. Debts and Mortgages.

### (a) Due by Testator.

The Devolution of Estates' Act, 49 Viet. c. 22 has not superseded, but is to be read in conjunction with R. S. O. (1877) c. 106, ss. 36, 37, and mortgaged land devised by will is primarily liable to pay its own burdens, unless the will otherwise directs by such terms as distinctly and unmistakably refer to or describe the mortgage debts:—Held, that the fact that of two lots owned by the testator, subject to encumbrances, he devised one to his son, D., while the other passed under a general devise to the executors in trust for the heirs-at-law, afforded no indication of intention that D. should enjoy free from the mortgage debt, nor did the fact that the testator directed his debts to be paid out of a mixed fund. *Mason v. Mason*, 13 O. R. 725.—Boyd.

On the 30th April, 1869, H. S. being indebted to J. P. in the sum of \$3,000, granted a hypothec on certain real estate which he owned in the city of Montreal. On 28th June, 1870, H. S. made his will, in which the following clause is to be found: "That all my just debts, funeral and testamentary expenses be paid by my executors, hereinafter named, as soon as possible after my death." By another clause he left to W. H. in usufruct, and to his children in property, the said immoveables which had been hypothecated to secure the said debt of \$3,000. In 1879 H. S. died, and a suit was brought against the representative of his estate to recover this sum of \$3,000 and interest:—Held, reversing the judgment of the Queen's Bench, 26 L. C. Jur. 79, Strong, J., diss., that the direction by the testator to pay all his debts included the debt of \$3,000 secured by the hypothec:—Per Fournier, Taschereau, and Gwynne, JJ., when a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, Art. 889 of the C. C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee. *Harrington v. Corse*, 9 S. C. R. 412.

### (b) Due to Testator.

J. S. directed his executors to cancel and entirely release the indebtedness of his son W. S. upon a mortgage made by him to the testator,

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such release to operate and take effect im-  
mediately on and from the testator's death. W. S.  
was also indebted to the testator on a promiss-  
ory note and for goods, which, together with  
interest, amounted to upwards of \$3,740. This  
amount the executors claimed they were en-  
titled to demand payment of before they could  
be called upon to discharge the mortgage, which  
contention was sustained by the master in an  
action for the administration of the estate; but,  
on motion, his finding was reversed by Proud-  
foot, J. (12 O. R. 615). On appeal to this court  
the judgment of the court below was affirmed  
with costs (Burton, J. A., dissenting). Per  
Burton, J. A.—The bequest of the mortgage  
was not a specific bequest; and without refer-  
ence as to what the original purpose of filing the  
bill was, W. S. had claimed to have his mort-  
gage released and had obtained an order for its  
unconditional discharge so that he stood in the  
same position as if he had brought an action for  
that purpose expressly, and had thus brought  
himself within the rule, that he who seeks  
equity must do equity; whereas the effect of  
the judgment appealed from by reason of the  
operation of the Statute of Limitations was to  
leave the legatee free from the debt due by him  
to the estate and to expose the executors to a  
liability to make good that loss. *Archer v.*  
*Seymour*, 14 A. R. 723.

#### 17 Void Devises or Bequests.

##### (a) Uncertainty.

The petitioner in a quieting title application  
claimed title as devisee under a will which  
contained the following provisions: "Secondly, I  
devise to my son J. F. (the land in question) but  
he is to be known as a sober, steady, and in-  
dustrious man. Thirdly, If at any time during  
the period of five years after my death, it appears  
to my executors, hereinafter named, that my  
said son J. does not remain sober, I give them  
power to sell and dispose of the said property for  
such charitable purposes as to them shall seem  
meet:"—Held, that the power of sale in the will  
was not void for uncertainty, and that the certi-  
ficate of title could only issue subject to such  
power. *Re Fox and the South Half of Lot No.*  
*One in the Tenth Concession of Downie*, 8 O. R.  
489.—*Holmsted, Referee*—Proudfoot—Chy. D.

See *Gillies v. McConochie*, 3 O. R. 203, p. 2220.

##### (b) Mistake as to Status of Object of Testator's Bequest.

Held, that, as it appeared that the only con-  
sideration for the testator's liberality to J. M. was  
that he supposed her to be "my beloved wife  
Julie Morin," while at that time J. M. was, in  
fact, the lawful wife of another man, the uni-  
versal bequest to J. M. was void; through error  
and false cause. *Russell v. LeFrancois*, 8 S. C. R.  
335.

##### (c) Devises or Bequests to Attesting Witness.

A testator devised land, subject to a lease, to  
J. H. in fee, and as to the rent directed half to  
be paid to J. H., and half to the executor in  
trust for J. H. The executor, assuming the de-

vise to be valid, paid all the rent to J. H. The  
latter executed a deed of the land to C. H., to  
whom he afterwards paid the rent with the  
privy of the executor, as soon as he received it  
from him. C. H. went into possession of the  
land after the expiration of the lease, and had  
been so receiving rent or in possession for more  
than ten years before action commenced. J. H.  
was a witness to the will.—Held (affirming the  
decision of Proudfoot, J.), that the devise of rent  
was void under 25 Geo. II. c. 6, s. 1, as J. H.  
was the beneficial devisee of the whole of it.  
*Hopkins v. Hopkins*, 3 O. R. 223.—Chy. D.

Quere, whether since *Ryan v. Devereux*, 16  
Q. B. 100, a bequest to one of the witnesses to a  
will would be held to be invalid. *In re Musie*,  
10 P. R. 98.—*Hodgins, Master in Ordinary*.  
But see *Musie v. Lindsay*, 11 O. R. 520. See  
also *Morrison v. Morrison*, 9 O. R., at p. 225.

A will having been attested by one of the  
legatees, the solicitor for the testator, being  
present at the time, and apprehensive that the  
legatee was incompetent, signed the will him-  
self, and procured another also to do so, but the  
name of the legatee was not struck out of the  
attestation clause:—Held, that evidence was  
admissible to prove the actual fact of the case,  
and it thus appeared that the mistake of having  
the legatee as an attesting witness had been  
remedied, not by striking out her name, but by  
the parties proceeding to a new attestation and  
subscription of the will, and the legatee was  
therefore not incapacitated from taking under  
the will. *Re Sturgis—Webbing v. Van Every*,  
17 O. R. 342.—Boyd.

See *Musie v. Lindsay*, 1 O. R. 164, p. 2226.

##### (d) To Foreign State.

A testator directed his executors to pay and  
deliver the residue of his estate to the govern-  
ment and legislature of the State of Vermont,  
to be disposed of as to them should seem best,  
having regard to certain recommendations set  
forth in the will:—Held (affirming the decree,  
27 Chy. 361), that the state was sufficiently de-  
signated as the legatee to entitle it to take the  
bequest; and the fact that the bequest was for  
the benefit of, and to take effect in a foreign  
country, could not be urged as an objection to  
its validity; neither could the objection that the  
State could not be made amenable to the courts  
of the State, and thus there would not be any  
supervision of the trusts, as it must be assumed  
that a sovereign state would not do anything to  
violate a trust; besides, which it appeared that  
the legislature was not, in reality, to assume  
the trust, their duty being to appoint trustees  
who would be amenable to the courts:—Held,  
also, that the direction for accumulation did not  
render the bequest invalid, it being for the  
courts in Vermont to say whether the direction  
should be carried out. *Parkhurst v. Roy*, 7 A.  
R. 614.

##### (e) To Religious and Charitable Institutions.

The residuary estate in this case consisted of  
mortgages, the bequest of which, under the  
Mortmain Act, was declared invalid, and to be-  
long to the next of kin of the testator, the plain-

tiff in the suit. *Thomson v. Torrance*, 28 Chy. 253.—Blake. See S. C., 9 A. R. 1.

Three weeks before the testator died he made his will whereby he directed his lands to be sold, and out of the proceeds gave \$2,000 to his widow in lieu of dower and further directed that "all moneys then remaining in the hands of my executors shall be divided between the following funds," naming five different charities in connection with the Canada Presbyterian Church—such "money to be divided in whichever way my executors may think best":—Held, that the bequests to the charities were void under the Mortmain Acts; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator; costs of all parties to be paid out of the estate. *Re Trusts of John McDonald's Will*, 29 Chy. 241.—Proudfoot.

A will dated the 1st April, 1880, contained this clause:—"I will and desire that the residue of my real and personal estate, being the sum of \$2,800, more or less, shall be paid to the four Churches of England, in the townships of Orford and Howard, in four equal parts to each such churches as follows: to Trinity Church, Howard; St. John's Church, Morpeth; St. ——— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively; and in case of no debt, or there being a balance or residue after the payment of such debt or debts on each of such churches, respectively, then the residue (if any) is to be paid by my executors to the churchwardens of such church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the incumbent of said church as a portion of his salary or stipend." The testator died on the 10th of the same month. Upon a special case stated for the opinion of the court, it was shown that there was a large debt existing on the Morpeth church for money borrowed on mortgage wherewith to pay off the building debt. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation:—Held, (1) that the mortgage debt on the Morpeth church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void, under the statutes of Mortmain. (2) That as to the Clearville church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being performed in such a manner as excluded the creation of a lien on the land. (3) That the bequest for the benefit of the incumbent would have been void if the investment had been directed to be made upon realty; but as the trust might be carried out by investing in personality the bequest was valid if so invested. (4) That the amount to which the incumbent would be entitled was the residue after deducting the void bequests for debts. *Stewart v. Gemer*, 29 Chy. 329.—Proudfoot.

A testator, a minister of the United Presbyterian Church of North America, after bequeath-

ing \$1,000 to the said church, proceeded as follows: "I give for a Jewish Mission \$1,000 to that church which is sound and evangelical in doctrine and pure in worship, using the songs of praise, the inspired book which can unite all nations," etc. The evidence showed that this description applied to the said church:—Held, not void for uncertainty, for that the testator clearly intended the said church as the legatee. *Gillies v. McConochie*, 3 O. R. 203.—Proudfoot.

The testator then proceeded thus: "To the pious poor converted Jews that meet together for the reading of the scriptures for their instruction and mental edification I leave \$1,000":—Held, a good charitable bequest and not void for uncertainty. *Id.*

Lastly, the testator gave "the balance" of his estate "to the poor and destitute, to supply their wants in food and raiment":—Held, a valid bequest so far as the residue consisted of personality, and an inquiry was directed to guide the court in the application of the fund. *Id.*

A testator devised land to K., in trust to sell and pay the proceeds "to the Sisters of Charity of Hamilton, to be their property absolutely." There were also bequests to K. of money, to pay the same to the St. Mary's Hospital, an Orphan Asylum and a Convent. No evidence was given to show who the Sisters of Charity were. In an action to recover the land brought by the heirs-at-law of the testator:—Held, that a corporate capacity could not be imputed to the Sisters of Charity, in order to destroy the gift to them under the Statutes of Mortmain, and that the devise, might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity. *Walker v. Murray*, 5 O. R. 638.—Osler.

R. P. L., by his will directed his executors "by and out of the moneys which shall be received by them from the P. B. & M. Co., for or on account of the debt or sum of \$35,000, owing and secured by mortgage by that company to me at the time of my decease, and of the interest thereof which shall accrue after my decease, in the first place to pay the sum of \$1,500, part thereof to the Bishop for the time being of Algoma in Canada, to be invested by him in or upon any of the investments hereinafter authorized with power for the Bishop of Algoma aforesaid for the time being from time to time to vary and transpose the investments thereof at his discretion for any other or others of the kind prescribed and the income of such investment to be applied in and for the education and qualifying of John Eskimah an Algoma Indian at present of the Shingwauk Home, Sault Ste. Marie, Algoma aforesaid. (heretofore supported by me), as and for a missionary in the diocese of Algoma, aforesaid for and during, and until such time as the Bishop of the said diocese for the time being shall consider sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying to apply such income as aforesaid for ever thereafter from time to time in and for the education and qualifying of some other person to be nominated by such Bishop for the time being for a like purpose, and during such time as he shall think proper; but for which applications the trustees and executors shall not be responsible. And after payment of the aforesaid legacy I give

proceeded as mission \$1,000 to evangelical in the songs of I can unite all this church:—Held, that the testator as the legatee. 103.—Proudfoot.

thus: "To the meet together for their instruction \$1,000."—Held, a void for uncer-

balance" of his titute, to supply 11.—Held, a valid consisted of person- to guide the fund. *Id.*

K., in trust to sell Sisters of Charity property absolutely. of money, to pay hospital, an Orphan evidence was given charity were. In an ought by the heirs- id, that a corporate d to the Sisters of y the gift to them main, and that the is a gift to the indi- the testator's death, of Charity. *Walker* sler.

ected his executors which shall be re- B. & M. Co., for or m of \$35,000, owing by that company e, and of the interest after my decease, in sum of \$1,500, part time being of Algoma ly him in or upon any after authorized with oma aforesaid for the me to vary and trans- of at his discretion for ind prescribed and the e to be applied in and fying of John Eskinah ent of the Shingwauk e, Algoma aforesaid, me), as and for a mis- Algoma, aforesaid for time as the Bishop of ne being shall consider uch purpose, and upon of such education and income as aforesaid for to time in and for the of some other person to shop for the time being such time as he shall which applications the shall not be responsible. aforesaid legacy I give

and bequeath the following legacies to be paid out of the same fund or moneys, namely:—To the treasurer for the time being of the Algoma missions in British America the sum of \$1,500 of Canadian currency for the benefit of those missions. To the treasurer for the time being of the Huron missions in British America the sum of \$1,500 of the aforesaid currency for the benefit of those missions. And to the treasurer for the time being of the Ontario missions in British America, the sum of \$1,500 of the aforesaid currency for the benefit of those missions:—Held, that the bequest to the Bishop of Algoma for the benefit and education of John Eskinah and others was intended to set apart a fund which was to have perpetual continuance and in which no individual was to have a personal right, and following *Gillam v. Taylor*, L. R. 10 Eq. 584, such bequest was void:—Held, also, that the bequest to the treasurer for the Algoma missions was a charitable gift and must fail, because no person or body was empowered to hold it as against the Statute of Mortmain, 9 Geo. II. c. 56, inasmuch as there was no incorporation of Algoma for ecclesiastical or missionary purposes with such powers:—Held, also, that the bequests to the treasurers of the Huron and Ontario missions respectively were intended for the missions sustained by the incorporated synods of the dioceses of Huron and Ontario, and that by virtue of their Acts of Incorporation both those dioceses were enabled to hold lands, etc., in mortmain, and that such bequests therefore did not fail either for uncertainty or because they could not be held by the defendants the synods respectively. *Labatt v. Campbell*, 7 O. R. 250.—Boyd.

H. S., by his will, bequeathed certain pure and impure personality to the London City Mission, a charitable organization, and died in 1865. In 1866 A. S., his heiress and next of kin, sent a signed writing to the executor of the will, in which, after reciting that doubts might arise whether the impure personality passed to the executor in trust for the charity, she declared her acquiescence in what she said she knew had been the testator's intention, viz., that the whole of the personality, pure and impure, should be treated by the executor as so passing to him, and renounced her rights thereto, and requested the executor to treat it all as so passing. In May, 1870, A. S. made a will devising and bequeathing all real and personal property on certain trusts. In July, 1870, she informed the executor of H. S. that she had changed her intentions as to the matter referred to in the writing of 1866, above mentioned, and she forwarded another will, dated July, 1870, in which she bequeathed all the property she had as heiress and next of kin to H. S. to J. R., and appointed the same person her executor as was executor of the will of H. S. J. R. died before A. S. In 1869, and in March, 1870, A. S. had written letters to the secretary of the London City Mission, in which she had expressed her intention of carrying into effect the intentions of H. S., as expressed in his will. A. S. died in 1877, and probate of her first will of May, 1870, was granted to the executors named in it:—Held, that the impure personality could not pass by the will to the London City Mission, and the writing of 1866 and the letters to the London City Mission did not amount to such an assignment of it

as would pass it to the charity inasmuch as the requirements of the Mortmain Acts were not complied with: that a gift by will of property that failed to take effect by reason of the Mortmain Acts, could not be added or set up by the party entitled to the property by anything less than what would be required to constitute a good gift by such party of the same property to the party intended to be benefited by the gift in the will. There can be no marshalling of assets in favour of a charity. As to the two wills of A. S., the bequest to J. R. by the second will lapsed by reason of her death before that of H. S., and the subject of it fell into the estate of A. S., so as to pass under the former will. *Becher v. Hoare*, 8 O. R. 328.—Ferguson.

G. W. by his will bequeathed \$1,000 to "The Protestant Orphans' Home for Boys in Toronto." The evidence showed that there were two institutions, either of which might have been intended by the testator:—Held, that the legacy should be divided between them. *Williams v. Roy*, 9 O. R. 534.—Boyd.

G. W. bequeathed to "the Benevolent Institutions and Charities of Owen Sound, \$1,000, to be distributed as my executors shall deem meet":—Held, that the testator intended a bequest to the Municipal Corporation of Owen Sound, to be distributed as the executors should direct. *Id.*

J. M. died on August 9th, 1884, having made his will three days before, in which, after giving certain legacies, he provided at follows: "I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church for the purpose of building a college in Canada, and not elsewhere, and in his name." The Lutheran Church was not incorporated and held no lands, but was composed of a number of congregations in different parts of the province. The lands upon which the various churches belonging thereto were erected, were vested in trustees for the benefit of the congregations, and some of these lands were suitable as building sites for a college:—Held, that the devise of the reality and all personality savouring of the reality was void:—Held, also following *Giblett v. Hobson*, 3 Myl. & K. 517, that the bequest of the pure personality was also void; that a bequest of money or other personality to any charitable institution to build or erect buildings, taken by itself, is within the Statute of Mortmain; and that the onus of showing that the intention of a testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in mortmain must be indicated or the future acquisition of building land, otherwise than by means of the legacy, must plainly be contemplated, or the words of the will must expressly include the application of the money given in the acquisition of land, which was not done in this case. *Murray v. Malloy*, 10 O. R. 46.—Ferguson.

A testator made his will dated 2nd February, 1884, in which was contained the following devise: "To the congregation of Burns' Church \* \* I bequeath the sum of \$2,000 to be used by the trustees of the said church towards the



purpose of purchasing land for a globe in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees for ever." He added two codicils on 21st September, and 5th December, 1885, respectively, not varying the above bequest, but confirming his will, and died on the 27th of December, following:—Held (reversing the decision of Ferguson, J.), that the fact of the codicils having been executed within six months of the testator's death did not, in the absence of anything in them revoking the charitable gift, render it void under R. S. O. (1877) c. 216, or 38 Vict. c. 75 (Ont.) *Holmes v. Murray*, 13 O. R. 756.—Chy. D.

A testator devised all his estate, real and personal, to a trustee upon trust to convert the same into money, to hold upon trust to pay "to the treasurer for the time being of the Superannuated Fund of the Methodist Church, \$1,000;" and "to pay all the rest and residue unto the treasurer, for the time being, of the Trustee Board of the Brant Avenue Methodist Church, to be applied by them or their successors, in redeeming the debt existing against the church property".—Held, that the legacy to the Superannuated Fund of the Methodist Church was valid, for by 14 & 15 Vict. c. 142, the corporation was empowered to take land devised in any manner whatsoever in its favour; and that all the benefits of the statute were extended to the Methodist Church, by the statutes of Union, 47 Vict. c. 106 (Dom.); and 47 Vict. c. 88 (Ont.), so far as the Superannuated Preachers' Fund was concerned:—Held, however, that the residuary devise was invalid, for neither by 47 Vict. c. 88 (Ont.) nor by any other statute, was the new corporation "The Methodist Church," empowered to hold land for all purposes, including that for the endowment of particular churches, and the proper construction of section 6 of 47 Vict. c. 88 (Ont.), as amended by 51 Vict. c. 83, s. 2, was that the corporation of the Methodist Church should have the rights, privileges, and franchises conferred upon the Connexional Society, but only for the purposes and objects of the said Connexional Society:—Held, lastly, that the residuary benefit intended was invalid both as to realty and personality, because the direction was, as to money, that it should be applied in payment of incumbrances on the church property. *Smith v. Methodist Church*, 16 O. R. 199.—Boyd.

The Act of incorporation of the Toronto General Hospital provides that the trustees shall have the powers and rights of bodies corporate, and shall be capable of taking from any person by grant, devise, or otherwise, any lands, or interest in lands, etc., for the support and use of the hospital:—Held, following *Smith v. Methodist Church*, 16 O. R. 199, that the plain meaning of this provision is to capacitate any person to devise land to the hospital, and to qualify the hospital to receive and hold beneficially land so devised. It is the duty of the court where it finds legislation intended to legalize the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation. *Butland v. Gillespie*, 16 O. R. 486.—Boyd.

See *Ray v. Annual Conference of New Brunswick and Prince Edward Island*, 6 S. C. R. 308,

p. 2195; *McClenaghan v. Grey*, 4 O. R. 329, p. 228; *Toomey v. Tracey*, 4 O. R. 708, p. 2202.

(f) *Void as in Restraint of Parental Rights.*

See *Clarke v. Darrrough*, 5 O. R. 140, p. 2184.

(g) *Restraint on Alienation.*

A direction in a devise in fee simple that the devisee should "not sell, or cause to be sold, the above named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper":—Held a valid restraint upon alienation:—Held, also, that the giving of a mortgage by the devisee was not a violation of the restraint. *Smith v. Faught*, 45 Q. B. 484.—Q. B. D.

The testator directed that his wife should have the use and control of all his property real and personal until his two sons W. and H. should come of age or until the said property is disposed of as hereinafter mentioned. He devised to each of these sons one-half of his farm, to be possessed by them when respectively of the full age of twenty-one. He then gave to his five daughters certain pecuniary legacies to be paid by each of his said sons within specified periods after their possessing the property, and directed them to give his wife a comfortable support, or £10 each annually during her life; and the will then proceeded: "I also will and direct that my above named sons W. and H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered. After attaining twenty-one H. mortgaged his share without his mother's consent, to the defendants C. & M., who sold on default in the mortgage to the defendant O., who purchased as trustee for M., with full knowledge of the state of the title. Upon a bill filed by the heirs-at-law:—Held, affirming the decree of Blake, V.C. (27 Chy. 161), that the restriction upon alienation was valid, and was a condition, the breach of which worked a forfeiture, but that the heirs took the land in question charged with payment of the annuity and the legacies:—Held by Blake, V.C., that the mortgaging of the estate operated as a forfeiture, but as the question whether the mortgage was necessarily a breach of the condition was raised in the argument, but not in the answer, it was not decided in this court. *Earls v. McAlpine*, 6 A. R. 145.

'By his will P. T., after giving a life estate to his widow, devised lands to his son as follows: "That T. T. do inherit the same as his property on the conditions that he never will or shall make away with it by any means but keep it for his heirs."—Held, on an application under the Vendor and Purchasers' Act, that the condition attached to the devise was invalid, being an absolute and unqualified restraint on alienation, and that there being in the opinion of the court no doubt of the vendor's title, the purchaser should pay the costs of the proceedings. *Re Watson and Woods*, 14 O. R. 48.—Robertson.

Testator devised as follows: "I also will that that portion of the within-mentioned lands which

*Grey*, 4 O. R. 329, p. R. 708, p. 2202.

### Parental Rights.

*Wh*, 5 O. R. 140, p.

### Alienation.

in fee simple that the or cause to be sold, the art thereof, during her be at liberty to grant whom she shall think restraint upon alienation of a mortgage of the land. *Re Weller*, 16 O. R. 318.—*Armour*.

that his wife should have his property real and personal W. and H. should said property is disposed of. He devised to half of his farm, to be respectively of the full then gave to his five minority legacies to be paid within specified periods of his property, and directed comfortable support, or during her life; and the will so will and direct that V. and H. do not sell or property without the written during her life." The after attaining twenty-one without his mother's sons C. & M., who sold on to the defendant O., who R. M., with full knowledge. Upon a bill filed by the affirming the decree of (161), that the restriction was, and was a condition, worked a forfeiture, but land in question charged annuity and the legacies: — that the mortgaging of as a forfeiture, but as the mortgage was necessary the answer, it was not *Earls v. McAlpine*, 6 A.

after giving a life estate to his son as follows: that the same as his property at he never will or shall any means but keep it for an application under the Act, that the condition was invalid, being an absolute restraint on alienation, in the opinion of the court of the proceedings. *Re* 4 O. R. 48.—*Robertson*. follows: "I also will that him-mentioned lands which

I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them, either by sale, by mortgage, or otherwise, except by will to their lawful heirs":—Held, that the condition imposed by the will was invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restrictions above mentioned. *Heddestone v. Heddestone*, 15 O. R. 280.—*MacMahon*.

Certain lands were devised to a married woman with the proviso that she should not alienate or encumber them until her sister should arrive at the age of forty years; and also that the devise should be for her separate use, independent of her husband's control. She applied under R. S. O. (1887) c. 132, s. 8, for an order to bind her interest, for her own benefit, in these lands:—Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a feme sole. *Earls v. McAlpine*, 27 Chy. 104, 6 A. R. 145; *Pennymann v. McGregor*, 18 C. P. 132; *Smith v. Faught*, 45 Q. B. 484; *Re Winstanley*, 6 O. R. 315, followed in preference to *Re Rosher*, *Rosher v. Rosher*, 26 Ch. D. 801.—Held, also, that the restraint on alienation was not a restraint on anticipation, within the meaning of the statute. *Re Weller*, 16 O. R. 318.—*Armour*.

A testator by his will devised certain real estate to two of his nephews subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'S., in my own family; this condition is to attach to every purchaser of the said property"—Held, that the condition was valid. *Re Watson and Woods*, 14 O. R. 48, distinguished. *O'Sullivan v. Phelan*, 17 O. R. 730.—*Robertson*.

See *Givins v. Darvill*, 27 Chy. 502, p. 2087. *Re Winstanley*, 6 O. R. 315, p. 2206; *Peterborough Real Estate Investment Co. (Limited) v. Patterson*, 13 O. R. 142; 15 A. R. 751, p. 2176; *Re Northcote*, 18 O. R. 107, p. 2206; *Meyers v. Hamilton Provident and Loan Co.*, 19 O. R. 358, p. 2178.

### (h) Perpetuities.

Held, that the Act against accumulations, commonly called the *Thelluson Act*, 39-40 Geo. III. c. 9, which was passed after the Statute 32 Geo. III. c. 1, by which English law was introduced into Canada and which did not extend in terms to the colonies, is not in force in this province, where the law appears to be as it was in England before that statute. *Harrison v. Spencer*, 15 O. R. 692.—*Boyd*. See, however, 52 Vict. c. 10, s. 2 (Ont.).

See *Parkhurst v. Roy*, 7 A. R. 614, p. 2218; *Meyers v. Hamilton Provident and Loan Co.*, 19 O. R. 358, p. 2178.

### 18 Lapsed Devises or Bequests.

The testator bequeathed an amount of personal estate to his brother John, "to have and to hold to him, his heirs and assigns, for ever." John predeceased the testator:—Held, that the legacy

lapsed, and that the next of kin of the legatee were not entitled. *Mealey v. Atkins*, 27 Chy. 563.—*Sprague*.

H. made his will on 10th October, 1868, devising land to his son J., without words of limitation, and added a codicil on 23rd February, 1870, by which he confirmed the will save as changed by the codicil. J., the devisee, died 17th February, 1874, and H., the testator, died 16th December, 1879:—Held, that as the will was made and republished by the codicil prior to 1st January, 1874, the sections subsequent to section 7 of R. S. O. (1877) c. 106, and among them section 35 did not apply, and that under the former law the devise to J. lapsed. *Zunstein v. Hedrick*, 8 O. R. 338.—*Proudfoot*.

In one clause of his will, a testator devised certain lands to his son A. S. M. "as soon as he attains the age of twenty-one years, for and during the term of his natural life," and after the determination of that estate to the sons of the body of A. S. M. in tail male, as they should be in point of birth, and for want of such issue, then to the daughters of the body of A. S. M. and the heirs of the body of such daughters, which daughters and their issue were to take as tenants in common, and for default of such issue, the lands were to be divided among the testator's other sons, or the heirs of the respective bodies, who at the death of A. S. M. should be entitled to any part of the lands devised in tail in the will to hold to his respective other sons, and in default of such sons and of their issue at the death of A. S. M. then to the right heirs of A. S. M. for ever. A. S. M. predeceased the testator:—Held, that thereupon the devise to A. S. M. lapsed, the whole scope of the clause intending that A. S. M. should survive the testator. *Riddell v. McIntosh*, 9 O. R. 606.—*Boyd*.

R. B. by his will devised his property to executors upon trust as follows: "Fifthly, in trust to pay to each of my two surviving children F. B. and M. A. B. the sum of \$1,000," and the residue after the payment of his debts, etc., and the said legacies and an allowance to his executors, to his four sisters. F. B. and M. A. B. were illegitimate children, and M. A. B. married and died during the lifetime of the testator leaving children surviving. In a suit for administration and construction of the will it was:—Held, that the words "child or other issue" in R. S. O. (1877), c. 106, s. 25, mean legitimate child or other legitimate issue and do not apply to an illegitimate child, and that the legacy to M. A. B. lapsed. *Hargrave v. Keegan*, 10 O. R. 272.—*Ferguson*.

See *McGarry v. Thompson*, 29 Chy. 287, p. 2209; *Becher v. Hoare*, 8 O. R. 328, p. 2222; *Rudd v. Harper*, 16 O. R. 422, p. 2203.

### 19. Election.

#### (a) By Heir.

Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of the 26 Geo. II. c. 6, s. 1, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the will, *Munsie v. Lindsay*, 1 O. R. 164.—*Boyd*.

20. *Forfeiture of Devise or Bequest.*

Forfeiture of legacy by executor. See *Kennedy v. Pingle*, 27 Chy. 305, p. 711.

Where a testator provided by his will: "that the farm be kept till the youngest surviving child comes of age, at which time I would desire the property to be sold and the proceeds to be divided equally between all my children and my wife. \* \* My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." The farm referred to was the only real property possessed by the testator either at the time of making his will or at his death. One of the testator's children, though living on the farm at the time of the testator's death, afterwards left it, and went to reside elsewhere:—Held, per Ferguson, J., that the words "family now at home" were designatio personarum, and that the child in question did not forfeit her vested right to share in the rents by afterwards leaving the home. She afterwards died intestate, before the testator's youngest surviving child came of age:—Held, per Boyd, C., that her share of the rents devolved on her personal representatives. *Dawson v. Fraser*, 18 O. R. 496.—Chy. D.

See *Earls v. McAlpine*, 6 A. R. 145, p. 2224.

## VIII. REGISTRATION OF WILLS.

The widow kept possession of the will for eleven months after the death of the testator when, she burned it for the purpose of enabling her to borrow money on the property devised, and she subsequently sold her interest under the will,—an estate for life—and the only child professed to convey, as heir-at-law, to one R., who created a mortgage, under which the property was sold to D., a bona fide purchaser without notice, who afterwards agreed to sell to R. for the amount of his purchase money, interest and costs:—Held, that there was not any such inevitable difficulty as afforded a reason for the will not being registered within twelve months after the death of the testator, and that therefore D. was entitled to the protection of the registry laws (R. S. O. 1877, c. 111, s. 75), as against the infant devisees; but it appearing that R. had notice of the will when he purchased from the widow and heir-at-law, the court declared the infants entitled to redeem. *Re Davis*, 27 Chy. 199.—Proudfoot.

By the will the plaintiffs were to come into possession when they should become of the age of twenty-one years, not being less than twelve years from the date of the testator's death, and they were infants of tender years at the time when, after the death of H. O'N., the defendant A. O'N., their father and guardian, agreed with the other heirs-at-law for the purchase of their shares, on the assumption that H. O'N. had died intestate, and obtained conveyances from them. A. O'N. and the other heirs-at-law were at this time aware of the facts in regard to both the wills, and were also aware that, after probate of the will of the 23rd April had been refused, it was the opinion of the solicitor for the estate that the will of the 17th April was properly executed and that probate might be obtained:—Held, that the plaintiffs' rights were not defeated or pre-  
judiced by the agreement and conveyances referred to; nor were the plaintiffs' rights defeated by the registration of the conveyances to A. O'N. and his assignment and mortgage to C., for A. O'N. had actual notice and knowledge of the plaintiffs' rights; and that the plaintiffs, who were not guilty of any wilful neglect or default, were prevented from registering the will by "inevitable difficulty" or "impediment" within the meaning of R. S. O. (1877), c. 111, s. 75. The defendant O. was by a counter-claim asked for damages, being the value of a crop in the ground and deprivation of possession of the land for a year or more, but a reference to assess these damages was refused. The plaintiffs and the defendant O. were allowed costs out of the estate except that the defendant O. was ordered to pay the costs occasioned by charges made by him of fraud and collusion; no costs were allowed to or against the defendant A. O'N. *McLeod v. Truax*, 5 O. S. 405, specially observed upon. *O'Neill v. Owen*, 17 O. R. 525.—Ferguson.

IX. COSTS OF 'CONTESTING' AND CONSTRUING WILLS.

## IX. COSTS OF 'CONTESTING' AND CONSTRUING WILLS.

The rule is, that if there exist "sufficient and reasonable ground, looking at the knowledge and means of knowledge of the opposing party, to question either the execution of a will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of the successful party." This rule was acted upon, and the plaintiff relieved from costs in a case where the plaintiff had seen the deceased the day after the will was executed, and found him very low and unable to speak intelligibly, and where the testator had to several persons spoken approvingly of the conduct of the plaintiff, a son of a deceased brother, and had expressed himself in such a manner as induced the plaintiff and others to believe that he would become a beneficiary under his uncle's will, in which his name was not mentioned, and which had been prepared at the house of the widow of another brother of the testator, where he had for some time been residing, and was taken ill and died, although at the hearing the plaintiff's case entirely failed in proof. *Macanlay v. Kemp*, 27 Chy. 442.—Spragge.

The court ordered that the costs in this case should be paid by the respondents (executors and trustees of the will) out of the general residue of the estate of the deceased, but if the said residue should have been distributed then the said costs should be contributed by the persons who should have received portions of the said residue ratably according to the amounts of the respective sums received by them. *Fisher v. Anderson*, 4 S. C. R. 406, 429.

Held, that although testamentary expenses, which include the costs of a suit for construction and administration, are usually payable out of the general personal estate, yet here the provision that the testamentary expenses were to be paid out of the first money which should come into his executors' hands, shewed the testator contemplated the payment of such expenses out of a mixed fund of pure and impure personalty derived from the conversion of his real estate; and there being nothing else in



## WITNESS.

- I. IN ARBITRATION—See ARBITRATION AND AWARD.
- II. IN CIVIL ACTIONS—See EVIDENCE.
- III. IN CRIMINAL MATTERS—See CRIMINAL LAW.
- IV. WITNESS FEES—See COSTS.
- V. TO WILLS—See WILL.

Costs of witnesses who have appeared before arbitrators to give evidence as to the value of land taken by a railway. See *Re McRae and the Ontario and Quebec R. W. Co.*, 12 P. R. 282, p. 1767.

## WORDS AND TERMS.

- I. IN WILLS—See WILLS.
- II. LEGAL MAXIMS—See MAXIMS.

"According to the present practice of the Court of Chancery."—See *Barker v. Furze*, 9 P. R. 83.

"According to the very right and justice of the case."—See *Peterkin v. MacFarlane*, 9 A. R. 429, p. 414.

"Acquired in any other way."—See *Dominion Loan and Investment Company v. Kilroy*, 14 O. R. 468.

"Actual first cost."—See *Black v. Toronto Upholstering Co.*, 15 O. R. 642.

"Actual, visible and continued possession of the bailees."—See *Re Monteith—Merchants' Bank v. Monteith*, 10 O. R. 529, p. 144.

"Adjoining municipality."—See *Re Gallerno and Township of Rochester*, 46 Q. B. 279, p. 1353.

"Adjuncts of the canal."—See *McQueen v. The Queen*, 16 S. C. R. 1, p. 1850.

"Adult."—See *Warnock v. Prieur*, 12 P. R. 264, p. 1320.

"Advances."—See *Goulding v. Deeming*, 15 O. R. 201, p. 810.

"Adverse claim."—See *O'Grady v. McCaffray*, 2 O. R. 309, p. 467.

"Against all casualties."—See *Dixon v. Riche-lieu Navigation Co.*, 15 A. R. 647, p. 213.

"Agent for the sale of crown lands."—See *Srigley v. Taylor*, 6 O. R. 108, p. 1437.

"Agents for persons not resident within the district."—See *Regina v. Marshall*, 12 O. R. 55, p. 1368.

"All costs incidental to the arbitration."—See *Re Bronson and Canada Atlantic R. W. Co.*, 13 P. R. 440, pp. 353, 1963.

"All days except Sunday."—See *Attorney-General ex rel. Hobbs v. Niagara Falls, Wesley Park and Clifton Tramway Co.*, 19 O. R. 624, p. 1988.

"All judges, etc., of the county court."—See *In re Parker*, 19 O. R. 612, p. 741.

"All judgments and all executions not completely executed by payment."—See *Abraham v. Abraham*, 19 O. R. 256, p. 108.

"All necessary accommodation."—See *Bickford v. Chatham*, 16 S. C. R. 235, p. 1811.

"All parties concerned."—See *Trustees for School Section 24 of the Township of Burford v. The Township of Burford*, 18 O. R. 546, p. 1728.

"Allow an appeal."—See *Vaughan v. Richardson*, 17 S. C. R. 703, p. 2006.

"Assignment for the general benefit of creditors under this Act."—See *Anderson v. Glass*, 16 O. R. 592, p. 101.

"Any person."—See *Chaput v. Robert*, 14 A. 354, p. 1547.

"Anything done under this Act."—See *Grant v. Culbard*, 19 O. R. 20, p. 930.

"Appeal brought."—See *Regina v. McGauley*, 12 P. R. 259, p. 901.

"Appeal commenced."—See *Regina v. McGauley*, 12 P. R. 259, p. 30.

"Apply at chambers."—See *In re Selby*, 8 P. R. 342, p. 1568.

"Approaches."—See *Traversy v. Gloucester*, 15 O. R. 214, p. 2138.

"Assets in Ontario which may be rendered liable to the judgment."—See *Purves v. Slater*, 11 P. R. 507.

"Assigns."—See *VanKoughnet v. Denison*, 1 O. R. 349, 11 A. R. 699, p. 421.

"Assumed to purchase."—See *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 428, p. 1629.

"At least eight days before the sittings at which the action is to be tried."—See *Bunbury v. Manufacturers' Ins. Co.*, 13 P. R. 52, p. 2044.

"Attested."—See *In re Weir*, 14 O. R. 389, p. 744.

"Authenticated."—See *In re Weir*, 14 O. R. 389, p. 744.

"Banking and incorporation of banks."—See *Regina v. County of Wellington*, 17 A. R. 421, p. 66.

"Bankruptcy and insolvency."—See *Regina v. County of Wellington*, 17 A. R. 421, p. 66; *Clarkson v. Ontario Bank*, 15 A. R. 191.

"Be the same more or less."—See *Nelles v. White*, 29 Chy. 338, p. 79.

"Being within the jurisdiction of such justice."—See *Regina v. Bachelor*, 15 O. R. 641, p. 1033.

"Brick houses."—See *Stevenson v. McHenry*, 16 O. R. 139, p. 210.

"Bridges over rivers."—See *North Dorchester v. County of Middlesex*, 16 O. R. 658, p. 2139.

"Broader and more comprehensive claims."—See *Withrow v. Malcolm*, 6 O. R. 12, p. 1583.

"Building."—See *Mitchell v. City of London Fire Ins. Co. (Limited)*, 12 O. R. 706, p. 209; *Carr v. Life Assurance Association*, 14 O. R. 487.



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"Business of the defendant."—See *Marshall v. McKee*, 16 O. R. 495, p. 1240.

"By reason of the railway."—See *McArthur v. Northern and Pacific R. W. Co.*, 15 O. R. 733, p. 1743; *May v. Ontario and Quebec R. W. Co.*; 10 O. R. 70, p. 1801; *Conger v. Grand Trunk R. W. Co.*, 13 O. R. 160, p. 1801.

"By way of gaming or wagering."—See *North American Life Assurance Co. v. Craigen*, 13 S. C. R. 278, p. 993.

"Canadian policy."—See *Re Briton Medical and General Life Association (Limited)* (2), 12 O. R. 441, p. 1006.

"Carrying goods for sale."—See *Regina v. Coutts*, 5 O. R. 644, p. 1106.

"Child or other issue" in R. S. O. (1877) c. 106 s. 25, means legitimate child or other legitimate issue.—See *Hargrave v. Keegan*, 10 O. R. 272, p. 2226.

"Children."—See *Paradis v. Campbell*, 6 O. R. 632, p. 2162.

"Claimants."—See *Standard Ins. Co. v. Hughes*, 11 P. R. 220, p. 1017.

"Coercion."—See *Sheard v. Laird*, 15 A. R. 339.

"Colour of right."—See *Bartlett v. Thompson*, 16 O. R. 716, p. 1154; *Price v. Guinane*, 16 O. R. 264, p. 397.

"Commercial Insolvency."—See *Rae v. McDonald*, 13 O. R. 352; *Clarkson v. Sterling*, 14 O. R. 460.

"Commissioner in B. R., etc."—See *Scott v. Mitchell*, 8 P. R. 518, p. 19; *Hamilton v. Harrison*, 46 Q. B. 127, p. 19.

"Common and notorious report."—See *Regina v. Richardson*, 8 O. R. 651, p. 1638.

"Community property."—See *Hughes v. Rees*, 5 O. R. 654, p. 1012.

"Completely executed by payment."—See *Clarkson v. Severs*, 17 O. R. 592, p. 108.

"Condition of re-entry."—See *In re Melville*, 11 O. R. 626, p. 492.

"Conditional limitation."—See *In re Melville*, 11 O. R. 626, p. 492.

"Construction."—See *Ontario and Sault St. Marie R. W. Co. v. Canadian Pacific R. W. Co.*, 14 O. R. 432.

"Containing by admeasurement sixty acres be the same more or less."—See *Brady v. Sadler*, 16 O. R. 49, 17 A. R. 365, p. 489.

"Contract."—See *Smith v. Harrington*, 29 Chy. 502, p. 123.

"Contractor."—See *Petrie v. Hunter*, 2 O. R. 233, p. 2244.

"Contrary intention."—See *Morrison v. Morrison*, 10 O. R. 303.

"Contributory."—See *Re Macdonald, and The Noxos Manufacturing Co.* 16 O. R. 368, p. 286; *In re Central Bank of Canada and Winding up Act—York's Case*, 15 O. R. 625, p. 288.

"Corrupt practices."—See *North Victoria Election (Dom.)—Cameron v. MacLennan*, H. E. C. 584, p. 1458.

"Corruptly."—See *Halton Election, (Dom.)—Cross v. McCraney*, H. E. C. 736, p. 1458.

"Cost of repairs."—See *Gerow v. British American Ass. Co.*, 16 S. C. R. 524, p. 989.

"Costs."—See *Re Bronson and Canada Atlantic R. W. Co.* 13 P. R. 440, p. 353.

"Costs of suit as between solicitor and client."—See *Re Monteith—Merchants' Bank v. Monteith*, 11 P. R. 361, p. 33.

"Costs of the day."—See *Hogg v. Crabbe*, 12 P. R. 14, p. 384.

"Costs of the execution."—See *Levy v. Davies*, 12 P. R. 93, p. 706.

"Costs to abide the event."—See *Andrews v. City of London*, 12 P. R. 44, p. 372.

"County."—See *Regina v. Shavelear*, 11 O. R. 727, p. 1029.

"Court."—See *Wellbanks v. Conger*, 12 P. R. 354, p. 8.

"Courts."—See *Re Clute v. Williams*, 13 P. R. 110, p. 1950.

"Currency."—See *Wallace v. Souther*, 16 S. C. R. 717, p. 155.

"Damage by reason of the railway."—See *North Shore R. W. Co. v. McWille*, 17 S. C. R. 511, p. 1789; *McArthur v. Northern and Pacific Junction R. W. Co.*, 15 O. R. 733, p. 1743; *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70, p. 1801; *Conger v. Grand Trunk R. W. Co.*, 13 O. R. 160, p. 1801.

"Dangers of navigation, fire and collision excepted."—See *Canadian Locomotive Co. v. Cope-land*, 14 O. R. 170; 16 A. R. 322, p. 1929.

"Days" in computing demurrage.—See *Gibson v. Michael's Bay Lumber Co. (Limited)*, 7 O. R. 746, p. 2023.

"Debt."—See *Walton v. Henry*, 18 O. R. 620, pp. 528, 1914.

"Decision."—See *Danjou v. Marquis*, 3 S. C. R. 251, p. 689.

"Defendant is not entitled to dower."—See *Banks v. Bellamy*, 27 Chy. 342, p. 1629.

"Demise."—See *Spears v. Miller*, 32 C. P. 661, p. 587.

"Depositing with."—See *Re Simmons and Dalton*, 12 O. R. 505, p. 1429.

"Deviation."—See *County of Victoria v. County of Peterborough*, 15 A. R. 617, p. 2139.

"Devolve."—See *In re Booth's Trusts*, 16 O. R. 429, p. 912.

"Dissolution by mutual consent."—See *O'Keefe v. Curran*, 17 S. C. R. 596, p. 1546.

"Domiciled nor ordinarily resident in Ontario."—See *Wanzer Lamp Co. v. Woods*, 13 P. R. 511, p. 557.

"Dry goods."—See *Regina v. Bassett*, 12 O. R. 51, p. 1368.

- "Due."—See *Goldie v. Johns*, 16 A. R. 129, p. 135.
- "Due enquiry."—See *Hands v. Law Society of Upper Canada*, 17 A. R. 41, p. 1160.
- "Effect of the mortgage."—See *Gibbons v. Wilson*, 17 O. R. 290.
- "Effectually prosecute."—See *Hughes v. Boyle*, 5 O. R. 395, p. 413; *International Bridge Co. v. Canada Southern R. W. Co.*, 9 P. R. 250, p. 1712.
- "Either in contract or in tort or otherwise."—See *Spahr v. Bean*, 18 O. R. 70, p. 494.
- "Either party."—See *McLean v. Thompson*, 9 P. R. 553, p. 2038.
- "Either personally or at his domicile."—See *Haldimand Election (Dom.)—Walsh v. Montague*, 1 E. C. 480.
- "Electors."—See *Re Craft and the Town of Peterborough*, 17 O. R. 522.
- "Employee."—See *Re Macfie v. Hutchison*, 12 P. R. 167, p. 1717; *Gowans v. Barnett*, 12 P. R. 330, p. 60.
- "Employment."—See *West Peterborough Election (Ont.)—Scott v. Cox*, H. E. C. 274, p. 1458.
- "Entrusted with the possession of goods."—See *Bush v. Fry*, 15 O. R. 122, p. 745.
- "Equitable grounds."—See *Merchants' Bank v. Robinson*, 8 P. R. 117, p. 1627.
- "Error or miscalculation."—See *Claxton v. Shibley*, 10 O. R. 295, p. 81.
- "Establish."—See *Township of Nottawasaga v. Hamilton and North Western R. W. Co.*, 16 A. R. 52, p. 1813.
- "Execution creditors."—See *Macfie v. Hunter*, 9 P. R. 149, p. 545.
- "Existing or accruing rights are preserved."—See *Card v. Cooley*, 6 O. R. 229, p. 104.
- "Family arrangements."—See *Buld v. Kingston*, 16 O. R. 341; 18 A. R. 63, p. 4.
- "Fieri Facias."—See *Macfie v. Hunter*, 9 P. R. 149, p. 544.
- "For the use of the corporation."—See *Jones v. Town of Port Arthur*, 16 O. R. 474, p. 1373.
- "Forthwith."—See *Maxwell v. Scurje*, 18 O. R. 529, pp. 708, 2022.
- "Fraudulent device."—See *East Northumberland Election (Ont.)—Casey v. Ferris*, H. E. C. 387, p. 1479.
- "Free grant territory."—See *Shairp v. Lakefield Lumber Co.*, 17 A. R. 322, p. 464.
- "From and after."—See *In re McAlpine and Township of Euphemis*, 45 Q. B. 199, p. 1724.
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#### 2. Subject to Certificate or Decision of Third Party, 2248.

#### 3. Recission for Abandonment of Contract before Completion, 2251.

#### 4. Promise of Legacy—See *WILL*.

### VII. MASTER AND EMPLOYEE—See *MASTER AND SERVANT*.

### VIII. LIEN—See *LIEN*.

### IX. WORK PERFORMED FOR THE CROWN—See *PETITION OF RIGHT*.

### I. PARTY DOING THE WORK.

Where a contractor for the building of a house made default in carrying on the work, and, in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed verbally with a sub-contractor who had been employed by the contractor, that if the sub-contractor would go on and finish the work he, the owner, would pay him:—Held that the sub-contractor was entitled to a lien for all work done under such agreement as a "contractor," and as to such work he was no longer in the position of a sub-contractor:—Held, also, that the sub-contractor acting under such an agreement, was not bound by clauses contained in the original contract with the dismissed contractor, providing for forfeiture, etc. *Petrie v. Hunter*; *Guest v. Hunter*, 2 O. R. 233.—*Boyd*. See *S. C.*, 10 A. R. 127.

### II. WHO ENTITLED TO SUE.

*Per Proudfoot*, J. A son working at home upon his father's place would not be entitled to recover for work and labour in the absence of an agreement to that effect. *Campbell v. McKerricher*, 6 O. R. 85.

See *McDonald v. Oliver*, 3 O. R. 310, p. 331; *Regina v. Smith*, 10 S. C. R. 1, p. 341.

### III. CONTRACT.

#### 1. Subject to Conditions.

Plaintiff entered into an agreement in writing with defendants to do certain work under a provisional by-law, and which agreement contained this clause: "Notwithstanding anything hereinbefore contained to the contrary, this agreement \* \* is made subject to the final passing of the said by-law \* \* and in the event of the said by-law not being passed \* \* then this agreement shall be null and void \* \* ." The by-law was never finally passed, and the agreement was produced at the trial by defendants to prevent the plaintiff recovering as on a quantum meruit:—Held (reversing *Ferguson, J.*, who retained his opinion), that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a mandamus to the defendants to raise the money. The stipulation as to the final passing of the by-law should receive a reasonable construction and

could only be invoked when the work was not properly performed. *Quaintance v. Township of Howard*, 18 O. R. 95.—Chy. D.

## 2. Performance Prevented.

S. & Co., contractors for the erection of a building, for the respondent in the city of St. John. N. B., brought an action claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed (under authority of an Act of the General Assembly of New Brunswick, 41 Vict. c. 7) two days after the contract was signed. On the trial of the action the plaintiffs were nonsuited, and an application to the Supreme Court of New Brunswick to set such nonsuit aside was refused:—Held, Henry, J., dissenting, that the by-law of the city of St. John made the said contract illegal, and therefore, the plaintiffs could not recover. *Walker v. McMillan*, 6 S.C. R. 241, followed. Per Henry, J.—That the erection of the building would not, so far as the evidence showed, be a violation of the by-law, and, therefore, the nonsuit should be set aside and a new trial ordered. *Spears v. Walker*, 10 S. C. R. 113.

Where an executory contract is entered into respecting property or goods, if the subject-matter be destroyed by the act of God or vis major, over which neither party had any control, and without either party's default, the parties are relieved. *McKenna v. McNamee*, 14 A. R. 339; 15 S. C. R. 311.

## 3. Extras.

A by-law, founded on the usual petition, was passed by defendants for the drainage of certain lands in the township, and a contract therefor under defendants' corporate seal, entered into with plaintiff for the construction of the drain. The depths required were marked on the profiles forming part of the contract. Between certain points, where the deepest excavation was required, the drain was to be tiled and covered. After the plaintiff had proceeded some distance between these points, the defendants' engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given, and that the drain was not deep enough between the said points, and he directed the drains to be deepened and the tiles, so far as laid, to be taken up and relaid at the increased depth, thereby occasioning to the plaintiff considerable work beyond that provided for by the contract. By amendments to the Municipal Acts, councils, in the case of drainage works, are authorized to make an assessment upon the property of those benefited when the means provided are not sufficient; and any damages recovered in proceedings respecting such works are to be charged against the lands benefited. It was proved that the work done was absolutely necessary, for without it the drain would have been useless. No formal resolution of the council was passed authorizing this work to be done, nor was there

any contract therefor under the corporate seal. In an action against defendants to recover the value of such work:—Held, that the defendants were liable therefor. *Green v. Township of Virton*, 15 O. R. 506.—C.P.D., S.C., reversed, 16 A.R. 4.

In actions against the Crown.—See PETITION OF RIGHT.

## 4. Liability for Material Supplied.

One M., by a written contract, agreed with the defendant for the erection of a dwelling-house in two months from date, and if M. neglected to build the house defendant was to be at liberty to purchase material and employ workmen to finish it, and deduct the cost of the material, etc., out of the price. The plaintiff agreed to supply M. with lumber to be used in the building, and M., after a portion of the lumber had been placed in the building, gave plaintiff an order on defendant for the sum of \$341.46, expressed to be "for lumber used in your house one month after the building is finished," which the defendant accepted. M. failed to complete the building, and the defendant employed a third party to do so in accordance with the terms of the agreement:—Held, per Hogarty, C. J. O., and Morrison, J. A. (affirming the judgment of the County Court), that the defendant was liable to pay the plaintiff, notwithstanding M. did not complete the building. Per Burton, J. A. The defendant was entitled to deduct whatever was properly expended in completing the building under the contract, and the balance only remaining in his hands would be applicable to the payment of the order, but this balance according to the evidence was sufficient. *Garner v. Hayes*, 10 A. R. 24.

## IV. PERFORMANCE OF WORK.

### 1. Proper Performance.

P. was a contractor with the government of Canada for building a postoffice and K. was sub-contractor to do the mason and brickwork for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and acceptance by K. P. being dissatisfied with the work done by K. took the contract out of his hands before it was completed and finished it himself. K. then brought an action for the value of the work done by him and on reference by the court to arbitration an award was made in K.'s favour. The Court of Appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that though the contract did not authorize P. to take over the work and finish it at K.'s expense, and the latter was therefore entitled to recover on the quantum meruit, yet the cost of completing the work was considerably in excess of the contract price:—Held, reversing the judgment of the Court of Appeal, that as it appeared from the evidence that the arbitrator fully understood the matter and got all the information that could be obtained on the subject, and as no impropriety or mistake was shown to have been committed by him, no benefit could result from sending the award back for reconsideration, and the decree of the Court of Appeal was not justified. *Kennedy v. Pigott*, 13 S. C. R. 609.

### 2. Completion.

L. sued N. et al. to recover from them under specially endorsed writ, the balance of account due under and in pursuance of an agreement under seal providing that "L. was to run according to his best art and skill a tunnel of 200 feet for the sum of \$4 per running foot; that \$150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." L. made five tunnels, none of which were 200 feet, but claimed he had done in all 204 feet. In addition to the count on the agreement the plaintiff inserted in his declaration the common counts for work and labour:—Held, that there was not a sufficient fulfilment of the agreement, and inasmuch as L. had given no particulars nor any evidence under the indebtedness counts, the rule absolute of the court below, ordering judgment to be entered for the defendants, should be affirmed and the appeal dismissed with costs. *Lakin v. Nattall*, 3 S. C. R. 685.

### 3. Penalty for Non-Performance.

The plaintiff agreed to complete and set up by a certain day a steam engine and machinery in defendant's mill in which he had previously been using water power, but failed to complete it for some time afterwards. The master at Owen Sound, in estimating defendant's damages, allowed him, for loss of profits, in addition to rental of the mill and interest on the value of the machinery and of logs waiting to be sawed, \$118. On appeal from his report, Proudfoot, J., made an order declaring "that the true measure of damages the defendant is entitled to claim is the amount which would have been earned by the mill in the ordinary course of employment," and referred it back to the master to review his report. On appeal therefrom to this court the judgment was reversed; the court being of opinion that the master had been sufficiently liberal in his allowance of damages to the defendant for breach of the contract; and that had any greater amount of damages been given it could have been allowed as speculative damages only. The right to recover for loss of profits discussed. *Corbet v. Johnson*, 10 A. R. 564.

See *Chatterton v. Crothers*, 9 O. R. 683, p. 1572.

### V. ACCEPTANCE OF WORK.

The defendants passed a by-law, approved of by the ratepayers, reciting that there was "an urgent necessity for a building to be used by the municipal corporation as a lock-up, fire hall, council chamber, and public hall," for the purpose of acquiring the land and erecting such a building at a cost of \$4,500, for the raising of which sum, provision was therein made. B.'s tender for carpenter work, etc. (including a shingle roof) was accepted, but at a special meeting of the council at which only three of the councillors with B. and L. the plaintiff, were present, an arrangement was made by which B. threw off \$4 a square, and was relieved of the roof part of his contract, and L. agreed to put on a metallic roof of \$6 a square, and it was resolved by the council that "the iron shingles instead of wooden shingles to be put on the roof of the new town hall." All this was done sub-

ject to the approval of the reeve who was not present, but who afterwards approved of it, and at whose instance L. ordered the material and did the work. L. received a payment on account, but on the discovery of some defects in B.'s work, the defendants refused, although they had taken possession of the building, to pay the balance, on the ground that the roof was not properly done, and that L. was a sub-contractor under B., and that there was no contract under seal with him:—Held (affirming the judgment of O'Connor, J.), that the legal effect of this was to consummate a tripartite agreement, by which B. was to give up part of his contract, and L. was to do the work for a specified price; that between the plaintiff L., the defendants and B. there was a novation of contract so far as the roof was concerned, and as to that L. became the principal and only contractor:—Held, also, that the taking possession, payment on account, etc., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract, or a case "of an actual and de facto performance of the contract by one party of which the other party has taken, received and enjoyed the benefit." The Mayor, etc., of Kidderminster v. Hardwick, L. R. 9 Ex. 18, cited; Munro v. Butt, 8 E. & B. 738, distinguished. A municipal corporation is liable on an executed contract for work done by its order, on its behalf and for its benefit, though there be no agreement under seal, if the thing done were urgently required for the purposes of the corporation, and especially so where the price to be paid is not of large amount: *Robins v. Brockton*, 7 O. R. 481, referred to. *Lawrence v. Village of Lucknow*, 13 O. R. 421.—Chy. D.

### VI. REMUNERATION.

#### 1. Implied.

The defendant agreed with the plaintiffs to sink an artesian well at seventy-five cents a foot. After sinking a distance of 160 feet, he met with an impediment, and refused to proceed further:—Held, reversing the decision of the County Court, that he was entitled to be paid for the work done, as the evidence did not shew an agreement that he should receive nothing unless he succeeded in finding water. Quare, whether evidence as to how contracts for artesian wells were usually made in Barrie should have been received. *Barrie Gas Co. v. Sullivan*, 5 A. R. 110.

#### 2. Subject to Certificate or Decision of Third Person.

By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forgo all right to compensation except under the agreement. One E. was to inspect and value the work already done on the building, and if not according to plans and specifications, L. was to rectify the same at his own expense. E. was to value the building in its present condition, and his award was to be final, and to be the sole amount due to L. to date; he was also to inspect and value the building material on the ground, which was to be paid for at the original cost:

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Held, that the effect of the agreement was, that a price to be fixed by E. was to be paid for L.'s works, that E. was not an arbitrator; and that the agreement could not be made a rule of court as a submission to arbitration. *In re Langman and Martin*, 40 Q. B. 569.—Oster.

Held, that the nonproduction of an architect's certificate approving of the work done, though required by the contract with the dismissed contractor, as a condition precedent to payment, did not preclude the sub-contractor from recovering under the verbal agreement, provided the work was so done as to morally entitle him to such certificate, following *Lewis v. Hoare*, 44 L. T. N. S. 66. *Petrie v. Hunter, Guest v. Hunter*, 2 O. R. 233.—Boyd.

The plaintiffs entered into a contract with the defendant to construct a cedar block roadway, etc., according to plans and specifications, and to the direction and satisfaction of the city engineer, etc. Payment was to be made monthly at the rates mentioned in the tender, during the progress of the work, upon the engineer's certificate and that of the chairman of the committee, and until the granting thereof no money was to become due or payable. A drawback of fifteen per cent. was to be retained by the corporation until after six months from the time of the final certificate, shewing the satisfactory completion of the work. By the by-law no contractor could demand payment until he should present to the treasurer a certificate from the engineer, etc., stating he had examined, measured and computed the work, and that the same was completed, or that the payment was due on such work, and also stating what the work was on which such money was due; also that every account before being paid should be certified by the engineer, and by the committee under whose authority the work was done; and the treasurer should not pay such accounts unless furnished with the two certificates.—Held, that the required certificate must be in writing. By the conditions found with the specifications the engineer was the sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor: that monthly payments up to eighty-five per cent. of the work done should be made, etc., on the measurement of the engineer, such certificates to be binding only as progress certificates, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up, and at the expiration of six months when a certificate for the balance should be issued by the engineer. Part of the work required to be done by the plaintiffs was the raising and removing of the street railway ties, etc., and replacing same after the grading and ballasting had been completed. The plaintiffs did not replace the ties, etc., as the street railway company elected to do the work themselves, but the plaintiffs sent in their accounts charging therefor as if they had done the work. As to a portion of the work there was no certificate by the engineer that the work was done or that the price was payable therefor; and as to the other portion the acting engineer wrote under the account sent in "allowed one-third of above \$521.66;" and then under this was written "certified for the sum of \$521.66." On the back of the account the

engineer subsequently certified that he had examined the account, and that plaintiffs were entitled to recover the sum of \$521.66, which was paid to the plaintiffs. Under this certificate the plaintiffs claimed that they were entitled to recover for the whole work done, as this was the effect of the certificate:—Held, that as to the first-named portion there could be no recovery by reason of the absence of a certificate; and as to the other portion the certificate did not show that the work was done to the engineer's satisfaction or was completed, or that the payment demanded was due; but at most that one-third of the work was done, which had been paid for; and therefore nothing was shewn to be due to the plaintiffs. *Ardagh v. City of Toronto*, 12 O. R. 236.—C. P. D.

The plaintiff entered into a contract with defendants for the construction of certain main sewers. The contract provided that the work and material should in all things be performed and provided according to the plans and specifications, by a named date, and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should, on the first day of each month, hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of eighty-five per cent. of work done during the previous month; an additional ten per cent. when the work was finished, and the balance of five per cent. at the expiration of three months from the date of the completion of the contract, etc. No final certificate was obtained from the engineer of the completion of the work; nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract:—Held, that the certificate of the engineer as to the completion of the work was a condition precedent to the right to recover, and therefore the plaintiff must fail. *Robinson v. Town of Queen's Sound*, 16 O. R. 121.—C. P. D.

S. et al. made a contract with Her Majesty the Queen, represented by the Minister of Public Works, for the construction of a bridge for a lump sum. After the completion of the bridge a final estimate was given by the chief engineer, and payment thereof made, but S. et al. preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, and caused by changes and alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of the claimants, a new contract between the parties:—Held, reversing the judgment of Henry, J. in the exchequer, Fournier, J. dissenting, that the engineer could not make a new contract binding on the Crown; that the claim came within the original contract and the provisions thereof which made the certificate of the engineer a condition precedent to recovery, and such certificate not having been obtained, the claim must be dismissed. The Crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed. *Regina v. Starrs*, 17 S. C. R. 118.

See *Forhan v. Lalonde*, 27 Cby. 600, p. 1166; *Berlinguet v. The Queen*, 13 S. C. R. 26, p. 1579.

3. *Rescission or Abandonment of Contract before Completion.*

The defendant had agreed with the plaintiffs for the erection by them of a house on his land; and while engaged in such work the plaintiffs alleged unnecessary delays in their operations caused, as they said, by the neglect of the defendant in supplying material for the building and in the course of a discussion the defendant told the plaintiff "If you won't go on with your work, go away."—Held, that this did not amount to a rescinding of the agreement, and that plaintiffs were not warranted in treating the agreement as abandoned by the defendant, who was entitled to counter-claim against the plaintiffs for the increased cost to him of finishing the building. *Midland R. W. Co. v. Ontario Rolling Mills Co.*, 10 A. R. 677, followed. Decision of Galt, J., 14 O. R. 608, reversed. *Clayton v. McConnell*, 15 A. R. 560.

**WORKMEN'S COMPENSATION FOR INJURIES ACT.**

*See* MASTER AND SERVANT.

**WOUNDING.**

*See* CRIMINAL LAW.

**WRITINGS.**

*See* EVIDENCE.

**WRIT OF ARREST.**

A writ of arrest will not be granted against the purchaser in a suit for specific performance, unless it be shewn by affidavit that the vendor's lien is insufficient. *Nelson v. Dafoc*, 8 P. R. 332.—Proudfoot.

Where the plaintiff in an alimony suit obtains a writ of arrest, and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into court, to be applied from time to time in payment of the alimony and costs: and—Semble, that upon such payment the sureties are entitled to be discharged from their bond. *Needham v. Needham*, 29 Chy. 117.—Boyd.

Where, under a writ of arrest a caption takes place, the sheriff is entitled to a bond for double the amount marked upon the writ. *Ib.*

**WRITS.**

- I. OF ARREST—*See* WRIT OF ARREST.
- II. OF CAPIAS—*See* ARREST.
- III. OF EXECUTION—*See* EXECUTION.
- IV. OF SUMMONS—*See* EJECTMENT—PRACTICE.

**WRONGFUL DISMISSAL.**

*See* MASTER AND SERVANT.

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OF ARREST.

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# APPENDIX

CONTAINING A DIGEST OF CASES REPORTED IN VOLS. I TO IV OF CART-  
WRIGHT'S CASES ON THE BRITISH NORTH AMERICA ACT, 1867.

COMPILED BY JOHN R. CARTWRIGHT, ESQ.

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See PROVINCIAL LEGISLATURES, 3.		Quebec have met; and the arbitrator	
ADMINISTRATION OF JUS-		chosen by the Government of Canada	
TICE—Jurors . . . . . ii.	644, 653, n.	shall not be a resident either in Ontario	
See CRIMINAL LAW, 9, 10.		or Quebec: <i>Held</i> , that no appoint-	
Appointment of Magistrates. . . .		ment once made under this provision	
See JUSTICES OF THE PEACE.		could afterwards be revoked by the	
ALGOMA—Commission of Oyer		Government by whom it was made and	
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to issue . . . . . i.	722	continue the proceedings and make a	
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Committee is not to grant leave to ap-		affected to resign, and an attempted	
peal in criminal cases except where		revocation of his appointment by the	
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place. <i>Riti v. The Queen</i> —P. C. iv.	1.	<i>tween the Province of Ontario and the</i>	
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shall lie to the Supreme Court of Can-		minion Officer. . . . . i.	592
ada without special leave: <i>Held</i> , that		See TAXATION, 3.	
this enactment is not binding on the		Indian Lands . . . . . i.	831
Supreme Court.— <i>Clarkson v. Ryan</i> —		See INDIAN LANDS, 1.	
Supreme Ct. Can. . . . . iv.	439	ASSURANCE POLICIES—Power	
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Special leave . . . . . i.	158	officer of the Crown who is considered	
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Trial for felony . . . . . i.	57	vince to assert the rights of the Crown,	
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North America Act provided (sect. 142)		Province, and not the Attorney-Gen-	
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Canada shall be referred to the arbitra-		erty vested in the Crown as represent-	
ment of three arbitrators, one chosen		ing the Government of the Dominion,	
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		Attorney-General of the Province is	
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\* See 51 Vict., c. 43 (Dom.)



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the power of making criminal laws is vested in the Dominion Parliament, the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of justice in the Province.—*Attorney-General v. Niagara Falls International Bridge Co.*—Chy., Ont. . . i. 813

2. An Act of the Dominion Parliament incorporating a company for the purpose of constructing a bridge across the Niagara River from Canada to the United States, directed that the bridge should be "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The bridge was completed for railway purposes only, and the time limited by the charter for completing the work having elapsed, an information was filed in the name of the Attorney-General of Ontario, seeking to enforce the terms of the charter, or for the removal of the bridge as a nuisance: *Held*, by the Court of Appeal, reversing the decision of Spragge, C., that the bridge as constructed not being a public nuisance the Attorney-General of Ontario was not the proper officer to file the information.—*Attorney-General v. International Bridge Co.*—C. A., Ont. . . . . ii. 559

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See NAVIGATION AND SHIPPING, 7.

**BANKRUPTCY AND INSOLVENCY.**—The Act of the Legislature of Quebec (33 Vict. c. 58) for the relief of the appellant society then (as appeared on the face of the Act) in a state of extreme financial embarrassment is within the legislative capacity of that legislature. The Act was held to relate to a matter of a "merely local or private nature in the Province," which by the 92nd section of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada.—*L'Union St. Jacques de Montreal v. Belisle.*—P. C. . . . . i. 63

2. The B. N. A. Act, 1867, sect. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects: consequently the Dominion Enactment, 40 Vict. c. 41, s. 38, providing that the judgment of the Court of Appeal in matters of insolvency should be final, *i. e.*, not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament and does not infringe the exclusive powers given to the Provincial Legislatures by sect. 92 of the Imperial

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Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, quere, what powers may be possessed by the Parliament of Canada so to do.—*Cuvillier v. Aylwin*, 2 Knapp's P. C. C. 72, reviewed.—*Cushing v. Dupuy.*—P. C. . . . i. 252

3. Sect. 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of the County Court or by the County Court on petition, and not by any suit, attachment, opposition, seizure or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869.—*Cronbie v. Jackson.*—Q. B., Ont. . . . i. 685

4. An Act of the Dominion assuming to provide for the liquidation of all building societies in the Province of Quebec, whether solvent or not was held to be beyond the competence of the Dominion Parliament.—*McClanaghan v. St. Ann's Mutual Building Society.*—Q. B., Quebec. . . . ii. 237

5. An official assignee, or his agent, acting under an Insolvent Act of the Parliament of Canada, can sell by auction the goods of a bankrupt without taking out a license therefor; and this right cannot be restricted by a provincial enactment. The Quebec License Act, 1870, in so far as it seeks to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32-33 Vict. c. 16, and to restrain the powers of assignees in putting that Act in operation is invalid.—*Côté v. Watson.*—Superior Ct., Quebec. . . . ii. 343

6. Sect. 59 of the Dominion Insolvent Act of 1869 provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if, before the payment over to the plaintiff of the moneys levied, the estate of the debtor had been assigned or placed in liquidation under that Act: *Held*, to be within the competence of the Dominion Parliament.—*Kinney v. Dudman.*—Supreme Ct., N. S. . . . ii. 412

7. An Act which provides for the examination of a debtor before a Judge, and which authorizes the Judge to grant the debtor a discharge from gaol or the limits as to the suit for which he

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was confined, on proof that he is un- able to pay his debts, and that he has made no fraudulent transfer or undue preference, is an Insolvent Act which a Provincial Legislature has no power to pass, since the B. N. A. Act came into force, and the assent of the Governor-General does not make such an enactment valid. — *The Queen v. Chandler*.—Supreme Ct., N. B. . . . ii. 421

8. The Legislature of New Brun- swick, prior to the union, passed an Act extending the gaol limits. This Act was not to come into operation until April 1st, 1868, and before that de- but after the union, it was repealed by a subsequent enactment: *Held*, that the subject of gaol limits does not so re- late to insolvency as to make the re- pealing Act ultra vires. — *McAlmon v. Pine*.—Supreme Ct., N. B. . . . ii. 487

9. An Act of the Legislature of New Brunswick, abolishing imprisonment for debt, was held not to be ultra vires as respects a party not shown to be a trader or subject to the Dominion In- solvent Act. — *Armstrong v. McCutchin*.—Supreme Ct., N. B. . . . ii. 494

10. An Act of the Legislature of New Brunswick, providing that as against the assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the time of the filing thereof, was held to be within the competence of the legislature. — *In re De Veker*.—Supreme Ct., N. B. . . . ii. 552

11. The Dominion Parliament by its Insolvent Act of 1875, enacted that any person who purchased goods on credit, knowing or believing himself to be un- able to meet his engagements, and con- cealing the fact with intent to defraud, and who does not afterwards pay the debt, shall be held guilty of a fraud and be liable to imprisonment for two years unless the debt and costs are sooner paid, provided that in the suit for the recovery of the debt, the defendant is charged with the fraud and declared guilty of it by the judgment rendered in the suit. The plaintiff sued for goods sold and delivered to the defendants, who afterwards became insolvent under the Act, and charged them with fraud in the terms of the Act: *Held*, by a majority of the Judges of the Common Pleas, by two Judges of the Court of Appeal, and by three Judges of the Supreme Court (the other three giving no opinion on this point), that the en- actment is within the competence of the Dominion Parliament. — *Peck v. Shields*.—C.A. Ont. . . . iii. 266

12. An Act of the Nova Scotia Leg- islation for facilitating arrangements between railway companies and their creditors, provided that a company might propose a scheme of arrangement between the company and its creditors and file the same in Court and that thereafter the Court might, on applica- tion by the company, restrain any ac- tion against the company on such terms as the Court might think fit. The Act also provided that notice of filing the scheme should be published, and that thereafter no execution, attachment, or other process against the property of the company, should be available or be

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enforced without leave of the Court: *Held*, by Ritchie, J., that the above provisions related to bankruptcy and insolvency, and were in excess of the powers vested in a Provincial Legisla- ture. — *Murdoch v. Windsor & Annapolis Railway Co.*—Supreme Ct., N.S. . . . iii. 368

13. By an Act of the Legislature of Nova Scotia, provision was made for the winding up of companies in general, where a resolution to that effect was passed by the company, or where the Court so ordered at the instance of a contributor, on its being made to appear that such order was just and equitable. The Act could be enforced although no debts were due by the company, but could not be called into operation by a creditor: *Held*, that the Act did not partake of the character of an insolvent law, and was within the legislative au- thority of a Provincial Legislature. — *In re The Wallace Hucatis Grey Stone Co.*—Supreme Ct., N.S. . . . iii. 374

14. Under the provisions of an Act of the Legislature of Nova Scotia, "to facilitate arrangements between rail- way companies and their creditors," the Windsor & Annapolis Railway Company proposed an arrangement whereby the so-called B debenture stock of the company then bearing interest at the rate of 6 per cent. was "abrogated and determined," and in lieu thereof the holders of said stock were to re- ceive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted: *Held*, (Weatherbe, J., dissenting), that so much of the Act as was necessary to the confirmation of the proposed scheme was within the legislative authority of the Legislature of Nova Scotia. — *Re Windsor & Annapolis Railway*.—Su- preme Ct., N.S. . . . iii. 387

15. The Dominion Parliament, under its jurisdiction as to bankruptcy and insolvency, has authority to provide for the compulsory liquidation or wind- ing up of a company incorporated by a Provincial Legislature. — *Shoolbred v. Clarke*.—Supreme Ct., Can. . . . iv. 459

16. The Dominion Parliament, under its jurisdiction as to bankruptcy and insolvency, has authority to provide for the compulsory liquidation or winding up of a company incorporated under a statute of the Imperial Parliament. — *Allen v. Hanson*.—Supreme Ct., Can. . . . iv. 470

17. There being no statute of the Do- minion on bankruptcy and insolvency, an Act was passed by the Ontario Leg- islation for the purpose of enabling in- solvent debtors to place their creditors on an equal footing, but not relieving the debtor from arrest or interfering with his after-acquired property: *Held*, by Burton and Patterson, J.J.A., affirming on this point the judgments of the Courts below (Hagarty, C.J., and Osler, J.A., dissenting), that the Pro- vincial Act was intra vires. — *Clarkson v. Ontario Bank*; *Edgar v. Central Bank*.—C.A., Ont. . . . iv. 499

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18. The Dominion Parliament provided that Insurance Companies doing business in Canada, should make a deposit with the Minister of Finance for the security of Canadian policy holders: <i>Held</i> , that this legislation was valid, and that the Canadian policy holders of an insolvent company were entitled to a distribution of the deposit, although proceedings for the winding up of the company were pending in the English courts.— <i>Re Briton Medical and General Life Association (Limited)</i> .—(Ch. D., Ont. . . . . iv. 639	
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BIGAMY.—Second marriage contracted abroad . . . . . iv. 606	
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BILLS OF LADING AND WAREHOUSE RECEIPTS.—A Provincial Act to the effect that all rights of suit should pass to the consignee of goods named in any bill of lading, or to the endorsee thereof, to whom the property in the goods should be transferred by such consignment or endorsement, and that every such instrument representing goods to have been shipped should, in the hands of a consignee or endorsee for value, be conclusive evidence of shipment as against the person signing the instrument, was held <i>not</i> to be beyond the powers of the Provincial Legislature as being an interference with trade and commerce.— <i>Beard v. Steele</i> .—(Q.B., Ont. . . . . i. 683	
2. The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its jurisdiction over the subjects assigned to it by the B.N.A. Act. Per Spragge, C.: The Dominion Act, 34 Vict. c. 5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct endorsement, is within the powers assigned to the Dominion Parliament and is valid.— <i>Smith v. The Merchants' Bank</i> .—(Chy., Ont. . . . . i. 828	
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COMPANIES.—The Dominion Parliament has no power to incorporate an association for the purpose of buying, leasing and selling landed property and buildings, the operations of a society for such purpose affecting exclusively property and civil rights within the Province where they are carried on; and therefore the Act 37 Vict. c. 103, incorporating the Colonial Building and Investment Association for such objects, was held to be ultra vires, though power was given by said Act to carry on operations throughout the Dominion. Monk, J., dissenting.— <i>Loranger v. Colonial Building and Investment Association</i> .—(Q.B., Quebec. . . . . ii. 275	

2. *Held*, that Canadian Act, 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires of the said Parliament: *Held*, further, that the corporation could not be prohibited generally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose.—*Loranger v. Colonial Building and Investment Association*, reversed.—*Colonial Building and Investment Association v. Attorney-General of Quebec*.—(P.C. . . . . iii. 118

3. A company incorporated by a Provincial Legislature for the business of insurance possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognized by comity or otherwise. The term "Provincial objects" in the B. N. A. Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective

\*This decision was reversed by the Court of Appeal, 8 A. R. 15, on other grounds but the decision of the Court of Appeal was subsequently reversed by the Supreme Court, 8 Can. S. C. R. 512. In the Court of Appeal, Armour, J., held that the provision in question was invalid, while in the Supreme Court, Fournier, Henry and Taschereau, J.J., held the contrary.

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CONTRACTS—Regulation of. i. 265  
See TRADE AND COMMERCE, 1.

COPYRIGHT.—*Right to legislate as to*—The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament, or of the Provincial Legislatures. All that the B. N. A. Act intended to effect by sect. 91, sub-sect. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion. The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to confederation. The Imperial Copyright Act, 5 & 6 Vict. c. 45, was in force in Canada at the time of confederation, and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force.—*Smiles v. Belford*—C. A., Ont. i. 576

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See NAVIGATION AND SHIPPING, 7.

COUNTY COURT JUDGE.—By the B. N. A. Act, 1867, sect. 96, the Governor-General is authorized to appoint the Judges of the County Courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of County Court Judges by the Lieutenant-Governor for incapacity or misbehaviour and had not power to pass an Act abolishing the Court of Impeachment, which existed in Canada before the B. N. A. Act, for the trial of charges against County Court Judges. A County Court Judge may be removed by the Governor-General in Council, under the Imperial Act, 22 Geo. III. c. 75, but there is no power under that Act, or the Con. Stat. C. c. 13, or under the Common Law, to issue a commission for a preliminary enquiry under oath with respect to such charges.—*Re Squier*—Q. B., Ont. i. 786

Power to confer jurisdiction on. . . . ii. 665; iii. 319

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## NAVIGATION AND SHIPPING, 3.

## IMPERIAL COURT.

CRIMINAL LAW.—An information under an Ontario Act for selling intoxicating liquors on Sunday was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself.—*Regina v. Roddy*.—Q. B., Ont. i. 709

2. A Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a law of the Province made in relation to a matter coming within its exclusive jurisdiction. In legislating in regard to a matter within Provincial jurisdiction, a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect of acts which would be criminal offences at common law. Sect. 57 of the Liquor License Act of Ontario, R. S. O. c. 181, by which it was provided that any person who, on any prosecution under that Act, tampered with a witness or induced or attempted to induce any such person to absent himself or to swear falsely, should be liable to a penalty of \$50, was therefore held to be invalid.—*Regina v. Lawrence*—Q. B., Ont. i. 742

3. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. Breach of a Provincial Statute is not a "crime" within the meaning of sect. 91, sub-sect. 27 of the B. N. A. Act.—*Pope v. Griffith*.—Q. B., Quebec. . . . . ii. 291

4. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. A Statute of Quebec having provided that no proceedings in civil matters before a district magistrate should be removed to any other Court by certiorari or otherwise, it was held that a proceeding before a district magistrate for the enforcement of penalties under the License Law of the Province was a civil proceeding within this enactment, and that the right to certiorari was taken away.—*Ex parte Duncan*.—Superior Ct., Quebec. . . . ii. 297

5. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.—*Page v. Griffith*.—Q. B., Quebec. . . . . ii. 308

6. A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact. An enactment of the Quebec Legislature prescribing the mode in which penalties for violations of a Statute of the Province (41 Vict. c. 3) are to be enforced, was held to be valid.—*Côté v. Chauveau*.—Superior Ct., Quebec. . . . . ii. 311

7. A Provincial Legislature has power to pass an enactment for the imprisonment of a person making default in payment of a sum due on a judgment in case (a) he has had since the date of the judgment or order, the means to pay the sum in respect of which he has made default and

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neglects or refuses to pay it, or in case (b) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally. *Weldon, J., dissenting.—Ex parte Ellis.*—Supreme Ct., N.B. . . . ii. 527

8. An Act of the Parliament of Canada provided in regard to appeals from summary convictions made by Justices of the Peace, that the parties might dispense with a jury if they thought fit, and submit themselves to the judgment of the Court appealed to without a jury: *Held*, that this enactment was not an interference with the "constitution" of the Court (in relation to which the Provincial Legislatures have exclusive jurisdiction), but that it related to criminal law and procedure in criminal matters, and therefore was within the jurisdiction of the Dominion Parliament.—*Regina v. Bradshaw.*—Q. B., Ont. . . . ii. 602

9. By a Dominion Statute "for avoiding doubt," it was declared and enacted, "that every person qualified and summoned as a Grand Juror or as a Petit Juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before, or be passed after the coming into force of the B. N. A. Act, 1867, subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act." Acts were afterwards passed by the Ontario Legislature changing the mode of selecting jurors in that Province: *Held*, that the Dominion enactment was not an unconstitutional delegation of legislative authority and was not ultra vires, and that a selection of jurors made in the manner prescribed by the Ontario Acts was valid for the purpose of a criminal trial.—*Regina v. O'Rourke.*—Q. B. D., Ont. . . . ii. 644

10. The Acts relating to the attendance of grand and petit jurors at the County Courts (Courts of criminal jurisdiction over all crimes which are not capital), are within the powers of the Local Legislature, under the B. N. A. Act, 1867, sect. 92, as pertaining to the "Administration of Justice" and the "Constitution and organization of Provincial Courts," and do not belong to the Parliament of Canada, under sect. 91, as "Procedure in criminal matters."—*Regina v. Foley.*—Supreme Ct., N. B. . . . ii. 653, n

11. By the Act 32 & 33 Vict. c. 31, s. 78 (D), it is provided that penalties against Justices of the Peace for the non-return of convictions may be recovered in an action of debt by any person suing for the same in any Court of Record: *Held*, that this provision was within the competence of the Dominion Parliament, and that a Provincial enactment, declaring that County Courts should not have jurisdic-

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tion in such actions, was thereby overborne.—*Ward v. Reed.*—Supreme Ct., N. B. . . . iii. 405

12. An Act of the Ontario Legislature provided that no person should, without written notice, supply to a cheese or butter manufactory milk in any way adulterated or from which cream had been taken, and imposed certain penalties for violation of the Act: *Held*, reversing the judgment of the Queen's Bench Division, that this Act was not an Act dealing with criminal law within the meaning of sub-sect. 27 of sect. 91 of the British North America Act, and was intra vires of the Provincial Legislature.—An Act of the Ontario Legislature respecting appeals on prosecutions to enforce penalties and punish offences under Provincial Acts was held not to be legislation dealing with criminal procedure within the meaning of the above sub-section, and to be intra vires.—*Regina v. Wason.*—C. A., Ont. . . . iv. 578

13. The Dominion Parliament by R. S. C. cap. 161, sect. 4 enacts that "Every one who being married marries any other person during the life of the former husband or wife whether the second marriage takes place in Canada or elsewhere is guilty of felony and liable to seven years' imprisonment," and that "nothing in this section contained shall extend to (a) any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada and leaving the same with intent to commit the offence." The original Act containing in substance this enactment was passed in 1841, and its validity was subsequently affirmed by the Court of Queen's Bench in Lower Canada: *Held*, that the enactment in the Revised Statutes was valid; and that having in substance been in force in Canada for some years prior to the passing of the B. N. A. Act, it was confirmed by sect. 129 of that Act if any imperial confirmation was required.—*Regina v. Brierly.*—Ch. D., Ont. . . . iv. 665

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DEBTOR.—*Power to provide for discharge of.*—By an Act in force in the Province of Nova Scotia at the Union, every debtor imprisoned under process from any Court was entitled to apply for and obtain his discharge. When this Act was passed there were no County Courts in Nova Scotia. In 1878 an Act of the Provincial Legislature was passed, making the above provisions applicable to persons imprisoned under process from the County Courts, and this enactment was held to be valid.—*Johnston v. Poyntz.*—Supreme Ct., N. S. . . . ii. 416

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DELEGATION.—Subjects which in one aspect and for one purpose fall within sect. 92 of the B. N. A. Act, 1867, may in another aspect and for another purpose fall within sect. 91. *Russell v. The Queen* (7 App. Cas. 829) explained and approved. *Held*, that "The Liquor License Act of 1877," c. 181, Revised Statutes of Ontario, which, in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with the general regulation of trade or commerce, but comes within Nos. 8, 15 and 16 of sect. 92 of the Act of 1867, and is within the powers of the Provincial Legislature. *Held*, further, that the Provincial Legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Hodge v. The Queen*.—P. C. ... iii. 144

2. Act No. 22 of 1869, of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council. The 9th sect. of that Act which confers upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.—*Regina v. Burah*.—P. C. iii. 409

3. A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted. *Held*, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act (Scheduled to 18 & 19 Vict., c. 54, ss. 1 and 45) *Held*, further, that duties levied by an Order in Council issued under sect. 133, are really levied by authority of the Legislature and not of the Executive. Also that under sect. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor.—*Powell v. Apollo Candle Co.*—P. C. ... iii. 432

Selection of Jurors. ... ii. 644

See CRIMINAL LAW, 9.

DOMINIONALSCHOOLS.  
A Provincial Legislature may legislate in regard to separate schools provided

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that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province at the time of confederation are not prejudicially affected by such legislation. The B. N. A. Act provides by subs. 3 of sect. 93 that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education": *Held*, that this enactment gives an appeal in respect of those decisions alone which are legislative acts, or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school. In election matters separate schools have the same right of appeal to a County Judge as public schools have.—*Separate School Trustees of Belleville v. Grainger*.—Chy. Ont. ... i. 816

2. The provisions contained in sect. 93 of the B. N. A. Act, that nothing in any law made by a Province in relation to education "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union," protect those legal rights and privileges only which existed in each Province at the Union by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal right. At the Union the law with respect to the schools in the Province of New Brunswick was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to denominational schools, and a subsequent Act, 34 Vict. c. 21, providing that the schools conducted thereunder should be non-sectarian, was therefore held to be valid. The constitutionality of the Act 34 Vict. c. 21, cannot be affected by any regulations of the Board of Education made under its authority; and semble, if the Board of Education have made regulations which they ought not to have made or have not made regulations which they should have made, the case falls within subsect. 4 of sect. 93 of the B. N. A. Act.—*Ex parte Renaud*.—Supreme Ct., N. B. ... ii. 445

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DIVISION COURTS.—Appointment of Judges. ... ii. 665

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DOMINION OFFICER.—Seizure of salary of.]—A Provincial Legislature



has no power to declare liable to seizure the salaries of employees of the Federal Government.—*Evans v. Hudson*—Superior Ct., Quebec . . . . . ii. 346

Taxation of income . . . . . i. 592

See TAXATION, 3.

**DOMINION GOVERNMENT.**—[*Jurisdiction and Property.*] Under the B. N. A. Act, 1867, s. 108, read in connection with the third schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada, but not for any larger interest therein than at that date belonged to the Province. The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd of September, 1871. Quere, whether it was ultra vires of the Dominion Parliament, by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement. But held, that Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September, 1871, or otherwise.—*Western Counties Railway Co. v. Windsor and Annapolis Railway Co.*—P.C. . . . . i. 397

2. Held, following the case of the Commissioners of the Cobourg Town Trust, 22 Grant 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government; as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered.—*Re Toronto Harbour Commissioners.*—Chy., Ont. . . . . i. 825

Prerogative rights . . i. 722; iv. 391, 409

See PREROGATIVE OF CROWN, 1, 3, 4.

Public Harbours . . . . . ii. 147

See HARBOURS.

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See STATUTES.

**DOMINION RAILWAY.**—Power to transfer. . . . . i. 233

See PROVINCIAL LEGISLATURES, 2.

**EDUCATION.**—Denominational and Separate Schools . . i. 816; ii. 445

See DENOMINATIONAL SCHOOLS.

Imperial Law . . . . . i. 761

See MEDICAL PRACTITIONER.

**ELECTIONS TO PARLIAMENT.** An Act of Canada passed before 1867 made void any contract referring to or

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arising out of a Parliamentary election, even for payment of lawful expenses; the Dominion Parliament passed an Act respecting Dominion elections, but not containing this or any like provision: Held, that this provision not having been repealed, was in force in Quebec as respects Dominion elections under sects. 41 and 129 of the B. N. A. Act, and that therefore a proprietary note given for the expenses of a subsequent Dominion election was void.—*Willett v. DeGrosbois.*—Superior Ct., Quebec ii. 332

**ESCHEAT.**—Lands in the Province of Ontario escheated to the Crown for defect of heirs belong to the Province and not to the Dominion. At the date of passing the B. N. A. Act the revenue arising from all escheats to the Crown within the then Province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act vested in the Dominion the general public revenues, as then existing in the Provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the Provinces—the words "lands, mines, minerals and royalties" therein including, according to their true construction, royalties in respect of lands such as escheats.—*Attorney-General v. Mercer.*—P. C. . . . . iii. 1

**EVIDENCE.**—Per Torrance, J. The Dominion Parliament can confer authority upon Courts and Judges in Canada, to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matter pending before any British or Foreign tribunal; and the Dominion Act, 31 Vict. c. 76, which contains provisions for this purpose, was therefore held to be valid.—*Ex parte Smith.*—Superior Ct., Quebec . . . . . ii. 330

2. The taking of evidence to be used in an action pending in a foreign tribunal is of extra Provincial pertinence, and does not fall within the exclusive legislative authority of the Provinces; the Dominion Act, 31 Vict. c. 76, providing for the taking of such evidence by Provincial Courts, was therefore held to be valid.—*Re Wetherell and Jones.*—Ch. D., Ont. . . . . iii. 315

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See CRIMINAL LAW, 1.

**EX POST FACTO LAW.**—Power to enact . . . . . ii. 678

See TEMPERANCE ACT OF 1864, 4.

**EXTRADITION.**—The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding that the B. N. A. Act previously passed, gives to the Canadian Parliament jurisdiction to carry out obligations resulting from extradition treaties.—*Ex parte Worms.*—Q. B., Quebec . . . . . ii. 315

**FEDERAL COMPANY.**—Power to dissolve or transfer . . . . . ii. 233

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**FERRIES.**—Taxation of . . iv. 370  
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**FINE AND IMPRISONMENT.**  
Power of Provincial Legislature to  
authorize punishment of same offence  
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**FINES AND PENALTIES.**—The  
Provincial Legislatures have the right  
to appropriate fines to municipal or  
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See PROVINCIAL LEGISLATURES, 1.

**FISHERIES.**—The B. N. A. Act in  
assigning to the Parliament of Canada  
the right to legislate with respect to  
Sea Coast and Inland Fisheries, did  
not thereby give authority to deal with  
questions of property and civil rights,  
such as the ownership of the beds of  
the rivers, or of the fisheries, or the  
right of individuals therein. What the  
Act gave to Parliament was a right to  
legislate in regard to matters of national  
and general concern, such as forbidding  
fish to be taken at improper seasons, or  
in an improper manner, or with destruc-  
tive instruments—such general laws as  
are for the benefit of the public at large  
as well as of the owner. Under the  
B. N. A. Act the exclusive rights of  
fishing vested in the proprietors of non-  
navigable rivers being in every sense of  
the word "property," can be interfered  
with only by the Provincial Legislatures  
in exercise of the powers given to them  
to legislate respecting property and  
matters of a local or private nature.  
The rights of the Provincial Govern-  
ments in respect of fisheries in non-  
navigable waters, the beds of which,  
not having been granted before con-  
federation, were then vested in the Pro-  
vinces as part of the public domain, do  
not differ from the rights of private  
owners which had been acquired by  
grant from the Crown before that date,  
and a lease made by the Minister of  
Marine and Fisheries of a non naviga-  
ble portion of a river in the Province  
of New Brunswick, passing partly  
through granted and partly through  
ungranted lands, was therefore held to  
be void.—*The Queen v. Robertson*.—  
Supreme Ct., Can. . . . . ii. 65

**GAOL LIMITS.**—Power to alter. ii. 487

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**GOVERNOR-GENERAL.**—Appeal  
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missions** . . . . . i. 722, 789

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COUNTY COURT JUDGE.

**HARBOURS.**—The "Public Har-  
bours," which by the B. N. A. Act are  
declared to be the property of the Do-  
minion, include all harbours, together  
with the bed and soil thereof, which the

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public have the right to use, and are not  
limited to such as at the time of Con-  
federation had been artificially con-  
structed or improved at the public ex-  
pense; and where a grant of part of the  
foreshore of a natural harbour used as  
such by the public, was made by the  
Provincial Government of Prince Ed-  
ward Island subsequent to the admis-  
sion of that Province into the Union,  
the grant was held to be invalid.—*Hol-*  
*man v. Green*.—Supreme Ct., Can. ii. 147

**HARD LABOUR.**—A Provincial  
Legislature has power to enforce any of  
its laws by imposing hard labour as a  
punishment for the violation of them.—  
*Regina v. Frauley*.—C. A., Ont. . . ii. 576

2. "Imprisonment" in No. 15 of sect.  
92 of the Act of 1867 (B. N. A. Act)  
means imprisonment with or without  
hard labour.—*Hodge v. The Queen*.—  
P. C. . . . . iii. 144

### IMPERIAL ACTS.

See STATUTES.

**IMPERIAL COURT.**—Power to im-  
pose duties on.—*Held*, (reversing the  
judgment of the Supreme Court of Nova  
Scotia) that the Dominion Parliament  
has power to confer additional jurisdic-  
tion on the Court of Vice-Admiralty at  
Halifax, although that court was cre-  
ated by an Imperial Act.—*Attorney-  
General of Canada v. Flint*.—Supreme  
Ct., Can. . . . . iv. 288

**IMPRISONMENT.**—Power to fine  
and imprison for same offence . . .  
ii. 320, 322, 324

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**IMPRISONMENT FOR DEBT.**  
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**INDIAN LANDS.**—Those "lands  
reserved for the Indians," which by  
sect. 91, sub-s. 24, of the B. N. A. Act  
are placed under the exclusive legisla-  
tive jurisdiction of the Parliament of  
Canada, are those Indian lands only  
which have not been surrendered by the  
Indians, and have been reserved for  
their use and do not include lands to  
which the Indian title has been ex-  
tinguished. The Ontario Legislature  
has power to tax against a vendee un-  
patented lands which the Indians have  
surrendered for the purpose of being  
sold; all unpatented lands, whether  
Indian lands or Crown lands, when  
once agreed to be sold, being upon the  
same footing as respects liability to  
municipal taxation.—*Church v. Fenton*.  
—C. P., Ont. . . . . i. 831

2. Sect. 109 of the B. N. A. Act of  
1867 gives to each Province the entire  
beneficial interest of the Crown in all  
lands within its boundaries, which at  
the time of the union were vested in the  
Crown, subject to such rights as the

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Dominion can maintain under sects. 108 and 117.—*Attorney-General v. Mercer*, (8 App. Cas. 767) followed. By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands "parts of our dominions and territories" as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the Governor of the colony in which the lands lie, and not by any private person. In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing: *Held*, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109: *Held* also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.—*St. Catherine's Milling and Lumber Co. v. The Queen*,—P. C. . . . iv. 107

INFORMATION—Nuisance i. 813;  
See ATTORNEY-GENERAL. . . . ii. 559

#### INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE—Regulation of contracts . . . . . i. 265

See TRADE AND COMMERCE, 1.

Tax on Policies . . . . . i. 117

See TAXATION, 2.

Taxation of Companies . . . . iv. 7

See TAXATION, 6.

INTEREST—The general law having limited the rate of interest, in the absence of agreement between the parties, to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. "increase" on overdue assessments, the so-called increase being but another name for interest. A municipal corporation was authorized by an Act in force at the time of confederation to charge ten per cent. on overdue assessments; the Legislature of Quebec passed an Act repealing this enactment, and providing anew for a similar charge: *Held*, by Johnson, J., that the former enactment was effectually repealed, and that the new enactment as to increase was invalid.—*Ross v. Torrance*,—Superior Ct., Quebec . . . ii. 352

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2. The general law having provided that on any contract or agreement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bearing the agreed rate of interest, was held to be within the competence of the Provincial Legislature. A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalized as to other persons having the right to borrow.—*Royal Canadian Insurance Co. v. Montreal Warehousing Co.*—Superior Ct., Quebec . . . . . ii. 861

INTOXICATING LIQUORS—Under the exclusive legislative authority given to it with regard to "Municipal Institutions" and to "matters of a merely local or private nature in the Province," a Provincial Legislature can confer on municipal corporations, power to pass by-laws wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses; and the conferring such power is not an interference with "the regulation of trade and commerce," assigned exclusively to the Dominion Parliament.—*Starin v. Village of Orillia*,—Q. B., Ont. . . . . i. 688

2. An Act of the Parliament of Canada prohibited the traffic in intoxicating liquors, except under certain restrictions, in any county or city the inhabitants of which chose to take the steps therein prescribed for the adoption of its provisions: *Held*, by the Privy Council, that such an Act was within the jurisdiction of the Dominion Parliament.—*Russell v. The Queen*,—P. C. . . . . ii. 12

3. The state of things existing in the confederated Provinces at the time of confederation, and more particularly that which was recognized by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act. At the time of confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities under the laws in force respecting municipal institutions in the then Province of Canada and in Nova Scotia, and consequently is to be deemed included in the provision as to "municipal institutions" contained in sect. 92, sub-s. 8, of the B. N. A. Act. The Provincial Legislatures have the power for the purposes of municipal institutions to pass a prohibitory liquor law, or a liquor law which is prohibitory except under certain conditions; this power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor

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law for the whole Dominion.—*Corporation of Three Rivers v. Sulte.*—*Q. B., Quebec.* . . . ii. 280

4. The Provincial Legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may, for this purpose, restrict the sale of spirituous liquors. The provision of the Quebec Statute, 38 Vict. c. 74, s. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays, and on every day from eleven of the clock at night, until five of the clock in the morning, is within the competence of a Provincial Legislature.—*Blouin v. Corporation of Quebec*—*Superior Ct., Quebec* . . . ii. 368

5. Provincial Legislatures can make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils.—*De St. Aubyn v. Lafrance.*—*Circuit Ct., Quebec* . . . ii. 392

6. A Statute of Nova Scotia, passed after confederation, imposed penalties for retailing intoxicating liquors without a license, and provided that licenses should only be granted upon the recommendation of the grand jury, concurred in by two-thirds of the members present, and accompanied by a petition for the license from two-thirds of the ratepayers of the polling district in which the tavern was to be established. Enactments not essentially different were in force in the Province before confederation; *Held*, that the Act in question was not ultra vires of the Legislature. *Held*, further, that if the restrictions were ultra vires, the proper course was to apply for a mandamus to compel the granting of a license, and that a refusal to grant licenses did not justify selling without a license or release from the statutory penalty thereby incurred. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made bona fide with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby. *Keefe v. McLennan*—*Supreme Ct., N.S.* . . . ii. 400

7. A New Brunswick statute, 36 Vict. c. 10, empowered the General Sessions of the Peace to grant licenses as in their discretion they should think proper, and they having refused to grant a license to any person whatever, a mandamus was granted for the purpose of compelling them to issue a license to the applicant. The Legislature of New Brunswick by an Act subsequent to confederation declared that “no license for the sale of spirituous liquors shall be granted

or issued within any parish or municipality in the Province when a majority of the ratepayers, residents in such parish or municipality, shall petition the Sessions or municipal council against issuing any license within such parish or municipality.” Prior to confederation, there had been no legislation of this character in New Brunswick, and this enactment was held by the Supreme Court of that Province to be beyond the competence of the Legislature. *Regina v. Justice of King's.*—*Supreme Ct., N.B.* . . . ii. 490

8. The Provincial Legislatures have authority to prohibit or regulate the sale of liquors in saions or taverns on Sundays, or at special times. The Statute 42-43 Vict. c. 4 (Quebec) which requires houses in which spirituous liquors, etc., are sold, to be closed during the whole of Sunday, and on every other day between 11 p.m. and 5 a.m. is valid. (*Ritchie, C. J., and Strong and Fournier, J.J.*)—*Poulin v. Corporation of Quebec*—*Supreme Ct., Can.* . . . iii. 230

9. The old Province of Canada, by an Act incorporating the city of Three Rivers conferred on the council authority to make by-laws for restraining and prohibiting the sale of intoxicating liquors or for authorizing such sale subject to such conditions as might be deemed expedient. In 1875 the Legislature of Quebec by a consolidation Act repealed the above and re-enacted the former provisions as to the sale of intoxicating liquors: *Held*, (affirming the judgment of the Queen's Bench) that the Act of 1875 was valid.—*Sulte v. Corporation of Three Rivers.*—*Supreme Ct., Can.* . . . iv. 805

10. The Canada Temperance Act being a general law enacted by the Dominion Parliament, when brought into force in any municipality by a majority of the votes of the qualified electors therein, may be enforced through the medium of Provincial officers appointed and paid for according to Provincial legislation, and a Provincial law making provision for such enforcement was held to be valid.—*License Commissioners of Frontenac v. County of Frontenac.*—*Ch. D. Ont.* . . . iv. 683

Criminal offence . . . ii. 606, 616

See TEMPERANCE ACT OF 1864, 3.

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See LICENSES.

Regulation of taverns . . . iii. 144

See DELEGATION, I.

JUDGES.—*Jurisdiction, respecting*  
—By an Act of the Legislature of New Brunswick since confederation, 39 Vict. c. 5, it was provided that Courts should be established for the trial of civil causes before commissioners appointed by the Lieutenant-Governor in Council. The jurisdiction of the commissioners was limited to \$40 in actions of debt, and \$16 in actions of tort; and was further restricted in special cases. On an application to set aside a judgment obtain-

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ed before a commissioner appointed as above provided, on the ground that since the passing of the B. N. A. Act, a Lieutenant-Governor had no power to appoint Judges of any kind, the New Brunswick Act was held to be valid. *Allen, C. J., and Duff, J., dissenting.*—*Ganong v. Bayley*.—Supreme Ct., N.B. . . . . ii. 509

2. In the Province of Ontario there were in existence at the Union, in addition to the Superior and County Courts, other Courts styled Division Courts, for the trial of small causes; of these Division Courts there were several in every county; and they had since their establishment been always presided over by the County Court Judges. An Ontario Statute, passed after the Union, provided in effect that two or more counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and the Act conferred on the County Court Judges of grouped counties, the same authority to try suits in each of the grouped counties, as they possessed in their own counties respectively. *Held*, that the Provincial Legislature had complete jurisdiction over the Division Courts, and could appoint the officers to preside over them, and that the enactment in question, as regarded these Courts, was valid. *Armour, J., dissenting.* *Wilson v. McGuire*—Q. B. D., Ont. . . . . ii. 665

3. An Act of the Ontario Legislature provided that the County Judge of one county might preside at the Sessions in a county other than that of which he was Judge: *Held*, by *Armour and O'Connor, J.J.*, (*Wilson, C. J.*, doubting), that this enactment was not within the competence of the Legislature.—*Gibson v. McDonald*—Q. B. D., Ont. . . . . iii. 319  
Commission of enquiry . . . . i. 789

See COUNTY COURT JUDGE.

JURORS.—Selection of. ii. 644, 653, n.

See CRIMINAL LAW, 9, 10.

JUSTICES OF THE PEACE—An Act of the old Province of Canada authorised the Governor to appoint Police Magistrates; the Act was temporary: *Held*, that an Act of the Ontario Legislature, continuing the same in force, was valid.—*The Queen v. Reno*.—Q. B., Ont. . . . . i. 810

2. Under the B. N. A. Act, the right to appoint Magistrates, such as District Magistrates, in the Province of Quebec, is vested in the Provincial Executives; and this right is not affected by the provisions contained in sects. 90 and 130 of that Act.—*Regina v. Horner*.—Q. B., Quebec . . . . ii. 317

3. The right of the Provincial Legislatures to legislate in relation to the Administration of Justice, includes a right to make provision for the appointment of Police Magistrates and Justices of the Peace by the Lieutenant-Governor.—*Regina v. Bennett*.—Q. B. D., Ont. . . . . ii. 634

4. *Held* by *Wilson, C. J.* (*Armour and O'Connor, J.J.*, expressing in this

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case no opinion on the point), that the power to appoint Police Magistrates is vested in the Lieutenant-Governors of the Provinces under sect. 92 of the B. N. A. Act.—*Richardson v. Ransom*.—Q. B. D., Ont. . . . . iv. 630

5. Laws providing for the appointment of Justices of the Peace relate to the administration of justice and fall within the powers of the Provincial Legislatures.—*Regina v. Bush*. . . . iv. 690

LANDS.—*Held*, that a conveyance by the Province of British Columbia to the Dominion of "Public Lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon and under such lands are not incidents of the land but belong to the Crown, and, under sect. 109 of the B. N. A. Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied.—*Attorney-General of British Columbia v. Attorney-General of Canada*.—P. C. . . . iv. 241

Escheat . . . . . iii. 1

See ESCHCHAT.

Indian Lands.

See INDIAN LANDS.

License to hold . . . . . iv. 701

See MORTMAIN.

LEGISLATIVE POWER.—The B. N. A. Act in assigning either to the Dominion or Provincial Legislatures, power to legislate on any particular subject, gives at the same time all the incidental subjects of legislation necessary to the exercise of the power so assigned.—*Bennett v. Pharmaceutical Association of Quebec*.—Q. B., Quebec . . . . . ii. 250

2. *Held*, that 34 & 35 Vict. c. 28, which authorizes the Parliament of Canada to provide for "the administration, peace, order and good government of any territory, not for the time being included in any Province," vests in that Parliament the utmost discretion of enactment for the attainment of those objects. Accordingly Canadian Act 43 Vict. c. 25, is intra vires the Legislature.—Sect. 76, sub-s. 7, which prescribes that full notes of evidence be taken, is literally complied with when those notes are taken in shorthand.—*Riel v. The Queen*.—P. C. . . . . iv. 1

LEGISLATURES OF ONTARIO AND QUEBEC.—The powers conferred by the B. N. A. Act, 1867, sect. 129, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867. The Act 22 Vict. c. 66, of the Province of Canada, which created a corporation having its corporate existence and rights in the Pro-

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vinces of Ontario and Quebec, afterwards created by the B. N. A. Act, could not, after the B. N. A. Act, be repealed or modified by the Legislature of either of these Provinces, or by the conjoint operation of both Provincial Legislatures, but only by the Parliament of the Dominion. The Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation which had been created by the Parliament of the Province of Canada before the B. N. A. Act, and to substitute a new corporation; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province, was held invalid. *Citizens Insurance Company of Canada v. Parsons* (7 App. Cas. 90), approved and distinguished. — *Dobie v. Temporalties Board*.—P. C. . . . . i. 351

#### See PROVINCIAL LEGISLATURES.

**LICENSES.**—*Power to make laws respecting.*—The right conferred on Provincial Legislatures by sub-s. 9 of sect. 92 of the B. N. A. Act, to deal with "shop, saloon, tavern, auctioneer, and other licenses," does not extend to licenses on brewers. *Regina v. Taylor* (30 U. C. Q. B. 218), overruled. *Ritchie and Strong, J.J.*, dissenting. — *Stearn v. The Queen*.—Supreme Ct., Can. . . . . i. 414

2. The Legislature of Ontario having passed an Act to regulate tavern and shop licenses: *Held*, that they had power to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should, on conviction, be imprisoned in the common gaol for three months; and that such enactment was not opposed to sect. 91, sub-s. 27, of the B. N. A. Act, by which criminal law is assigned exclusively to the Dominion Parliament. — *Regina v. Boardman*.—Q. B., Ont. . . . . i. 676

3. The B. N. A. Act in conferring legislative jurisdiction over particular subjects, must be held to have given at the same time the powers needed for the effective exercise of the jurisdiction granted; consequently, the right conferred on Provincial Legislatures to make laws in relation to shop, saloon, tavern, auctioneer and other licenses includes the right of imposing penalties for violating the provincial laws in relation to those subjects. Provincial enactments by which persons who sell liquor by wholesale are required to take out a license are not invalid as an interference with trade and commerce. — *Ex parte Leveille*.—Superior Ct., Quebec . . . . . ii. 349

4. Provincial Legislatures can impose fines and penalties for selling liquor without license. — *Regina v. McMillan*.—Supreme Ct., N. B. . . . ii. 489

5. Per Spragge, C. J.: The jurisdiction of a Provincial Legislature to legislate respecting licenses is not confined to the object of raising a revenue. *Regina v. Frazer*.—C. A., Ont. . . . ii. 576

6. The inspector of licenses for the revenue district of Montreal, charged a drayman in the employ of certain brewers duly licensed under the Dominion Statute, 43 Vict., c. 19, before the Court of Special Sessions of the Peace, at Montreal, with having sold beer outside the business premises of the brewers, but within the said revenue district in contravention of the Quebec License Act of 1878. Thereupon the brewers claiming inter alia, that being licensed brewers under the Dominion Statute they had the right to sell beer by and through their employees and draymen without a Provincial license, and that the Quebec License Act and its amendments were ultra vires, and if constitutional did not authorize the complaint, caused a writ of prohibition to be issued out of the Superior Court enjoining the Court of Special Sessions of the Peace from further proceeding: *Held*, per Ritchie, C. J., and Strong, Fournier and Henry, J.J., that the Quebec License Act and its amendments were intra vires, and that the Court of Special Sessions of the Peace at Montreal, having jurisdiction to try the alleged offence, and being the proper tribunal to decide the question of fact and of law involved, a writ of prohibition did not lie. Per Taschereau and Gwynne, J.J., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition. — Per Gwynne, J. The Quebec License Act of 1878 imposes no obligation on brewers to take out a Provincial license to enable them to sell their beer, and therefore the Court of Special Sessions of the Peace had no jurisdiction, and prohibition should issue absolutely. — *See also*, A license from the Dominion Government granting authority to a brewer to manufacture beer, does not confer the right to sell the beer manufactured under such license elsewhere than on the brewer's premises. — *Molson v. Lambie*.—Supreme Ct., Can. . . . . iv. 334

7. The New Brunswick Liquor License Act, 1887, provides that applications for licenses must be accompanied by a certificate that the applicant is a fit person to hold a license and his premises suitable for the purpose, and that such certificate shall be signed by at least one-third of the ratepayers for the polling sub-division. The Act also provides that no person holding a license shall be qualified to sit on the commission of the peace, to be a member of a municipal council or a teacher in a public school: *Held*, that these enactments were valid. — *Danaher v. Peters*.—Supreme Ct., Can. iv. 425

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**LOCAL WORKS AND UNDER-TAKINGS.**—By an Act of the Province of New Brunswick, passed prior to confederation, the plaintiff company was incorporated for the purpose of constructing a railway from the city of St. John, in that Province, westward to the boundary of the United States. After confederation another Act (32 Vict. c. 54) was passed for the purpose of removing doubts respecting the liability of subscribers for shares in the company, and this latter Act was held to be within the competence of the Provincial Legislature. The fact of the legislature of a foreign country authorizing the construction of a line of railway in that country for the purpose of connecting with a Provincial railway, does not in any way affect the authority of the Legislature of the Province to legislate with respect to the railway within the bounds of the Province.—*European and North American Railway Co. v. Thomas*.—Supreme Ct., N. B. . . . . ii. 439

2. All works which are wholly within one Province, whether the undertaking to which they belong be for a commercial purpose or otherwise, are within the control, and subject to the legislation of the Province in which they are situate, unless they are by the Parliament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. The Dominion Parliament cannot without such declaration, authorize a company to establish in two or more Provinces, works needing special legislative authority, and which are in their nature local in each Province, the jurisdiction in such case to give the needed authority, being determined by the location and object of the works, and not by the circumstance that the company is authorized to make them in several Provinces. A company was incorporated by Act of the Dominion Parliament for the purpose of establishing telephone lines in the several Provinces of the Dominion, but not of connecting two or more Provinces by telephone lines, nor was the undertaking declared to be for the general advantage of Canada, or of two or more of the Provinces, and in the absence of these con-

ditions it was held that the Act, so far as it professed to confer a right to erect poles in the streets of cities and towns was invalid.—*Regina v. Mohr*.—Q. B., Quebec. . . . . ii. 257

**MAGISTRATES**—Appointment of.  
See JUSTICES OF THE PEACE.

**MARITIME COURT**—The Act, 40 Vict. c. 21, D., establishing a Maritime Court, with jurisdiction limited to the Province of Ontario, is within the powers of the Dominion Parliament.—*The Pictou*.—Supreme Ct., Can. . . . . i. 557

**MARKETS**—A statute of the Province of Quebec gave to the council of the city of Montreal authority to regulate and license the sale in any private stall or shop in the city, outside of the public meat markets, of any meat, fish, vegetables, or provisions usually sold in markets: *Held*, affirming the judgments of the Courts below, that the enactment was intra vires of the Provincial Legislature.—*Pigeon v. Recorder's Court*.—Supreme Ct., Canada. iv. 442

Power to regulate . . . . . i. 756  
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**MATTERS OF A MERELY LOCAL OR PRIVATE NATURE**—Direct taxation for local purpose. i. 95  
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**MEDICAL PRACTITIONER**—*Registration*—The Imperial Parliament having enacted since confederation that any person registered as a medical practitioner under the English Medical Act (21 & 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration and that the term "colony" shall include any of Her Majesty's possessions which have a legislature, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration, notwithstanding the consideration Act and the exclusive power given thereby to the Provinces to legislate in relation to education.—*Regina v. College of Physicians and Surgeons, Ontario*.—Q. B. Ont. . . . . i. 761

**MILITARY AND NAVAL SERVICE**.—The Parliament of Canada has, under the B. N. A. Act, exclusive jurisdiction in matters relating to militia, military and naval service, and defence, and consequently, the provisions of the Imperial Army Act, 1881, do not apply to Canada, so as to make persons not connected with the active militia of the Dominion liable in respect of acts which are offences under the Imperial Act, but not under the

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Militia Act of Canada.—*Holmes v. Temple*.—Sessions of the Peace, Quebec . . . ii. 396

MORTMAIN.—An Act of the Dominion Parliament, incorporating a company and purporting to enable the company to hold lands, may operate as a license from the Crown for this purpose. Such an Act would not prevent the Province from passing a law preventing altogether or restricting the holding of lands by corporations in the Province.—*McDiarmid v. Hughes*, —Q. B. D., Ont. . . . iv. 701

MUNICIPAL INSTITUTIONS.—The provision contained in the Municipal Act of Ontario, authorizing city councils to pass by-laws "for preventing criers and vendors of small-ware from practising their calling in the market, public streets and vacant lots adjacent thereto," is not ultra vires of the Ontario Legislature, as being a regulation of trade and commerce. In giving jurisdiction to the Provincial Legislatures in all matters relating to municipal institutions, the intention must have been that these Legislatures should have power to alter and amend all the existing laws with respect to such institutions, and especially to enlarge the scope of a power existing in the Municipal Act at the time of confederation.—*Harris v. City of Hamilton*.—Q. B., Ont. . . . i. 756

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NAVIGATION AND SHIPPING.  
The power to incorporate a navigation company the operations of which are limited to a particular Province, belongs exclusively to the Legislature of such Province.—*Macdougall v. Union Navigation Co.*—Q. B., Quebec . . . ii. 228

2. The Government of the Province of Quebec having by letters patent granted a water lot extending into deep water at the mouth of the River St. Maurice, the letters patent were held to be valid, subject to an implied restriction that the requirements of navigation and commerce were not to be interfered with or injured thereby.—*Normand v. St. Lawrence Navigation Co.*—Q. B., Quebec . . . ii. 231

3. The Dominion Parliament can confer on the Vice-Admiralty Courts jurisdiction in any matter of navigation and shipping within the territorial limits of the Dominion. When an Act of the Parliament of Canada is in part repugnant to an Imperial Statute, effect will be given to the former so far as its provisions do not conflict with those of the Imperial enactment.—*The Farwell*.—Vice-Admiralty Ct., Quebec . . . ii. 378

4. A Provincial enactment authorizing the erection of booms in a navigable river does not conflict with the power of the Parliament of Canada with respect to navigation and shipping under sect. 91 of the B. N. A. Act the words navigation and shipping

being employed in that section in the sense in which they are used in the several Acts of the Imperial Parliament relating to navigation and shipping, and in the Act of the Parliament of Canada, 31 Vict. c. 58, viz.: As giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion, and not as excluding for all purposes Provincial jurisdiction over navigable waters.—*McMillan v. Southwest Boom Co.*—Supreme Ct., N. B. . . . ii. 342

5. A Provincial Legislature may incorporate a boom company, but cannot confer upon the company power to obstruct the navigation of a tidal and navigable river, Taschereau, J., doubting. *McMillan v. Southwest Boom Co.*, (1 P. & B. 715), overruled in part.—*Quddy River Driving Boom Co. v. Davidson*.—Supreme Ct., Can. . . . iii. 243

6. The control over navigation conferred on the Dominion Parliament by the B. N. A. Act does not prevent the Provincial Legislatures from exercising municipal and police control on navigable rivers; consequently the Quebec Act 43 & 44 Vict. c. 62, extending the limits of the town of St. John's to the middle of a navigable river was held to be valid, and to confer the right to tax property within the added limits. Judgment of the Court of Queen's Bench on this point affirmed.—*Central Vermont Railway v. St. John's*.—Supreme Ct., Can. . . . iv. 326

7. Notwithstanding the exclusive legislative authority over navigation and shipping possessed by the Dominion Parliament, a Provincial Legislature can confer on municipalities the right to tax ferrymen and ferries; consequently the Quebec Act, 39 Vict. c. 52, by which the city of Montreal is authorized to impose an annual tax on ferrymen or steamboat ferries is valid. The appellants, while successful on other grounds, having failed to seriously impugn the Act in question, were ordered to pay the costs of the Attorney-General.—*Longueuil Navigation Co., v. City of Montreal*.—Supreme Ct., Can. . . . iv. 370

NEW BRUNSWICK.—Statutes.

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See STATUTES.

NUISANCES.—The power of the Parliament of Canada to enact a general law of nuisance, as incident to its right to legislate as to criminal law, is not incompatible with a right in the Provincial Legislatures to authorize municipal corporations to pass by-laws against nuisances hurtful to public health, as incidental to municipal institutions.—*Ex parte Pillow*.—Superior Ct., Quebec . . . iii. 357

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**PATENT OF INVENTION.**—Proceedings in the nature of a *scire facias*, to set aside letters patent of invention issued under the Dominion Statute, 35 Vict. c. 26, cannot be instituted in the name of a Provincial Attorney-General, and can only be legally brought by the Attorney-General of Canada.—*Mousseau v. Bate*.—Court of Review, Quebec. . . . . iii. 341

2. The Dominion Parliament, having in the year 1872 passed an Act respecting patents of invention which by sect. 28 provided that all patents were to be subject to certain conditions non-compliance with which should render them void, and that the Minister of Agriculture or his deputy should have authority to finally determine any dispute as to whether a patent had or had not become void: *Held*, that a court or judicial tribunal for the determination of the matters referred to in the said section was thereby constituted and that the constitution of such a court was within the competence of the Dominion Parliament.—*In re Bell Telephone Co.*—C.P.D., Ont. . . . . iv. 618

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**PREROGATIVE OF CROWN.**—The provisions of the B. N. A. Act have not superseded the prerogative right of the Crown to issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer and General Gaol Delivery, for trial of felonies, etc.; and such a commission by the Deputy of the Governor-General was held to be legal. Per Wilson, J.—The Lieutenant-Governor, as well as the Governor-General has the power to issue commissions to hold Courts of Assize.—*Regina v. Amer*.—Q. B., Ont. . . . . i. 722

2. The petitioner having been declared duly elected a member to represent the Electoral District of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council: *Held*, that such application must be refused. Although the prerogative of the Crown cannot in general be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be susceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the Act

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was held to be that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative; and the Act having been assented to on the part of the Crown, and the Crown being therefore a party to it, there was held to be no prerogative right to admit an appeal contrary to the intention of the Act.—*Theberge v. Landry*.—P.C. . . . . ii. 1

3. The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government. The prerogative privilege to priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a Provincial corporation in a Provincial court.—*Reg. v. Bank of Nova Scotia*.—Supreme Ct., Can. . . . . iv. 391

4. The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government. The prerogative privilege to priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of an insolvent bank.—*Maritime Bank v. The Queen*.—Supreme Ct., Can. . . . . iv. 409

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**PROPERTY AND CIVIL RIGHTS.**—An Act of the Legislature of Quebec authorizing the Lieutenant-Governor to revoke the right of certain municipalities to exact tolls on a toll bridge, for default in making repairs, and to transfer the property to others, was held valid, as the matter related to property and civil rights and was of a merely local nature.—*Municipality of Cleveland v. Municipality of Melbourne and Brompton Gore*.—Q. B., Quebec. . . . . ii. 241

2. Quere, whether the Dominion Act, 32-33 Vict. c. 29, s. 134, relating to costs in actions against Justices, is not ultra vires of the Federal Parliament as relating to procedure in a civil matter.—*Whitler v. Dubee*.—Supreme Ct., N.B. . . . . ii. 492

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 Federal Parlia-  
 edure in a civil  
*blee—Supreme* . . . ii. 492

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3. The jurisdiction of the Provincial  
 Legislatures over "property and civil  
 rights does not preclude the Parliament  
 of Canada from giving to an informer  
 the right to recover, by a civil action,  
 a penalty imposed as a punishment for  
 bribery at an election. The Dominion  
 Elections Act, 1874, by sect. 109, provides  
 that all penalties and forfeitures (other  
 than fines in cases of misdemeanour)  
 imposed by the Act shall be recover-  
 able, with full costs of suit, by any per-  
 son who will sue for the same, by action  
 of debt or information, in any of Her  
 Majesty's Courts in the Province in  
 which the cause of action arose, having  
 competent jurisdiction: *Held*, that this  
 enactment was valid.—*Doyle v. Bell*.—  
*C. A., Ont.* . . . iii. 297  
 4. Where land then forming part of  
 the Ordinance lands of the old Province  
 of Canada had been granted to the  
 corporation of the city of Toronto in  
 the year 1858, it was held that after  
 the passing of the British North Amer-  
 ica Act the power to vary the trusts  
 contained in the grant was vested in  
 the Legislature of the Province and  
 not in the Parliament of the Dominion.  
 —*Kennedy v. City of Toronto*.—  
*Ch. D., Ont.* . . . iv. 649  
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 See BANKRUPTCY AND INSOL-  
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 merce . . . i. 265  
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 Transfer of Warehouse Receipts. i. 828  
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 HOUSE RECEIPTS, 2.  
 PROVINCIAL COURTS.—*Power*  
*to impose duties on.]* The Parliament  
 of the Dominion of Canada has power to  
 impose new duties upon existing Pro-  
 vincial Courts, and to give them powers  
 as to matters coming within the classes  
 of subjects over which the Dominion  
 Parliament has jurisdiction, conse-  
 quently the Dominion Controverted  
 Elections Act of 1874 (Canadian Stat.  
 37 Vict. c. 10), which confers upon the  
 Provincial Courts jurisdiction with re-  
 spect to elections to the Dominion  
 House of Commons, is valid. Special  
 leave refused to appeal from two con-  
 current judgments of the Courts in  
 Canada, affirming the competency and  
 validity of the said Act of 1874; it ap-  
 pearing to the Judicial Committee of  
 the Privy Council that there was no  
 substantial question requiring to be  
 determined, none of their Lordships  
 having any doubt of the soundness of  
 the judgments, though several judges  
 of the first instance had held the Act  
 to be invalid.—*Vatin v. Langlois*.—  
*P. C.* . . . i. 158  
 Precedence in . . . i. 488  
 See QUEEN'S COUNSEL.  
 PROVINCIAL LEGISLATURES  
 —By the Statutes of the Quebec Leg-  
 islation, 31 Vict. c. 32, and 32 Vict. c. 29,  
 Fire Commissioners or Marshals were  
 appointed, with power to investigate  
 the origin of any fires occurring in the

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cities of Quebec and Montreal; to com-  
 pel the attendance of witnesses, and  
 examine them on oath; and to commit  
 to prison any witnesses refusing to  
 answer without just cause: *Held*, that  
 these Statutes were within the com-  
 petency of the Provincial Legislature.  
 On petition by the Attorney-General  
 of the Province of Quebec, special leave  
 was granted to appeal from a judgment  
 of the Queen's Bench, Quebec, on a  
 case reserved in a trial for felony.—*The*  
*Queen v. Coote*.—*P. C.* . . . i. 57  
 2. A Provincial Legislature of Can-  
 ada has no power to pass an Act  
 transferring to a new company, or other-  
 wise, a federal railway, with its appur-  
 tenances, property, rights and powers,  
 or to dissolve a federal company, or to  
 substitute for it a company to be  
 governed by, and subject to, provincial  
 legislation.—*Bourgeois v. La Compagnie*  
*du Chemin de Fer de Montreal, Ottawa,*  
*et Occidental*.—*P. C.* . . . i. 233  
 3. The first step to be taken with a  
 view to test the validity of an Act of a  
 Provincial Legislature under the  
 B.N.A. Act is to consider whether the  
 subject-matter of the Act falls within  
 any of the classes of subjects enumer-  
 ated in section 92, which states the  
 legislative powers of the Provincial  
 Legislatures. If it does not come  
 within any of such classes, the Provin-  
 cial Act is of no validity. If it does,  
 these further questions may arise, viz.,  
 whether the subject of the Act does not  
 also fall within one of the enumerated  
 classes of subjects in sect. 91, which  
 states the legislative powers of the  
 Dominion Parliament, and whether the  
 power of the Provincial Legislature is  
 or is not thereby overborne.—*Debie v.*  
*Temporalities Board*.—*P. C.* . . . i. 351  
 4. A testator had devised the residue  
 of his estate in trust for such of his  
 children as should be living at the  
 decease of his widow, and for the chil-  
 dren of any of them who should then  
 be dead. Before the widow's death,  
 and on her application and that of the  
 testator's children (all of whom were  
 living), the Provincial Legislature of  
 Ontario passed an Act (34 Vict. c. 99)  
 for dividing the property among the  
 testator's children forthwith: *Held*,  
 that such an Act was within the com-  
 petence of the Provincial Legislature;  
 but the Court held further (Draper,  
 C.J., and Spragge, C. dissenting) that  
 the testator's grandchildren, not hav-  
 ing been expressly named in the Act,  
 and there being no express and explicit  
 enactment specifically referring to and  
 barring their rights, their interests re-  
 mained unaffected by the Act.—*Re*  
*Goodhue*.—*C. A., Ont.* . . . i. 560  
 5. Provincial Legislatures are not  
 restricted to legislation respecting  
 property such as bonds held in the  
 Province, and where debts and other  
 obligations are authorized to be con-  
 tracted under a local Act, passed in  
 relation to a matter within the power  
 of a Local Legislature, such debts may  
 be dealt with by subsequent Acts of  
 the same Legislature, notwithstanding  
 that by a fiction of law they may be

domiciled out of the Province.—*Jones v. Canada Central Railway Co.*—Q. B., Ont. . . . . i. 777

6. Provincial Legislatures have, as incident to their express powers under the B.N.A. Act, the right to summon witnesses, and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation, and the control assigned to them in respect of the administration of public affairs. The provisions of the Act of the Quebec Legislature, 35 Vict. c. 5, regulating this right are valid. *Ramsay, J.*, dissenting.—*Ex parte Dansereau.*—Q. B., Quebec . . . . . ii. 165

7. A Provincial Legislature has authority to determine the age or other qualifications which shall be required on the part of persons resident in the Province, to entitle them to manage their own affairs, or to exercise certain professions or branches of business attended with danger or risk to the public. If laws on these subjects incidentally affect trade and commerce, this incidental power must be deemed to be included in the right to deal with those matters which are specially placed under provincial control. The Quebec Pharmacy Act of 1875, so far as it requires certain qualifications on the part of persons exercising the business of selling drugs and medicines, is valid. The Provincial Legislatures have the right to appropriate fines to municipal or other corporations.—*Bennett v. Pharmaceutical Association of Quebec.*—Q. B., Quebec . . . . . ii. 250

8. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals, or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made bona fide with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby.—*Keefe v. McLennan.*—Supreme Ct., N.S. . . . . ii. 400

PUBLIC INJURY.—Proper officer to complain of.

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See PROVINCIAL LEGISLATURES, 6.

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See STATUTES.

QUEEN'S COUNSEL.—Appointment of. A Provincial Legislature has no power to authorize the Lieutenant-

Governor to appoint Queen's Counsel, or to grant to any member of the Bar a patent of precedence in the Courts of the Province. (Henry, Taschereau and Gwynne, J.J.) The question arose on an appeal by Queen's Counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the respondent being a Queen's Counsel appointed by the Governor-General; and Strong, Fournier and Taschereau, J.J., were of opinion that the Provincial Acts under which the appellants were appointed were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General; and it was therefore held, Per Strong and Fournier, J.J.:—That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.—*Lenoir v. Ritchie.*—Supreme Ct., Can. . . . . i. 488

RAILWAYS.—Where it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the railway companies cannot by agreement waive this provision.—*Credit Valley Ry. Co. v. Great Western Ry. Co.*—Chy., Ont. . . . . i. 829

2. The Province of Ontario passed an Act to make provision for the safety of railway employees and the public, such provision having reference to the construction and maintenance of railway frogs, etc. Per Spragge, C. J., a Provincial Legislature has no power to pass such a law with reference to a Dominion railway situate locally within the Province. The other Judges of the Court of Appeal expressed no opinion upon the point, being of opinion that the Act was not intended to apply to Dominion railways, and for that reason did not apply to the Dominion railway company in question.—*Monkhouse v. Grand Trunk Railway.*—C. A., Ont. . . . . iii. 289

3. The Ontario Legislature by Rev. Stat., 1887, c. 141, gives to workmen, injured in the course of their employment, the right, under certain conditions, to recover compensation therefor from their employers: Held, that this enactment was valid and applied to the defendant company as well as other railways under the legislative control of the Dominion Parliament.—*Canada Southern Ry. Co. v. Jackson.*—Supreme Ct., Can. . . . . iv. 451

4. The Dominion Parliament having by a general railway Act, applicable to all railway companies over which the Parliament had jurisdiction, limited to six months the time for bringing actions against railway companies for any injury caused by reason of the

\*See R.S.O., 1887, c. 170, sect. 9, sub-s. 17.

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railway: *Held*, by Hagarty, C.J., and  
Osler, J.A., affirming the judgment of  
Street, J., (Burton and Maclellan,  
J.J. A., dissenting) that this enactment  
was valid.—*McArthur v. Northern and*  
*Pacific Junction Ry. Co.*—C. A., Ont.  
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The members of the Executive Council  
of a Province, under the B. N. A. Act,  
represent the Sovereign, and cannot be  
sued in the civil courts of the Province  
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charge of their official duty.—*Molson v.*  
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statute, was held to be within the legis-	
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B. N. A. Act, sect. 92, art. 2, impose	
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to relate to a matter of "a merely local or private nature in the Province," which, by the 92nd section of the B. N. A. Act is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in art. 10, sub-sect. (a) of the said section.

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2. The clauses of the Act, 39 Vict. c. 7 (passed by the Legislature of Quebec), which impose a tax upon certain policies of assurance and certain receipts and renewals, are not authorized by the B. N. A. Act, 1867, sect. 92, subss. 2, 9. A License Act by which a licensee is compelled neither to take out, nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a Stamp Act and not a License Act. The imposition of a stamp duty on policies, renewals and receipts with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed is not warranted by the terms of an Act which authorizes the imposition of direct taxation.—*Attorney-General for Quebec v. Queen Insurance Co.*—P. C. . . . . i. 117

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5. The Local Legislature has authority to enact a law imposing a tax on the Dominion notes held by a bank as portion of its cash reserve under the Dominion Act relating to "Banks and Banking" (34 Vict. c. 5, s. 14).—*Windson v. Commercial Bank of Windsor*. . . . . iii. 377

6. Held, that Quebec Act, 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the Province is intra vires of the Provincial Legislature. A tax imposed upon banks which carry on business within the Province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the Province, is direct taxation within clause 2 of sect. 92 of the B. N. A. Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3 or 15 of sect. 91. Similarly with regard to insurance companies taxed in a sum specified by the Act.—*Bank of Toronto v. Lamont*.—P. C. . . . . iv. 7

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2. A Provincial Legislature cannot  
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